

The Eritrean Notary Public in the Context of Global Notaries System

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Abstract

The Eritrean Notary Public was established, simultaneously with the cadastral system at the end of the 19th century during the Italian colonial administration. Both the public notary and the cadastre system were originally constituted with the sole purpose of guaranteeing security of property ownership for the Italian settlers in complete violation of the natives' property rights. But, later they were gradually transformed to embrace Eritrean citizens' property. Their complementarities continued during the several occupational administrations until Eritrea attained its independence in May 1991.

Both the notary public and the cadastre offices, as mutually complementary institutions worked in close harmony. They played their roles, respectively in the authentication of legitimacy of titles as well as contracts of transactions, and the certification of ownership over land and immovable property erected overland. In due course, the two institutions had experienced difficult periods and survived attempts at their elimination, particularly during the Ethiopian military rule in the mid-1970s.

Notary public has a long history of providing legal security for individual and legal person's property. And nowadays, its need has grown tremendously with the advent of globalization and internationalization of the market and businesses for use of legal services. However, the services it provides vary from country to country depending on the countries' historical traditions and policies. This paper provides an overview of the roles of notaries' public world-wide, states the role the Eritrean notary public has played in securing the legitimate title of ownership through ensuring lawful transactions of immovable property, and calls for reinstating the notary public offices in all regions of Eritrea as well as broadening the scope of its services beyond witnessing contracts of agreements of immovable property transactions.

1. GLOBAL OVERVIEW OF THE NOTARIES SYSTEM

1.1 Historical Development

The notary public ('notary', notarial officer', or 'public notary'), which is a public office, has a long history that traces its origin back to the Fertile Crescent of ancient Babylon, the Greek city-states, and later adopted under the Roman Empire (Civil Law Notary,

Wikipedia, 2010, p. 10). The origin of the notary is also found in Hammurabi's Code, dated at least 2000 BC, and in 360 BC in ancient Greece there were 'public officials' drafting contracts for citizens (Malavet, 1994, in Berhane, 2000, p.2). At the beginning a notary (the 'notarius') was one who took down statements in shorthand and wrote them out in the form of minutes, but at later times the title notarius was applied to registrars attached to courts of provincial governors, secretaries of governors and the highest class of officials in the government. Despite the collapse of the Western Empire in the 5th C AD, the notary continued with some importance in many parts of Continental Europe throughout the Dark Ages (Wikipedia, 2010, p. 4).

The civil law experienced its renaissance during medieval Italy from the 12th C, and the 'notary was established as a central institution of that law', which still continues in countries whose legitimacy is derived from that civil law (Ibid, p.4). The development of modern 'notariat' happened with the opening of the school of 'Notariato' in 1228 in Bologna, Italy that influenced Europe. Notarial acts were later acted in France (1270), Portugal (1315), Spain (1333), and in Germany a modified Latin type notary ('natar') exists. We now find the word notary, 'notaire' in French, 'notaio' in Italian, 'notario publico' in Spanish and 'notaris' in the Netherlands (Berhane, 2000, p.3). On the other hand, in England a separate development of the common law notary public, 'free from most of the influences of the Roman Law' (Wikipedia, 2010, p.4), was introduced during the 13th and 14th centuries.

The World Book Encyclopedia (1994, p. 550) defines Notary Public as 'an officer authorized by state law to certify certain documents and to take oaths'. Wikipedia, the Free Encyclopedia (2012, p.1) also defines 'notary public' in the common law countries as a public officer constituted by law to serve the public in non-contentious matters concerned with estates, deeds, powers of attorney, and foreign and international business, whereas in the civil-law notaries or Latin notaries they are lawyers of voluntary private civil-law offices who draft, take, and record legal instruments known as notarial acts or deeds for private parties, provide legal advice and give attendance in person, and are vested as public officers with the authentication power on behalf of the state (Wikipedia, 2011, p. 1). Thus, in contrast to common law notaries, civil-law notaries are able to provide legal advice and prepare instruments with legal effect.

1.2 Notarial Requirements and Practices

Both the civil law and common law notaries agree that many documents, such as deeds, businesses, etc. must be notarized before becoming legally effective. The purpose is to protect those who use them from forgeries. That is why the 'notary signs the document to certify that the individual who signed it appeared in person and swore to the notary that the signature on the document is genuine'. The notary records that fact and stamps a seal on the document.

Unlike the current practices of developing countries such as Eritrea, the functions of notaries public go far beyond the simple contract agreement of transactions of property, witnessing oaths and acknowledgement of deeds and conveyances to embrace administration of oaths and affirmations, take affidavits and statutory declarations, witness and authenticate the execution of certain classes of documents, protest notes and bills of exchange, provides notice of foreign draft and provide notarial copies. The duties and functions of notaries public are summarized in Brooke's Notary (p.19) as follows:

‘A notary public...whose public office and duty it is to draw, attest or certify under his official seal deeds and other documents, including wills or other testamentary documents, conveyances of real and personal property and powers of attorney: to authenticate such documents under his signature and official seal in such a manner as to render them acceptable, as proof of the matters attested by him, to the judicial or other public authorities in the country where they are to be used,...’

Depending on historical traditions, and policies of countries, the professional requirements and appointing bodies for notaries public vary from country to country. For example, a notary in Great Britain and Canada is appointed by the Court of Faculties, in the United States by a Governor or State Secretary or in some cases by the State Legislature and in Australia (excepting in Queensland) by the Supreme Court of the relevant State or Territory, in New Zealand (and Queensland) by the Archbishop of Canterbury acting through the Master of Faculties (Wikipedia, 2010, p. 6) and in India by the Central Government (Wikipedia, 2012, p.9). But it has to be noted that each state in the USA has different requirements for becoming a notary public and performing notarizations. The notaries public functions in the USA and Canada are limited to domestic affairs and documents are valid domestically. They are not lawyers, but take relevant courses to properly carry out their duties restricted to the administration of oaths, witnessing signatures on affidavits and statutory declaration, providing acknowledgements, certifying true copies, etc. (Wikipedia, 2010, p. 8).

On the other hand, the civil-law notaries, or Latin Notaries whose main practices are property conveyance and registration, contract drafting, commercial transactions, successions and other estate related matters (Notary Public in Russia, Wikipedia, 2010, p. 2) are lawyers of private law and unlike lay notaries public provide legal advice and prepare instruments with legal effect (Civil Law Notary, Wikipedia, 2010, p. 1). Civil-law notaries are judges and lawyers who specialize in notarial law and prepare notarial acts that are public instruments. In France, they are appointed by the Ministry of Justice, in the Netherlands by the Crown, in Germany by the state, etc. In practice the Eritrean notaries, fixed in number between two and four were legal experts and appointed by the Judiciary and the statement in the Eritrean Notaries Act of 1956 ‘well versed in laws relating to his office’ implies similarity with civil law notaries.

In the People's Republic of China (PRC), the Public Notary System was enacted into

legislation in 1935, continued until it failed to make progress in the late 1950s and later during the Cultural Revolution it virtually came to a standstill. This was similar to that of Eritrea's Public Notary during the mid-1970s, which experienced difficult periods aimed at its elimination. The presumed justification was similar: the Government nationalized private property and land, making notarization of real property transactions and services irrelevant. However, with the introduction of economic market reforms in the late 1970s, the notary public in China revived its historic place: legislation was enacted and Public Notary Offices setup in all Municipalities, provincial cities and other major cities and towns to increase the effectiveness of reforms (Public Notary Offices of the PRC, Wikipedia, 2010, p. 2).

Since 2000 the Chinese Public Notary Offices have been reorganized as 'non-profit entities with a legal-person status that independently conduct notarial businesses to meet market demand and assume full responsibility for their operations' (China Public Notary System, Wikipedia, 2010, pp. 1-3). Public notaries are recruited through open examinations administered by the Ministry of Justice. As civil law notaries, they undertake notarial functions with the purposes of notarized documents' use for evidence, enforceability, legality and extraterritoriality, i.e., notarized documents are legally valid outside China.

Notaries in common-law countries like England and Wales, South Africa and civil law notaries are qualified lawyers, referred as notaries-at-law or lawyer notaries. Notaries in all civil-law countries of the world: 34 European countries such as France, Germany, Belgium, Spain, Portugal, Italy, Greece, the Netherlands, Hungary, Poland, Romania, Russia, Turkey; four Asian countries, China, Japan, Indonesia, and Bangladesh; 23 Latin American countries, and 15 French speaking former African colonies, etc. have retained a civil-law tradition, and thus a civil-law notarial profession (Civil Law Notary, Wikipedia, 2010, pp. 7-9). The civil-law notaries of these countries are members of the International Union of Notaries, and many other countries from Eastern Europe, Asia and Africa have asked to join the Union. In France group liability for professional errors in the performance of duties for collateral damages committed are paid from nation-wide consolidated fund, which is not known in any other profession in the world (Ibid, pp. 7: 9).

Notaries public in many European Union (EU) countries are generally modeled on the French system: appointment, based on nationality, is usually for life, limited in number, and are qualified lawyers who have effective monopoly on all land transactions and some other matters (Europe- INFO, 2010, p. 3). Unlike the civil law notaries in the EU, in the USA they are lay notaries public commissioned for a briefer term with the possibility of renewal. Appointments and their number in the EU countries are highly regulated, whereas commissions' fees are not regulated. And this is part of the reason for the far greater number of notaries in the USA than in other countries. For instance, the number of notaries present in the USA is about 4.5 million whereas in England and Wales is about 740 (Wikipedia, 2010, p. 3) and in Australia and New Zealand 1,250 (Wikipedia, 2012, p. 3). The number of notaries public in many European countries is also limited.

As noted earlier, the functions and duties of notaries public differ from country to country; however, the following are some of the services generally provided by notaries public world-wide (Notary Public, Wikipedia, 2010, pp.7-13):

- Attesting the signature and execution of documents under his signature and seal;
- Authenticating the execution of documents;
- Authenticating the contents of documents;
- Administration of oaths, witnessing affidavits, and statutory declarations;
- Preparing and witnessing powers of attorney, wills, deeds, transactions of property, contracts and other legal documents;
- Preparing mercantile documents and conveyances of real and personal property;
- Authenticating personal documents and information for immigration or emigration purposes;
- Verification of translations from foreign languages;
- Certification and provision of notarial copy documents;
- Preparation of international contracts and agreements; and
- Authenticating company and business documents and transactions.

The available literature shows the long history of notaries public and its role in providing legal security for individuals, business and financial and real estate communities at large. Its role has grown with the globalization of markets to provide legal services to facilitate such growth.

2. THE ERITREAN NOTARY PUBLIC

2.1 The Background

In Eritrea, the Notary Public came into existence with the establishment of cadastral system at the end of the 19th C by the Italians. At the beginning, the Colonial Power authorized the Governors to appoint competent notaries. However, later it was institutionalized according to Italian Decree No. 1649 of 1935 and continued with some amendments by Proclamation NO. 133 of 1952. During the Federation of Eritrea with Ethiopia in 1956 the Eritrean Notary Act was enacted. This act that mandated the notary office to the Judiciary, established a notaries' committee, composed of a President of the Supreme Court, the Secretary of Law and Justice, the Attorney General and a judge of a court. It specified the method of appointment, the number of notaries to be licensed, the criteria for nomination, withdrawal of license and termination of appointment (GoE, 1956).

Whereas in many European countries, the cadastre system was developed from the need to tax land equitably (Larson, 1996, pp. 2-4), the cadastre system in Eritrea, like that of the Public Notary was also established for the purpose of guaranteeing security of property ownership for Italian settlers. The Eritrean Cadastre was designed to serve the colonial policy of transforming Eritrea into a settler colony. The registration system, which was based on Italian laws, was carried out on voluntary basis and confined mainly to urban

areas and some fertile agricultural lands (Weldegiorgis, 2009, p.2). The registered property had simple survey plan, and records related to ownership, area, and plot and parcel numbers. In this way the Cadastre and the Notary offices continued for more than a century, but without any qualitative change in their procedures.

Both the Cadastral Office and the Public Notary in Eritrea experienced difficult periods, including attempts at their elimination, particularly during the Ethiopian military rule, in the mid-1970s. The presumed justification was that all extra-houses, small and large were nationalized, thus denouncing registration of private houses as anti-socialism. Nonetheless, they narrowly survived as institutions (Ibid, 2009, p. 2). After Eritrea's independence in May 1991, the Cadastral Office became the main supporter and reliable source of evidence providing property security in the Housing Commission's verification of property ownership. The Commission for the Verification of Houses was established in early 1992 to verify and ascertain ownership and to return the nationalized houses and property to their original legal owners.

The Public Notary plays the role of an agent for the authentication of contract agreement in the transaction of immovable property. The Notary prepares all the paper work, registers title- deeds and sends the deeds to the Cadastral Office for registration of the immovable property. The deed is a record of contract of a particular transaction – purchase, inheritance, donation, partition, etc. that serves as specific agreement. It is similar to other countries' 'real estate agent', but unlike them prepares almost all the paper work related to contract of the vendor and buyer.

After Eritrea's independence, the notary office that continued to be seated in the capital city of Eritrea (Asmara) with a national scope of duties up to the end of December 1995 was restructured under the Municipality of Asmara (Central Region) and its work confined only to the Central Region. As a result of this, in the remaining regions, immovable property exchanged through internal contract has not yet been transferred legally from the vendor to the buyer exposing immovable property ownership to insecurity. But the power of appointing the notary public, be it in the Civil Code of Ethiopia (1960, Art. 146, 147, p. 27) or in the Draft Civil Code of Eritrea (2009, Art. 138, 139, p.25) remains with the Judiciary. The Cadastre Office registers land and other immovable property, transactions of ownership and right as processed by the notary, and in turn provides information of rights (ownership, usufruct, and lease), mortgages, pledges, etc. Currently, the cadastre system in Eritrea does not have regional or national coverage, but in order to enforce mandatory registration it is on the process of expanding its offices to all regions of the country.

2.2 Current Role of the Eritrean Public Notary

The main functions of the Eritrean Notary Public are preparation of contract agreements of immovable property transactions (other than land) through sale or inheritance, donation,

exchange, partition and wills. Land is state-owned and unlike other countries where land is privately owned and marketable, it is not subject for sale or any other form of transaction.

In the preparation of such contracts the directives of the Public Notary Office (1999) states that the notary ascertains the presence and verifies the authenticity of all relevant documents and clearances from tax, debt, mortgage and pledge from concerned institutions. The main documents required for the validation of the transaction by the notary public include: approved construction plan, certificate of ownership, contract of sales, courts' approval (in cases of inheritance or will), agreement of partitioning, power of attorney (in case of representation by other persons), certification of marital status, proof of property ownership prior to marriage (for a spouse claiming sole property ownership), signed willingness of spouse for the transaction (in case of married), etc. This is done to ensure the legality of the immovable property transactions.

After the verification of documents and the legality of the transactions and fulfillment of the necessary clearances, the notary public has the responsibility of directing it to the Department of Infrastructure (technical section) of the regional administration for surveying and verification of the plan and further drawing of the updated plan (including partitioning as required) in the name of the new owner. The surveying and authentication of the plan is the responsibility of the Department of Infrastructure. The contracting parties are then made to sign the contract in the presence and the signature of witnesses of the notary public. Once this is accomplished, the notary public has the responsibility of ensuring that the payments of appropriate taxes and dues to the various eligible government bodies, as well as the complete settlement of the sale amounts from the buyer to the seller are effected, before directing it to the Cadastral Office for the registration and issuance of certificate of ownership of the immovable property to the new proprietor. The amount of tax and dues paid to the Department of Inland Revenue and the Municipality of Asmara is 9% of the assessed value of the property and is one of the highest in the world, excepting for many African countries.

2.3 Immovable Property Registration

The main mandate of the Cadastral Office is to register all lands, rights over land, duties that emanate from such rights and the registration and issuance of certificate of ownership of immovable property acquired through sale, donation, inheritance or other legal means (GoE, 1997), as evidenced by either the Department of Infrastructure and/or the Notary Public (the latter in cases of property involving transactions). It is further mandated with the responsibility of registering right holders of land (usufruct) together with property erected over it, providing information on transfers of immovable property for any encumbrances for the notary office and other clients and charges fees for the services it provides. For example, the fee for registration of property is ERN 150.00 (equivalent to \$10). The notary office guarantees safe transfer of immovable property whereas the

Cadastral Office protects and guarantees security of immovable property ownership and use overland. The Cadastral Office strives to inculcate judicious organizational culture such as integrity, fairness, professionalism, teamwork and openness across its procedures.

An effective mechanism for the registration of immovable property and/or transfer of immovable property is of paramount importance. It requires an effective registration system, that is, harmonious interplay amongst the Cadastral, Infrastructural and Notarial offices, an objective legal framework of these offices and empowered clientele society. Besides, adequate human and material resources as well as competent human personnel are prerequisites. Without these factors, there can be no fast property registration and property transactions and secure property ownership rights.

2.4 Procedures of Transfer of Immovable Property

The procedures for the transactions of immovable property are shown in Figure 1 below:

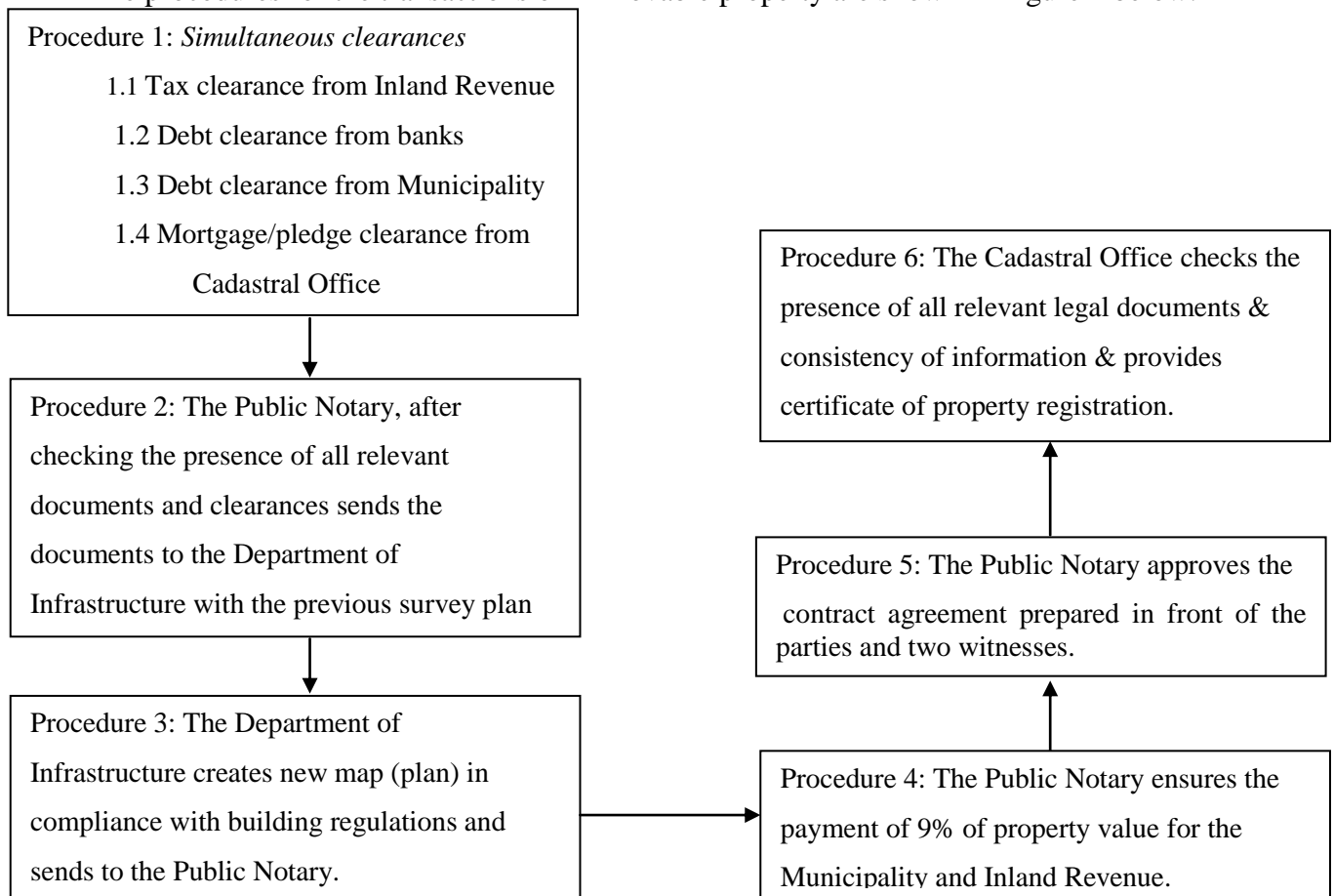


Figure 1: Procedure of Transfer of Immovable Property

The six steps illustrated by figure 1 are the procedures currently applied in Eritrea. It shows the linkages and roles played by the Notary Public, the Department of Infrastructure and the Cadastral Office in the provision of effective, efficient, transparent and safe transfer of immovable property and protection of property ownership rights.

Procedure one ensures that the property is clear from any debts or mortgages from banks, the Inland Revenue, the Cadastre Office and the Municipality in order to be freely transacted in any lawful manner. In the second step, the notary public checks that there is sufficient authentic documentation evidencing the rightful ownership of the property by the client applying to transfer the property. Once that the legal ownership has been ascertained, the technical specifications of the immovable property to be transacted are surveyed for verification by the Department of Infrastructure and accordingly a new plan drawn in the name of the new owner and this is forwarded to the notary public.

In step four the notary public ensures that the client pays all his dues (9% of the assessed property value) to the municipality and the Inland Revenue, as well as the settlement of the whole (in case of sale) sale amounts to the seller before it witnesses and approves the transfer contract or agreement between the parties concerned. In step five, the Cadastre Office issues a new certificate of ownership to the legal holder and registers the property in his title. The Cadastre Office retains a copy of all the documents that served the legal basis of the transactions, as processed by the Notary Public and the Department of Infrastructure.

The tight procedural links between the Notary Public and the Cadastral Office avoid any dubious transaction and holding of title of ownership over immovable property thereby protecting the property rights of the population. As indicated earlier, however, Notary Public functions only in the Central Region and its absence in other regions is adversely impacting the immovable property transactions in the rest of the country. However, efforts are being exerted to expand the Public Notary and Cadastral Office presence and make available the services of the institutions in the other administrative regions.

3. PROFESSIONAL ETHICS

All notaries whether lay notaries or legal professionals have to ensure that documents are notarized to become legally effective. Those who use the documents are protected from forgeries, thus guaranteeing security. As a response to the increasing global demand for legal security, its importance today is becoming far greater than ever.

The preparation of contract agreement of transactions of immovable property through sale and other mechanisms, authentication of documents, attestation of signatures and execution of documents, affidavits and statutory declarations, witness and authenticate the execution of certain classes of documents, etc. require strict adherence to the rule of law. Notaries public, for example, must use notary public seal only for notarial purposes. This responsibility highly demands that public notary profession owns integrity,

objectivity, competence, legal, moral and ethical values in the implementation of legal duties. In short, Roosevelt's (in TEO, 2010, p. 1) words look relevant: 'Confidence... thrives on honesty, on honour, on the sacredness of obligations, on faithful protection and on unselfish performance'.

The Public Notary Code of Professional Responsibility (2010, p. 1) summarizes the guiding principles of notaries public in more exhaustive detail. The Notary shall:

- As government officer and public servant, serve all of the public in an honest, fair and unbiased manner;
- Act as an impartial witness and not profit or gain from any document or transaction requiring a notarial act, apart from the fee allowed by statute;
- Require the presence of each signer and oath-taker in order to carefully screen each... and to observe that each appears aware of the significance of the transaction requiring a notarial act;
- Not execute a false or incomplete certificate, nor be involved with any document or transaction that the notary believes is false, deceptive or fraudulent;
- Give precedence to the rules of law over the dictates or expectations of any person or entity;
- Act as a ministerial officer and not provide unauthorized advice or services;
- Affix a seal on every notarized document and not allow this universally recognized symbol of office to be used by another or in an endorsement or promotion;
- Record every notarial act in a bound journal or other secure recording device and safeguard it as an important public record;
- Respect the privacy of each signer and not divulge or use personal or proprietary information disclosed during execution of a notarial act for other than an official purpose; and
- Seek instruction on notarization, and keep current on laws, practices and requirements of the notarial office.

These guiding principles of rules, values, beliefs and intent, in the form of 'codes of professional conduct' help the notaries execute their duties with professional competence and integrity. These guiding principles in the form of 'codes of professional conduct' should be part and parcel of the regulations governing the notaries public profession.

4. REFLECTIONS

The need for notaries public has grown tremendously because of the internationalization of the market and businesses for legal services. Today, many countries in the globe use the notaries since documents related to deeds, businesses, contracts and others need to be notarized in order to be legally effective. Thus, the question of legal security of diverse documents and certifications remains to be more important today than ever before with the

globalization of the world economy and multiplicity of dealings. Businesses and markets require notarial services for their growth. Eritrea, with its aspiration of fast socio-economic development can not be excluded from this reality. Because of this the notary public of countries like Eritrea needs to embrace other notarial services beyond the present simple contract agreement of transactions of immovable property. This is what Eritrea and other developing countries have to learn.

Due to historical traditions, socio-economic conditions and policies of countries, the authorizing body, professional requirements and scope of responsibilities of notaries public in different countries are varied. Besides, the effectiveness of their powers is not internationally congruous. Hence, the need for an international standardization of the profession, so that all notarial functions and systems become compatible with each other is tremendously great.

In appointing notary public, requirement of nationality or legal residence in the country in question also matters. In England and the US, one of the requirements is legal residence whereas in many European countries nationality is a requirement. He/ she must be the national of the country in question, that is, must be a German, French, Spanish, etc. to be notary public in the country. Spain's decision to block notarial acts (Europe-INFO, 2010, pp. 1-4) prepared by English and other European notaries remains to be controversial. The right of UK and other European notaries to register their notarial documents in Spain seems to contradict with EU's goal of free movement of authentic documents in member states.

In Eritrea, the presence of Notary Public in Central Region is ensuring secure transfer of immovable property in that part of the country. On the other hand, in other regions, in the absence of notaries public, legal transfer of immovable property is currently hampered. This encourages illegal sale and purchase of immovable property, exposing transfer and ownership of immovable property to insecurity.

Finally, learning from the experiences of various countries should throw some insight that requires skilful application of what looks appropriate with the objective realities of the country in question. What is appropriate to one country may be inappropriate to another country depending on the history, socio-economic and political conditions of the country. Yet, the learning from others' experiences and applying them skillfully should not be overlooked.

5. CONCLUDING REMARKS

The office of the Notary Public in Eritrea has a history of more than a century, working in close cooperation with the Cadastral Office. They are still working but under new environment. The Notary Public continued its duties of contract agreement of immovable property transactions as an independent body until the end of 1995. From this time onwards it has been restructured under the Municipality of Asmara, whereas in the other five regions it is yet to be reinstated.

In a time when the demand for notaries public have grown tremendously world-wide with the internationalization of the market and businesses transactions requiring for legal documents and services, the need for the reinstating of the notary public office in all regions is great. Besides, the notarial services need to be further diversified to embrace some of the notarial services in use world-wide that are relevant to Eritrea's objective reality, aspiring for the socio-economic development and integration into the world economy.

But, learning requires insightful application of other countries' experiences. Hence, reinstating public notary offices in all regions and broadening the notarial services beyond contract agreement of immovable property transactions is absolutely imperative that needs serious consideration.

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BIOGRAPHICAL NOTES

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