THE ROLE OF THE NOTARY PUBLIC IN HISTORY

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ARISTOTLE, writing over three hundred years before Christ, affirms that: 'no state can exist at all in the absence of those offices which are absolutely indispensable; no properly governed state can exist in the absence of those which ensure good organisation and order'.[1] Amongst these indispensable offices this great philosopher includes that required for the registration of private contracts and judicial decisions.

It is evident that the members of every civilised society have from time immemorial entered into binding agreements or contracts with one another, in their day to day transactions. Originally, most of these agreements were concluded in the oral form, but with the introduction of various methods of writing and their accessibility to the more learned members of society, it became necessary to commit such agreements to writing, so as to ensure their authenticity and their preservation in a stable and permanent form. The more progressive and sophisticated societies gradually developed a system of registration of private agreements and therefore, it comes as no surprise to us that in ancient Greece, the birth place of modern civilisation, there existed a public official who was specifically entrusted with the task of receiving and registering private contracts, an office which is not inconsistent with that of the Notary Public.

The position in ancient Rome presented a totally different view. Under the Republic the 'tabularii', also known as 'notarii' were no more than educated slaves, whose job was, in more ways than one, similar to that of the modern stenographer. One of their tasks was to write down in shorthand (and hence the word 'notarius') the speeches and orations of the consuls, magistrates, generals and of any other wealthy Roman who required their services.

Gradually, the functions of the 'tabularii' or 'notarii' were altered to a considerable extent. They became public employees – 'tabellarius sive tabellius scriba publicus' – working at the offices of the censors as clerks and archivists and were responsible 'inter alia' for the safe keeping of public records, contracts and wills.

With the diffusion of the art of writing amongst the Roman population, it was felt necessary to record in the written form the more important events of civil life. No one was better suited to such a task than the 'tabularii' or 'notarii'. These became renowned for the speed and expertise with which they drew up their conventions or agreements, which fact earned them the title of 'cursores'. This they achieved through the invention of an elaborate system of signs and abbreviations, known as 'signes'.

The services of the 'notarii' became more and more in demand especially in Court circles, members of the profession being ultimately chosen as secretaries to the Emperor (and were later on to be called 'cancellieri').

By the end of the fourth century A.D. the 'notarii' had been progressively moulded into a shape which resembles to a large extent that of the present day notary, though they never acquired the status of a public officer. Indeed, they became the only persons competent to draw up wills, codicils, public deeds and private agreements.

Justinian confirmed the existence of the Notarial Profession by legislating specifically in its regard; he raised the status of the Notary to an esteemed position by treating it with the dignity and respect it so well deserved and he also recognised the burdens and responsibilities which were particular to every single notary, and

[1] Aristotle: 'Politics' Bk. VI, Chap. 8 (translated by Ernest Barker in 'The Politics of Aristotle')

which necessarily arose out of the exercise of his profession.

With the fall of the Roman Empire, the Italian peninsula was divided into two great zones, the southern sector retaining close political ties with the Byzantine Empire and the northern sector falling under Lombard domination. In the former territoty, it was the 'tabelliones' who prevailed and ultimately survived in the form of 'scrivani urbis', while, in the territory under Lombard domination, one comes across 'pubblici notarii', clerks working in a private capacity, though endowed with state recognition.

Lombard legislation in this field was rather sporadic and certainly not as extensive as its Roman counterpart, but still, it was by no means non-existent. The earliest and indeed most fundamental edict was that of Rotari, aimed at suppressing the forgery of deeds which, in those days, was of common occurrence. This Edict prescribed so severe a punishment, on any scribe found guilty of uttering a false document, as to make it impossible for him to commit the same offence twice:

'Si quis chartam falsam scriperit, aut quodlibet membranum, manus euis incidatur'.

In the Middle Ages, the position remained somewhat at a standstill. The 'tabelliones' continued to perform strictly notarial duties and to constitute their own colleges headed by a 'proto tabellio' or 'primicerius'. On the other hand, the word 'notarii' was primarily attributed to the secretaries and accountants attached to the Imperial Court, to the Holy See or even to the Communes. Thus, one often comes across 'notarii imperiali auctoritate' (nominated by the Emperor) and 'notarii apostolici' (those nominated by the Church).

The notarial profession, in its modern connotation, may have been introduced in Malta by the Normans, probably late into the eleventh or early in the twelfth century, though this is more conjecture than fact due to the legal obscurity of this period and to the lack of primary sources. Nevertheless, during this early period a number of 'notarii' were known to attend the sittings of the 'Università' (or Consiglio Popolare as it was more commonly known). Their principal task was to render an annual account of the legal situation existing in these Islands to the Magna Curia. For instance, in Gianbruno[2] one finds recorded the name of Notary Angelu di Manueli, who, in July 1439, was sent to the Court of Sicily, as ambassador of the Università, to present a number of 'capitoli' for the approval of the Sovereign.

Unfortunately, however, no notarial act has survived prior to the middle of the fifteenth century, which might have thrown some light on the status of the profession as it existed in our Islands in those times. In fact, the earliest notarial acts which are extant are probably those of Notary Paolo Bonello who exercised his profession between 1467 and 1517.

It appears that, up to the fifth decade of the domination of the Knights of St. John, a number of clerics, notably parish priests, had acquired by custom the faculty of performing certain functions pertaining to the notarial profession, such as the drawing up of marriage contracts. This was considered an abuse by the Church authorities. So much so, that when Mons. Duzzina paid his Apostolic visit to these Islands in 1575, he warned the local parish priests, in the strongest possible terms, to desist from those activities which were their office 'sub poena suspensionis et aliis poenis arbitris euisdem Domini Ordinarii medesimi'.[3]

MALTESE NOTARIAL LEGISLATION

Proper legislation regulating the rights, functions and responsibilities of members of the notarial profession was only introduced into the Island after the arrival of the Knights, though notaries previously

[2]Gianbruno e L. Genuardi: 'Città Demaniali di Sicilia'

[3]M.S. 643; R.M.L.; 'Visitatio Apostolica' Duzzinae

employed by the Order in Rhodes had been governed by a notarial law, entitled 'De notariis et eorum salariis', which was enacted by Grand Master Fra Enrico d'Ambrosiere in 1509.[4]

Nevertheless during the earlier period of the Knights' domination, any legislation in this particular field of law was sporadic, confused and superficial and indeed, it was only with the publication of the 'Leggi Prammaticali' of Grand Master Lascaris in 1640 that a somewhat orderly and comprehensive legislation was introduced.

Still, it would not be amiss to give a cursory glance at some early attempts at legislating in this sphere of law which are particularly interesting from a historical point of view, though they are of a doubtful legal value.

The ball was set rolling as early as 1553 with the Promulgation of the 'Pandectae et Ordinationes' by Grand Master D'Homedes,[5] which more or less consist in a compilation of a set of rules regulating the tariffs due to members of the legal professions. The fifth chapter, entitled 'Iura Notariorum' deals fully with the fees payable to notaries, as well as the manner in which they may be computed.

Forty years later, Grand Master Hugo Lonbeaux de Verdale (1582-1595) enacted a codification of the existing laws with numerous amendments and innovations, entitled 'Statuta et Ordinationes', wherein is included a somewhat short title called 'De Tabellionibus.'[6]

Of particular interest is the second section which refers to the 'Recognoscendi contrahentibus per notarios'. In fact, this was the first occasion when our legislator thought it fit to lay down that, on pain of deprivation of office, the notary should declare in the deed that he is personally aware of the identity of the contracting parties.

With Verdale ended the first phase of notarial legislation and a new era thereafter commenced with the promulgation of the 'Leggi Prammaticali' of Grand Master Jean Paul Lascaris Castellar (1636-1657) on the first of March, 1640.[7] The Prammatiche are divided into eighteen titles, each being further subdivided into chapters. The chapter entitled 'De Tabellionibus' which deals with the office of notaries undoubtedly shows a marked improvement both on the 'Pandectae' of D'Homedes and on the 'Statuta' of Verdale, even though the provisions contained in the latter two codes proved to be the primary source of Lascaris' legislation.

After the 'Prammatiche' of Lascaris, we find yet another compilation of 'Prammatiche' this time published by Grand Master Gregorio Caraffa (1680-1690) on the eleventh of September 1681.[8] Chapter ten, entitled 'De Notari Publici', deals with public notaries, archivists and obligations 'ex contractu'. It also contains a number of important innovations one of which lays down the basic requirements a notary was expected to have to be allowed to exercise the profession. The more important of these requirements were an age limit of twenty five years (now repealed by Act XXX of 1973), a sound character, sufficient means (at least a minimum of 500 scudi) a continuous apprenticeship with a notary for a period of five years and a final examination.

With the Grand Mastership of Antonio Manoel De Vilhena (1722-1736) commences the last phase of notarial legislation under the Order. This was an era which experienced the publication of two great codes of law namely the 'Leggi e Costituzioni Prammaticali' of Vilhena and the 'Diritto Municipale di Malta' of Grand Master De Rohan.

[4] M.S. 704; R.M.L.
[5] M.S. 439. R.M.L.
[6] M.S. 704. R.M.L.

[7] M.SS. 148 and 152, R.M.L.: 'Leggi Prammaticali pubblicate l'anno 1640 per comando del Ser. Principe Fra Gio. Paolo Lascaris Castellar'.
[8] M.S. 151, R.M.L. 'Costituzioni Prammaticali Ordinate dal Sermo Gregorio Carafa, 11 Settembre 1681'.

The former code, published in 1723 was the work of an Italian Abbate Paccarotti, though most of its twenty-nine titles were culled directly from Caraffa's 'Prammatiche' and from the 'Consolato di Mare di Malta' of Perellos. However, title eleven which deals with 'Notarii' and 'Archiviari' may be considered an innovation in its field for it was by far the most complete and orderly notarial legislation enacted in the Island up to this period.

Notarial legislation under the order culminated in the 'Diritto Municipale di Malta' commonly known as the 'Code de Rohan.' It was first published on the seventeenth July, 1784 and consists of seven titles, each of which is further subdivided into chapters.

Chapter 41 of the First Title is dedicated to the 'Notari Publici e Stipulanti' and it deals extensively with the fundamental duties and responsibilities of notaries as well as the manner in which public deeds and wills are to be properly drawn up and preserved.

The provisions governing the exercise of the notarial profession found in the 'Code de Rohan' remained in force throughout the first half of the nineteenth century. However, the legal improvements which were effected in other spheres of Maltese law rendered, by comparison, such provisions obsolete and indeed these were soon felt to be inadequate to cater for the needs of a rapidly expanding profession.

The badly needed reform was eventually brought about by the Promulgation of Ordinance V of 1855, which radically abrogated the relative provisions of the 'Code de Rohan' and substituted them by more detailed and scientific legislation largely based on the notarial laws which had been enacted in a number of European countries earlier on in the century with special reference to the French Notarial Law of the twelfth August, 1902.

Nevertheless, although this Ordinance had been called by Count Caruana Gatto 'una meraviglia per quei tempi'[9] the exigencies of a rapidly developing Maltese society were soon to render necessary a number of modifications and ameliorations to Ordinance V of 1855. In fact, the draft of the notarial law now in force in these Islands was originally submitted to the Legislative Assembly on the first of June 1922, but subsequent prorogations of the Assembly each time brought about the fall of the said draft.

A final successful attempt to pass the act was made on the ninth November 1925 by the Hon. Prof. Mallia. The draft was subsequently approved at its third reading on the eighth of March 1926. The 'Notarial Profession and Notarial Archives Act', then, became law by Act XI of 1927, now Chapter 92 of the Revised Edition of the Laws of Malta.

[9] Parliamentary Debates (1921-1922) Part II, Vol. II, Pg. 2336.