THE HISTORICAL DEVELOPMENT OF THE JURY IN MALTA AND ABROAD

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This paper was delivered at a forum organised by the Għaqda Studenti tal-Liġi on March 12th., 1974.

Your Honour, Members of the Staff, and fellow students,

All of us here will be aware that perhaps the most popular parody of the legal profession is embodied in the expression, 'Ladies and gentlemen of the Jury...,' normally voiced with as stiff an upper lip as possible, and frequently accompanied by the notorious pose of hanging on to one's lapels for dear life. Among all legal fields, the criminal law is the most glamorous and the most sensational; and within that field, trial by jury, the most appealing to the public sentiment; for it is here that the proverbial ordinary man (or woman, now) in the street, is allowed to play a part – other than those terrible roles of plaintiff, defendant, accused or witness – in that impressively dramatic sanctum which are the law courts. It is through the institution of the jury that the ordinary people keep a watchful and effective eye on what goes on in the Court-room.

We shall attempt in the next few minutes to trace together the historical development of the jury in its mother country, England; then we shall examine its success there, the substitutes suggested in its stead, and its export abroad. We shall than examine the jury in our own history, which is mainly divided into periods roughly between 1811-1829, 1854-1934, 1934-1944 (the war years), and 1944-1972. Finally we shall examine some points of divergence between the Maltese jury and the English jury.

In its original prototype, the jury was only partially similar, and then only in form, to our modern panel of jurors. Just now, we referred to England as the 'mother country' of the jury: we must, however, qualify that reference by saying that England is the origin of the jury, *as we know it,* that is a panel of ordinary citizens who compliment the judge's task of adjudication. The jury's real origin, however, lies in the ancient inquisition of the Frankish kings, dating from the 9th century, whereby groups of disinterested

neighbours were required to declare under oath information that was used to establish royal rights.

This essentially Frankish institution was carried into the Duchy of Normandy, and thence to England, via the Norman Conquest of the Anglo Saxons in 1066. Twenty years later, in 1086 we find the jury being employed on a really grand scale – still solely for the Crown's benefit – in the compilation of that famous statistician's delight, the Domesday Book. We see therefore that throughout this earliest part of the jury's history it was essentially an instrument of the body politic, a fact finding commission, as it were, in the hands of the State.

Henry II, however, who reigned from 1154-1189, employed the jury for the first time in the determination of private rights; so that a jury of sworn men who knew the facts could decide where the boundary of an estate in dispute really lay. Moreover, during Henry's reign, we find the origin of the criminal jury, which is more at issue in this forum than the civil jury. In 1166, Henry required that a jury of 12 men should present to every county court session, the names of men as were notorious murderers or robbers, or receivers of such. These men, once names, would be sent to trial by ordeal, the real test of guilt or innocence. We see, therefore, that the jury was first merely a body to gather up information, – much like a modern Inquiry; and, after 1166, a body whose only task was accusatory, much like the office of the Crown Advocate General today.

But in 1215, Pope Innocent III disallowed any clerical participation in the ordeal, thus depriving that barborous travesty of justice of its heretofore divine justification. Henry III, therefore, because of what appeared to be a purely ecclesiastic measure, was constrained to do away with the already unpopular trial by ordeal, and substituted it by what until then had merely been its own prelude – trial by jury. So in that year, we find the body of 12 accusing men transforming itself into a body of 12 judging men. Quite obviously to all of us, this transformation created a lacuna, in that the accusatory body, could not continue to carry out any such function, in compliance with the *nemo iudex* principle. So another jury of 12 men was set up to carry out the accusatory functions of the original jury – thus you had two types of jury developing together. In 1367, the accusatory jury was increased to 24 in number, and hence the name Grand Jury; while the trial jury was left at 12 – hence Petty Jury.

A word here, about this dichotomy, of the Grand and Petty Jur-

ies, which is of particular relevance to American law, which still safeguards, in the 5th Amendment to the Constitution, the citizen's right to the Grand Jury. The best definition of the functions of a Grand Jury, I think, was given by Sir Thomas Maitland in his address to the 1st Grand Jury in Malta, where he stated that the Grand Jury had to answer the question:

> 'whether the evidence adduced before them was so relevant to the act stated in the indictments and induced such suspicion of the party indicted as to require, for the ends of public justice, that he should be called upon to answer the charge before a tribunal competent to proceed to further examination.'

The Grand Jury, therefore, indicts or accuses, while the Petty Jury decides guilt; and in fact, where Grand Juries are employed, they are usually rubber-stamps for the Public Prosecutor's Office.

The British, apparently, lay more trust in the Attorney-General's Office than the Americans, and they saw fit to abolish the Grand Jury completely in the Criminal Justice Act, 1948, (even though it had become a dead letter long before that date). They thus left all accusatory functions up to the Home Office and its subordinates.

Back now, however, to the general history of the Jury. Blackstone, who was most vociferous in his defence of the jury system, called it 'a barrier between the liberties of the people and the prerogative of the Crown'. (Comm. iii. 379) The history of the jury in England indicates, however, that the relation of parity between Judge, (as appointed by the Royal Prerogative), and Jury, (as representing the people) was not as sacrosanct a principle as it is nowadays. Regarding the question of unanimity in verdicts, for example, judges used to forbid food and drink during deliberation, ever since the 14th Century, when unanimous verdicts became compulsory. Incidentally, this is still the *de jure* situation under s. 483 of our own Criminal Code. Indeed, until 1640, English Judges actually fined or even imprisoned jurors who acquitted people whom the judges wished to be convicted. In the notorious case of Sir Nicholas Throckmorton, for example, the jury acquitted the accused, notwithstanding that they had not been allowed to hear the witnesses in his favour; for this they were imprisoned and ruinously fined, the foreman forfeiting £M2,000, which was an enormous sum in Tudor England. Moreover, this rigour was fatal to Sir John Throckmorton, who was found guilty on the same evidence on which his brother had been acquitted. Lest we run off with the wrong

idea, though, it is safe to remark that this sort of physical coercion of judges vis-a-vis the jury is obsolete: as we shall see later on this evening, the judge's influence on the jury today is subtler and more in the interests of Justice.

We have seen, therefore, the intimate historical connection between the jury as we know it and the British Isles. But how popular is the jury in its natural habitat today? A statistic as recent as 1970 indicated that only 5% of all indictable offences are actually tried by jury: the overwhelming majority of English criminals far prefer the robed professional to the civilian amateurs. The decline and abolition of the Grand Jury in England has already been accounted for. The decline of civil juries and criminal juries has been ascribed diversely to the rapid growth in the volume of litigation in civil cases, the even more rapid growth of summary jurisdiction in criminal cases, and a general appreciation that juries were both unpredictable and fallible. So even within its own birthplace, the jury has been decreasing in popularity. Let not this prejudice us, however, as to the merits of the jury system: Justice, as all of us in this room should be aware, is not to be measured merely, or even primarily, by the statistician's yardstick. In fact, the most recent Committee to report on the English Jury System, the Morris Committee of 1965, saw fit to state, despite this admitted drop in numbers:

> 'There is we think a fundamental conviction in the minds of the public, that a jury is in a real sense, a safeguard of our liberties.'

Leaving England now, how has the jury fared abroad? It is generally admitted that most exportation as there was, ran into serious difficulties. This mainly because the delineation between judge and jury is hard to draw in an environment which has not had Britain's historical background; and also – particularly on the Continent – rules of evidence regarding the character of the accused have not quite caught on. Particularly in the USA, jury trial is admitted to have worked badly, partly because of the over-vigorous use of the right of challenge, partly because of intimidation and racial problems, and partly because of lack of tactful control by presiding judges; also exemptions from jury service leave unskilled workers chiefly to qualify.

Dissatisfaction with the working of the jury system has given rise to various suggestions as to its substitution, among which

two deserve special mention: firstly, trial by three judges, giving reasons for their decisions and subject to correction on appeal. Secondly, the German *Schoeffengerichte,* which means literally a Jurors' Court, and involves precisely a Bench composed of professional judges and lay citizens, sitting together, with a two-thirds majority vote necessary for conviction. Discussion of these alternatives will be conducted later on this evening.

Before we leave the general development of the jury and start on the Maltese experience, I think it is appropriate here to make a short detour into the political geography of the jury system, and see whether we can draw some link between the Jury and Democracy. France, for example, introduced the Jury during the 1789 Revolution, and abolished it under the puppet Vichy Government. Franco's Spain has no jury at all, and neither does Portugal, even though both countries used to enjoy the institution before the accession of their respective totalitarian regimes. We must not, however, take this concurrence with democracy too far: it is interesting to note that even though it was Mussolini who did away with the Jury in Italy, it has never been restored in that country. Moreover, Germany abolished the jury long before Hitler came to power. Finally, the jury's popularity on the Continent is restricted to Austria, Belgium, Norway, and four of the Swiss cantons.

And this brings us finally to Malta. As I said earlier, the history of the Maltese jury conveniently falls within these periods: 1811-1829, that is from Maitland's rule and his Piracy Courts to Proclamation VI of 1829, under Ponsonby; from the 1854 Code to the 1934 suspension of our constitutional powers; from 1935 to 1944, the War Years; and 1944 to the present day.

The history of Trial by Jury in Malta finds its origin, quite naturally, in the British connection. In fact, in 1811, just 11 years after we had joined the Empire, Marquis Testaferrata was sent to London to press for the introduction of the jury system, which he described as the fundamental basis for the proper administration of Justice. The 1812 Royal Commission, however, while upholding the intrinsic value of the institution, were very unwilling to transplant this essentially English mechanism to Malta, mainly because of the miniscule size of the Island's manpower, which could not safely be further depleted by the introduction of Jury Service; and also because the close-knit interrelations of Maltese society could hardly make for the empanelling of an unbiassed jury.

However, in 1813, Maitland became very concerned about the

frequency of piracy on the surrounding seas, and asked for the setting up of a Commission of Piracy for Malta, which was, in fact, duly granted on the 1st February, 1815. Now, under a Statute passed by the British House of Commons under George III, Piracy Commissions were to be composed of Judge and Jury; and since the order setting up the Commission in 1815 required it to be governed 'according to the rules and practice of the British Courts', the introduction of the Piracy Commission meant, *ipso facto*, the introduction of the jury in Malta, albeit on a very limited scale. We see therefore, that the jury was introduced into Malta not *qua* a jury system, but as an addenda with regard to Piracy, made necessary by an English Statute. The system as introduced was still based on the Grand-Petty Jury dichotomy, and the Petty Jury could only convict on an unanimous verdict. Despite Maitland's trepidation, expressed bluntly in his opening speech to the Grand Jury, the experiment succeeded beyond all expectations. In fact, Maitland himself, in his report to the Secretary of State of 1816, was constrained to admit that, 'the jury, in every instance, found according to the evident Justice of the case submitted to them.'

Only six years later, however, in 1824, Sir John Richardson, in his report to H.M. Government, expressed himself to be against the introduction of the Jury in Malta, with the proviso, though, that once the English and Maltese sections of the population had been fully integrated, then the time would have arrived for the jury to be experimented with on a small scale.

The appropriate time, however, was to come far earlier than he expected, and it came about sooner more by reason of the appointment of a new Chief Justice, Sir John Stoddart, than because of any increased affinity the Maltese had acquired for their British masters. Sir John Stoddart, appointed as Chief Justice in 1826, immediately started working on various plans with regard to the introduction of the jury into Malta, and in this he was aided by Sir John Richardson, and an English-speaking Maltese judge, Dr. Ignazio Bonavita. These three legal reformers consulted each other throughout the better part of three years, and the two English jurists suggested and counter-suggested new plans to the Government, agreeing on broad lines but frequently disagreeing about various important points of detail, as, for example, whether the jury should be an appellate court, or one of first instance; and the question whether judge and jury should deliberate alone or together (cf. Schoeffengericht). These negotiations are, however, extremely

well dealt with in Dr. H. Harding's 'Maltese Legal History under British Rule', and it would, I feel, be superfluous to reproduce his detailed documentation here.

Be that as it may, all this planning between 1826 and 1829 led up to Proclamation VI of 1829, enacted on the 15th of October of that year, and this could indeed be said to be the real starting point of a Jury System in Malta which enjoyed almost universal application. Under this first Jury Law, a Court of Special Commission, composed of the Chief Justice, and three or more Commissioners who were Judges of the Superior Courts, was established to try *with a jury* crimes punishable by death or life imprisonment, and cases of complicity in such crimes, irrespective of their punishment. Its jurisdiction depended on annual commissions and could be extended. There was no longer a Grand Jury in the English tradition. The jury was composed of a foreman and six common jurors, three of whom were drawn from what was termed the Maltese class, and the other three from the British. A simple majority was in every case sufficient for the validity of a verdict. If the foreman disagreed with the verdict, he could say so, in a note attached to the verdict. But in capital cases, unless the accused persisted in pleading guilty, an unanimous verdict was essential for the passing of the death sentence. One final point which will become relevant towards the end of this paper: practising lawyers were among those exempted from jury service.

Barely eighteen months later, after the Court of Special Commission had dealt with six cases, of which only one was received with public disapproval, Chief Justice Stoddart deemed fit to applaud publicly the performance of these first few Maltese juries. He said:

> 'It is my conscientious opinion that every one of the verdicts in these five cases was as correct, as just and as legal as could have been given by any tribunal in the world... Upon the whole, the jurors who served upon these trials have, by their conduct, triumphantly refuted the false notion that the Maltese are unfit for trial by jury: they have shown that Malta is worthy of that great boon conferred on her by the ever memorable proclamation of the 15th October, 1829; and they have, honourably to themselves and to their country, fulfilled the confidence reposed in them by a liberal and enlightened government, and have fully justified, so far as they are concerned, the wisdom of the law.'

The system continued working well, so well in fact, that in 1845, thanks to the pressure brought to bear on Govemment by Andrew Jameson and Sir Antonio Micallef, Crown Advocate, the jurisdiction of the jury was extended to all crimes punishable by five years' imprisonment or upwards. Finally in 1854, when our first Criminal Code was promulgated, art. 435 specifically laid down that all criminal cases, except those tried by the Courts of Judicial Police, and appeals from those Courts, shall be tried by H.M. Criminal Court, with a jury.

The next interesting date as far as the history of our jury is concemed is 1934, when the British Govemment, after the suspension of our 1921 Constitution, and consequent return to gubernatorial autocracy, abolished the function of the jury in respect of crimes of sedition, an occurrence which harks back to the link I tried to describe earlier between the institution of the jury and the concept of democracy.

We come now to the War Years. The second time our predecessors were deprived of the right to trial by jury was during the war, for fairly obvious reasons of expediency and the strain on manpower. The restitution of the jury in 1944 was acclaimed in Malta, and not least among these acclamations was that expressed in that year's Journal of the Society under whose auspices we speak today, which called the restitution 'a judicious measure.'

Our present Code, finally, talks about the jury mainly in Title VI, Part II, of Book II, and also in other parts of the Code relating to procedure. I do not intend to go through today's law, which I am sure we can all peruse at greater leisure elsewhere. The papers before you may, however, be helpful when we come to differentiate between our law and English law, and also later on during discussion. One point, however, which I feel I ought to make specifically, out of deference to the ladies amongst the audience, is that women have been allowed voluntary jury service by Act XXXIII of 1972.

Having traced thus the history of the jury in Malta down to the present day, I shall now attempt to highlight some points of divergence between the English law and practice regarding juries and our own. The factors I will treat are by no means exclusive and the only reason for their choice is that they are amongst the most controversial. Moreover, here I will only state the divergencies, not discuss them. That, I hope, will be the task of the audience. To give a quick run-through of these points right now, they are: the

property qualification, the foreman and unanimity.

First, the property qualification. Time does not allow now to go into the quantity of property required; so I will dwell only on the more important question of the *existence* of this qualification. As far as Britain is concerned, the answer is quite simple: the law requires a property qualification. Under Maltese law, however, the qualification section, s. 597, has undergone some very interesting changes. Under the 1829 jury, a certain amount of property was absolutely necessary. Then the 1854 Code struck a very interesting balance between the rigid English property qualification and the practical realities of social life in Malta, in the context of which such a rigid qualification would exclude quite a lot of able people who owned neither houses nor lands. So in 579(4), that Code admitted to jury service any person who was competent to serve as a juror (e.g. age, nationality etc.,) but did not fulfil the property qualification. This slightly incongruous, but eminently practical, measure was repeated in the 1942 Code in s. 597(1)(d). The recent Act of 1972, referred to above with respect to women jurors, did away with the incongruity and upheld the practicability of the 1854 and 1942 provisions, and we now have no property qualification at all. This was, of course, easier to do in the context of Independence. Meanwhile, however, and this we must remember, Britain still bears a property qualification.

Now the foreman. The functions of the foreman are described in s. 480, and from that section it may appear that his function is purely mechanical. It is easy to realize, however, that in actual fact, his psychological position vis-a-vis the common jurors is far more important than that of a mere clerk. Now, notwithstanding this fairly obvious reality, the British method of choosing a foreman is highly unsatisfactory: the whole thing is meant to be done by election among the empanelled jurors, but in actual fact, in order to prevent embarassment in a group of people who are completely new to one another, it is the Marshall of the Court who suggests one of the panel, a suggestion more often than not grabbed at by the rest of the jurors. In Malta, the foreman has always been regarded with greater care and respect. The Proclamation of 1829, in Art. VII, required him to have been a juror at least once before; moreover, the importance which that Proclamation paid to the foreman is also obvious in Art. XXVII, where the foreman must add an apposite notification if he disagrees with the verdict of the majority of the jury. Both the 1854 and the 1942 Codes also stipulated that the *prim gurat* should

have acted at least once as a common juror. However, one could readily realize that this stipulation only makes sense if the person chosen is, in actual fact, competent enough to act as a foreman: once an ass, always an ass, and it makes no difference at all that one proves oneself an ass twice, rather than once! Now, I think it can safely be argued that one of the professions more suitably adapted to the office of foreman is, precisely, the legal profession. We come, therefore, to the rather surprising divergence between our law and English law, regarding the exemption of lawyers from jury service. Our own Courts act on the quite laudable custom that the *prim gurat* is, where possible, a lawyer. In England, on the contrary, lawyers are exempt from all jury service whatsoever. Our own Proclamation VI of 1829 – our first Jury Law – likewise exempted lawyers, and it is rather hard to reconcile this with the importance which that Proclamation attached to the office of foreman, as we saw above. Without meaning to advocate any professional snobbery, I think it is only in the interests of justice that the Courts pursue the usage as it has developed in this matter, in Malta. And I hope this will be one of the points treated in discussion.

Finally, we come to what is, perhaps the most important controversy regarding jury service, and that is the majority required in a verdict. Suffice it here to state the facts. In England, the Courts accepted a simple majority verdict before the 14th Cent. Then, from that time till very recently (1972) an unanimous verdict was required. Now, they have reverted to a majority verdict. In Scotland, they have long enjoyed an 8-7 majority, out of a 15-man jury. Malta also had a bare majority verdict, under Proclamation VI of 1829; However, even there, s. XXVII indicates the propensity which the law had towards unanimous verdicts in the English tradition, where it says:

> 'Such judgement of the majority... shall be the verdict of the jury. Provided that where a verdict is not unanimous, the number of the majority will be stated.'

The propensity, moreover, of the judges towards unanimous verdicts will also be recalled from Sir John Stoddart's satisfaction that the first five Maltese juries all came to unanimous decisions. He said, 'One very satisfactory consequence resulted from the dispassionate examination of the evidence, and that was that it led in every case to an unanimous verdict.' In the early stages of our jury development, therefore, we see this *de jure* sufficiency of a majo-

rity verdict, but a *de facto* tendency towards the belief that unanimity shows a greater value of justice.

The change of course towards a *via media* between unanimity and majority in Malta came in 1854, when s. 467 of that year's Code stipulated:

> 'For every declaration of the jury, whether in favour or against the accused, the concurrence of at least six votes shall be necessary.'

This two-thirds rule has been repeated in s. 479 of our present Code, and remains in force to the present day.

Incidentally, there remains one instance where the unanimous verdict retains its relevance, insofar as our law is concerned; and that is the contingency provided for under s. 504, whereby the presiding Judge may substitute a sentence of hard labour for life with a sentence of not less than twelve years, if the jury shall not have been unanimous. This certainly seems to imply that our Law admits that an unanimous verdict is a juster verdict. And this prompts one to comment that it is rather strange that the Code admits this ultimate justice only in the most stringent punishment; and that therefore, perhaps, our Law as it stands, looks at justice from the tail end, as it were, from the punishment's side of the scale; rather than from the point of view of the lesser criminal who can go to jail for any term shorter than life, if only six of his fellow citizens think he should. I think our legislators should take the bull by the horns and look into the very roots of this concept of majority. I hope we will, too, in discussion.

I hope that in this study, I have laid before you such facts as may be helpful to us while thinking about and discussing the institution of the jury. This aspiration of mine is, however, made subject to one very important, and very troubling qualification: and that is the oracular nature of the jury. I admit that the rule of INCOMMUNICADO, enshrined in our s. 482 is important in the interests of the particular accused. But once that accused has been tried, is it harmful to interview jurors about their time in the jury room, as has indeed been held in one English case? More boldly, would it be harmful to monitor the proceedings of the deliberations of a jury, always of course in the interests of scientific research and a better insight into the workings of justice? Two students in America were once refused such permission completely. This lack of research, and this lack of documentation can only lead to the worst type of

doubt about the workings of our Courts of Law: a doubt based on the fact that there are no recorded facts at all; based therefore on doubt itself. This sort of uncertainty, immediately unnoticeable as it is, gnaws into society, which lies at the very root of all justice. In our context, short of a scientific enquiry into the working of an actually operating jury, I think that mechanism ought to be created to facilitate the empanelling of law students as jurors during their student years. The whole rationale of this spirit of enquiry could, of course, be questioned on the ground that it is superflous, since what really matters is what the public thinks of the jury; and since there has been nothing but acclamation for the institution, *qua* institution, then we must assume that society is happy with the jury as it is. This again warrants lenghtier discussion later on this evening.

And on this note of acclamation I shall end. Earlier on, I referred to the Law Society's approval of the restoration of the jury in post-war years. I failed to mention then, and it is appropriate to mention now, that that same Editorial, in true student tradition, or rather anti-tradition, expressed very serious doubts as to the essential notions of jury trial. I can find no better way to end than to quote a relevant passage from that Editorial:

> 'As the correspondence columns of the Press have for months clamoured for the restitution (of the jury) and for months pictured it as an unmixed blessing, it is easy for many people to pass over the weaknesses and shortcomings of the institution. Most of the correspondents were laymen and it is the habit of laymen to be effusive and to ignore the opposite viewpoint.'

I make way now, for the second speaker to examine just these opposing viewpoints. Thank You.