

Research Article

THE DEVELOPMENT OF NOTARY AS FREE LEGAL PROFESSION IN KOSOVO

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ABSTRACT

Background: This paper analyses the role of notaries in Kosovo, individuals authorised by the state to draft, solemnise, and legalise legal civil documents. Today, notary services are performed by qualified lawyers who meet state-set criteria and pass a professional exam to practice as independent professionals. The experiences in the world show that notaries contribute to the relieving and efficiency of courts and administrative bodies, thereby expediting legal processes and safeguarding the rights and interests of natural and legal persons. The notary is a public service exercised by authorised persons licensed by the state to fulfil the requests of legal and natural persons through the preparation of notarial acts. In the Republic of Kosovo, notaries are also registered as individual businesses with the Business Registration Agency. During the preparation of these acts, notaries are expected to have high personal and professional integrity, directly impacting the fulfilment of the citizens' requests with high efficiency and professionalism. In terms of how it is organised and operated, the notary service is very complex in the eyes of the citizens and within the justice system itself. To increase confidence, the Kosovo Chamber of Notaries has identified the development of the notary as a permanent process of modernisation and harmonisation of notary services with the evolving needs of legal and natural persons receiving such services. This strategic focus ensures the effective protection of legal interests and promotes legal certainty.

Methods: In the present research, we employed the qualitative method, commonly utilised in the social sciences. Our study uses a combination of literature review and analysis approaches in conjunction with normative, comparative, and historical methods. We analyse the legal treatment that the Kosovo notary system has received from the legislative and academic literature and examine the system's benefits and drawbacks. This approach, which compares the notary system to the one used by the Kosovo courts before 2011, assists in defining the purpose, significance, and status of the notary system in Kosovo.

Using the comparison method, we identify the common and distinctive elements of the notarial system in Kosovo as well as the directions for its development under international standards, giving a clear overview of its place, role, and importance of the notarial system in Kosovo. Based on the legal analysis, we highlight the changes in the interior of legal relations, which were previously the responsibility of administrative bodies and courts but are now the responsibility of notaries.

Results and Conclusions: *The existing normative framework provides a good basis for information on the work of notaries and the Chamber of Notaries. However, an even greater contribution should be made to better inform citizens about the functioning of the notary system, which is crucial for strengthening public confidence in the Notary.*

1 INTRODUCTION

Notary as a profession is very ancient. It is worth noting that the Notary's Office predates any other now connected with administration or jurisprudence in France. Like many other features of the laws and government of France, it has retained traces of Roman origin. However, it cannot be said that the Romans had any public functionary with duties equivalent to those of the modern notary. In the earliest times, public slaves served as scribes, taking notes of proceedings between individuals, preparing agreements for parties, and, in certain cases, entering into stipulations for them by their authority.¹

The Institute of Notaries represents a novelty in the process of reforming Kosovo's modern legal system and its approximation and harmonisation with EU legislation, but also with international law. The notary institute is immanent in continental legal systems and Anglo-Saxon law with their respective differences in importance and action. The justice system comprises a wide range of bodies, whereby in addition to traditional justice bodies such as courts and prosecution offices, the system also includes free professions, including the Notary service, Bar, Mediation, Private Enforcement, and Bankruptcy Administration. The Notary service is very important as a large number of civil, administrative, and other legal relations are dealt with by this service, in particular, the conclusion of various contracts which enable the circulation of goods and the provision of various services to citizens in the function of facilitating the lives of citizens and developing businesses in general.

Notaries have the greatest impact in civil law, where the professionalism of notaries depends on the accuracy and legality of their acts, as they are always used as evidence in courts and other bodies. The establishment of the notary institution in the Kosovo legal system is relatively new, dating back to 2012 with the enactment of the Law on Notary.²

1 WW Smithers, 'History of the Franch Notarial system' (1911) 60(1) University of Pennsylvania Law Review 19.

2 Law of the Republic of Kosovo no 03/L-010 of 17 October 2008 'On Notary' [2008] Official Gazette of the Republic of Kosovo 42/1.

Following the legal system model of most Western European countries, Kosovo has adopted the Latin notary model as a free profession.³ The solutions adopted for the organisation and powers of the notaries imply that the notary service is a public service independent of any other service. Embracing contemporary legal solutions, the notary system in Kosovo prioritises legal certainty, ensuring that qualified and skilled persons carry out these jobs.

This marks an important step towards setting up a notary service dedicated to contributing to providing a distinct legal service aimed at enhancing legal certainty by relieving courts of redundant cases, many of which are non-judicial. This will consequently impact the effective realisation of citizens' rights and the creation of greater legal certainty.

With Kosovo's legislative decision to introduce a "*Latin notary*" service, significant dilemmas revolved around defining the scope of authority for the notary service. This included determining the extent of their responsibilities compared to those of courts, administrative bodies, and lawyers prior to their commencement of work. Due to the solutions adopted in the laws, the position of notaries and the notary service is mainly expressed in the obligations of notaries to abide by their powers in the exercise of their profession.

These obligations are, in particular, expressed in impartiality, which means that notaries are tasked with impartially defending and advising all parties involved in proceedings while protecting their interests. This obligation to inform and protect parties is particularly important in legal matters requiring notarial document drafting.

An important part of the court's jurisdiction, such as inheritance, has been transferred to notaries as a non-contentious procedure to establish uncontested facts. However, if disputed facts are presented, the parties are instructed to resolve their disputes in court in a contentious procedure.

The usefulness of this institute in the court's non-contentious procedures, particularly in inheritance proceedings, cannot be denied. Notaries exclusively handle legal affairs concerning the transfer or acquisition of ownership or other real rights in immovable property and the establishment of a mortgage on immovable property. In these cases, the form of the notarial act is mandatory, with any other form considered null and void, lacking any notarial effect.⁴

But, this does not mean that notaries cannot prepare acts for additional legal work. At the parties' request, notaries can draw up the notarial acts for other legal works that do not fall within their exclusive competence.

3 UINL, 'Fundamental Principles of the Latin Type Notarial System' (*International Union of Notaries (UINL)*), 8 November 2005 <https://www.uinl.org/en_GB/principio-fundamentales> accessed 10 November 2023.

4 Law of the Republic of Kosovo no 06/L-010 of 23 November 2018 'On Notary' [2018] Official Gazette of the Republic of Kosovo 23/22, art 40.

In addition to their traditional role in drafting documents, wills, and authenticating legal transactions, notaries' work extends to legal areas which, until the entry into force of inheritance legislation and uncontested procedure in 2018, were previously exclusively within the jurisdiction of the courts, such as inheritance proceedings.⁵ Notaries are authorised to draw up a will outside of court, known legally in law as notarial wills.⁶

Contemporary trends are moving towards introducing a new legal regime for notaries in the inheritance procedure, as these procedures now fall under the competence of notaries. Before the drafters of the Kosovo civil legislation, which aimed to intensively work on harmonisation with EU law, there was a demand for complete harmonisation of the Law on Notary with other laws related to inheritance, non-contested matters, advocacy, etc.⁷

Therefore, the Law on Notary in Kosovo is entirely based on Europe's most developed notarial legislation, such as the German Law on Notary, French Law on Notary, Austrian Law on Notary, and Slovenian Law on Notary.⁸ By transferring the powers governing the non-contentious cases, which they accept as entrusted work, the notaries discharge the courts from these cases and, through notarial acts, which are enforceable documents, create security for the parties in the procedure. This transition not only reduces the burden of contested cases on Kosovo's courts but also ensures quicker and more cost-effective handling of these matters by the notaries.

The interconnectedness of all free professions and the justice system highlights the necessity for complete harmonisation, as disputes over their powers and responsibilities often arise. To illustrate the issue, it is worth noting the recurring issue where lawyers draft contracts provided by the Law on Bar, but these contracts are not validated by notaries who claim that drafting and certifying contracts is an exclusive power within their domain.⁹

One of the persistent challenges has been the lack of adequate and updated registers, as well as the lack of access to public registers for notaries. This created legal uncertainty and posed a permanent risk for the parties involved, as well as for notaries, during the compilation and authentication of notarial acts. However, this has been overcome because, since last year, notaries have been obliged to record the contract number in the concrete column of the ownership certificate when drafting notarial deeds. This serves as a sign for the competent cadastral office that a new transaction has been completed concerning the property, which is expected to be deposited in the cadastral office for registration.

5 Bedri Bahtiri dhe Asllan Bilalli, *E Drejta Trashëgimore* (Universiteti i Prishtinës Hasan Prishtina 2021) 26-8.

6 Hamdi Podvorica dhe Fatlum Podvorica, *Komentari i Ligjit për Trashëgiminë së Kosovës* (Prishtina 2023) 328-32.

7 Ministry of Justice of the Republic of Kosovo, *Kosovo National Strategy on Property Rights* (US Agency for International Development Kosovo 2016) 108-9.

8 Bashkim Preteni dhe Aliriza Beshi, *Komentari i Ligjit për Noterinë* (Oda e Noterëve të Republikës së Kosovës 2021) 35.

9 Law of the Republic of Kosovo no 04/L-193 of 2 May 2013 'On the Bar' [2013] Official Gazette of the Republic of Kosovo 20/2, art 4, para 1.3.

Also, a continuing problem is the issue of spouses' joint property as well as joint family property, including inherited property. In most cases, such properties are registered in real estate books under the name of sellers but have been in possession of bona fide buyers for decades, purchasing through informal contracts and not according to legal procedures.

Post-war Kosovo has faced numerous ownership legal problems in post-war Kosovo due to falsifications of property documentation and transactions, exacerbated by the absence of cadastral documentation in Serbia. This has led to cases in judicial practice whereby a property has been sold and purchased by several different owners, only to discover later that the documentation was forged.¹⁰ Often, even state authorities fall prey to these documents.

It is worth mentioning that this situation was expressed especially before the establishment and functioning of the notary system, respectively, until 2010. Therefore, given the above, there is a need for further improvement of the notary service as a public service in Kosovo. This includes qualitative normative harmonisation of all the provisions and transferal of certain procedures conducted under the rules of non-contested procedure from the jurisdiction of the courts to the notary service.

While a notable degree of development of the notary service has been achieved in the past period, it needs to be further developed. It is worth emphasising the commitment of the Republic of Kosovo to the European integration process and the reform and development activities outlined in the Council of Europe's recommendations in the field of notary.

Moving forward, it is crucial to continue progressing in the reform process and creating conditions for sustained development while also focusing on enhancing the quality of notary services. Additionally, there is a need to establish a transparent and predictable framework for tracking up-to-date achievements and creating conditions for their sustainability.¹¹

2 THE LEGAL FRAMEWORK OF THE NOTARY IN KOSOVO

The notary profession stands at a crossroads, operating within a world of traditional paper-based transactions where signatures and seals are mandatory and the emerging digital landscape where such practices and procedures must adapt. Establishing a framework for the authentication of computer-based information in today's commercial environment

10 For instance, see the judgment of the Basic Court in the municipality of Gjakova: Rasti nr 256/24 (Gjykata Themelore Në Gjakovë, 16 janar 2018) <https://gjakove.gjyqesori-rks.org/wp-content/uploads/verdicts/GJK_P_P.nr.256_14_SQ.pdf> aksesuar më 10 nëntor 2023.

11 European Commission, 'Kosovo* 2022 Report: Communication on EU Enlargement policy' (*European Commission*, 12 October 2022) 44 <https://neighbourhood-enlargement.ec.europa.eu/kosovo-report-2022_en> accessed 10 November 2023.

requires a familiarity with concepts and professional skills from both the legal and computer security fields.¹²

One of the fundamental components of the modern legal system and the rule of law is the notarial act and service.¹³ In Kosovo's legal system, the notary is a new profession established by the Law on Notary No. 03/L-010. Implemented in 2011, respectively three years after its enactment, the Ministry of Justice, in consultation with municipal court presidents and the Chamber of Notaries, determined the initial number of 74 notaries headquartered in Pristina, the capital city.¹⁴

Currently, the field of the notary is regulated by Law No. 06/L-010, dated 23 November 2018, and Law No. 08/L-149, which amends and supplements Law No. 06/L-010, dated 8 November 2022. The notary aims to reduce the burden on the courts, speed up legal actions taken before notaries and install legal certainty in certain actions and procedures entrusted to notaries in citizens' best interests. According to the Law on Notary, the notary service is defined as a legal and public service for protecting the legal interests of natural and legal persons under the Constitution¹⁵ and the laws of the Republic of Kosovo. This activity is overseen by a notary appointed by the Minister of Justice.¹⁶

The profession of a notary is performed by a professional in the field of justice—the notary, who is entrusted with public authorisations by law. As a professional lawyer and public official, the notary exercises his or her function within the scope of the law by adhering to the Notary's Code of Professional Ethics and professional conduct under the oath given. Notwithstanding the public nature of the service, notaries operate independently and impartially.¹⁷

To be appointed by the Minister of Justice, the notary must meet specific criteria, including being a citizen of the Republic of Kosovo, possessing legal capacity to act, demonstrating personal and professional integrity, holding a law degree from a four (4) year program or having completed master studies at a recognised law faculty in the Republic of Kosovo or in another country (upon recognition of such diploma in the Republic of Kosovo), having at least three (3) years of working experience in the field of Law, passing the notary examination in Kosovo, and being able to provide the necessary premises and equipment for the exercise of notary profession.

Additionally, the Law on Notary outlines conditions that disqualify individuals from serving as notaries, such as being convicted of a criminal offence, being heavily indebted or

12 Leslie G Smith, 'The Role of the Notary in Secure Electronic Commerce' (master thesis, Queensland University of Technology 2006).

13 Bashkim Preteni, 'Recognition and enforcement of Kosovo Notarial Acts' (2013) *Juridica*.

14 Law no 03/L-010 (n 2) art 76, para 9.

15 Constitution of Republic of Kosovo of 15 June 2008 <<https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702>> accessed 10 November 2023.

16 Law no 06/L-010 (n 4) art 2, paras 1, 2.

17 *ibid*, art 2, paras 1, 3.

bankrupt, holding a political position, or being subject to disciplinary action by a judge, prosecutor, or status of an attorney, notary, or civil servant in the Civil Service of the Republic of Kosovo, administrative staff employed in the judicial and prosecutorial systems, as well as other officers employed in the Kosovo Police, Kosovo Security Force, Kosovo Customs and Kosovo Correctional Service, for breaches of conduct and discipline in the last three (3) years from the filing of an application for notary duties (Law on Notary No 06/L-010, Article 4). An essential aspect in terms of legal certainty is the establishment of professional liability insurance for notaries.

Without a doubt, a lawyer's professional practice aids in applicants' proper professional preparation and increases their readiness for the competitive portion of the notary duties application process.¹⁸

It is worth noting that the operationalisation of the notary system has freed the courts from non-judicial cases and significantly improved the efficiency of handling movable and immovable assets within a short period. This has positively impacted Kosovo's economic development, as there are no significant delays in processing cases referred to notaries.

3 THE NOTARY'S AUTHORISATION

The authorisation, namely the competence of a notary in Kosovo, is mainly provided by the Law on Notary and partly by other laws that regulate specific legal areas. The Notary Law¹⁹ provides that the notaries are competent to perform the following tasks:

- 1) compiling, certifying, and issuing notarial documents;
- 2) certifying notarial documents that a party or a third party has produced;
- 3) receiving and preserving documents, cash, payment orders, checks, public obligations securities, and other items;
- 4) undertaking all actions in non-contentious / hereditary procedure, including drafting notarial wills, reviewing hereditary property and deciding on inheritance in non-contentious cases, conducting public valuations and sales of movable and immovable property in non-contentious procedures, especially in voluntary sales cases, and safeguarding inheritance documents, money, securities or valuables.²⁰

For the efficient exercise of all these delegated competencies and responsibilities, especially regarding the examination of inheritance, which, until 2018 in Kosovo, was the competence of the court, the qualifications of notaries must be raised. This entails requiring them to have completed the jurisprudence exam, as they now handle cases previously within the court's purview, necessitating a higher professional standard. With the new Draft Law on

18 Mimoza Sadushaj dhe Elona Saliaj, *Noteria* (Pegi 2009) 80.

19 *ibid*, art 3, para 1.

20 Preteni and Beshi (n 8) 49.

Notary in the Assembly of the Republic of Kosovo for further proceedings, the jurisprudence (bar) exam is also provided as a condition to submit to the notary exam.

As defined by law, the term “notarial acts” encompasses a decision on uncontested inheritance and legal documents and statements made by notaries. Additionally, notarial acts include:

- a) documents produced by a party or a third party and certified/solemnised by the notary; and the certification of facts that, within the authorisations, is approved by the notary and the certification of copies, signatures, and notes other (notarial certificate).
- b) minutes of the actions performed or attended by notaries (notary minutes).²¹

The law stipulates that the notarial documents issued under the Notary Law may be deemed public documents if they adhere to the basic formalities provided by law during drafting and issuance while also possessing evidentiary value and serving as an enforcement document in cases provided by law.²²

4 AUTHORISATIONS ENTRUSTED TO NOTARIES

With the enactment of the new Notary Law in 2018, amendments and supplements have been made to certain laws that regulate specific words and actions now entrusted to notaries. These include the Law on Inheritance and the Law on Contested Procedure. The transitional provisions of the Notary Law - 2008 stipulate that amendments and supplements to inheritance and contested procedure legislation will be made within one year.²³

The Law on Property and Other Real Rights stipulated that contracts for the transfer of immovable property, which require valid legal work between the parties, must be concluded in writing in the presence of both parties in a competent office, implying that the action is performed at the notary's office.²⁴ The Law on Obligations stipulates that the life care contract must be made in the form of a notarial act.²⁵

With the legislative harmonisation that has been made in the laws covering the property, obligation, and business areas, and especially in the areas of inheritance and non-contentious procedures and in the new Notary Law (2018), three types of works are now distinguished which by law are delegated to the notaries powers: the work entrusted by the court; compilation and certification of documents; and deposit affairs.

21 Law no 06/L-010 (n 4) art 3, para 1.

22 *ibid*, art 3, para 2.

23 Law no 03/L-010 (n 2) art 76, para 10.

24 Law of the Republic of Kosovo no 03/L-154 of 25 June 2009 'On Property and Other Real Rights' [2009] Official Gazette of the Republic of Kosovo 57/8, art 36, para 2.

25 Law of the Republic of Kosovo no 04/L-077 of 10 May 2012 'On Obligational Relationships' [2012] Official Gazette of the Republic of Kosovo 16/117, art 561.

We can distinguish non-public and public documents from documents compiled and certified by notaries. Non-public documents are notarial acts, which, if they contain all the elements provided by law, constitute an enforcement document. If notaries are not cautious in drafting their notarial acts, there will be unnecessary litigation over notarial acts that were issued with errors of various natures that infringed or violated subjective civil rights, a phenomenon that is present in several cases in Kosovo as well.²⁶

The declaration of pledge has the mandatory form of a notary act, which means that the document must have the content and form prescribed by law to which the notary is responsible. The Pledge Statement, as a public document certified in the form of a notarial deed, is an enforcement document, which means that in the event of the compulsory sale of the immovable property subject to the Pledge Statement, the depositary creditor may claim, according to the rules of the contested procedure under the mortgage legal provisions.²⁷ Contracts for life legal custody and the will made by the notary must be compiled in the form of a notarial act.²⁸

Contracts for the circulation of immovable property concluded between persons with the capability to act; in other words, contracts for the sale, exchange, and donation of immovable property, which constitute the basis for the transfer of property rights over immovable property, are certified in the exclusive notarial form, which means that the Notary is obliged to explain to the parties the meaning of the legal work, to ascertain whether the parties are legally authorised and capable of acting for such legal work while concerning the content the Notary shall make ex officio verifications whether the contract is under the mandatory provisions, legal order and good customs or not.

The exclusive territorial jurisdiction for drafting the contract for the circulation of immovable property shall be exercised by the notary in whose territory the immovable property or object of the contract is situated. In terms of legal certainty concerning the circulation of immovable property, Kosovo legislation provides for establishing the Unique Record of contracts²⁹ that have been certified in court or by notaries, respectively, the Register of Rights on Real Estates.³⁰

Meanwhile, to prevent the possibility of a seller alienating two or more times the same real estate, which is happening in Kosovo, the notary who has signed (solemnised) the real estate contract must send the certified copy of that contract to the body responsible for maintaining the immovable property rights register. To prevent tax evasion, the notary who has solemnised the contract for circulating immovable property is obliged to send the

26 Preteni and Beshi (n 8) 38

27 Law no 03/L-154 (n 24).

28 Law no 06/L-010 (n 4) art 40.

29 Law of the Republic of Kosovo no 2002/5 of 20 August 2008 'On the Establishment of the Immovable Property Rights Register' [2008] Official Gazette of the Republic of Kosovo 34/44.

30 Law no 03/L-154 (n 24) art 287.

certified copy to the competent tax authority within ten days from the day the contract is concluded. Thus, the notarial documents solemnised by the notaries as non-public documents prove that the concept of freedom of contract in non-public documents has been preserved and that the parties may contract on the subject of their wish. In contrast, the notary only certifies and respectively solemnises the contract.

Due to non-amendment, the expiry of the Law on Legalization of Signatures, Manuscripts and Copies, issued by the Assembly of the Autonomous Socialist Province of Kosovo (KSAK) on December 28, 1971,³¹ as a basic law in this field, which was applied even during the administration by United Nations Mission in Kosovo, respectively until the commencement of the notaries' work under the Notary Law of 2008, legally, there is parallel power between the notaries and the bodies of local self-government. This legal problem of parallelism of powers will have to be given special importance as part of the activity for harmonisation of normative acts with the new Law on Notary to determine whether the competence of notaries and parallel jurisdiction over the legalisation of signatures, manuscripts, and copies will exist, or according to legislation in the field of inheritance and uncontested procedure, even legally, shall be exclusively entrusted to notaries.

Introducing and implementing provisions for notaries as a new legal institute in our legal system assumes a comprehensive process of particular importance. It is necessary to regulate with the notary law or to issue a special law regarding the legalisation of signatures, manuscripts, and copies, as well as to specifically repeal the Law on the Legalization of Signatures, Manuscripts, and Copies of the previous system of former Yugoslavia, which is not repealed. With the new legal provisions, it should be specified that only notaries are competent in legalising signatures, manuscripts, and copies.

The fact that notary services were added to Montenegro's legal system was overlooked by the Montenegrin legislators when they adopted the new Law on Certification of Signatures, Manuscripts, and Transcripts. In contrast to the majority of comparable laws, certification of signatures, transcripts, and manuscripts has not been placed under the sole jurisdiction of notaries; instead, notaries, local government agencies, and the courts continue to compete with each other to complete these tasks. Retaining competitive jurisdiction in this regard is no longer appropriate. This solution does not lead to building legal certainty, protecting the public interest, or relieving the work of courts and administrative authorities, which were the underlying legal and political motivations for introducing the notarial

31 Law of the Autonomous Socialist Province of Kosovo of 28 December 1971 'On Legalization of Signatures, Manuscripts and Copies' (1971) Official Gazette of the Autonomous Socialist Province of Kosovo 37.

After the declaration of independence of the Republic of Kosovo, in its Constitution, Art. 145 para. 2 states that: Legislation applicable on the date of the entry into force of this Constitution shall continue to apply to the extent it is in conformity with this Constitution until repealed, superseded or amended in accordance with this Constitution.

profession.³² Parallel jurisdiction does not align with the standard of notarial services in European continental law, which has adopted the Latin model of the notary as an independent profession vested with public authority.³³

5 THE NOTARY CHAMBER ON ITS BODIES

Notaries are usually organised in chambers. The Notaries Chamber of Kosovo³⁴ is a public entity in which all notaries within the territory of the Republic of Kosovo are compulsorily organised and, as such, it has the capacity of a legal entity. This means that the Chamber of Notaries is a professional notary organisation established to take care of the prestige, honour, and rights of notaries, ensuring that notaries perform their work responsibly and under applicable legislation as well as the Notary Code of Ethics and Professional Conduct,³⁵ following the oath given.

Notary chambers or any other notary association in countries where the Latin type of notary has been accepted are affiliated with the International Union of Latin Notaries (UINL).³⁶ UINL now consists of notaries from 84 countries, including Kosovo, from March 2013, which has been admitted as a full member. The Chamber has its revenues, which, by law, are determined to be the proceeds of membership fees and fines, donations, and other revenues. In the meantime, the Chamber should make all revenues transparent, publishing them in an Annual Report submitted to the Minister of Justice no later than 31 January each year and publishing it on the Chamber's website.³⁷

To carry out professional and administrative duties within the Chamber, a professional service is established, headed by the Secretary of the Chamber, and elected by the Board of Directors of the Chamber.³⁸ The basic functions of the Chamber of Notaries are mainly concerned with:

- 1) assuring that notaries perform their professional duties responsibly and correctly, respect professional ethics, and act in a dignified manner;
- 2) harmonising professional activities of notaries;

32 Velibor Korać, 'Comperative Jurisdictions of Local Administration Authorities and Notaries for the Certification Purposes in Montenegro' (2021) 19(3) *Lex localis* 439, doi:10.4335/19.3.439-459(2021).

33 *ibid.*

34 Law no 06/L-010 (n 4) art 62; *Notary Chamber of the Republic of Kosovo* (2023) <<https://www.noteria-ks.org/dokumentet>> accessed 10 November 2023.

35 Council of Europe, *Code of Notary Ethics* (EU, CoE 2021) <<https://rm.coe.int/hf6-code-of-notary-ethics-eng/1680a21dec>> accessed 10 November 2023.

36 *Union Internationale du Notariat Latin (UINL)* (2023) <<https://www.csn.notaires.fr/en/international-organisation-civil-law-notaries>> accessed 10 November 2023.

37 Statute of the Notary Chamber of the Republic of Kosovo (26 January 2019) art 17 (1.11) <<https://www.noteria-ks.org/dokumentet/statuti-i-onk-se>> accessed 10 November 2023.

38 Law no 06/L-010 (n 4) art 62 para 6.

- 3) organising training of notaries and notary office workers;
- 4) representing notaries before state administration institutions and bodies to protect the rights and interests of the notary profession under the law and the Statute establishes and implements cooperation with chambers of notaries abroad;
- 5) preparing recommendations for the harmonisation of notary practices concerning the profession;
- 6) defining paid functions within the Chamber;
- 7) acquiring and managing immovable and movable property necessary for the performance of the duties specified in this Law and
- 8) carrying out all other activities under its Law and Statute of Notary.³⁹

The bodies of the Notary Chamber, according to the Law on Notary (Art. 62, para. 3), are: 1) The Assembly of the Chamber; 2) the Steering Council; 3) the President of the Chamber; 4) the Disciplinary Committee;⁴⁰ and 5) the Audit Committee.

However, there is an inconsistency between the provisions of Article 7 of the Statute, which regulates some issues related to the bodies and powers of the Assembly of the Chamber, and Article 62 of the new Notary Law. Therefore, there is an urgent need to harmonise the existing Statute of the Chamber with the provisions of the new Law on the notary. The provision of Article 7 of the Statute, which regulates some issues related to the bodies and powers of the Assembly of the Chamber, differs from Article 62 of the new Notary Law. In other words, the regulation under the Statute is more extended and not fully in legal harmony with the Law on Notary.

Consequently, an urgent need exists for harmonisation of the existing Statute of the Chamber with the provisions of the Law on Notary. This is mandatory because the statute as a by-law must be harmonised with the law since the law has greater legal force than the statute; therefore, each change in the law must be reflected in the statute, contributing to legal certainty and the rule of law. This harmonisation of the statute with the new law on notaries has not happened yet, necessitating urgent action to rectify this.

39 *ibid*, art 63; Statute of the Notary Chamber (n 37) art 5. For more, see: Preteni and Beshi (n 8) 346.

40 Government of the Republic of Kosovo in January 2024, approved the Draft Law on Amendments and Supplements to the Law on Notary, which draft in principle has been approved also by the Committee on Legislation in the Assembly of the Republic of Kosovo, and is expected to pass the first reading in the next sessions. Based on this draft, there is a propose to take over Disciplinary Committee from the chamber of notaries as a body of the chamber and it is thought that it will be transferred to the competence of the Ministry of Justice in the first instance, also in a mixed composition of 2 judges and 1 notary. According to this logic, there will be no second level in the administrative procedure and this decision will be final, while the parties and the notary will have the right to open the administrative conflict before the relevant court. If we refer to the legislation of countries neighboring Kosovo such as: Croatia, Slovenia, Albania, Bosnia and Herzegovina, Macedonia, Montenegro, as well as Serbia, the Disciplinary Commission is a body of the Chamber of Notaries, with a mixed composition depending on state policies and nowhere we encountered that this commission is outside the Chamber of Notaries.

6 THE SUPERVISION OF THE NOTARY'S WORK

Ministry of Justice exercises control over all notaries and notary archives and may order any specific control it deems necessary.⁴¹ In the event of a violation being identified, it must first be looked at with preventive measures and then with other measures, which, as a rule, are foreseen and should be given in a scalable manner according to the type of violation and based on the gravity of the violation, the damage caused and the degree of guilt of the notary. However, before disciplinary action, the procedure must be followed to guarantee the right to be informed, seek clarification of facts, and be protected. Disciplinary proceedings against a notary may be initiated “*ex officio*” by the Ministry of Justice upon the proposal of the Notary Chamber or the complaint of the injured party when investigations by the responsible mechanisms of the Chamber and the Ministry have found a violation of the law or the Code of Ethics while exercising the activity of a notary. Finally, three institutions oversee the work of notaries: the Ministry of Justice, the court, and the Notary Chamber.⁴²

6.1. The supervision by the Ministry of Justice

The supervision carried out by the respective organisational unit at the Ministry of Justice is seen in the control of the performance of the work of the bodies of the Notary Chamber concerning supervision and in the control of the business of the bodies of the Chamber. The Ministry may “*ex officio*” supervise or, based on requests from interested persons, assign control to the work of the Chamber and take the necessary measures to eliminate the irregularities found.⁴³

The Ministry, in particular, controls the organisation of the notary service, the keeping of notary books, the operation of deposits, the application of the notary fees, the preservation of foreseen records, and the performance of work related to the internal business of the notary's office. The Notary Law⁴⁴ set out the Chamber's obligations to enable the Ministry to check the documentation and books. The Chamber also must submit an annual work report of the Chamber to the Ministry, which also contains the general assessment of the work of the notaries and may also include the proposal of measures to improve the conditions for exercising the notary service. The Ministry of Justice, in addition to overseeing the legality of the performance of the work of the bodies of the Chamber, oversees the work of the notaries and finds that all notarial acts have been exercised under applicable law.⁴⁵ Such supervision includes but is not limited to the preparation of notarial documents, archiving of notarial documents, and observance of notarial fees.⁴⁶

41 Law no 06/L-010 (n 4) art 74 para 1.

42 *ibid*, arts 71-73.

43 *ibid*, art 64.

44 *ibid*, art 64, paras 2, 3.

45 *ibid*, art 74, para 1.

46 *ibid*, art 75.

Despite efforts by the department for the supervision of the work of notaries and the Chamber to bring results in the implementation of legislation in the field of notaries and even better results in the efficiency and updating of the work of notaries and the Chamber, from conversations held at the Department for Free Legal Professions and other relevant units as well as in the Chamber of Notaries and with notaries, it was announced that in the future, according to the new Law on Notary, the activities for exercising the function of supervision should be increased. In addition, the activities for harmonisation of the secondary legislation of the Chamber with the new Law on Notary should be accelerated.

In addition, the Ministry of Justice and the Chamber should be involved in the training of notaries, the professional staff employed in the Chamber and the Ministry of Justice,⁴⁷ through the organisation of training on legislative changes in the field of notary services, which should be crowned with a publication, of a sort of Notary Handbook, which would also cover the issue of supervision in this area. The focus should be on developing activities related to the implementation of issued normative acts, professional training of notaries and staff employed in the Chamber of Notaries, etc. Indeed, the continued reform of the notary field, namely undertaking activities to implement further reform, is intended to create solid foundations for the successful operation of an independent, impartial, and efficient notary service. Particular attention should also be paid to the training of notaries, their assistants, and the staff of the Notary Chamber on EU law, particularly training on the European Court of Human Rights case Law, which is necessary in our path toward EU accession. Article 53 of the Constitution of the Republic of Kosovo states, "*Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights*".⁴⁸

Based on the above, it is necessary to review the entire legal and by-laws of the notary field to bring it in line with the Strategy for the Rule of Law 2021-2026 issued by the Ministry of Justice,⁴⁹ where in this document, the directions of the general reform in the sector are defined, including the notarial system for the following period. The strategic goals would be strengthening:

- 1) the independence and freedom of the notary;
- 2) the efficiency of the notary;
- 3) access to administrative and justice bodies;
- 4) public confidence in notaries.

47 *ibid*, art 5; art 11, paras 5, 6; art 63, para 1.3.

48 Constitution (n 15) art 53; European Court of Human Rights (2023) accessed 10 November 2023.

49 Ministry of Justice of the Republic of Kosovo, 'Strategy on Rule of Law 2021-2026' (July 2021) <<https://md.rks-gov.net/desk/inc/media/8EF86336-E250-4EA2-9780-D4B8F7E853B5.pdf>> accessed 10 November 2023; Decision Government of the Republic of Kosovo no 04/24 of 11 August 2021 'Strategy on Rule of Law 2021-2026' <<https://gzk.rks-gov.net/ActDetail.aspx?ActID=45816>> accessed 10 November 2023.

A functional review should encompass the notary service as part of the ongoing reform in the justice sector. The vision of Kosovo Notary is to be open to all and inspire confidence in notaries, who must ensure justice for all. The realisation of this vision is contingent upon achieving the strategic goals, wherein notaries should be independent, free, and functional; accessible to all; fair and respectful to all persons; effective, efficient and open; willing to act under the Constitution, law and international instruments while respecting without prejudice and consistent in ensuring the equitable provision of services.

Kosovo's legal framework lacks proper mechanisms for supervising the work of notaries, such as the inspectorate. Establishing a dedicated inspectorate to oversee the work of notaries would significantly affect the realisation of the mission and duties of the Ministry of Justice in terms of inspection. This mechanism for controlling the work of notaries should have as its primary objectives:

- 1) assessment of compliance with legal requirements by the inspection subject;
- 2) establishment of good practices in compliance with legal requirements and their spread;
- 3) advising the inspected notaries on the correct implementation of legal requirements;
- 4) ordering the correction of violations of legal requirements and elimination of the consequences arising from them;
- 5) implementing other administrative measures to avoid risks that may be caused to the public interest and the legal interests of natural and legal persons, according to the conditions and procedures provided in the law.

While ad hoc mechanisms for supervision may exist, relying solely on ministry officials and/or experts engaged ad hoc from abroad is not the best way to supervise and control the quality of work and respect for the law, as well as unify notarial practice. Therefore, the establishment of a notary service inspectorate is necessary.

6.2. Regular supervision by the Notary Chamber

Based on the Statute of the Chamber of Notaries, regular supervision is carried out by a Special Commission appointed by the Governing Council of the Chamber consisting of three members: two notaries and an employee of the administrative service of the Chamber in the capacity of process keeper. The notary who this commission inspects may propose one of the members of this commission.

The objective of regular supervision is to monitor the professional activities of notaries, including the availability of notarial services, the organisation of work and customer service in the notary office, statistics related to notarial acts, keeping books related to professional activities, maintaining documents, the electronic processing of personal data and the connection to the registers, the organisation of data storage, the existence of professional

liability insurance, the implementation of professional secrecy and that of professional confidentiality and the implementation of the law, general acts and decisions and positions of the Chamber. Every year, the Governing Council of the Chamber will report the inspections made to the Ministry of Justice.

6.3. Strengthen the access of the relevant competent bodies to the work notaries

The right of access to the work of notaries is one of the aspects of the right of supervisory bodies to the work of notaries and represents an international legal standard. The access to competent supervisory bodies and the equality of the parties are fundamental principles of fair conduct and have a common purpose, namely the assurance of the same equality, which is the basis of the principle of the rule of law. In the literal sense, the right of access to the work of notaries means the right of everyone to address the notary and the Notary Chamber to exercise and protect their rights and the obligation of the notaries and the Chamber to act within the powers set forth by law.⁵⁰ Special care should be taken in cases of fictitious transactions related to tax evasion, money laundering, or other criminal activity.⁵¹

In this sense, the Notary Chamber must be more active in identifying these cases and implementing unified practices, leaving no room for different treatment of the same cases in the proceedings before it. This should consider not only the legal obligation of every notary to register every transaction in the online notary register but also the reporting of any suspicious transaction to the competent authorities to prevent money laundering under the law.

We believe that continuing the digitisation of the justice system, in general, through information technology and the notary system, in particular, should remain a priority.

Creating an efficient system for online application in the real estate register by a notary remains a significant challenge in respecting and protecting citizens' rights through the provision of fast, quality, and effective services. Since the law of Notaries is one of the competences of notaries, inheritance matters, this requires the creation of a separate Register of Testaments, in which the notaries must register the wills signed before them, as well as the Register of Inheritance Declarations, in which the notaries record evidence of legal inheritance or the wills. The Chamber of Notaries should administer both registries under the supervision of the Ministry of Justice.

50 Law no 06/L-010 (n 4) art 64, para 1.

51 Joanna Brooks, Risk assessment for the Kosovo Chamber of Notaries (Swiss Cooperation Office Kosovo 2019) 33.

6.4. Strengthening public confidence in the notary service

Compared to other areas of the legal profession, European notaries have generally been less affected by economic globalisation and European harmonisation. This has a straightforward explanation. As public officers tasked with creating public instruments, notaries are typically appointed by governments based on need in the majority of civil law regimes. The European Parliament viewed the partial delegation of state authority that is a necessary component of practising notarial work in 1994 as support for the decision that notaries were exempt from the provisions of Article 55 of the Treaty of Rome, which guarantees the freedom of establishment and the provision of services. In most European countries, notaries use their public office role to enforce the nationality requirement for their professional members. Latin notaries have thus far primarily operated in marketplaces shielded from domestic and, most likely, foreign competition. There has been variation in their readiness to even contemplate increased flexibility.⁵²

In contrast, English notaries operating in a common law setting have legitimate concerns about being exposed to competitive pressures. Unlike their counterparts in civil law jurisdictions, they do not hold delegated authority from the state, their numbers are not subject to a *numerus clausus*, they are not protected by a nationality requirement, and there are very few legal specialities that only require their specific notarial knowledge that cannot—and frequently cannot—be performed by members of other professions. Even in the context of international business, the marginal standing of English notaries inside the common law system is starting to pose a major threat, as if this was not enough reason to be concerned.⁵³

The Notary, as one of the important pillars of a democratic society, must exercise its function responsibly and ascertain the truth in a formalised and complex procedure. Given that notaries are also entrusted with some judicial powers, particularly in inheritance and non-contested procedures, a close relationship exists between the two categories of rights and freedoms of fair trial. This relationship emphasises the importance of respecting an individual's privacy and freedom of information.

Accordingly, current provisions stipulate that the work of notary offices is public and information regarding notarial work is provided by the notary or the person authorised. Notarial certifications contribute to greater legal certainty and are more accessible to citizens without excessive cost.⁵⁴ As a result, notaries must provide services with integrity, professionalism, and efficiency, adhering to current laws and honouring the notarial services charge.⁵⁵

52 Gisela Shaw, 'Notaries in England and Wales: Modernising a Profession Frozen in Time' (2000) 7(2) *International Journal of the Legal Profession* 146-7, doi:10.1080/09695950020053719.

53 *ibid* 147.

54 Korac (n 32).

55 Hamdi Podvorica, Fatlum Podvorica dhe Enisa Haliti, *E Drejta Noteriale* (Trend 2018) 63.

Notaries are prohibited from disclosing information that could influence the development of the respective procedure. Procedural rules generally offer public access, except where the law excludes the public. When providing information in some instances, the confidentiality provisions of the proceedings and the prestige, privacy, and business interests of the parties and other participants must be respected. In cases where public disclosure is deemed appropriate, the notary and the Chamber may choose to inform the public about their work through organised press conferences. On the contrary, disregarding the principles of public information can lead to the dissemination of unprofessional information and undermine notarial procedures. We consider that failing to provide information may weaken public confidence in the work of notaries and the Chamber.

When two or more parties participate in creating a notarial act, the notary must exercise caution. They are not authorised to defend one party's interests at the expense of the other.⁵⁶

7 CONCLUSIONS

Based on the research, to function more effectively in the notarial system in Kosovo as a free profession, several additional steps and activities should be undertaken in several directions:

- 1) strengthening the system of independence and accountability of notaries regarding the exercise of their powers and responsibilities;
- 2) further development of the legal framework and continuous training of notaries, including the appointment of new notaries to cover all places and official headquarters and the initiation of measures to address the shortage of notaries in some municipalities in Kosovo;
- 3) enhancing the criteria for obtaining a notary's license, ensuring that positions are not obtained through friendship, clan, family, and political ties, as well as maintaining full transparency in the selection process while promoting gender equality and the ever-greater promotion of female notaries;
- 4) ensuring full access to all public registers by notaries, with an obligation to maintain confidentiality and imposing punishment for disclosing professional secrets;
- 5) mandating that both current notaries and new notaries take the jurisprudence exam in addition to the notary exam;
- 6) establishing an inspectorate as a special mechanism for supervising the work of notaries;
- 7) harmonising by-laws in the field of notaries with the law on notaries, with particular emphasis on the harmonisation of the Statute of the Chamber of Notaries with the Law;

56 Arben A Hakani, *Noteria në Republikën e Shqipërisë* (2 botimi, Onufri 2011) 71.

- 8) explicitly repealing the Law on the legalisation of signatures, manuscripts, and copies issued by the Assembly of the Autonomous Socialist Province of Kosovo (KSAK) on 28 December 1971 and replacing it with a new law in this field;
- 9) ensuring coverage of all municipalities with a notary, as mandated by law;
- 10) increasing inter-institutional cooperation and improving the electronic systems of public registers, as well as the prevention of suspicious and fictitious transactions that may be linked to various criminal acts of corruption, organised crime, money laundering, and terrorist financing.

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