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Legal Nature of Notarial Acts

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Abstract: Taking into accou nt that notarial system in Russia is based on the principles of self-organization and self-development, we can state that it is one of the most successful forms of implementation of the rights and liabilities and one of the best and least expensive forms of protection and prevention of violations in the sphere of civil law. If we consider statistical data, annually >90 mln. notary acts are fulfils. Accordingly, > half of the country's citizens visit a notary a least once a year.

Key words: Notary, law, notarial system, unified law, Russia

INTRODUCTION

The draft laws on notarial system is being publically discussed now a days and the interest towards the notary institutions is growing, thus, the role and position, nature and essence of the notarial system are widely disputed and researched. Notarial system is researched by many scholars, both in Russia and abroad. For example, V.V. Yarkov considers notarial system to be a branch of law and views the prospects of its development in the Russian legal system, I.G. Medvedev compares the Russian and foreign legislation on notarial system and its law enforcement practice, Gaudio comments on the notarial acts and develops an adapted version of the Unified Law on notarial acts, adopted in 1982. Special attention should be paid to the research by M.Z. Shvarts, I.G. Cheremnykh, I.V. Dolganova, B.A. Borzenko, J.P. Decor, I. Matei, J. Talpis, etc.

It is impossible to imagine civil circulation without notarial system which has proved its efficiency. For example, in European countries where notarial system of Latin type is functioning, the number of disputes in notarized deals is about 1-1000 while in the USA this figure is 40-50 times larger. At the same time, notarial system simplifies international document circulation. We agree with G. Schin who points out that "one should be alert when travelling for business, for personal reasons, to reunion with the family living abroad or just moving to a region with a better climate. You must reduce the risks of conflicts between the laws in your country and the country where you are going. In the changing world the notaries should be able to inform the clients about consequences including the legal consequences of the actions they commit and to predict conflicts which can arise". The Russian Federation is also interested in the experience of the joint and coordinated work of notaries from the European Union. Maintaining the principles of free notary work and document circulation within the European Union implies, on the one hand, further admittance of notary documents in the European Union as legal documents and on the other hand, the right to take exams and practice as a notary (Europe-Information and a request for help. Prof. Gisela Shaw.http://www.notaries.org.uk/europe-info/europe-info.html. 07.11.2014).

MATERIALS AND METHODS

The researched legal institution has an interesting history. As for the Soviet notarial system, we should note that it underwent all stages of development: it used to be almost completely eliminated, then restored, it underwent many ups and downs, it was turned private out of the state one. We should also note that the Soviet and the Russian notarial systems are opposite: in the Soviet period both legislation and doctrine paid much attention to the mechanism of notarial acts, while the Russian notarial system shelves the main function of the notary and views the status of notaries, notarial chambers, quotas and division of territories. The overview of normative acts, determining the organization and functioning of the Soviet notarial system shows that there were two ways of this institution's regulation. In the

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majority of Soviet republics the organization and functioning of notaries were determined by rather detailed provisions, thus eliminating the necessity to issue instructions for their enforcement. While in other republics the provisions are short and the order of implementing notarial acts was stipulated by thorough instructions of their justice ministries. Each system has its own advantages. The first system is beneficial as all norms are contained in one normative act. The second system allows to make amendments and additions to the order of implementing notarial acts without turning to the republic's council of ministers when that is needed in the everyday practice of notarial bodies. The second system could be beneficial in modern Russiaas it could take into account the features of each federal subject.

It should be noted that the Soviet normative-legal acts are implemented until now. Some provisions of the Soviet legislation can serve as the basis for the modern legislation on notarial system. For example, the instruction on the order of accounting of deposit operations in state notarial offices of the USSR, approved by the Order of the Ministry of Justice of the USSR of 1 August 1975#20, contained the main provisions referring to the mechanism of accepting money and securities into the notarial depositsas well as the forms of documentation connected with deposit operations. These provisions can be implemented nowadays.

Article 57 of the RSFSR Civil-Procedural Code (The RSFSR Civil-Procedural Code of 11 June 1964//Code of laws of the RSFSR.-1964.-Vol. 8.-Art.175. (void) stipulated the possibility to provide evidence by the court on privy's request and specially stated that the provision of evidence before the case initiation in court is carried out of notarial bodies. However, Article 64 of the new of the RF Civil-Procedural Code does not contain the notification of the pre-court provision of evidence by the notaries which causes a lot of discussions nowadays concerning the possibility for the notaries to provide evidence. This norm should be adopted by the modern legislation.

Obviously, both in the Soviet legislation and Soviet scientific literature, the notarial activity was viewed mainly in the law enforcement aspect; more attention was paid to the efficient implementation of notary acts. Thereupon, we consider the Soviet notarial system to leave a lot of positive results. This issue requires a more detailed consideration and further implementation in the modern notarial system.

It is common knowledge that a special group of public relations in notarial law is notarial actions, the result of which is a notarial act. The history of notarial acts begins with the formation of property right and other rights had to be protected. Traditionally the formation of the modern notarial system is connected with the appearance of the institution of tabellions in Ancient Rome. In Russia the first mention about actions similar to those of a notary is found in the Pskov.

Furtheras the Sobornoye Ulozheniye of tsar Aleksey Mikhaillovich was adopted in 1649, the formation and development of notarial system in the Russian state, then the Russian Empire, began. At that period the order of notarial actions was determined by particular orders of the tsar. An order of scriveners appeared, who were professional scribes specializing in making civil deals for fee. They established the authenticity and voluntariness of the deal, checked the property rights of the seller and existence of encumbrances and prohibitions for its disposal. Only after registering of the acts in the order book and stamping the inscription, the property was considered disposed and the property right of the buyer occurred. Nowadays the notary's functions are actually the same. In the XVIIIc, the notarial actions were repeatedly transferred to various establishments, civil courts, district courts, etc. The issue has not been solved till now: where should notary be attributed to? The question can be answered only by defining the notary. Is notary an independent or complex branch of law? To our mind, the comprehensive answer was given by Alekseyev (1981) "Notarial law has been formed so far as a complex branch of law regulating the public relations in the sphere of notarial acts. The complex character of notarial law is explained by the fact that it is a secondary, derivational establishment; these establishments are complex as the constituent norms are not bound by a single regulatory technique and mechanism but are derived from the basic branches" (Alekseyev, 1981). It follows that the notarial system is an auxiliary body implementing the basic rights and liabilities of the legal subjects. At the same time, due to the preventive character of notarial acts, it must be independent.

The dramatic transformation of notarial system in Russia took place after Alexander II approved the Regulation on Notarial Sector in 1866 as part of the Court reform of 1864. That period faced the forming and functioning of the unified notarial system as a form of public activity of independent notaries, authorized by the state to perform notarial acts "preventing the law violation by the lawful, indisputable support of the parties' true wills" (Vergasova, 1981). The notarial system in Russia became professional.

However, after the October Revolution, Decree #1 of 24 November 1917 "On court" was adopted; the functioning state authoritative bodies were abolished, including courts, court inquisitors, prosecutor's

supervision, the barristers and private advocacy. As a constituent part of that system, the notaries were abolished later, on 23 March 1918 by the Decree of the People's Commissars Council of Moscow and Moscow gubernia as the functions they performed disappeared with the abolition of private property.

In 1993, a new law "On legislation of the Russian Federation on notarial system"(Bases of the Russian legislation on notarial system of 11 February 1993# 4462-1 //Rossiyskaya gazeta.-1993.-13 March.-#49.) was adopted which functions till now.

Nevertheless, a lot of disputes are held on changes in legislation, adopting new laws, imposing new functions upon the notaries, increasing the number of notarial acts (like verification of mediation agreements and protocols of juridical persons, transactions of business partners and investment companies). At the same time, there are no sufficient theoretical researches devoted to the nature and essence of notarial acts, though they are the main function of notarial bodies. Without the systemic study of this legal institution and the practice of its enforcement, it is impossible to ensure the full-fledged protection of the rights of civil relations' participants. Due to the active implementation of information technologies, it is necessary to have a clear algorithm of notarial acts.

Notarial acts are an indispensable preventive, law enforcement and law implementing mechanism of civil circulation. Notarial acts are, first of all, a regulator by which the participants of civil circulation regulate their relations.

At the same time the term "notarial act" is ambiguous: it can be viewed both as a juridical fact or a complex of fact and as a document. Thus, a question arises: is notarial act a juridical fact or the result of notarial act is a juridical fact, is it a complex of fact or one juridical fact?

There is no juridically determined definition of a notarial act, though the term is often used in legislation (Bases of the Russian legislation on notarial system of 11 February 1993#4462-1//Rossiyskaya gazeta.-1993.-13 March.-#49; The RF Civil-Procedural Code of 14 November 2002 #138-//Rossiyskaya gazeta.-2002.-20 November.-# 220; Order of the Ministry of Justice of Russia of 10 April 2002#99 "On approval of register Forms of notarial acts, notarial certifications and certification inscriptions for transactions and certified documents"//Rossiyskaya gazeta.-2002.-24 April.- #74). Scientific literature proposes a few definitions of the term. For example, D.V. Kosenko in the work "Notarial acts as a legal institution: issues of definition and content" proposes the following definition: "Notarial act is professional activity for confirming the indisputable rights and facts stipulated by law, carried out for fee (with exceptions stipulated by the laws of the Russian Federation and the subjects of the Russian Federation) in the stipulated order by authorized persons on behalf of the Russian Federation, with the aim to ensure the rights and liabilities of the citizens and juridical persons, protection of rights and lawful interests of citizens, juridical persons, society and state and to render juridical assistance. We cannot agree with this definitionas notarial acts is not only confirmation of indisputable rights and facts. In compliance with Articles 35, 36 of the Bases of the Russian legislation on notarial system, the notaries' competence also comprises: taking measures for protection of hereditary property; transfer of applications of physical and juridical persons to other physical and juridical persons; accepting of money and securities to deposits; accepting documents for storing and accomplishing other notarial actions stipulated by the Russian legislation. Moreover, the expression " protection of rights and lawful interests of citizens" is doubtfulas notarial system is a preventive legislative body, so the term "provision of rights and lawful interests of citizens" would be more appropriate.

The definition proposed by Kalinichenko (2009) in the work "Notarial acts: notion, content and types" does not bear scrutiny either: "notarial acts is an externally expressed will of a notary, aimed at implementation of permissions and obligations in cases stipulated by law, observing the stipulated notarial procedure, entailing or able to entail the juridically significant consequences" (Kalinichenko, 2009). One should take into account that the subjects of notarial relations are participants of civil legal relations and the notary; accordingly, a notarial act is not only externally expressed will of a notary but of other subjects as well. It should also be noted that notarial acts are made not by notaries only. In compliance with the Bases of the Russian legislation on notarial system, if a settlement or a municipal district does not have a notary, the notarial acts can be accomplished by the head of administration, of the settlement and a specially authorized official of the local self-government. On the Foreign territories, the notarial acts are accomplished by officials of consular offices of the Russian Federation, authorized for such actions.

Speaking about the types of notarial acts, it would be wrong to state that they are aimed at the implementation of permissions and obligations only. There a lot more types of notarial acts and notaries' functions, accordingly.

As for the system of juridical facts, we should point out that in the system of juridical facts of the civil law the notarial acts have a special significance. The notarial act itself is a juridical fact. Civil law as a branch of legislation

does not regulate the activity of notarial bodies but the science of civil law must research these legal phenomenaas notarial system is an efficient mechanism of implementation of the civil rights and liabilities. The notary doctrine has to be createdwhich will emphasize it as one of the main institutions providing the legal basis and stability of civil circulation, not just a juridical-technical profession. As was truly pointed out by A.G. Nuriyev, "in future we should abandon the unilateral, mono-functional interpretation of notarial activity as a mere certification of juridical acts of will and witnessing other juridical facts".

Basing on the theory of juridical facts of civil law, Kosareva (2004) gives the following definition: "notarial act as a juridical fact is a juridical act of a person authorized by the state a notary, aimed at stating, altering, ceasing, confirming or guaranteeing of lawfulness of civil relationships". However, a person authorized for accomplishing the notarial acts is not only a notary. Besides, to our mind, the functions of notarial acts are not completely disclosed in this definitionas "stating, altering, ceasing, confirming and guaranteeing" imply that the legal relationships already exist. Actually, notarial acts can also serve as facts of accrual of civil legal relations. Accordingly, the Kosareva's definition hould be complemented with the term "accrual". Another point of view was stated by M.V. Shvachkina, who defines the notarial act as "a juridical act accomplished by a notary or another authorized person which confirms, states, alters or ceases civil legal relations. However, to our mind, this definition also does not completely disclose the essence of the term "notarial act".

Thus, it is necessary to find an optimal definition to the term "notarial act". To do that, we will view the term in the aspect of the theory of juridical facts and disclose the essence of notarial acts as a form of juridical facts.

In the theory of juridical facts, classification of juridical facts is made by various criteria. In the system of juridical facts, notarial acts are referred to actionsas their occurrence depends on the people's will (of the civil circulation participants and a notary as an official or other authorized persons). The actions are classified as legal and illegal. Notarial acts are legal if they correspond to the existing legislation. In case of accomplishing an illegal notarial act, such actions are referred to as actus reusas they entail legal consequences only in the presence of guilt in notary's actions and the causal connection between the action and the damage inflicted. As legal actions are subdivided into juridical acts and juridical deeds, we can suppose that notarial acts refer to juridical actsas they are committed purposefully to achieve the legal result.

The research by K.S. Yudelson "Soviet notarial system which was the first fundamental research on notarial system in Soviet times is notable for its classification of notarial acts. The author classified notarial acts by the stages of legal relationship development and distinguished four groups of notarial acts) aimed at accrual and confirmation of legal relations-certification of deals issuing certificates on the right for heritage issuing certificates on the property right for a share of the spouses' common property) aimed at providing and implementing of civil legal relations-imposing prohibitions to alienate a dwelling house, depositing money and securities, making execution inscriptions, protesting bills of credit, presenting bills for payment and certifying the non-payment of bills) having protective character-taking measures to protect the hereditary property) having universal character-all other notarial acts, including provision of evidences, certifying the fidelity of documents' copies and storing documents, etc.

RESULTS AND DISCUSSION

This classification is valid until now. Taking all the above into account, we propose the following definition of notarial acts: "notarial acts are juridical acts, entailing accrual, alteration or cessation of civil legal relations, accomplished by a notary or another authorized person, by the will of civil circulation participants with the purpose of protection and implementation of their rights and liabilities". We believe that this definition fully discloses the notion of notarial act as a juridical fact. Notarial acts as a form of juridical facts of civil law are wilful, legal or illegal juridical acts, entailing juridical consequences. However, we should highlight that the characteristic of willfulness is in the first placeas the main objective of a notary is to "hear" the will of the parties, so the accomplishment of notarial acts should not be viewed as a merely technical procedure.

Further, we will consider the issue of the most frequent notarial acts in the civil circulation. One of such acts is certification of a letter of attorney. According to the norms of Federal law of 7 May 2013 #100-OC "On alterations in subsections 4 and 5 of section I of Part 1 and Article 1153 of Part 3 of Civil Code of RF", the limitation of the terms of a letter of attorney was raisedwhich aroused a lot of disputes. On the one hand, if, for example, a term of 50 years is set, it is correct from the legislator's viewpoint but it cannot be called "a reasonable term". On the other hand, a letter of attorney does not produce any juridical consequences when composed, i.e., it is not a juridical fact. It becomes one

only when the representative joins the civil-legal relations and if that does not occur, the letter of attorney remains just a notarial act.

Since 1 September 2014, the provisions of Item 3 of Article 67.1 of RF Civil Code are implementedwhich stipulate the possibility to notarially certify the establishing of a non-public economic union and its members present at its establishingas well as to notarially certify the establishing of a limited liability society, if another way is not stipulated by the chart. This notarial act is not mentioned in the Bases of RF legislation on notarial system, the mechanism of this notarial act is not regulated by legislation, the notarial tariff for this notarial act is not statedwhich actually will entail various interpretations and implementations of the law. Article 8 of RF Civil Code interprets decisions of assemblies as a special group of juridical facts, thus, "notarial certification of an assembly decision" means certifying an objective fact. Consequently, if we state that decisions will be certified as facts, then what is certified will be just an attempt to accomplish a juridical factor a complex of objective factswhich may serve as an evidence when deciding if the juridical fact had been accomplished. That is, in this case the legality of the deal will not be taken into account. Then, it is not clear, what is the notarial certification necessary for? In our opinion, the notarial certification is necessary to ensure the legality of the assembly decision. Thus, the notarial act should consist of a complex of juridical facts, in particular: a notary will have to check the compliance of documents of the juridical person, the order of calling and holding of the meeting, the quorum on each issue, the compliance of the agenda issues to the issues in the competence of the assembly, the rights and legal capacity of each representative and the authority of each participant and to keep record of the meeting. However, the possibility to carry out these juridical facts is doubtfulas well as the necessity of such expenses of time and money.

It is notable that nowadays such notarial act as execution inscription is not fully implemented, though it is stipulated by Article 35 of the Bases of the Russian legislation on notarial system. It is probably due to the fact that the modern execution legislation stipulates only an execution inscription of a notary if there is an agreement on non-court charge on the pledged property, signed as a separate agreement or included into the agreement of pledge. Consequently, the execution inscription is very rarely implemented in practiceas there are no implementation mechanisms, though in undisputable cases it is indispensable.

The issue of notarial certification of deals is also disputable. Article 12 of the RF Civil Code does not refer the notarial certification of a deal to the means of civil rights protection, though it is such. The practice of such countries as France, Spain, Germany and others shows that the continental legal system of state registration of rights together with the notarial certification of a deal provides the legality of real estate circulation, thus ensuring the public interests as well (Closen and Dixon, 1992). Thus, it is obviously the most efficient protection of civil circulation participants' rights and this function will have to be returned to the notarial system.

Moreover, such notarial actsas provision of evidences, storing documents, certifying the fidelity of documents' copies and extracts, require alterations in notary procedures. For example, the documents are still being stitched, though the purpose of this action is unclear nowadays. It takes a notary more time to fill in the register of notarial acts, than to accomplish the notarial actswhich is unallowable in the 21st c. American practice is notable: in 1999 the National conference of authorized persons on unification of state laws adopted a Uniform Electronic Transactions Act ("UETA") and in 2011 an electronic law of Virginia on notarial system was adopted. This is the first law on authorization of distant notarial certificationswhich allows notarial certification via the Internet by cloud technology with audio and video conferences. According to this law, the signee from any point on Earth can appear on-line at the notaries.

The most complex and the most important issue for the Russian notarial system is the issue of the notarial act authenticity. The internal legislations of 71 countries of International Union of Notaries stipulate that a notary is a public official, who provides authenticity to notarial acts. The authenticity concept contains the main idea of special reliability, genuineness and guarantees of origin of the acts, when they cannot be disputed. The characteristics of indisputability is acknowledged by the state for the acts which are accomplished by the public authorities. Till this issue is solved, the notarial system will be perceived as a bureaucratic body with unreasonable expenses. Note than the western countries have already solved this problem (exequatur of authentic acts, introduced by the EU Regulation#44/2001 of 22 December 2000 on jurisdiction, acknowledgement and execution of decisions on civil and trade cases (Official publication: JOCE#L 12 16.01.2001) and Lugansk convention of 16 September 1988). "Due to the characteristics of authenticity, attributed by the notary on behalf of the state, the civil acts acquire the status of official documents and possess the power of evidence and execution. The evidence power of the notarial act implies its self-sufficiency for the confirmation of reality of the facts described in it. Hence, a person referring to

the notarial act to substantiate their demand has only to submit it to the court. Besides, in those latin notarial system countries, where the traditions of the famous ventose law (Paris, 22 fevrier 1990, D.S. 1990 IR 108 et Clunet 1991, 162 ; La Haye, 18 octobre 1985, N.J. 1986, n° 512, observ. Schultsz) are still strong, the contestation of a notarial act is only possible if a party initiates and successfully implements a very complex procedure of "forgery statement" against a notary.

Nowadays, when computer technologies are wide-spread, the juridically significant acts should be accomplished with all facilities of the Latin notarial system. The review of law enforcement confirms the possibility to certify information via the Internet by composing protocols of web-sites study (Decree of Federal Anti-monopoly Agency of Volga region of 10 July 2013 on case #A65-18392/2012//"KonsultantPlus" assistant system; Decision of the Higher Arbitration Court of the Russian Federation of 28 October 2013# A-15198/13 on case #A65-18392/2012//"KonsultantPlus" assistant system (not published officially). Besides, the notarial certification of a web page is currently being used as an evidence in cases of copyright violation (Decree of Federal Anti-monopoly Agency of Volga region of 10 July, 2013 on case #A65-18392/2012//"KonsultantPlus" assistant system; Decision of the Higher Arbitration Court of the Russian Federation of 28 October 2013 #A-15198/13 on case #A65-18392/2012//"KonsultantPlus" assistant system (not published officially). Thus, the legal regulation of electronic declarations of will is necessary for the secure document circulation as well as reduction of time and money expenses. However, though the Latin notarial system successfully functions in many countries, including Russia, we should pay attention to the fact that the modern notarial practice has sufficient drawbacks. That is spending a lot of time and money without essential guarantees. The reason is that notaries are not trained specially and their actions are based on their personal interpretation of law. The Russian notarial system requires renovation and in our opinion, the system of quotation of the maximal number of notaries should be abolished. Thus, the least capable notaries would resign and only the most capable and active would stay. Also it is notable that, according to Art. 17 of the Bases of the Russian legislation on notarial system, a notary bears full responsibility for the damage inflicted on the property of a citizen or a juridical person as a result of accomplishing a notarial act contradicting to the lawas well as for disclosure of information about the accomplished notarial acts but the court practice shows that notaries are deprived of the license very rarely and mainly by the initiative of notarial chamber only.

In our opinion, the notarial system requires sufficient changes and complex reformation. And the main issue is the lack of authenticity of notarial acts in Russia. If a notarial act is authentic, the consequent juridical facts are objective and they begin to function from the moment of the notarial act accomplishment.

Summarizing the above, we conclude that it is necessary to reform the legal regulation of notarial acts accomplishment, to legally define the model of notarial acts so that this model could regulate civil legal relations in compliance with the level of society development.

The possibilities of the notarial system has not been fully estimated so far. Analyzing the existing legislation, we can extinguish the following priorities in the notary law science:

- Development of active notarial system
- Notary as a mediator
- Attributing higher evidence and execution power to notarial acts

At the moment, the Draft Federal Law "On changes in the Bases of the Russian legislation on notarial system" has been preparedwhich was designed according to point 1 of the assignment of the Russian government of 25 July, 2013 #ДМ-П4-56**пр** and subprogram 1 "Provision of protection of public interests, implementation of rights of citizens and organizations" of the State program "Justice", approved by an edict of the Russian government of 15 April 2014 #312. Like the previous draft laws on notarial system, this draft also draws criticismas it does not contain a definition of notarial acts, nor a mechanism of their implementation.

CONCLUSION

We should note thatas the past experience shows, the activity of the notarial bodies is determined by the direction of the country's development. Nowadays the world faces globalization. It means that no country can stay outside international relations, including economic ones. To be a full-fledged participant of these relations, Russia should take decisive actions to develop law, including the notarial one. To make notarial system a guarantor of civil rights implementation, to gain trust of the citizens, it should undergo dramatic changes not only in law making but in law enforcement. Thus, the future of the Russian notarial system is in renovation, based on the experience of the Soviet notarial system under new social-economic relations and the new civil legislation.

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