UNIVERSITÀ
DEGLI STUDI DI BARI
ALDO MORO

DIPARTIMENTO JONICO IN SISTEMI
GIURIDICI ED ECONOMICI DEL MEDITERRANEO
SOCIETÀ, AMBIENTE, CULTURE
IONIAN DEPARTMENT OF LAW, ECONOMICS
AND ENVIRONMENT

ANNALI 2017 DEL DIPARTIMENTO JONICO

ANNO V

ESTRATTO

FERDINANDO PARENTE

The notarial disciplinary proceeding and his historical evolution

http://edizionidjsge.uniba.it/ • ISBN - 978-88-9095-699-7

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Ferdinando Parente

THE NOTARIAL DISCIPLINARY PROCEEDING AND HIS HISTORICAL EVOLUTION * **

ABSTRACT	
Nel testo della legge 16 febbraio 1913, n. 89, il procedimento disciplinare notarile era modulato sulla diversificazione delle competenze secondo la gravità delle sanzioni. Per le sanzioni disciplinari più gravi - l'ammenda, la sospensione e la destituzione - la competenza per i tre gradi di giudizio era affidata al giudice ordinario, ossia al Tribunale, alla Corte d'Appello e alla Corte di Cassazione. Per le sanzioni meno gravi - l'avvertimento e la censura - la competenza, nel primo grado, era conferita al Consiglio notarile distrettuale, che decideva con provvedimento impugnabile dinanzi al giudice ordinario. Il d.lgs. 1 agosto 2006, n. 249 ha modificato radicalmente il regime del procedimento disciplinare notarile e ha istituito la Commissione amministrativa regionale di disciplina (Co.Re.Di.), avente natura amministrativa, per l'applicazione delle sanzioni disciplinari e delle misure cautelari notarili e per la valutazione dei presupposti di cessazione temporanea o definitiva dalle funzioni notarili. Nel quadro della riforma, invece, al Consiglio notarile distrettuale il legislatore ha assegnato il mero ruolo d'indagine e di controllo sul regolare svolgimento dell'attività notarile ed il potere di attivare il procedimento disciplinare tramite il diritto di azione accreditato al suo presidente.	In Law 16 February 1913, n. 89, the notarial disciplinary proceedings was modulated on the diversification of powers according to the severity of the provided penalties. For more serious disciplinary sanctions - amends, suspension and dismissal – the competence for the three judgment degrees was entrusted to the ordinary judge, i.e. to the Court, to the Court of Appeal and to the Court of Cassation. For less serious sanctions - warning and censorship - the competence, in the first instance, was conferred on the Notarial District Council, which decided with a measure which was challengeable before the ordinary courts. The Decree August 1, 2006, n. 249 has radically changed the regime of notarial disciplinary proceedings and has established the Regional Administrative Disciplinary Commission (Co.Re.Di.), which have an administrative nature, for the application of disciplinary sanctions and notarial precautionary measures and for the assessment of the conditions of temporary or definitive cessation from notarial functions. In the reform context, instead, the legislator assigned to the Notarial District Council the mere role of investigation and control on the smooth conduct of the notarial activities and the power to activate the disciplinary proceedings through its president's right of action.
Notaio - procedimento disciplinare - natura giuridica.	**Notary - disciplinary proceeding - legal nature.**

* Saggio sottoposto a referaggio secondo il sistema del doppio cieco.

** Il presente saggio riproduce la relazione svolta alla "8th Polish-Spanish International Conference of European Legal Tradition", Katolicki Uniwersytet Lubelski Jana Pawla II, Lublin (Poland), 2 giugno 2017.

Summary: 1. The ancients origins of the notary. – 2. Tabelliones and notarii: historical evolution. – 3. The notarial disciplinary proceedings before the reform. – 4. The notarial disciplinary proceedings after the reform. – 5. Reasons for the reform of the notarial process. – 6. The problem of the contrast of Co.Re.Di. Law with the art. 102 of the Italian Constitution. – 7. The Co.Re.Di.: its territorial dislocation. – 8. The composition of the Co.Re.Di. – 9. The administrative nature of the proceedings before the Co.Re.Di.

1. The modern notary role has remote historical origins. The same *notarius* word, which, in Latin Notary systems, designated for centuries this unique category of public official, usually, goes back to the time of the *ancient Roman Republic* (509-264 a.C.), under which were processed the embryonic assumptions of the Notaries Law[1].

In Roman classic law, mostly, the *notarii* were *slaves*, practical in the use of tachograph *notae*, substantially *court reporters*, which was entrusted with documents *writing* with abbreviations, asked by politicians, businessmen, lawyers, writers and other privates, that, rather than proceed to draft an autograph of drafts, provided the composition of text written with the instrument of *dictare*[2].

Only in the next epoch, during the decline and fall of the Roman Empire, in the period from 180 A.D. to 1453, until 1590, according to the lines drawn in the famous work *History of the Decline and fall of the Roman Empire* - published by the English historian *Edward Gibbon* in the years 1776 (vol. I), 1781 (vol. II-III) and 1788-1789 (vol. IV-V-VI) with the original title *The History of the Decline and Fall of the Roman Empire* - the *notarius* assumed a role close, but not identical, to that of the modern notary, becoming, in a first time, a *collaborator* of the Emperor and, subsequently, *editor* of the scriptures on behalf and in place of the parties[3].

In the diachrony of the human history, institutes comparable to the *notarius* have been in use both in the older Jewish experience, wherein is witnessed the presence of *scribes* or *secretaries* responsible for receiving contracts with the affixing of a public seal, both in the social life of the ancient Greek people, which utilized the *scribes* to receive and retain the contracts to provide the *evidence* of their conclusion[4].

2. In terms of connotations and functions, perhaps, the most similar figure to the modern notary was the *tabelliones* - so called because wrote their acts on *wax tablets* - which had the task of drawing up the scriptures of the private, supervising the legal

[1] Cfr. *Chi è il notaio, www.consiglionotarilecosenza.it.*
[2] Cencetti, *scrineum.unipv.it.*
[3] Cfr. *Declino e caduta dell'impero romano, it.m.wikipedia.org*.
[4] Cfr. *Chi è il notaio, www.consiglionotarilecosenza.it.*

form: their acts, however, not yet enjoyed than *public faith* today attributed to public acts drawn up by notaries (art. 2699 c.c.)[5].

In Roman law, in fact, the *tabellione*'s job was a *mere writing*, who enjoyed great consideration, because prepared by a law *expert* which operated under the supervision of the State, but did not have an absolute value. Only the documents issued by the courts and offices which mentioned the *ius actorum conficiendorum* enjoyed *full faith*[6].

The *tabelliones*, already mentioned by the jurist Eneo Domizio Ulpiano (born in Tiro about in 170 and died in Rome in 228), were freelancers, gathered in colleges or *scholae*, obliged to observe minute editorial and documental provisions, enacted especially by Justinian in the years 528, 536 and 538: they exercised the activity by virtue of an *auctoritas*, i.e. a State' concession strictly personal, as a rule not be delegated, and were subject to the *supervision* of the public authority[7].

Only later, at the time of Charlemagne, due to the effect of the Capitular *De scriviis et notariis* of 805, it came to the fusion of *tabellione* and *notarius* in a single office: to notary acts was given the same force and the same effects of the judgments which have become res judicata[8].

In the Middle Ages, between the XI and XII centuries, due to the full allocation to the notarial deeds of *publica fides*, the Notary profession began to be judged to be prestigious and authoritative. However, only during the *French Revolution* (1789-1799) were outlined the key aspects of the modern notary, subjected to a rigorous *public oversight* and a peculiar *disciplinary proceedings*[9].

In Italy, Notary and notarial process were regulated for the first time by L. 25 July 1875, n. 2786, then by the Royal Decree of 25 May 1879, n. 4900, and finally by L. 16 February 1913, n. 89, still in force, albeit with significant modifications and integrations[10].

3. In the original text of L. 89 of 1913, the notarial disciplinary proceedings was modulated on the diversification of *competences*, according to penalties' severity[11]: for more serious disciplinary sanctions, such as *amend*, *suspension* and *dismissal*, the competence for the three degrees of judgment was entrusted to the ordinary judge: Court, Court of Appeal and Court of Cassation (arts. 151-156, L. 16 February 1913, n. 89); for less serious sanctions, i.e. *warning* and *censorship*, the competence, only in the

[5] Cfr. *Chi è il notaio, www.consiglionotarilecosenza.it*.
[6] Cencetti, *scrineum.unipv.it*.
[7] Cencetti, *scrineum.unipv.it*.
[8] Cfr. *Chi è il notaio, www.consiglionotarilecosenza.it*.
[9] Cfr. *Chi è il notaio, www.consiglionotarilecosenza.it*.
[10] Cfr. *Chi è il notaio, www.consiglionotarilecosenza.it*.
[11] Parente, 2014, 823; Caporusso, 2012, 239. About sanction hierarchy, modulated on sanction severity, v. Cass. 23 March 2012, n. 4720, *http://www.dejure.giuffre.it*.

first instance, was conferred to the Notarial District Council, which decided with a measure challengeable before the ordinary judge[12].

The judgment of the second instance court, instead, was not challengeable on its merit (Articles 148-150, L. 16 February 1913, n. 89), but could be challenged for *legitimation* before the Court of Cassation, *ex* art. 111 Cost.[13].

The Decree August 1, 2006, n. 249 has radically changed the regime of notarial disciplinary proceedings[14], introducing the *Regional Administrative Disciplinary Commission* (c.d. Co.Re.Di.), to apply disciplinary sanctions and interim protective measures in respect of notaries and to value the conditions of temporary or definitive cessation by notarial functions, in the cases provided for by art. 34, paragraph 2, l. n. 89/1913[15].

The presidential decree of 7 August 2012, n. 137, on «regulated professions disciplinary proceedings» reaffirmed that, despite the reform, «stand still the provisions in force on disciplinary matters relating to notary profession (art. 8, paragraph 4)[16].

The disciplinary measure of the warning, therefore, continues to be applied to all violations without specific sanction, as noticeable from the Council of State's opinion dated 16 March 2006 and by Ministry of Justice's circular on 23 August 2006, n. 10/2006. In other words, the delegated legislator confirmed the *residual nature* of the penalty of the warning also in the new regime[17].

4. As a result of the 2006 reform, which amended Articles 148 ff. of the notarial law, the Notarial District Council has retained the power to manage the investigation phase aimed at the possible promotion of the disciplinary action before the Co.Re.Di., which is the body authorized to conduct of the judgment at first instance, for all disciplinary sanction[18], and that decides with a *challengeable measure* which can be appealed before the Court of Appeal, which emits a judgment challengeable before the Court of Cassation[19].

To the Notarial District Council, therefore, the legislator assigned both the role of investigation and control on the smooth conduct of the notarial activities, and the power to activate the disciplinary proceedings, through the right of action credited to its Chairman[20].

[12] Parente, 2014, 823-824; Di Fabio, 2007, 392; Ciatti, 2011, 256 ss.; Caporusso, 2012, 241.
[13] Parente, 2014, 824; Boero, 1993, 640; Protettì, Di Zenzo, 2009, 474 ss.
[14] Parente, 2014, 823; Danovi, 2013, 338; Caporusso, 2012, 240; Santarcangelo, 2007, *passim*.
[15] Parente, 2014, 823; Caporusso, 2012, 239 ss.
[16] Danovi, 2013, 338.
[17] Cfr. Co.Re.Di. Lombardia, 7 febbraio 2013, *Notariato*, 2013, 348; *contra*, Cass. Sez. VI 24 July 2012, n. 12995, *Ced. Cass*.
[18] Di Fabio, 2007, 392-393; Danovi, 2013, 338; Caporusso, 2012, 240.
[19] Parente, 2014, 824; Caporusso, 2012, 242.
[20] Parente, 2014, 824; Casu, 2007, 1197 ss.; Danovi, 2013, 338; Caporusso, 2012, 241-242.

5. In the sphere of the notaries category, the intention to reformulate the disciplinary procedure regime is growth on the basis of a double order of reasons: *a)* to accredit the imposition of disciplinary sanctions, including those of greater severity, to an *internal authority* within the category of notaries, analogically to the options already in force for other professional categories; *b)* to adjust the size of the amend for the new monetary values, in order to make *fair* the financial penalty imposed after disciplinary proceedings[21].

The reform of the disciplinary procedure has resulted in a delicate work of balance between the needs of the organization of the notary profession and the public function exerted by notaries[22].

In fact, if, on the one hand, the legislator has attributed to an interim body the *control* on notarial activities[23], on the other hand, has reserved a *not marginal role* to the ordinary courts in accordance with the connotations of general interest of notarial function[24].

For a more systematic perspective, the new articulation of the disciplinary proceedings regime placed on the interpreter the burden to assess whether the establishment of a control body of category is not in contrast with the axiological canons subtended to art. 102, paragraph 2, Constitution which *prohibit* the establishment of special bodies of jurisdiction[25].

6. The doctrine outlined the plausible contrast between art. 102 of Italian Constitution and the establishment law of Co.Re.Di.

To refute the contrast has been observed that the cognition activity and the imposition of disciplinary sanctions by the notarial body, is not an operation of jurisdiction, but a function *similar* to the administrative action[26].

Actually, the uncertainty about the nature of the functions that the domestic jurisdiction is called to play has led to preserve a certain power of control and decision in the hands of the judicial authorities, to greater protection of the notarial activities and of its public function[27].

The need to balance the professional interests of notaries category with respect of the solemn function of notarial activities, within the overall architecture of the disciplinary proceedings and in the articulation of competences, has pushed the legislator to provide only a first degree of judgment before the Co.Re.Di.[28], while induced him to reserve to the bodies of the ordinary jurisdiction the task to intervene

[21] Parente, 2014a, 824; Danovi, 2013, 338-339; Caporusso, 2012, 239 ss.
[22] Parente, 2014a, 824; Di Fabio, 2007, 392 ss.
[23] Bove, 2014, 418; Caporusso, 2012, 240.
[24] Parente, 2014a, 824; Casu, Sicchiero, 2010, 556.
[25] Parente, 2014a, 824-825; Fabiani, 2009, 87 ss.
[26] Parente, 2014a, 825; Caporusso, 2012, 240; Casu, Sicchiero, 2010, 556.
[27] Parente, 2014a, 825; Fabiani, 2009, 87 ss.; Molinari, 2009, 467 ss.
[28] Casu, 2013, 439.

in successive degrees, in the case of appeal against the sanctions issued by the interim judgment body, to assess judicially the congruity of the sanction delivered in concrete in the first instance[29].

However, the competence on irregularities of the preliminary phase, which precedes the start of the process, does not fall within the jurisdiction of the administrative judge, but of the ordinary judge, to whom is reserved to decide about notarial disciplinary offenses.

In fact, for the jurisdiction purposes, there is no plausible reason for separating the disciplinary initiative from the process, as the possible illegality of the procedure start have a nature equal to which concerning subsequent acts.

Actually, even though the acts of an administrative procedure, in both cases we are in the presence of subjective rights, the protection of which, as always happens in the disciplinary field, devolved to the ordinary judge[30].

7. From the point of view of the territorial dislocation, which is nowadays on national territory, Co.Re.Di. is established in each *territorial constituency* its headquartered at the notarial council district of the capital of the region[31].

The Valle d'Aosta and Piemonte, Marche and Umbria, Abruzzo and Molise, Campania and Basilicata, Trentino-Alto Adige, Friuli-Venezia Giulia and Veneto merged into a unique form of territorial constituencies with seat, respectively, at the notarial council district of the capital of the regions of Piemonte, Marche, Abruzzo, Campania and Veneto[32].

If the territory of a district falls into two different regions, the entire territory shall be deemed to be included in the constituency in which is located the largest number of seats of the same district. Finally, the United districts of La Spezia and Massa are included in the constituency of Liguria[33].

8. The Co.Re.Di. is composed by a magistrate, appointed as the president, and six, eight or twelve notaries, depending on whether the number of notaries assigned to each constituency is not more than two hundred and fifty or is higher than this number, but less than four hundred, i.e. is equal to or greater than four hundred[34].

Within the meaning of Articles 150 and 151-bis of the notarial law, usually may be elected *members of the commission* all notaries enrolled to each territorial constituency.

[29] Parente, 2014a, 825; Caporusso, 2012, 240 ss.
[30] Parente, 2014a, 825; Miccoli, 2013, 228. Cfr. Cass. S.U. 31 July 2012, n. 13617, *Ced. Cass.*
[31] Parente, 2014a, 825; Caporusso, 2012, 240; Di Fabio, 2007, 393.
[32] Parente, 2014a, 825; Di Fabio, 2007, 393.
[33] Parente, 2014a, 825; Di Fabio, 2007, 394.
[34] Parente, 2014a, 825; Di Fabio, 2007, 394.

The members of the commission, including the secretary and the treasurer, shall hold office for *three years*[35] and, for *prorogatio legis*, shall carry out their duties until the settlement of new components[36].

Finally, the costs for the election of the notary component of the commission, operating costs, offices, staff, equipment, reimbursements and attendance fees and all other expenses which are fundamental for commission's activities are payed in advice from the notarial district of each territorial constituency[37], in proportion to the professional fees perceived by notaries whose headquarters were in the same district in the previous year, and charged annually to notaries of the districts in the computation of the total amount of the fee collegial[38].

9. The definition of the nature, administrative or judicial, of the proceedings before the Co.Re.Di., modulated on the principle of prosecution, is relevant for the inclusion of notarial disciplinary proceedings in the riverbed of the administrative procedures or in the system of judicial proceedings[39].

The collocation of the notarial proceeding in one or the other, in fact, implies the application or the disapplication of the regime of L. 7 August 1990, n. 241, about administrative procedure, i.e. the rules of the code of civil or criminal procedure, and affects the proposition of exceptions of constitutional illegitimacy[40].

In fact, the *administrative nature* of the Co.Re.Di. organism, consequent to the prohibition of the establishment of special courts (art. 102, paragraph 2, Const.)[41], lend for the *administrative qualification* of notarial disciplinary proceedings of first instance[42], with all of the inductions and foreclosures regulations [43].

The qualification involves the appointment of the *responsible official*, that, for the need to an expedite adoption of the decision, should compete to the President, rather than to the entire panel[44], and the configuration of the decision as *administrative measure*, susceptible of revocation (art. 21-*quinquies*, l. n. 241/1990) and *self-annulment* (art. 21-*nonies*, l. n. 241/1990)[45].

[35] Caporusso, 2012, 240; Di Fabio, 2007, 394.
[36] Parente, 2014a, 825-826.
[37] Di Fabio, 2007, 393.
[38] Parente, 2014a, 826.
[39] Parente, 2014b, 826; Bove, 2014, 419; Caporusso, 2012, 239 ss.; Tenore, Celeste, 2008, 10 ss. e 155 ss.; Brienza, 2007, 54.
[40] Parente, 2014b, 826.
[41] Bove, 2014, 419; Casu, Sicchiero, 2010, 541 ss.
[42] Danovi, 2013, 339; Caporusso, 2012, 240; Casu, Sicchiero, 2010, 541 ss. In senso contrario, cfr. Brienza, 2007, 54.
[43] Parente, 2014b, 826.
[44] Bove, 2014, 420; Rampulla, 2008, 641.
[45] Parente, 2014b; Bove, 2014, 420.

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