

# Justitiële verkenningen

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## On civil law notaries

### Summaries

Justitiële verkenningen (Judicial explorations) is published nine times a year by the Research and Documentation Centre of the Dutch Ministry of Justice in cooperation with the publishing house Gouda Quint BV. Each issue focuses on a central theme related to criminal law, criminal policy and criminology. This section contains abstracts of the most relevant international articles of each issue. The central theme is: On civil law notaries.

#### **Notary in the marketplace**

A. Rieter

In the Netherlands, civil law notaries are regular publicity targets. At the moment, a draft bill is pending. The position of notaries in the free market is a key element of the public debate. Is the position of a notary compatible with the free market? The function of the law is to regulate peacefully. The function of the notary is to provide legal protection, in a preventive sense, a function that has its basis in jurisprudence. In the current debate on socio-economic issues, market factors are dominant norms. The preventive administration of justice is a core task of government. It does not belong to the free market. The author points out that, if the government makes notarial help obligatory, it should ensure that citizens have practical access to such help, without price thresholds. The KNB (a professional association of the civil law notaries) establishes current rates. It argues in favour of having the government do so. In this way, incomes would also be subject to control. The author presents notarial profession with two alternatives: getting rid of the notarial profession as a public office (see Scandinavia and the Anglo-Saxon countries), or employing notaries as salaried civil servants.

#### **A cultural-economic perspective on the new legislation concerning public notaries**

A. Klamer

This paper presents an economic-cultural perspective on the world of public notary in the Netherlands. It highlights the tension between its public character and its participation in commercial activity, the real estate market in particular. The first calls for an independent status and a salary provided by the public, the other for a more open competitive structure. New legislation of the Dutch government improves the competitive structure but leaves the public character intact. It does not make for a coherent profile of the Dutch notary.

#### **Quality or satisfaction? the notarial service between profession and entrepreneurship**

C.L.B. Kocken

The notary will tell you their services are of high quality. But what qualities should a notary have and are they realized in his practice? The author draws on his 4-year research project on notaries to look into their independence and impartiality. The legal structure for the notary supposes both these qualities to be present and the professional group itself claims they are also present in reality. The author argues that there are in fact severe problems in realizing these qualities. He breaks down the idea of impartiality in different elements and then concludes that impartiality is often lacking. One of the main reasons for failing to perform in an independent and impartial way is the entrepreneurship of the notary. They depend too much on their customers. This dependence on 'marketforces' will only increase with the coming of the new law of the notary.

#### **Notarial secrecy; summum jus summa jura?**

J.J.M. Hoogendam

Since the early seventies the notary has been an effective instrument for financial criminality. Research shows that notaries, next to lawyers and accountants, are involved in criminal activities, both voluntarily and involuntarily. The notaries want to take action against this involvement in criminal activities. Jurisprudence shows that a notary has to set aside his secrecy in certain cases. Having the privilege of non-disclosure, the notary does not have the legal obligation to report serious crimes to the authorities. However, the standing of his office implies that certain crimes have to be reported to the authorities. The action taken by the notaries includes the appointment of five persons of confidentiality in January 1997. The notarial organisation has also drawn up a list of indicators as an instrument to recognize malafide clients. If the notary has refused to render certain services, he has to decide whether this case has to be reported to the authorities, in this case the National Criminal Intelligence Service. The regulations have been effective for a short period now. Results are not yet available.

### **Notare et cavere**

W. Heersink

The notary in the Netherlands was introduced by the church courts of the middle ages, where clergymen performed notarial services. During the following centuries these clergymen did their services also out of court. In the sixteenth century the ecclesiastical notary had developed into a public notary. The reliability of the notary was of major importance for the public. His trustworthiness gave authenticity to the deeds he produced. The rising class of burghers and merchants, a new market for notarial products, gave the growth of the profession an important stimulus. The authorities tried to guarantee the notarial reliability and authenticity by legislation and control. For instance, the admission to the profession was dependent on an examination of knowledge and skills. Legislation and education improved the professional quality and the social status of the public notary. Parallel to this development the public notary concentrated on deeds and settlements concerning civil law, partly due to legislation, partly a result of specialization. As in the middle ages the modern public notary writes for a particular and small group of clients. Luckily, the public notary try to increase their market.

### **The civil law noary; professional tradition and electronic legal transactions**

G.J.C. Lekkerkerker

A civil law notary's assistance, as shown by a deed, at all times makes it a legal fact that the agreement laid down in it was made by the parties at a particular time. The person who has set his or her hand to a notarial instrument cannot deny that it is he or she that has signed; it is an established fact that the instrument is 'authentic'. It is also beyond doubt that the instrument is 'sound', meaning that the contents of the instrument are held to be 'true'. The parties cannot deny that they actually declared what they state in the instrument. Another characteristic of the notarial instrument is its fixed date, proof that the act was done on a particular date. Finally, the civil law notary sees to it that the exchange of communications is confidential, and the requirement of continuing 'undeniability' of the agreement in the future is also fulfilled through the fact that the notarial instrument is filed in the notarial records. With the arrival of electronic documents, the question how the authenticity, soundness, confidentiality and undeniability of the communications exchanged can be sufficiently ensured has become topical again. The work of the civil law notary must be translated into new techniques. However, the civil law notary has his own position within the legal order and in society. New notarial services should fit in with what is rightly expected of a civil law notary. A number of possible notarial services in electronic legal transactions are discussed. It is concluded that much can be done, but that the quality of the service to be offered should always be such that the great trust the civil law notary enjoys with the public is not put at risk.

### **Notaries and the foreign countries**

A.A. van Velten

The so-called 'Latin' notary is a functionary who can be found in countries with a legal system which is based on Roman Law. In Anglo-Saxon countries the notarial duties are performed by solicitors or attorneys (lawyers) who - besides these duties - often occupy the position of notary. A significant difference is that, in contradistinction to the 'Latin' notary, these functionaries are not independent practitioners of law and they are not qualified to draw up authentic deeds. The national organizations of 'Latin' notaries cooperate in de world-wide

association: the 'Union Internationale du Notariat Latin' (UINL). Within this association a number of working procedures exist, amongst others a procedure for specific problems in the field of the European Union. Furthermore, the associations of 'Latin' notaries in the European Union have inaugurated a 'Conférence des Notariats de l'Union Européenne' who have the aim to look after the interests of the 'Latin' notaries in the European Union. In order to give an impetus to legal services across the borders, the 'Conférence des Notariats de l'Union Européenne' have adopted a 'Code' which provides rules for notarial services across the borders. The function of 'Latin' notary will probably not be covered by art. 52 of the EC-treaty, because part of the state-authority is also included in this function. The European Parliament share this opinion. The European Parliament advocates a further harmonization of notarial laws, which can hardly be seen separately from the European harmonization of private law.