THE RELATIONSHIP BETWEEN NOTARIAL ACTIVITIES, PROCESS AND MEDIATION IN MODERN CONDITIONS

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The scientific article reveals the relationship between notarial activities, process and mediation in modern conditions. Different interpretations of the functions of the notarial process are distinguished, which can be considered as: legal influence, which includes forms and instruments of influence on notarial procedural legal relations; legal regulation of the process of performing notarial actions, including through legal norms, as well as the development of notarial procedural legal relations. The functions of the notarial process also cover key areas of notarial proceedings, which are inherent only to them, and which determine the phasing of notarial proceedings depending on the type of notarial action being performed or the performance of other actions that are not notarial, but are aimed at protecting the civil rights and interests of the parties, in particular, notarial, and are not prohibited by the legislation of Ukraine.

We emphasize that in general, the functions of the notarial process follow from the functions of the notary. However, by their nature they are notarially specific, as they reflect the features and specifics of the organization of notarial activity (notarial proceedings) in relation to each participant in the notarial process.

It has been proven that the functions of the notarial process are a multifaceted and complex concept that arises from the diversity of notarial activity in the state in general, and the process itself in particular, including various aspects of its implementation and, directly or indirectly, the mediation process that notaries (both private and public) use both when performing notarial actions and when performing other actions to give them legal credibility (in accordance with current legislation).

The significance of the functions of the notarial process lies in the fact that they direct the development of the notarial process in the context of the pro-European movement, based on the key principles of Latin notarialism. Similarly to the countries of Latin notarialism, the main function of the Ukrainian notarial process is the high-quality performance of notarial actions using mediation.

The functions of the notarial process during the conduct of mediation are not a stable state, they are constantly evolving, responding to the development of notarial activity and process, as well as the granting of new powers to notarial bodies.

Keywords: principles, notarial activity, notary, notarial activity, mediation, correlation, process, regulation, functions.

Usually, the functions of law highlight the substantive role, that is, the «work» of law in societies. Knowledge of the functions of law is an idea of what exactly to expect from the functioning of legal law (legal regulation). Indeed, through knowledge of the functions of law, the social significance of legal activity, the activity of those officials whose work is somehow «interwoven» into the process of (legal) regulation is realized [1, p. 98].

That is, through the functions of the notarial process, society and its ordinary citizens realize the significance of notarial bodies, in particular, notaries who perform notarial actions in order to protect the rights and interests of participants in civil-notarial legal relations.

The functions of the notarial process are its social role or purpose, directions of influence on notarial procedural legal relations.

Thus, participants in the notarial process or future participants, before applying for the performance of notarial actions with the help of the functions of the notarial process, are aware of what results they will achieve (or what results they strive for), both in terms of their performance not only of notarial actions but also of other actions, in accordance with current legislation, in order to provide them with legal certainty.

It is worth noting that in most cases, the functions of the notarial process are considered as: legal influence, i.e. forms and means of influence on notarial procedural legal relations; legal regulation of the procedure for performing notarial actions, including through the use of legal norms, as well as the development of notarial procedural legal relations.

The functions of the notarial process are also the main directions of notarial proceedings, which are inherent only to it and which determine the stages of notarial proceedings depending on the types of notarial action performed or the performance of other actions that are not notarial, but are aimed at protecting the civil rights and interests of the parties, including notarial ones, and which are not prohibited by the legislation of Ukraine.

We emphasize that the functions of the notarial process mainly follow the functions of the notary office. However, they are notarial-special by their nature, since they reflect the peculiarities and specifics of conducting notarial activities (notarial proceedings) in relation to each of the participants in the notarial process.

The classification of functions is generally carried out according to several criteria, which are based on the reflections of scientists, an analysis of current legislation, the political and economic situation of Ukraine, as well as the state of the legal system at the corresponding stage of the state's development.

For example, one can single out the social functions of notarial services [2, p. 53], which are also directly related to the notarial process. Another group consists of notarial-special functions, which are designed not only to reflect the specifics of notarial activities [6, p. 99], and the notarial process in particular, but also reflect the functions of the subjects of the notarial process.

The functions of the subjects of the notarial process are that they should not contradict the functions of the notarial process. It is clear that each participant in a notarial action should not violate the rights of other participants in the transaction and they should not set a goal that contradicts the current notarial and civil legislation.

Also, the functions of both the notary and the notarial process, depending on the nature and content of the impact on civil legal relations, can be divided into: regulatory and protective, as well as control.

The regulatory functions of the notarial process establish, using legal norms, the procedural position of the subjects of notarial-procedural legal relations. They also regulate: the procedural legal capacity of subjects of notarial-procedural legal relations, the rights and obligations of subjects of notarial-procedural legal relations, the stages of the notarial process depending on the type of notarial action being performed (the order of their movement).

The protective function of the notarial process is seen, first of all, in the guarantees of the notarial process, which are an integral part of the guarantees of notarial activity and are a new phenomenon in Ukraine.

The guarantees of the notarial process are divided into three main groups: guarantees of the conduct of the notarial process regarding the performance of notarial actions; guarantees of the performance by notaries of other actions that are not notarial, in order to provide them with legal certainty; guarantees of the performance of actions that are equated to notarial certified, quasi-notarial bodies of the state [3, p. 73].

S. Fursa and E. Fursa, arguing that the notary has no advantages compared to the subjects who have turned to him [4, p. 79].

One of the most important mechanisms of notarial procedural guarantees is the protection of notarial secrecy, that is, information obtained during the performance of a notarial act or the appeal of an interested person to a notary, including regarding mediation services.

Also, the protective function of the notarial process is to ensure the accessibility of the population to notarial services in state notary offices, private notaries and other quasi-notarial bodies.

Let us consider the function of control in the notarial process.

According to Article 18 of the Law of Ukraine "On Notary Public" [5], in state notary offices and state notary archives, the Ministry of Justice of Ukraine and its territorial bodies shall only inspect the organization of the work of the above-mentioned notary offices and state notary archives.

Article 33 of the Law of Ukraine "On Notary Public" [5] establishes that control over the activities of a private notary consists in checking by the Ministry of Justice of Ukraine and its territorial bodies the organization of the work of such a notary, as well as his compliance with the notarial process when performing notarial acts and maintaining notarial records, in accordance with the order of the Ministry of Justice dated 17.02.2014 No. 357/5. That is, the above order establishes the rules for conducting inspections regarding the procedure for performing notarial acts and notarial records not only by private notaries, but also by state notaries of Ukraine.

Therefore, we propose to amend Article 18 of the Law of Ukraine "On Notarial Services" by supplementing both the title of the above article and the text of part one with the words "compliance by state notaries with the procedure for performing notarial acts and implementing the rules of notarial records".

Also, in the notarial process, the function of self-control is important, both on the part of the notary and the parties to the transactions. Recognition of notarial transactions as invalid occurs only in civil proceedings.

The educational function of the notarial process is to form among participants in notarial procedural legal relations the expediency of the notarial order of performing certain procedures in accordance with the order of «legal regulation» and the need to coordinate their behavior and desires with the requirements of Ukrainian legislation.

That is, this is the awareness of the subjects of the notarial process of the need to comply with the established norms, in particular, civil legislation and notarial procedural legislation.

The function of providing legal assistance to persons who have applied for the performance of notarial actions is generally considered to be a function of notarial activity. However, in most cases, this function is a prerequisite for the subsequent performance of notarial actions, that is, the notarial process, the quality of the consultations provided by notaries will largely depend on the future protection of the rights and interests of the parties to the notarial transaction.

This is particularly noted in Article 2 of the Law of Ukraine "On Notarial Affairs" [5] and the order of the Ministry of Justice dated 7.07.2014. No. 1066/5 on the need for constant and effective legal explanatory work among the population on the issues of performing notarial acts [6].

Depending on the subjects of implementation of notarial functions, A. Marzhyna divides them into 5 groups: notaries, state notary offices, notarial archives, officials of local government bodies and consular institutions [9, p. 279].

In our opinion, the above division into subjects is not successful, since notarial acts are performed only by notaries, both state and private. The author also did not take into account all types of quasi-notarial bodies.

The division of notarial functions, as well as the functions of the notarial process, depending on the bodies performing notarial acts, should be carried out into two main groups. The first group includes functions performed by notaries (both private and public, working in state notary offices and state notary archives), and the second group includes functions performed by other quasi-notarial bodies.

The functions of the notarial process can also be divided into the main types of notarial proceedings: those related to the notarial actions performed, and those not related to the notarial actions performed.

The main and significant function of the notarial process is the performance of notarial actions or the conduct of a notarial process.

Since the adoption of the Law of Ukraine «On Notarial Affairs» in independent Ukraine in 1993, changes have occurred in the activities of notarial bodies, including the expansion of

the circle of subjects of the notarial process, as well as the expansion of the types of functions performed by them.

Private and public notaries, of all types of notarial and quasi-notarial bodies, have the broadest notarial powers, which relate to both the right to perform notarial acts and other actions, in order to provide them with legal certainty, as well as the provision of mediation services [7].

M. Dyakovych is right, who claims that mediation is "de facto inseparable from the functions of a notary" [3, p. 55].

The Law of Ukraine "On Mediation" [10], adopted on November 16, 2021, once again expanded the functions of notarial bodies of the state. Thus, from December 15, 2021, notaries have the right, in addition to performing notarial actions aimed at legally consolidating undisputed civil rights and facts, to conduct mediation as an out-of-court procedure for resolving conflicts (disputes), provided that they have undergone basic mediator training.

The body that will train notaries-mediators has been designated as the professional association of notaries: the Notarial Chamber of Ukraine, as a legal entity that will issue the appropriate certificate.

In our opinion, both a private notary and a public notary have the right to undergo mediator training. This right can be exercised by both a notary and the head of a state notary office, as well as the head of the state notary archive and the notary of the same archive. It is seen that the above-mentioned entities will conduct mediation in order to prevent conflicts (disputes) in the future or to resolve any conflicts (disputes) in civil, family, and inheritance cases.

We agree with M. Dyakovych that «the result of mediation in notarial practice does not necessarily have to be a notarial act, since the parties may not reach an understanding and the notarial act will not be performed» [8].

Thus, the significance of the functions of the notarial process lies in the fact that they guide the development of the notarial process in the context of the pro-European movement, based on the key principles of Latin notarial law. Similarly to the countries of Latin notarial law, the main function of the Ukrainian notarial process is the high-quality performance of notarial actions using mediation.

The functions of the notarial process during mediation are not a stable state, they are constantly evolving, responding to the development of notarial activity and process, as well as the granting of new powers to notarial bodies.

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СПІВВІДНОШЕННЯ НОТАРІАЛЬНОЇ ДІЯЛЬНОСТІ, ПРОЦЕСУ ТА МЕДІАЦІЇ В СУЧАСНИХ УМОВАХ

В науковій статті розкрито співвідношення нотаріальної діяльності, процесу та медіації в сучасних умовах. Виокремлено різні тлумачення функцій нотаріального процесу можна розглядати як: юридичний вплив, що включає форми та інструменти впливу на нотаріальні процесуальні правовідносини; правове регулювання процесу вчинення нотаріальних дій, у тому числі через правові норми, а також розвиток нотаріальних процесуальних правовідносин. Функції нотаріального процесу також охоплюють ключові напрями нотаріальних проваджень, властиві тільки їм, і які визначають етапність нотаріальних проваджень залежно від типу здійснюваної нотаріальної дії або виконання інших дій, що не є нотаріальними, але спрямовані на захист цивільних прав та інтересів сторін, зокрема, нотаріальних, і не заборонені законодавством України.

З'ясовано, що загалом функції нотаріального процесу випливають з функцій нотаріату. Проте, за своєю сутністю вони є нотаріально-специфічними, оскільки відображають особливості та специфіку організації нотаріальної діяльності (нотаріальних проваджень) стосовно кожного учасника нотаріального процесу.

Доведено, що функції нотаріального процесу – це багатогранне та комплексне поняття, що випливає з різноманітності нотаріальної діяльності в державі загалом, так і самого процесу зокрема, включаючи різні аспекти його здійснення та, прямо чи опосередковано, медіаційного процесу, який застосовують нотаріуси (і приватні, і державні) як під час вчинення нотаріальних дій, так і при здійсненні інших дій задля надання їм юридичної достовірності (відповідно до чинного законодавства).

Значущість функцій нотаріального процесу полягає в тому, що вони спрямовують розвиток нотаріального процесу в контексті проєвропейського руху, базуючись на ключових принципах латинського нотаріату. Аналогічно країнам латинського нотаріату, головною функцією українського нотаріального процесу є високоякісне вчинення нотаріальних дій із використанням медіації.

Функції нотаріального процесу під час здійнення медіації – це не сталий стан, вони постійно еволюціонують, реагуючи на розвиток нотаріальної діяльності та процесу, а також наділення нотаріальних органів новими повноваженнями.

Ключові слова: *засади, нотаріальна діяльність, нотаріус, нотаріальна діяльність, медіація, співвідношення, процес, регулювання, функції.*