THE RESPONSIBILITY OF THE NOTARY PUBLIC

Roxana Maria ROBA[*]

ABSTRACT: *According to Law no. 36/1995 on notaries public and notarial activities, the notary public is invested to fulfill a public interest service and has the statute for an autonomous function. The present study aims to analyze the responsibility of the notary public in the light of the jurisprudence and actual legal provisions, in comparison with other legislations.*

KEYWORDS: the notary public, the responsibility, public service, autonomous function.
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1. INTRODUCTORY CONSIDERATIONS

The notary public plays a role of maximum importance in the society, being involved in the significant life moments of the individuals or legal persons: the purchase of a house, the conclusion of a matrimonial agreement, the divorce, the settlement, the drafting of the will, the succession debate, the drafting of the companies' articles of incorporation or of other legal persons, as well as the legal documents regarding changes in their structure.

The notarial activity is realized by the *public notaries* through notarial acts and notarial legal consultations, being invested to perform a service of public interest and holding the status of an autonomous function[1].

The notary public performs a series of notarial acts and procedures, some of them bearing a special legal complexity[2], and others requiring a more formal involvement[3].

While performing their own activity, the notaries public have the obligation to verify, in order to prevent litigation, that the acts they instrument do not include clauses contrary to the law and the good morals. They also have the obligation to ask and to make sure the

[*] Lecturer PhD., Faculty of Economics and Law, "George Emil Palade" University of Medicine, Pharmacy, Sciences and Technology of Targu Mures, ROMANIA.

[1] Article 3, para. 1 of Law no. 36/1995 of notaries public and notarial activities republished in the Official Gazette no. 237 of 19 March 2018.

[2] Such as authentication and writing of documents with legal content, at the request of the parties, the notarial succession procedure, fiduciary activities, the divorce procedure, according to the law, the issuance of the European Certificate of Succession, the liquidation of the estate liabilities, with the agreement of all the heirs, the issuance of executory titles.

[3] Such as the certification of certain facts, in the cases provided by the law, the legalization of the signatures on the documents, the legalization of the translations, the issuance of duplicates from the acts that he has prepared.

parties understood the content and the meaning of these acts in order to accept their effects. In all the hypotheses where the act requested by the parties is against the law and good morals, the notary public will refuse to draw it up.

In carrying out his duties, the notary public must respect the principle of equality, the notarial activity being performed equally for all persons, regardless of race, nationality, ethnic origin, language, religion, gender, opinion, political affiliation, wealth or social origin[4].

In the present study, we intend to analyze the different forms of liability of the notary public[5], as they are provided in the current legislation, in the light of the relevant judicial practice.

2. THE LEGAL FRAMEWORK OF THE PUBLIC NOTARY'S LIABILITY

The legal provisions that outline the liability of the notary public can be found in the Law no. 36/1995 of the public notaries and the notarial activity, of the Regulation of 2013 for the application of the Law of the public notaries and of the notarial activity no. 36/1995, of the Statute of 2014 of the National Union of Notaries Public in Romania, of the Decision no. 9/2015 for the approval of the Deontological Code of Notaries Public in Romania, of Law no. 589/2004 regarding the legal regime of the notarial electronic activity, but also of the provisions of the Civil Code.

The responsibility of the notary public can be involved from a civil, disciplinary, contraventional but also a criminal point of view.

3. THE CONDITIONS FOR INVOLVING THE DISCIPLINARY LIABILITY OF THE NOTARY PUBLIC

The disciplinary liability of the notary public has an *exclusively personal feature*, being inconceivable a disciplinary liability for the deed of another or a transfer of this responsibility to another person. Moreover, it is transposed into a mainly material constraint or on the contrary, mainly moral constraint.

As in the case of any liability, it does not have only a sanctioning function, but also a preventive and educational one.

Committing the disciplinary offense is the necessary and sufficient condition, the sole basis of the disciplinary liability of the notary public. In order to be accountable disciplinarily, it is necessary to meet the following constituent elements of the disciplinary deviation:

-the object consisting of social relations arising from the performance of the legal activity of the notary public;

- the objective aspect refers to the action or inaction which violates the legal, statutory provisions, the Code of ethics of notaries public or the provisions, decisions and judgments of the governing bodies of the Union and the Chambers, issued under the

[4] Article 10 of Law no. 36/1995 of public notaries and notarial activities.
[5] Published in the Official Gazette no. 930 of 16 December 2015.

conditions of the law[6], and which may consist in an act committed once or a continuous act;

- the subject who is always an individual, as a qualified subject, respectively the notary public;

- the subjective aspect refers to the guilt in the form of the intention, direct or indirect and to the guilt of negligence or carelessness that must be concretely assessed, on a case-by-case basis;

- the wrongful act consists in the disciplinary offense which is required to be in a causal connection with a harmful result on the disciplinary level.

In case law, disciplinary offense was considered in the case where the notary public authenticated a number of 46 documents having as object real estates located in the city of Sibiu, using for the calculation of taxes the values of the expert report for 2007, producing serious consequences by not collecting and not transferring to the state budget the tax for the transfer of the property right, VAT, the income tax, thus disregarding the provisions of the Fiscal Code[7]. The deed committed was considered as a fact of unfair competition and it was considered that it constitutes a violation of the provisions of Article 28 letter f) and g) of the Code of Ethics and Article 39 letter d) of Law no. 36/1995.

The disciplinary action shall be exercised, as the case may be, by the Minister of Justice, the President of the Public Notaries Union, respectively the Governing Board.

4. THE PUBLIC NOTARY'S CONTRAVENTIONAL LIABILITY

The contents of the Law no. 589/2004 regarding the legal regime of the notarial electronic activity[8] regulates facts that constitute contraventions. Thus, according to the provisions of Article 31 of this normative act, contravention is the drawing up of notarial documents in electronic form without obtaining an authorization from the regulatory and supervisory authority specialized in the field[9], during the period of suspension from his profession or during the period necessary to update the authorization, as well as the omission by the notary public of making the notifications provided in Article 8, para. 1 and Article 9, para. 2 of the law[10].

The contraventions committed are sanctioned with a fine, determining the contraventions and the application of the sanctions being in the jurisdiction of the personnel with control attributions within the regulatory and supervisory authority specialized in the field.

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[6] The deviations that are capable of entailing the disciplinary liability of the notary public are set out in the contents of Article 74 of Law no. 36/1995.

[7] See the Decision of the High Court of Cassation and Justice no. 257/2011 published on https://www.scj.ro/.

[8] Published in the Official Gazette no. 1227 of 2004.

[9] Currently, this authority is represented by the Ministry of Information Society.

[10] According to these provisions, the public notaries are forced to notify, in advance, the regulatory and supervisory authority specialized in the field, of any modification of the approved computer system and also any modification in connection with the identification data. The regulatory and supervisory authority specialized in the field has the obligation to verify the new identification data and, if they comply with the legislation in force, to update within 48 hours the authorization held by the notary office.

5. CIVIL LIABILITY OF THE NOTARY PUBLIC

In accordance with article 73 of Law no. 36/1995, the civil liability of the notary public can be involved under the conditions of the civil law, for the breach of his professional obligations, when he caused with guilt in the form of the bad faith a prejudice, established by an unappealable court decision.

The legal text refers, therefore, to the general provisions of the Civil Code[11], regarding the involvement of civil liability.

At the same time, it should be mentioned that in the Civil Code there are also provisions that establish the criminal liability for the personal deed of the notary public, in the Article 1258.

According to this legal text, the harmed party may request the public notary to repair the damages suffered, under the terms of tort liability for his own action in case of annulment or determining the invalidity of the contract concluded in authentic form for a cause of nullity whose existence results from the text of the contract[12].

Analyzing this special hypothesis of liability of the notary public and which expressly refers only to the situation of cancellation or finding of invalidity of the contract concluded in authentic form, the following special conditions must be fulfilled: the contract concluded in authentic form by the notary public was canceled or the nullity of it was determined; the existence of the cause of invalidity should result from the text of the contract itself, so as it could have been determined by the notary public; if the parties have suffered damage as a result of the cancellation or because of the nullity of the contract. Because Article 1246, para. 3 of the Civil Code stipulates that, unless the law provides otherwise, the nullity of the contract can be ascertained or declared by the agreement of the parties, the question arises whether the liability of the notary public can be involved even if we are in the situation of an amicable nullity or only if we discuss about a judicial nullity. As the legal text does not make a distinction, it follows that not only in the case of a final court decision regarding the annulment or cancellation of the contract, the question arises on the civil liability of the notary public, but also if this sanction intervenes as a result of the agreement of the parties.

Another special hypothesis of civil liability of the notary public regulated by the Civil Code is the one provided in Article 378, para. 3 of the Civil Code, according to which, in order to repair the damage resulting from the abusive refusal of the notary public to determine the dissolution of the marriage through the agreement of the spouses and to issue the divorce certificate, any of the spouses can address, separately, the competent court. This case refers to the situation in which the notary public, stating that the conditions provided by law are not met, rejects the application for divorce. In such a case, the parties do not have a remedy against the refusal of the notary public, if they consider that it is unjustified. However, they can apply to the court with a request to have the divorce settled by judicial means. If the court considers that all the conditions stipulated by the law are fulfilled and it pronounces the divorce, the parties have the

[11] Chapter IV, title II of the 5th book of Law no. 289/2009, republished in the Official Gazette no. 505 of 2011.

[12] *In this respect see Decision no. 565/2018 of 18 October 2018, Caras Severin County Court, published on www.rolii.ro.*

possibility to request the notary's obligation to repair the damage that was caused by the unjustified refusal to pronounce the divorce.

Involving the civil liability of the notary public in the case regulated by Article 73 of Law no. 36/1995 assumes the cumulative fulfillment of the conditions for committing civil liability in general, namely the existence of an unlawful act, of the damage, of the guilt and of the causal link between the fact and damage.

As regards the unlawful act, it consists in the notary's failure to comply with the obligations incumbent upon him in the performance of his duties provided by law.

Regarding the guilt, regardless of its form, it is likely to give rise to the obligation of repair, the text of Article 1357, para. 2 of the Civil Code stipulating that the perpetrator of the damage is responsible for the most nonsignificant fault.

As regards the injury, it must meet all the conditions, that is to say, it should be certain, direct, personal and must result from the infringement or the attainment of a legitimate right or interest (Pop, et al., 2012).

A final essential element for involving the civil liability of the notary public refers to the existence of the causal link between the wrongful act and the damage (Baias, et al., 2012). The judgment will be enforceable within the period of prescription laid down by law (Moldovan, 2019).

6. CRIMINAL LIABILITY OF THE NOTARY PUBLIC

This type of liability can be involved when the notary public commits acts that are considered as crimes.

By the Decision of the Constitutional Court no. 276/2002[13] the application to challenge the constitutionality of the provisions of Article 145 and of Article 147 of the Criminal Code was rejected, the Court concluding that the notary public is a civil servant within the meaning of Article 147, para. 1 of the Criminal Code and can be held criminally liable for service offenses or in connection with the service.

Also the case-law of the courts is in the same respect. Thus, by the Decision of the High Court of Cassation and Justice no. 1423/2009[14] it was stated that the act of the notary public who did not properly fulfill the obligation to verify whether the Romanian state exercised its pre-emption right with regard to the estranged property, meets the constituent elements of the criminal negligence in service, provided by Article 249, para. 1 of the Criminal Code. Also, by another decision of the supreme court (Sandu, 2013), it was definitively ordered the conviction of a person having the capacity of notary public for committing the crime of abuse in service against the interests of the people and forgery.

In another judgment of a case, it was appreciated that the non-observance of the obligation of the notary public to calculate, collect and transfer the taxes is an attribution that derives directly from the laws, and its non-compliance can be a material element of the abuse in service crime[15].

[13] Published in the Official Gazette of Romania, Part I, no. 832 of 19 November 2002

[14] Published on https://legeaz.net/spete-penal-iccj-2009/decizia-1423-2009.

[15]See Criminal judgment of the Court of Appeal Iasi no. 40 din 31.03.2017, published on https://www.jurisprudenta.com/jurisprudenta/speta-13suo7ju/

By the Decision of the Constitutional Court no. 582/2016[16] the application to challenge the constitutionality was admitted and it was found that Article II para. 1, para 5 and para 15 of the Law for the completion of the Government Emergency Ordinance no. 119/2006 regarding some measures necessary for the application of certain community regulations starting with Romania's accession to the European Union, as well as for the modification and completion of the Law of public notaries and of the notarial activity no. 36/1995 are unconstitutional. The reasoning of this decision held that the exclusion of notaries public from the category of civil servants "for the decisions and the organizational and administrative activity submitted to the notary's office and within the other structures of the notary organization" is not based on objective and rational criteria, the distinction made by the legislator being void of a logical justification, since it has the effect of establishing two different legal regimes regarding the activity of the notary public, this being partly civil servant, partly natural person, within the same legal entity - notary office or other structure of the notary organization - and in carrying out the duties inherent to the quality of public notary.

The *decisions* and the organizational and administrative activity are in close connection with the activity of public authority that the notary carries out and cannot be disassociated, in terms of responsibilities, from this public authority. Moreover, the profession of notary public and the entire legal status, including the forms of exercising the function in a notary office - individual office or professional company -, is regulated unitarily and unequivocally, so that any amendment of the legal framework in the respect desired by the legislator would not determine only a privileged regime of notaries public, but also a violation of the provisions of Article 54 paragraph (2) of the Constitution, according to which "The citizens to whom public functions are entrusted [...] are responsible for the fulfillment of their obligations in good faith [...]". The criticized provision creates a privileged regime for the professional category of notaries public in relation to the other liberal professions for which the provision contained in Article 175 paragraph (2) of the Criminal Code is still enforceable, with no distinction depending on the nature of the professional activities performed. Thus, what entails the incidence of the criminal regulation is the quality of notary public, whose activity carried out within the unitary framework provided by the law of organization and functioning of the profession is considered a public service, fulfilled under conditions of public authority, therefore it is the nature and purpose of the service provided and the legal basis by which it is provided, and not the nature of the acts and activities that contribute to the fulfillment of the public service. These, although they have a self-contained existence, they have as purpose precisely the good administration of the public service, so that the persons who perform them follow and remain subject to the legal regime applicable to it, maintaining the quality of civil servant throughout the period of holding the quality of notary public and with regard to all the attributions inherent to this quality.

[16] The decision regarding the admission of the application to challenge the constitutionality of the provisions of Article II para. 1, para. 5 and para. 15 of the Law for the completion of the Government Emergency Ordinance no. 119/2006 regarding some measures necessary for the application of some Community regulations starting with Romania's accession to the European Union, as well as for the modification and completion of the Law of public notaries and of the notarial activity no. 36/1995; it was published in the Official Gazette no. 731 of 2016.

7. EXEMPTION FROM LIABILITY OF THE NOTARY PUBLIC

In the French legal literature it has been shown that the notary public must prove impartiality. Even if the act was free, the notary public could not be relieved of responsibility in the event of a lack of diligence, even if the notarial act was not drafted by him[17]. This is because the notary public has the power to transform a simple act under private signature into an authentic act by its mere signature. At the same time, the notary public has the obligation to ensure that the parties have understood the thoroughness of their obligations and especially the consequences arising therefrom. In case of non-fulfillment of this obligation, the notary's liability will be involved[18].

The exemption clauses of the public notary's liability for non-fulfillment of the obligations stipulated by the law in its duty cannot be considered valid. However, regarding the obligation of the notary public to discern the legal relationships between the parties in what concerns the act they want to conclude, to verify that the purpose they pursue is in accordance with the law and to give them the necessary guidance regarding its legal effects[19], the notary public may request the parties to give a written statement expressly mentioning that they have been given all the necessary explanations and that they have understood the content and effects of the legal acts they conclude.

8. CONCLUSIONS

Starting from the provisions of Article 3, paragraph 1 of Law no. 36/1995 of the notaries public and the notarial activity, according to which the notary public is invested to perform a service of public interest and has the status of an autonomous position[20], the double feature of the function performed by the notary public is: on the one hand, the public notary performs a service of public interest, and on the other hand he is a freelancer.

The fact that the notary public is a freelancer also results from the fact that civil liability can be involved in case of breach of professional obligations. The notary public does not exercise his duties under an individual employment contract, but is a member of a professional organization, the National Union of Notaries Public in Romania.

From an administrative point of view, the notary public cannot be considered a civil servant by reference to the provisions contained in the Emergency Ordinance no. 57/2019 regarding the Administrative Code[21].

However, from the criminal law point of view, the situation is quite different, because according to Article 175, para. 2 of the Criminal Code, civil servant is considered the person who exercises a service of public interest for which he was invested by the public authorities or who is subject to their control or supervision in what concerns the

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[17] See Cass. Civ 1ère 16 février 1994, n°91-20.463 : Bull. Civ. I n°69.
[18] See https://www.village-justice.com/articles/responsabilitE-civile-notaires,14861.html
[19] Obligations provided by Article 80 of Law no.36/1995.
[20] Article 3, para 1 of law no. 36/1995 of public notaries and notarial activities republished in the Official Gazette no. 237 of 19 March 2018.
[21] According to Article 371, para. 1 of the Emergency Ordinance no. 57/2019 regarding the Administrative Code, published in the Official Gazette no. 555 of 5 July 2019, *the civil servant is the person appointed, according to the law, in a public position.*

performance of the respective public service[22]. However, the notary public, according to the law of organization, is vested to perform a service of public interest.

From the analysis of the applicable legal provisions, we can conclude that, due to the role and importance of the activity and duties they exercise, the liability of the notary public is an aggravated one and takes the form of disciplinary, civil, contraventional or criminal liability.

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[22] Published in the Official Gazette no. 510 of 24 July 2009.