

## Civil Law Notaries in Bosnia and Herzegovina: Actors in Preventive Justice

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### **Abstract**

Civil law notaries are professional lawyers and public officials appointed by the State to confer authenticity on legal deeds and contracts contained in documents drafted by them and to advise persons who call upon their services. Institution of the notary was introduced for the first time in the legal system of Bosnia and Herzegovina in 2007. Introduction of the office of notary was one of the steps taken to ensure independent and impartial judiciary and to adapt legal system with European Union law. Before its introducing there was no institution or legal profession which acted impartially on behalf of all parties to a contract or transaction.

Notarial services are very wide and complex. It encompasses all judicial activities in non-contentious matters, ensure legal certainty to clients, thus averting disputes and litigation. As a guarantor of legal certainty, notary is one of the most important actors of preventive justice which include all means of reducing resort to the courts for the settlement of controversies. In this study we analyzed contribution of notary office to preventive justice in Bosnia and Herzegovina.

**Keywords:** civil law notary, preventive justice, legal certainty, realising justice, avoiding disputes

## 1.INTRODUCTION

The 1995 General Framework Agreement for Peace in Bosnia and Herzegovina ended the 1992-95 war and created the independent state of Bosnia and Herzegovina (BiH). BiH consists of two entities and one district: The Federation of Bosnia and Herzegovina (FBiH) and the Republika Srpska (RS), as well as Brčko District of Bosnia and Herzegovina (BD BiH), which is an autonomous district. The entities and the BD BiH have their own government and assemblies and enact their laws and regulations, which are typically harmonized, but yet separate and distinct. Furthermore, the FBiH consist of 10 administrative units – cantons, which have their own constitutions and administrative organization.

We can conclude that BiH has a specific and very complex constitutional and legal system which remains inefficient and is subject to different interpretations. The complicated decision-making process has contributed to delay in structural reforms and reduce the country's capacity to make progress towards the EU.<sup>25</sup> Few credible steps have been taken to improve the adoption of key legislation relevant to EU integration. One of those steps was introduction of notary office into domestic legal system. It represents an effort of getting closer to the European standards governing legal services, especially in the fields of civil and business law.<sup>26</sup>

Before the Second World War the office of notary did exist in the region of the ex Yugoslavia but was abolished by enactment of the Implementing Statute relating to the Office of Notary passed on 17th November 1944. After abolition of the office of notary the notary's duties were at first taken over by the courts; later some of the notarial duties were also transferred to the advocates and administrative bodies.<sup>27</sup> Although a number of notarial positions were determined by the Ordinance on the Number and Location of Notarial Positions for BiH as well, they never start with performance of the duties.<sup>28</sup>

Institution of the notary was introduced for the first time in the legal system of Bosnia and Herzegovina (BiH) in 2007. As a consequence of constitutional organization of the State, three different laws have been introduced: the Notary Law of the Federation of Bosnia and

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25 European Commition, Bosnia and Herzegovina 2011 Progress Report, page 11.

26 M. Povlakić, Country Reports on Notary Service in Southeast European Countries, German Organisation for Tehnical Cooperation (GTZ) GmbH Open Regional Fund for South East Europe - Legal Reform, 102.

27 E. Braniselj, Notarius International, No 3-4/2004, page 169.

28 Official Gazette of the Kingdom of Yugoslavia No 7610

Herzegovina (FBHLN)<sup>29</sup>, the Notary Law of the Brčko District of Bosnia and Herzegovina (BDLN)<sup>30</sup> and the Notary Law of the Republic of Srpska (RSLN)<sup>31</sup>.

First notaries started to perform their duties in 2007 in Federation of Bosnia and Herzegovina and Brčko District, while notaries of the Republic of Srpska began their work in March 2008. The Notary as existing today in BiH belongs to the Civil law or Latin notarial system.

The specific structuring of preventive justice differs from country to country. In general preventive justice include all means of reducing resort to the courts for the settlement of controversies. The term should cover the following things:

- the legal settlement of issues of fact through administrative tribunals, leaving a resort to the courts on issues of law;
- the prevention of litigation through the settlement of disputes out of court and
- the prevention of disputes through care in the avoidance of grounds of disputes, when entering into transactions giving rise to legal rights.<sup>32</sup>

Notaries are part of preventive justice and they can contribute to development of legal system in general throughout the strengthening of legal certainty, protection of public interest and avoiding disputes.

## **2.Entry to the profession and powers of notaries**

A notaries are appointed to a vacant notarial position by the Justice Minister of Federation of Bosnia and Herzegovina, Justice Minister Republic of Srpska and President of Judiciary Commission of Brčko District BiH (hereinafter: Justice Minister). Advertising of a free notarial position is announced by the Justice Ministry in the Official Gazette of the relevant entity/District.

In order to be appointed as notary, a candidate must fulfill the following requirements:

- Bosnian nationality,
- Legal capacity and sound health,
- An academic title as graduate in law,
- Successfully completed the bar exam,
- Successfully completed the notary exam,

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29 Official Gazette of the FBiH No 42/02

30 Official Gazette of the BDBiH No 09/03

31 Official Gazette of the RS No 86/04, 02/05, 74/05, 76/05, 91/06, 37/06, 50/10

32 W. F. Dodd, Progress of Preventive Justice, American Bar Association No 6-1920, 151.

- Not to have been convicted of crimes against humanity and international law, offence against duty or any other premeditated offence that is still a matter of criminal public record with the relevant body at the time of appointment,
- Not to be a member of a political party.<sup>33</sup>

In accordance with the BiH Law notaries draw up authentic documents relating to legal transactions or for proceedings establishing a legal right; they take documents, money and securities for delivery to third parties or to state bodies into safekeeping and on behalf of the court or other state body handle matters which can be passed on to them in accordance with the law.<sup>34</sup> Certain legal transactions require the form of a notarial act in order to be valid, in particular:

- Contracts relating to the settlement of financial relations between spouses,
- Contracts relating to the disposal of the assets of a minor or persons without legal capacity,
- A promise of a gift,
- Incorporation documents for a legal entity,
- All types of real-estate contracts.

All of the aforementioned legal transactions have to be authenticated by a notary. Transactions that are concluded without observing the statutorily or contractually required form or that are not given corresponding approval will be null and void.<sup>35</sup>

### **3.Functions of the notary office in BiH**

Notaries in BiH, like a most of notaries in civil law countries all over the world, exercise a public power. Their primary task is to confer authenticity on the legal instruments and contracts they establish for their clients, mainly in area of civil law. Although notaries in BiH are not paid by the State, this does not make their role any less of a public role. They hold a portion of public power and have the status of public official.

The notary's role contributes to preventive justice and increasing legal certainty in BiH in several ways:

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33 Article 26 FLN, 208 RSLN, 5 BDLN

34 Articles 69-72 FLN, 64-67 RSLN, 43-46 BDLN

35 Article 73 FLN, 68 RSLN, 47 BDLN

### **3.1.Ensuring legal certainty**

Although one of the most important principle of the Contract law in BiH is freedom of contract it does not eliminate the need for supervision regarding its implementation. The notarial function is particularly important in ensuring an effective legality check.<sup>36</sup> By placing the State's seal next to the signatures of the parties on the instruments they draw up, notaries are responsible for the content and the form. They ensure that the authentication process has been respected perfectly and that the authenticated instrument expresses the wishes of its signatories, their correct identity and the date and substance of their commitments.<sup>37</sup> Authentic instruments in general have almost same value as a judgment and can be contested only through judicial proceedings.

Furthermore, each notary has a legal duty to be aware of the provisions of the 2009 Law on the Prevention of Money Laundering and Financing of Terrorist Activities (hereinafter Act) to prevent and detect the commission of money laundering and terrorist financing.<sup>38</sup> The 2009 Act transposes the Third EU Money Laundering Directive (2005/60/EC) and associated implementing Directive 2006/70/EC into domestic legal system. When performing duties notary, if they found that there are reasons to suspect money laundering or funding of terrorist activities, in connection with transaction or certain person, they are obliged to inform the State Investigation of Protection Agency -Financial-Intelligence Department without delay (FID). Every time when a client requests an advice in relation to money laundering or funding of terrorist activities, notaries have to inform the FID immediately and not later than three working days from the date when the client requested such advice. <sup>39</sup> Throughout this function notaries protect not just consumers but public interest as well.

### **3.2.The notarial function in avoiding disputes**

Notaries act as independent, impartial and objective advisers to all parties to contract or a transaction. The independence and impartiality is ensured by an incompatibility of notary's

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36 C. Jaquet, Notariat without borders: legal security at the service of Europeans, 1st Congress of EU Civil Law Notaries

37URL <http://www.cnue.be/>

38 Official Gazette of BiH, No 53/09

39 Article 41 of the Act.

work with any other for-profit work with the exception of the administration of his/her own assets. Nevertheless, a notary public may perform any scientific, publishing, teaching, interpreting, expert witnessing and artistic work against payment.<sup>40</sup> The impartiality of the notary in all his activities is the foundation of the Notary profession in BiH. The notary must exercise his office faithfully to his oath. He is not the representative of one party, but an independent and impartial guide for the parties concerned - unlike an advocate who always looks for the benefits for his client. The impartiality of the notary guarantees a new contractual order which is characterised by the search for balance between the parties and the protection of the consumer.<sup>41</sup> They examine the intentions of the parties, draft the contracts and instruments necessary to carry out the intended transaction and ensure that the contractual provisions are in full compliance with the law. They also verify that the parties have full capacity to enter into the intended agreement and that they have fully understood the legal implications of their commitment.<sup>42</sup> Otherwise, the civil law notary is required by law to refuse his participation.

Essential idea of notaries impartiality is to establish a preventive legal control by informing and advising clients on the legal and financial consequences of their transactions. This is why notaries are thought of as amicable settlement magistrates, practicing preventive justice.<sup>43</sup>

### **3.3. Realising justice**

Realising justice is also very important function of the notaries in BiH as well as important part of a system of preventive justice. The backlog of cases remained one of the most acute problems facing the BiH judiciary and court proceeding are generally lengthy. Despite the many reforms conducted by the State bodies, the backlog still stands at over 2.1 million cases country-wide. The fragmented legal framework across the country restricts effectiveness of

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40 Article 56 FLN, 51 RSLN, 35 BDLN

41 XXIV International Congress of the Latin Notariat, Mexico City, October 2004, Impartiality of the Notary:

ensuring certainty in contractual relationships,

<http://www.uinl.net/congreso.asp?idioma=ing&submenu=CONGRESOEJORNADAS&submenu2=CONCLUSIONESANTERIORES>

42 Article 80 FLN, 70 RSLN, 53 BDLN

43 <http://www.cnue.be/>

judiciary system in BiH. Also existence of 14 different ministries of justice with its own budget continues to adversely affect the independence of the judiciary in BiH.<sup>44</sup> Notarial documents enjoy a presumption of legality and exactness of content and may only be contradicted through judicial proceedings. They have evidentiary value and enforceability which reduces the costs of lawsuits as it avoids the reiteration during the proceedings of proof that had already been declared extra judicially. Enforceability avoids long and costly lawsuits and evidently represents a saving on costs. Like judicial decisions, they are enforceable, enabling the parties to have their obligations enforced directly by the judicial officers, without having to pass before the courts.

#### **4.CONCLUSION**

By introducing the notary profession, BiH has made a big step towards improvement of consumer protection, independent and impartial judicial system, as well as adaptation domestic legal system with European Union law. In our study we have found that notaries have contributed to the development of preventive justice in BiH by ensuring legal certainty, avoiding disputes and realising justice.

As independent, impartial and objective advisers to all parties to a transaction, notaries lead to the strengthening of legal certainty and protection of public interest. They also provide the market and development with trust.

The main idea by introducing notary office into the legal system of BiH was to establish a preventive legal control in order to avoid costly and time-consuming litigation.

Additional improvement in the context of the administration of preventive justice can be made by transferring more powers to the notary office, such as process of mediation which makes process of dispute resolution simpler, quicker and less costly in the interest of citizens.

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<sup>44</sup> High Judicial and Prosecutorial Council of Bosnia and Herzegovina, 2010 Annual Report, 144.

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