

## THE JURY TRIAL: ENGLISH AND FRENCH CONNECTIONS\*

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SUMMARY: I. *Introduction*. II. *The Birth of the Jury in England*. III. *The Introduction of the Jury in France*. IV. *Divergence from English Model*. V. *Developments under Influence of the European Convention*. VI. *Conclusion*.

### I. INTRODUCTION

It is well known that the jury developed on English soil and that it became an outstanding feature of the Anglo-American trial procedure. The institution also had a determining influence on the other characteristics of the Anglo-American system. In essence this entails that the trial is a continuous process during which oral evidence, in conformity with the rules of admissibility, is presented directly to the Court.

What is not well known is the exact origin of the jury. The reason is that its origin is shrouded in the darkness of the Middle Ages in England. An unknown author remarked succinctly that “its origin is lost in the night of time”.<sup>2</sup> In order to glean some facts surrounding the birth of the jury it is

\* I have been invited by the Mexican Institute of Constitutional Procedural Law to contribute this paper to a *liber amicorum* in honour of professor Héctor Fix-Zamudio. I am honoured to participate in such a prestigious project and I wish to express my sincere gratitude to the Institute for the invitation. In order to reach a South African audience I also propose to submit the paper to a local journal. This is done with the permission of the Institute.

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<sup>1</sup> See Kötz, *The Role of the Judge in the Court-room: the Common Law and Civil Law Compared*, 1987, TSAR 35, pp. 39 y 40; *Cfr.* also Schwikkard and Van der Merwe *Principles of Evidence*, 2a. ed, 2002, p. 5.

<sup>2</sup> Despite diligent efforts I could not trace the author of this comment. I made a note of it years ago but unfortunately neglected to record the name of the author.

necessary to go back in history to the latter half of the 12th century in England, when Henri II, count of Anjou, ruled over this domain and large parts of present-day France.<sup>3</sup>

## II. THE BIRTH OF THE JURY IN ENGLAND

The birth of the jury must be seen against the background of the anarchy that prevailed in England in the period prior to Henri II's succession to the throne in England in 1154. This turmoil is vividly described by Windeyer:

The stern rule of the Conqueror, the harshness of his infamous son Rufus, and the more just, but not less oppressive government of Henry I kept the feudal baronage subject to the monarchy. Those Kings established their peace throughout England, the peace of a grim, and often cruel, despotism. But the disruptive forces of feudalism broke loose as soon as the sway of the monarchy was relaxed; and, during the wretched reign of Stephen, England experienced anarchy and civil war at their worst. Great barons became lawless and independent of the Crown. From their castles they plundered the lands of their unfortunate neighbours. Their dungeons they filled with unhappy victims who had no redress against the tortures and horrors inflicted on them. For 'nineteen long winters' the people of England suffered under many masters the miseries which the Anglo-Saxon Chronicle in its last chapters so pathetically records.<sup>4</sup>

Although Henri II did not speak English and made regular trips to his domains in France he is regarded as one of England's greatest kings.<sup>5</sup>

<sup>3</sup> This journey back in time can be achieved with the assistance of *inter alia*. Pollock and Maitland, *History of the Law of England*, vol. 1, 1898; Barker *An Introduction to English Legal History* (1990); Windeyer *Lectures on Legal History* (1957); and Clermont *Principles of Civil Procedure* (2005). Although the epic novel by Ken Follett entitled *Pillars of the Earth* (1989) is not a legal source the historical setting depicted in the book accords with the legal sources. The mammoth story that unfolds in this book gives a fascinating account of the social chaos that prevailed on the eve of Henri II's ascension to the throne in England. Knowledge of this anarchy gives one insight into the steps that Henri II took upon his assumption of power, which led to the birth of the jury in England.

<sup>4</sup> *Lectures on Legal History* 47. As mentioned above in num. 3, Follett *Pillars of the Earth* is also instructive in this regard.

<sup>5</sup> Windeyer *Lectures on Legal History*, num. 4.

Henri II was a mere 21 years old when he became the King of England.<sup>6</sup> But he had such formidable personal attributes that his tender age did not deter him from asserting his authority from the outset. Apart from restoring orderly government to England he made a lasting contribution to the establishment of the common law in England.<sup>7</sup> Clermont gives a succinct description of Henri II's outstanding abilities: "Henry II was able to play such a key part in legal history because he was an exceptional person. He was a man of action and learning, impetuous and charming of splendid physique and overwhelming will".<sup>8</sup>

However, the author also added that Henri II had certain fatal shortcomings, which impacted negatively on his reign: "[H]is temper and other negative aspects of his temperament got him involved in the 1170 murder in the cathedral of his chancellor and archbishop, Thomas à Becket. These two old friends had fallen out in a dispute over jurisdiction, namely whether royal or ecclesiastical courts would try 'criminous clerks' or clergy accused of crime".<sup>9</sup>

Despite this faux pas Henri II is remembered for his lasting contribution to the development of the law in general and procedural law in particular. Under his reign the system of royal writs developed and the royal courts were established where the common law was shaped within the framework of the writ system.<sup>10</sup>

On Henri II's assumption of power his first task was to restore order to the land and to keep the peace. In order to achieve this it was necessary to obtain information about inter alia the following —crimes that had been committed—, people who had been dispossessed of land, who the rightful owners of certain land were and what the customs in a certain place were.<sup>11</sup> The means Henri II employed to obtain this kind of information was the norman inquest, a "prerogative right of the Frankish kings".<sup>12</sup> The king or a royal official would go to a certain neighbour-

<sup>6</sup> See Hawkins (ed), *The Oxford Reference Dictionary*, 1992, p. 381.

<sup>7</sup> Baker, *An Introduction to English Legal History*, num. 15. See also Windeyer *Lectures on Legal History*, pp. 47 y 48.

<sup>8</sup> *Principles of Civil Procedure* 12.

<sup>9</sup> *Idem*.

<sup>10</sup> Windeyer, *Lectures on Legal History*, 48 et seq; Clermont *Principles of Civil Procedure* 12 et seq.

<sup>11</sup> *Cfr.* Pollock and Maitland, *History of English Law*, 139.

<sup>12</sup> *Ibidem*, 140.

hood and summon a group of men —“the best and most trustworthy”— to give true answers under oath to questions put to them.<sup>13</sup> It is clear that the information that these men supplied was based on their own knowledge of events in the district.<sup>14</sup>

In due course the inquest procedure became an important mechanism in deciding legal disputes. The king used it and later conferred this prerogative right on his subjects.<sup>15</sup> From an early stage the practice arose to call up twelve honest men to give true answers under oath to questions put to them. So, for example, such a body of men from the district could be called and sworn (*jurata*) to tell the truth concerning a dispute relating to land between the church and the king.<sup>16</sup> It seems evident that the name “jury” is derived from *jurata*.

As alluded to above, one of the great legacies of Henri II was the establishment of the royal courts at Westminster, where the common law was shaped over the following centuries.<sup>17</sup> He also appointed itinerant judges who visited the counties to dispense justice. The judges now became the officials who called upon the body of neighbours to say the truth under oath.<sup>18</sup>

I pause here to mention that the Frankish inquest procedure, which was taken to England by the Norman conquerors, never developed further on French soil. In fact, it disappeared because it was “overwhelmed by the spread of the Romano-canonical procedure” during the Middle Ages when darkness settled over Europe.<sup>19</sup> Therefore, if it were not for the Norman invasion and the employment of the Frankish inquest by Henri II the jury would never have been born. Pollock and Maitland state aptly:

“[B]ut for the conquest of England, [the Frankish inquest] would have perished and long ago have become a matter for the antiquary”.<sup>20</sup>

<sup>13</sup> Pollock and Maitland, *ibidem*, num. 141. See also Windeyer, *Lectures on Legal History* 60.

<sup>14</sup> *Cfr. op. cit.*, nota 12, Windeyer 62.

<sup>15</sup> Pollock and Maitland, 144.

<sup>16</sup> *Cfr.* Pollock and Maitland, num. 141. See also Windeyer, *Lectures on Legal History*, num. 60.

<sup>17</sup> Clermont *Principles of Civil Procedure*, pp. 12-16

<sup>18</sup> Pollock and Maitland, *History of English Law*, pp. 154-156.

<sup>19</sup> *Ibidem*, 141.

<sup>20</sup> *Idem*.

It should be clear from this brief historical survey that the jury, which has been described as a “‘palladium of [English] liberties’ is in its origin not English but Frankish, not popular but royal”.<sup>21</sup>

I do not intend to trace the further development of the jury in England in any detail, because it is now the appropriate moment to turn to events in France. Suffice it to say that the jury underwent a gradual but dramatic change of character during the five centuries after the reign of Henri II. White describes this development as follows:

As population increased and everyday activities grew more complex, it developed that neighbours knew little or nothing of the facts in dispute. It was then that witnesses who did not know some facts were called in to supply the requisite information... [T]he jury laid aside its old character... The very thing... [i. e. personal knowledge] ... that qualified a man for jury service in the olden times, at a much later date disqualified him.<sup>22</sup>

The process of transformation was concluded in the 17th century, when it was decided that a witness “swears but to what he hath heard or seen to what hath fallen under his senses. But a jury-man swears to what he can infer and conclude from the testimony of such witnesses...”.<sup>23</sup>

Before leaving English soil I would like to mention an interesting feature of the early jury trial. From an early stage the practice arose among judges to insist on a unanimous verdict by the members of the jury. There are early traces of cases where judges accepted majority verdicts but by the latter part of the 14th century the principle of unanimity was firmly entrenched. In the words of Baker, “[a] leading case of 1367 put the matter beyond doubt; rejecting the earlier precedents, the Court held a majority verdict to be void”.<sup>24</sup>

To counter improper influence and to encourage unanimity “[t]he sequestration of the jury became a regular practice”.<sup>25</sup> This meant that the jurors were confined “without meat, drink, fire or candle, or conversation

<sup>21</sup> *Ibidem*, 142. Windeyer, *op. cit.*, nota 13.

<sup>22</sup> “Origin and Development of Trial by Jury” 1961 *Tennessee LR* 8 15 as quoted by Schwikkard and Van der Merwe *Principles of Evidence* 4. See also Windeyer *Lectures on Legal History* 62; and Baker *An Introduction to English Legal History* 89.

<sup>23</sup> *Bushell’s Case* 124 ER 1006 1009, *idem*.

<sup>24</sup> *An Introduction to English Legal History* 90.

<sup>25</sup> Baker 89.

with others until they were agreed".<sup>26</sup> The process of sequestration was enforced so strictly, according to Baker, that the members of the jury "became as prisoners to the Court".<sup>27</sup>

### III. THE INTRODUCTION OF THE JURY IN FRANCE<sup>28</sup>

One of the outstanding features of the ancien régime in France was the "oppressive and secretive judicial system that routinely employed torture..., which aroused the most acute sense of popular grievance".<sup>29</sup> The Revolution of 1789 was, therefore, not only aimed at overthrowing the monarchy under Louis XVI but also at radically transforming the judiciary. The idea of a jury trial in the English mould had already been popularised amongst the legal fraternity and intellectuals, prior to the Revolution, by Montesquieu and other commentators.<sup>30</sup> The revolutionary fathers saw in the English jury an important popular institution, which involved the ordinary people in the judicial process and contained the power of the judiciary.<sup>31</sup> It is, therefore, not surprising that they embraced this institution with enthusiasm and introduced both a grand jury (jury d'accusation) and a petty jury (jury de jugement) based on the English model.<sup>32</sup> There were even proposals for the introduction of a civil jury but the Constituent Assembly rejected them.<sup>33</sup>

Soon after Napoleon became emperor of France in 1804 he abolished the grand jury but for rather obscure reasons he retained the petty jury.<sup>34</sup> Although it is not quite clear what his motives were, the most probable reason for retaining the jury trial was that he regarded the jury as a means to limit the powers of the judiciary. In Napoleon's words "a judge

<sup>26</sup> *Idem.*

<sup>27</sup> *Idem.*

<sup>28</sup> My exposition of the developments in France under par 3 and 4 relies mainly on Munday "Jury Trial, Continental Style", *1993 Legal Studies*, p. 204. For the modern-day position in France, see also Bell, Bayron and Whittaker *Principles of French Law*, 1998, p. 44; West, Desdevises, Fenet, Gaurier and Heussaff, *The French Legal System: an Introduction*, 1992; Dadomo and Farran *The French Legal System*, 1993, pp. 200-202.

<sup>29</sup> Munday 1993, *Legal Studies*, pp. 205 y 206.

<sup>30</sup> *Ibidem*, 206.

<sup>31</sup> *Idem.*

<sup>32</sup> *Idem.*

<sup>33</sup> *Idem.*

<sup>34</sup> *Ibidem*, pp. 206 y 207; Hawkins (ed), *op. cit.*, nota 6, p. 537.

with jurisdiction to determine both matters of fact and law would be too powerful".<sup>35</sup>

An important feature of the jury trial in France was that it was perceived as a judgment by the people.<sup>36</sup> And since the people were sovereign it was decreed as early as the year 1791 that there was to be no appeal against a jury's verdict.<sup>37</sup>

The Court in which the jury was introduced and in which it became a permanent feature is called the *cour d'assises*.<sup>38</sup> This is the Court that hears the most serious cases, like murder and rape.<sup>39</sup>

#### IV. DIVERGENCE FROM ENGLISH MODEL

The jury model that was introduced in France after the Revolution adhered to the English approach by recognising a strict division between law and fact, which fell within the domain of the judges and the jury respectively.<sup>40</sup> As was the case in England, the jury consisted of twelve members and initially the idea was that they should deliberate on their own and strive to come to a unanimous verdict.<sup>41</sup> However, the French jury soon started diverging from the English model. As far as a unanimous verdict is concerned, it happened from the outset.

##### 1. *The principle of unanimity*

The French never endorsed the principle of unanimity fully. Right from the outset the jury was allowed to render a majority verdict if unanimity could not be achieved.<sup>42</sup> Provision was also made for judicial intervention in the deliberations of the jury in the case of a divided jury. The judges would then retire with the jury for a second deliberation to resolve the matter and if a unanimous verdict could still not be reached

<sup>35</sup> As quoted by Munday, *op. cit.*, nota 28, p. 208.

<sup>36</sup> *Cfr. Idem.*

<sup>37</sup> *Idem.*

<sup>38</sup> *Idem.* See further the French sources cited in n28 above.

<sup>39</sup> West *et al.*, *The French Legal System* 93; Dickson, *Introduction to French Law* 24; Dadomo and Farran, *The French Legal System*, p. 74.

<sup>40</sup> Munday, *op. cit.*, nota 28, p. 210.

<sup>41</sup> *Ibidem*, 216 and 208.

<sup>42</sup> *Ibidem*, n28.

the case could be decided by a majority of the jurors and judges.<sup>43</sup> This early tradition to allow judges to intervene in the deliberations of the jury led to further legislative changes to the french model.

## 2. *Joint deliberations by judges and jury*

In the first half of the 19th century the jury gained the right to express themselves on extenuating circumstances and thereby to influence the sentence imposed by the collegial Court. In 1824 the legislature first allowed the jury to make a recommendation on extenuating circumstances to persuade the Court to impose a lenient sentence.<sup>44</sup> This was followed by a law of 1832 that allowed the jury to make a finding on extenuating circumstances, which was binding on the Court.<sup>45</sup> Since sentence was regarded as a matter of law the jury's indirect say on sentence was perceived as an encroachment on the terrain of the judges.<sup>46</sup> In my view this was the first step in the direction of allowing the jury to take part in the decision on sentence.

In 1881 an important reform was introduced, when the legislature abolished the authority of the presiding judge of the cour d'assises to deliver a summing up (le résumé) to the jury. The legislature took this step because judges apparently abused their authority in this regard.<sup>47</sup>

The next development took place in 1908 when a law was passed that allowed the jury, having been "deprived of the guidance of a summing-up, to invite the presiding judge to join them in their retiring room to answer any questions they might have".<sup>48</sup> At this point in time, in the words of Munday, "the Rubicon was crossed".<sup>49</sup> This paved the way for laws passed in 1932 and 1941, which obliged the judges to retire together with the jury to deliberate on both questions of guilt and sentence.<sup>50</sup>

<sup>43</sup> *Ibidem*, p. 208.

<sup>44</sup> *Ibidem*, p. 210.

<sup>45</sup> *Idem*.

<sup>46</sup> *Idem*.

<sup>47</sup> *Ibidem*, p. 211.

<sup>48</sup> *Idem*.

<sup>49</sup> *Idem*.

<sup>50</sup> *Ibidem*, p. 212.

### 3. *The number of jurors*

The principle of twelve jurors survived until 1941, when it was reduced to six. In 1945 the number was increased to seven and, finally, in 1958 it was settled at nine. It was also enacted that at least eight members of the Court had to agree to deliver a verdict of guilty.<sup>51</sup> Since the judicial component of the Court consists of three judges it means that a conviction can only ensue if a majority of the lay jurors concurred in the decision.<sup>52</sup>

### 4. *Full circle*

It should be apparent from the above survey that the jury in France has come full circle. It made its way in embryo form from french soil to England in the 11th/12th centuries and then in the late 18th century, when the jury had reached maturity in England, it was transplanted from english soil back to France.

## V. Developments under Influence of the European Convention

In the mid 1990's a debate commenced in France on the question of the absence of a right to appeal against a decision of the cour d'assises. This happened as a result of the influence of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, which recognises the right of appeal.<sup>53</sup> This debate raised many questions and many legislative proposals were put forward.<sup>54</sup> One of the main problems, about which there was not sufficient consensus, was how the appellate forum should be composed. For example, should it be an appeal from people and judges to other people and judges or from people and judges to a panel consisting only of judges? And should the option of an appeal from people and judges to other people and judges be ac-

<sup>51</sup> *Ibidem*, pp. 216 y 217 where this development is discussed.

<sup>52</sup> *Ibidem*, p. 217. See also West *et al.* and Dadomo, *op. cit.*, nota 39.

<sup>53</sup> Protocol 7, article 2 of the Convention, see Wadham and Mountfield *Human Rights Act 1998* (2001) 145.

<sup>54</sup> See *eg Le Monde* 1995-09-30, pp. 1, 9 and 13; *Le Monde* 1996-05-02, pp. 1 and 10 and *Le Monde* 1996-05-17, p. 7.

cepted, the next question would be, how many people should sit in the Court of appeal.

I do not intend to go into the detail of this debate and all the proposals. Suffice it to say that the notion of the “sovereignty of the people”<sup>55</sup> won the day. This thorny issue was finally resolved with a statute of 2000, which provides for a *cour d’assises d’appel* consisting of three judges and 12 jurors.<sup>56</sup> By providing for three more people in this Court due weight was clearly given to the voice of the populace.

## VI. CONCLUSION

This survey illustrates the close relationship between the character of a procedural system and great historic events in society. Were it not for the conquest of England by William the Conqueror in 1066, the anarchy in England prior to Henri II’s ascension to the throne and the genius of Henri II to restore order with his prerogative right of an inquest, the jury would never have been born. And were it not for the french Revolution in 1789 the jury would never have made it back to France.

<sup>55</sup> *Cfr.* Munday, *op. cit.*, nota 28.

<sup>56</sup> *Loi* 2000-516 of 2000-06-15; articles 380-1 to 380-15 of the *Code de Procedure Pénale*.