THE FRENCH CRIMINAL JURY

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Its Origin

The criminal jury in France is a product of the Revolution[1] and its subsequent transformations reflect the turbulence of that social catastrophe. Strictly speaking it constituted a political achievement rather than a judicial reform. For at least fifty years pamphleteers had been demanding that the royal prerogative of judging the gravest criminal acts should be transferred to the people.

In the eyes of Montesquieu the English jury—twelve citizens chosen at random—presented a true image of the nation and provided an essential guarantee of personal liberty. To be judged by independent and enlightened individuals instead of by courts submitted to monarchical pressure seemed to parliamentarians an ideal of justice based on the principle of free equality.

It was to this enthusiasm that the Revolutionary Assembly succumbed when on 29 September 1791 was voted the institution of the jury. But the reasoning which appeared to justify the reform was suspect once it was asserted that a person need not be a lawyer in order to judge properly criminal acts. Good sense and loyalty would suffice to solve questions of fact and to recognize the culprit. It was believed that all the problems could be resolved by separating the facts from the law. The function of the judges, bound by a verdict which had no need of reasoning, was merely to impose the appropriate penal sanction. The mission of the jury was thus to make simple factual declarations.

But the Constituent Assembly of 1789 had not realized that it must also be decided whether or not the accused is guilty. For this to be done it is necessary to find a criminal intention or a motive for the act and to establish the purpose which the accused had in mind. And what of the excuse, the provocation, the insurmountable necessity, the irresistible impulse and other subjective elements in the offence? Since the jurors were required to answer questions posed in advance by a mere yes or no the guilt or innocence of the accused was at the mercy of their personal tastes, social prejudices or political affiliations

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1 I am indebted to the illuminating article *La réforme du Jury Criminel et la Réorganization de la Cour d'Assises* by Maître Adrien Peytel in *Gazette du Palais* (1942), *Doctrine* p. 16, for most of the historical and critical commentary. I have to the best of my ability adapted and brought up to date (having regard to the *Code de Procédure Pénale* of 1958 which replaced the *Code d'Instruction Criminelle*) such portions of the article as seemed likely to be of interest to a wider audience. I hope the learned author will kindly forgive any errors of commission or omission that I may unwittingly have perpetrated and for which I bear sole responsibility.

not to speak of political trials in which the accused is condemned or glorified according to the sentiment of the majority for which no justification in fact can be given. One can also imagine the delicate and complex problems involved in weighing the defamatory character of a political accusation in respect of which the actor or writer is entitled to assert the truth.

Although the jury did much to allay the distrust and contempt for the royal courts and permanent magistrates, evidence of political pressure is to be found in the numerous modifications to which it was subjected at periods which coincide sharply with the historical evolution of the country.

By the Law of 29 September 1791, *citoyens actifs, i.e.,* those qualified to be electors, could alone be jurors. Their names had to be inscribed on the register of each district kept by the registrar *(secrétaire greffier).* Lists were submitted to the attorney-general *(procureur-général syndic)* who extracted every three months 200 names for the approval of the departmental council *(directoire départemental).* The public prosecutor *(accusateur public)* was entitled to reject a tenth. In 1792 the general list was enlarged by the Decree of 12 August which suppressed the title of *citoyen actif* and nominated all citizens of twenty-one years of age to the primary assemblies *(assemblées primaires).*

After the political confusion of *l'an II* (1793-1794), the Law of 2 *nivôse* (the fourth month of the republican calendar: 21 December-19 January) amended the organization of the jury in keeping with the political changes in the form of government. The *agent national du district* was now required to compile the lists from his personal knowledge and according to information furnished by the *agents nationaux* of the *communes* (parishes) for subsequent approval of the departmental council. In addition, the jurors had to be at least thirty years of age. Thus, the jury had escaped from the control of elected assemblies only to fall under the tyranny of departmental bodies in which seditious passions manifested themselves even more violently, so much so that the *5 brumaire an VI* (1797-1798) abolished the Law in fifty departments *(départements).*

The tribulations of the jury did not terminate with the fall of the *Comité de Salut Public;* the Constitution of *22 frimaire an VIII* (1799-1800), for example, introduced the so-called *listes de confiance*—lists formulated by the citizens themselves in each *arrondisement* (administrative sub-division of a *département*) on a proportional basis of one to ten—which never came to fruition. Several alternative procedures were tried without success, the organisation of the jury changing with the varying ramifications of the electoral law. But it was in vain that the *Cour de Cassation* and *le Grand Juge* denounced the shortcomings of the jury system and asked for its abolition. When in 1804 the discussion on the project of a *Code d' Instruction*

Criminelle opened before the *Conseil d' État*, Portalis[2] exerted all his persuasive powers to have this imported institution effaced from French law. He denounced the feebleness and incapacity of jurors, their dependence on the political order and their unreliability of judgment. On the other hand, Berlier and Treilhard rallied to its defence.

Despite renewed attacks the *Code d' Instruction Criminelle* of 1808 while retaining the jury attempted, in providing for the election of jurors, to substitute for the theory of rights a theory of aptitudes. Seven categories of citizens comprising those who seemed most fitted to render justice were formulated. The procedure was complicated and led to further modifications in harmony with the new electoral rights of 1817 and 1820. The Law of 2 May 1827 introduced reforms and the revolution of July 1830 increased still further the number of potential jurors.

When the revolution of 1848 established universal suffrage all citizens, as in 1792, became eligible for jury service. But the committees of justice and legislation were disturbed to find on juries individuals lacking in capacity and morality. It was not uncommon for jurors to be incapable of reading or writing, or of establishing their identity; some had been convicted of serious crimes. In consequence, at the beginning of the Second Empire a proposal was put forward, culminating in the law of 4 June 1853, to distinguish clearly between the electorate *(corps électoral)* and the body of jurors *(corps des jurés)* manifesting a high morality. It was considered that the dispensing of justice was not a right but merely a function of the individual. The right to render justice belongs only to society.

The complicated Law of 1853 laid down that in the compiling of lists of jurors, the mayor, the *sous-préfet* and the *préfet* should represent the administration, while the *juge de paix*, the *procureur impérial* and the *procureur général* should represent the *ordre judiciaire*. The Law also provided for incapacity and incompatibility by rejecting illiterates, day or manual labourers, and domestic servants. The collapse of the Empire spelled the doom of the 1853 Law and, as in 1830 and 1848, the new régime imposed the recruitment of jurors based on the electoral lists. Immediately after Sedan the *Gouvernement de la Défense Nationale*, by decree of 14 October 1870, reverted once again to revolutionary tradition giving all electors the right to be inscribed on the jury lists. As in previous experience the level of the jury was so abased that some reform was essential. This was brought about by the Minister of Justice *(le Garde des Sceaux)* Dufaure who piloted through the Law of 21-24 November 1872. Like the Law of 1853 it made jury service a function and not a right en-

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2 French lawyer and statesman (1746-1807), one of the chief architects of the *Code Civil*. As the most industrious member of the commission charged by Napoleon with the drawing up of the Code he sought to permeate it with the ideas of Roman law.

trusted only to those citizens fitted to fulfil the duties and of the requisite moral calibre. But contrary to the régime of 1853 it attempted to free the jury from administrative control and to make predominant the *ordre judiciaire*. For seventy years since that time the matter has been regulated by the Law of 1872 slightly modified in detail by the Law of 20 January 1910 (*Gaz. Pal.* 1910.1.780) and the decree of 27 September 1926 (*Gaz. Pal.* 1926.2.860) but without altering the general principles of the law.

To understand properly the reform of 1941 it is important to recall the essential elements of the 1872 legislation which purported to distinguish the political and juridical constituents. Under that Law a juror had to be thirty years of age, in possession of political and family rights, of French citizenship and domiciled in the *département*. Persons convicted of serious crimes, condemned to certain correctional penalties *(peines correctionnelles)* or certain military offences were not qualified to be jurors. Other incapacities included dismissed ministerial officers, undischarged bankrupts, mental defectives, aliens, domestic servants, apprentices and illiterates. But a Law of 13 February 1932 (*Gaz. Pal.* 1932.1.1024) conferred the right on domestic servants.

The method of election is still bedevilled by the annual and sessional lists (*i.e.*, the political and electoral elements are still involved) and it is this which the Law of 26 November 1941 attempted to eradicate, the jury depending in no way on the political organization of the country. The new Law is the logical and happy outcome of the movement of ideas perceived since 1853.

Mechanism of the Law of 25 November 1941

This Law introduced a complete reorganization of the jury system and of the recruitment of its members. Henceforth, each juror must be of French nationality (of either sex), born of a French father, not be a Jew nor an officer or dignatory of a dissolved secret society, be at least thirty years of age, able to read and write in French, in enjoyment of political, civil and family rights, and not within the categories of incapacity or incompatibility established by law.[3]

[3] Incapacities include persons with criminal records even if rehabilitated; those condemned to correctional penalties for theft, fraud, *abus de confiance,* infanticide, abortion, blows and wounds under art. 309 *Code Pénal;* offences against morals, usury, vagabondage, the army recruiting laws, the Head of State or the National Unity or French people; for acts inspired by Communism or anarchy; for *délits* comprised in some seventeen articles of the *Code Pénal* and other articles in the *Code de Justice Militaire.* Incompatibilities include a government minister, secretary of State, senator, deputy; member of the *Conseil d'État, Cour de Cassation, Cour des Comptes; préfet, sous-préfet, magistrat des cours* or *tribunaux, juge de paix, commissaire de police;* members of the army, navy or airforce on active service; customs and postal officers, primary teachers.
Exemptions include septuagenarians and persons who have been jurors in the current or preceding year, save in the case of special sittings, also those who to live have to do manual or daily work. There are provisions to restrict the number of jurors placed on the annual list, *e.g.*, 1,200 for the *département* of the Seine (Paris); for the other *départements* it is one juror for 1,300 inhabitants. The minimum of jurors must not be less than 160 nor more than 240 (these figures are less than half the number previously).

It is now the justice of the peace in each *canton* (subdivision of an *arrondissement)* who draws up a preparatory list. The annual list is then formulated by a commission in each *arrondissement* (district or ward) composed of the *président* of the civil tribunal, *président* and justices of the peace.[4] There is also a special list of *jurés suppléants* (substitute jurors) composed of jurors who live in the assize town (120 for Paris, twenty for the other *départements).*[5]

The *président* of the assize court compiles from the annual list a separate jury list for each session *(la liste de session)* drawing by lot twenty-seven names (formerly 36) in public audience fifteen days before the assizes commence; six *jurés suppléants* from the special list are also drawn by lot. Each juror is notified by the *préfet* at least eight days before the opening of the session.

If among the jurors present for the trial there is any who does not fulfil the requirements of aptitude, capacity or compatibility or who is for some reason exempted, the *président,* on the advice of the *procureur général,* strikes his name from the list of *jurés titulaires* (regular jurors). Should there remain less than twenty-three jurors present their complement is filled by the *jurés suppléants.* If the latter are insufficient there is a further drawing by lot in public audience from the names on the special list or in default from the names of local jurors on the annual list. There are penalties for default in attendance.

Before the trial commences the names of the eligible jurors are recited in public and in the presence of the accused and of the *procureur général.* Each name-tab is placed in an urn. Under the system in operation since the *Constituante* the challenges *(récusations)* made by the accused and the prosecutor had to cease when there remained only twelve jurors, both sides exercising an equal number of challenges. If the number of jurors was odd the accused was entitled to one challenge more than the prosecutor. The new Law has removed the abuse of challenges by providing that the accused (or his counsel) can reject five jurors and the prosecutor can reject four when the names are drawn by the *président* from the urn. No reasons for the rejection can be given and the jury is formed when nine names come unchallenged out of the urn.

The 1941 Law reduced the size of the jury from twelve to six (*Code Criminelle,* art. 342) but under the *Code de Procédure Pénale,* art. 296, the number of jurors has now been increased to nine. The nine jurors are seated on the bench, if the Court is so designed, on either side of the three judges and they are sworn in by the *président* (arts. 303-304 *C.P.P.*).

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4 *Conseillers généraux* (elected) are no longer members of the commission.
5 Under the Law of 1872 the number was 300 for Paris and fifty for the other *départements.*

The Tribunal

The most important effect of the new Law appears to be the close association of two constituent parts of the assize court previously kept distinct by the *Code d'Instruction Criminelle* and between which the laws of the nineteenth century had established a barrier which must never be crossed. Formerly, the jury had to be quite independent of the judges. Although it was true that the *président* could exercise a discretionary power in directing the discussions or in trying to elicit the truth by methods of investigation, he had neither the possibility nor the right to enlighten the jury during the proceedings or even to attempt useful explanations which might have appeared to give the impression of partiality.

By integrating the judges and jury the new Law creates a criminal tribunal composed of three judges and nine jurors who are together required to ascertain the facts, to apply the law and to pronounce judgment jointly. It is interesting to note that the jurors (as well as the judges) may ask questions of the accused and of the witnesses (art. 311). Accused persons will now be judged by this unified and mutually responsible body whose members vote by secret ballot alike on the question of culpability as on the penalty to be imposed. A majority of eight votes will constitute the decision in which the *président* has no preponderance.

It will be appreciated that this innovation is of prime significance in the history of criminology and its value remains to be judged in the light of experience. But there can be no doubt that the new Law fundamentally changes the principle formerly adopted by the *Constituante* as a fundamental guarantee of individual liberty: that is not to condemn the reform out of hand.

Henceforth, the country—fictionally represented by twelve jurors—is no longer required to determine the question of guilt without having to give reasons. Instead, the accused appears before a tribunal which assumes full responsibility and whose combination of judges and jurors at once ensures respect for the law and the maintenance of public order. It is a far cry from the day when jurors, chosen by the agents of public authority, pronounced upon the gravest criminal matters without having to provide the least justification. The development of criminal investigation can alone explain this radical change in the method of tackling problems which in the past have provoked many scandals and encouraged the belief in the insolvency of justice. The Law *de brumaire an IV* gave the *président* of the assize court a limited discretionary power to order whatever he thought conducive to the manifestation of the truth. But it had to be exercized within the narrow framework of the law and it was intended only to provide for unforeseen necessities. Theoretically it depended upon the conscience of the judge, but in practice those rights were limited in order

that the jury might not guess either the intentions of the court or its feelings about the crime in question.

Formerly, when the public discussions had been completed it was the task of the *président* to give a *résumé* of the facts. While at liberty to comment on matters which seemed to him of significance he had the strict duty to remain impartial and not to adduce any further evidence of facts other than that presented at the hearing. Such intervention of the *président,* violently criticized as disguised pressure of the magistrate on the conscience of the jurors, was suppressed by the Law of 19 June 1881 which prohibited this summing-up at the cost of nullifying the trial. The framers of the Law asserted in effect that the *résumé* was superfluous because, if the *président* restricts himself to a recapitulation of the principal evidence, he fulfils an idle task:

> it is dangerous because, whatever might be the desire of the *président* to hold the balance equally between prosecution and defence, it is impossible that even involuntarily the author of the *résumé* will not depart from the impartiality he is supposed to observe. The more he is convinced that he has before him a culprit, the less will he preoccupy himself with keeping within the strict limits which the law assigns to his intervention, shielded moreover against the consequences of an abuse of power by the promptings and witness of his conscience.[6]

Thus, for more than a century the tendency increased to separate the two mutually responsible elements of the assize court, to prevent all contact of thought between magistrates and jurors and to safeguard the apparent independence of the latter, so firmly was anchored in the public spirit this jealous superstition that the jury constituted the guarantee of public liberties. Nevertheless, certain verdicts continued to astonish general opinion and the press was not slow to signal some singular acquittals or unexpected condemnations. The *parquet* (public prosecutor's department) itself adopted the procedure of sending before the *tribunaux correctionnels* (lower criminal courts) rather than to the assize courts some cases of *abus de confiance* by wage earners. Falsehoods became the constitutive manoeuvres of fraud in order to protect the accused from penalties out of proportion to the faults committed. If, on the one hand, the jury repressed without mercy such offences against property of which they might imagine themselves to have been the victim, on the other hand, their sentimental indulgence often induced them to acquit murderers under the pretext of irressistible passion, to feel pity for the infanticides and abortions, and to submit in political trials to influences which, if not judicial, were no less afflicting. It was this instinctive feebleness of the jury in respect of crimes which injure in the first place the public

[6] Report of M. Agnel to the Chamber of Deputies.

interest, but which do not directly affect private interests, that later obliged the legislator to modify article 315 of the *Code Pénal* by making the crime of abortion a simple misdemeanour (*délit*); (Law of 27 March 1923: *Gaz. Pal.* 1923:1.841). Equally in regard to bigamy the rigour of the law constantly tempted the jury to acquit the accused. The *Code Pénal*, in fact, provided for the crime of bigamy the penalty of forced labour for a term of years (art. 340 *ancien*). A Law of 17 February 1933 (*Gaz. Pal.* 1933.1.1081) was enacted providing that the offence of bigamy, henceforth to be deferred before the *tribunaux correctionnels*, should be subject to penalties of from six months to three years imprisonment. Such judicial anomalies resulted from widespread ignorance or indifference to the necessity for repressing offences against the public order in an epoch of expanding public powers.

Numerous proposals for the reform of the assize court were put forward in the early years of this century culminating in the Law of 5 March 1932 (*Gaz. Pal.* 1932.1) whereby the jury remained solely qualified to adjudicate on questions of fact and to determine *souverainement* the guilt or innocence of the accused. The judges and jury then deliberated together in the matter of the penalty to be imposed. Previously, the jury had the right to adjudicate on the question of culpability. Now the law invested it with the task of determining the penalty in collaboration with the judges. As in this deliberation the vote depended not upon rank but upon heads, the jury by its numerical superiority *ipso facto* became master both of guilt and of punishment. Thus, the new association of judges and jury whose aim was to fortify the public order against the feebleness of juries served only to strengthen the latter by assuring them of a total and uncontrolled right of appreciation.

It was undisputed that numerous acquittals had been given because the jury feared that the court might make a too rigorous application of the law. However, it was thought that once the jury was master of the penalty there would no longer be a pretext for refusing the condemnations requested by the *ministère public* (prosecution), and that the authority of assize court judgments would be thereby reinforced. But it seems to have been overlooked that the intervention of the jury in the deliberations and the necessity of obtaining an absolute majority for fixing the penalty resulted in a lowering of the repression seeing that the magistrates now counted only three voices against the twelve of the jury. One was therefore entitled to ask whether the abuse of short penalties was not more injurious to the general welfare than the erstwhile multiplicity of acquittals. The criminal procedure can only function properly if the law establishes a stable equilibrium between its two interdependent elements, namely, the judges and the jury, not only in respect of culpability but also in the matter of the penalty.

The Law of 1932 was paradoxical in that the old disequilibrium became aggravated, the jury remaining master of the facts and the judges being paralyzed in the law. It seems that instead of perpetuating the traditional opposition between jury and magistrates by this misguided reform an instrument of collaboration should have been fashioned in which those two different elements became merged in the overriding interest of justice. It is this aim which the Law of 1941 pursued in creating a criminal tribunal composed of three magistrates and six jurors (now nine) designed as a composite entity to adjudicate harmoniously over questions both of law and of fact.

It has undoubtedly introduced some very important innovations by radically changing the conception of criminal justice which had been held for more than a century. It is recalled that the principle always observed from 1791 and since the promulgation of the ***Code d'Instruction Criminelle*** was the complete separation of the jury and magistrates. Admittedly, the *président* had a discretionary power to direct the discussions and to prescribe measures of investigation which he considered necessary for arriving at the truth, but those rights were limited and no contact was allowed between the bench and the jury until the moment when the foreman (*président*) of the jury, after due deliberation, rose and with hand placed on heart read the declaration on culpability. While the Law of 19 June 1881 had prohibited the summing-up of the *président* the Code laid down with a prescribed formalism the words which he could address either to the accused or to the witnesses and the manner in which the questions should be put to the jury. Once the debates were concluded and the questions had been put, the jurors retired to their room for deliberation and they could leave it only after having voted their declaration. During the deliberation nobody was allowed to enter the room for any purpose without the written authority of the *président*. The latter could go in only if requested by the foreman of the jury who sought advice or instruction and provided that he was accompanied by counsel for the accused, the *ministère public* (public prosecutor) and the registrar.

The procedure created by the Law of 1941 reverses most of those principles.

The Declaration of Culpability

After closure of the public discussions the *président*, who is still forbidden to sum-up, reads the questions which both the judges and the jury will have to answer since henceforth they deliberate together. Such reading is not obligatory when the questions are set out in the *arrêt de renvoi* (order of the *chambre d'accusation* committing the accused for trial) or if the accused or his counsel do not insist.

The question is put in the following terms: 'Is the accused guilty of having committed the act?'

Each of the aggravating circumstances is made the object of a separate question. When aggravating circumstances are not mentioned in the *arrêt de renvoi*, or if they arise from the discussions, the *président* puts one or more special questions. If the criminal act involves a *qualification légale* other than that given in the *arrêt de renvoi* the *président* poses a subsidiary question. If the accused puts forward in excuse an act accepted as such by the law the *président* must, at the risk of nullity, put the following question: 'Is such act *constant?*' (*i.e.*, certain or unquestionable). If the accused was under eighteen years of age on the day he committed the act with which he is charged the *président* puts, also at the risk of nullity, this question: 'Has the accused acted with *discernement?*' (discretion).

The new Law has therefore preserved the method and form of questions which obtained when the jury had to give answers. Since the judges and jury are now required to deliberate together it may appear superfluous to follow the ancient formalism. However, the new legislation has the advantage of determining with precision the duties imposed on the tribunal, of defining the juridical facts which are submitted to it and thereby affording a protection, exacted at the price of nullity, to the prosecution and to the accused. It is also provided that if controversy arises in the matter of questions the judges are to adjudicate and their decision cannot be the subject of appeal.

When the *président* has declared the discussions closed he orders that the dossier of the proceedings be deposited with the registrar of the court. If in the course of their deliberation the judges and jury find it expedient to examine further the contents of the dossier the *président* can ask that it be brought into the *salle des délibérations* where it can be inspected in the presence of the public prosecutor and of counsel for the accused and the civil party (*partie civile*).

The appropriate questions having been put by the *président*, the judges and jury unite in the *chambre des délibérations* and the rule, which obliged the jury to remain together in the chamber until a decision had been arrived at, now applies to both judges and jury. The *président* instructs the chief of the gendarmerie in attendance to guard the door and nobody can enter during the deliberation for any reason without the permission of the *président*. The latter can order imprisonment for twenty-four hours if this prohibition is not observed.

The question of culpability is thus no longer confided to the jury alone but to the judges and jury acting in collaboration. After deliberating, a ballot (*scrutin*) is conducted by written voting papers (*bulletins*) and by separate and successive ballots first in respect of the principal act and, if necessary, concerning the aggravating circumstances, any legal excuse, the question of discretion (*discernement*) and finally about the existence of attenuating circumstances which the *président* is obliged to raise whenever the culpability of

the accused has been recognized. The new Law provides the same protection for the jury in the consideration of the separate questions and the requisite answers. Each judge and juror receives blank voting paper marked with the stamp of the assize court and bearing the inscription: 'On my honour and my conscience before God and before men, my declaration is . . .,' to which must be added the words '*oui*' or '*non.*' This is written at a table disposed in such manner that nobody can observe the answer marked on the voting paper. The voting papers are then folded and given to the *président* who places them in an urn designated for the purpose. The formalities are identical with those established by the Law of 13 May 1836 save that the foreman of the jury no longer collects the voting papers or counts the ballot. The *président* now performs this function in the presence of the other judges and the jury and he it is who scrutinizes the voting papers. He records the result of the ballot in the margin or immediately following the question resolved. Voting papers which are unmarked or declared null by the majority are regarded as favourable to the accused and immediately after the counting of each ballot the voting papers are burned. The declaration of the judges and jury in respect of attenuating circumstances is made only if the result of the ballot is affirmative; this was already prescribed by the Law of 9 June 1853.

The decisions common to the judges and jury are made by majority voting and the declaration of the majority is reported without reference to the actual number. In other words, the new Law conserves the provisions of the 1853 Law prohibiting on pain of nullity the disclosure of the number of votes at a time when the jury was alone the judge of culpability. The old article 352, which had been modified by the Law of 9 June 1853, provided that if the accused was found guilty the judges, when convinced that the jurors while observing the formalities had deceived themselves as to the substance, could grant a reprieve and transfer the case to a later session where it would be presented before a new jury. Although the present organization of the assize court renders this eventuality almost impossible the 1941 Law allows the *président*, instead of sending the case to another session, to request a fresh ballot whenever there is a contradiction between two or more replies. The removal of the case to another session is therefore suppressed and it is only in the event of flagrant contradiction that the *président* may ask the court to rectify the votes in question.

In consequence of the Law of 5 March 1932 the jury, after the declaration of culpability, deliberated with the judges respecting the application of the penalty, but the jurors were then twelve in number and the judges three. This explains why, in numerous cases, the preponderance of the jury resulted in the weakening of repression since the twelve jurors imposed on the court some decisions of indulgence incompatible with the public interest. To escape this danger the 1941

Law reduced the number of jurors to six so that the tribunal was composed of nine persons (six jurors and three judges).

The *Code de Procédure Pénale* of 1958 has now increased the number of jurors to nine and provides in article 359 that all decisions unfavourable to the accused, including the existence of mitigating circumstances, must be supported by at least eight votes. But the declaration merely records that a majority of at least eight votes has been achieved without disclosing the exact number.

It is recognized that the judges of the assize court study the dossier with scrupulous care and acquaint themselves in advance with the details of the case, the depositions of the witnesses and the relevant documentary evidence. Consequently, they can enlighten the court on matters which, after long discussion, might remain confused in the minds of the jury. It seems that if the jury has lost its complete independence justice has thereby gained in clarity and the public order will benefit from a repression fully reflective and well documented.

An eminent judge of the Court of Paris, M. Delegorgue, had the excellent idea, when widespread repugnance was felt for a total reform of the assize court, of allowing the *président* to confer with the jurors in order that he might give them all the explanations requisite in the course of their deliberations. Although this innovation would clearly have constituted an amelioration of the old system, nevertheless the *président* would not have been allowed to participate in the voting and it is probable that the reform would have been found insufficient in practice. On the other hand, the Law of 25 November 1941, by creating an entirely new organization, appears to have taken account at once of the double necessity of safeguarding the public order and of guaranteeing individual liberty by maintaining the principle of the jury and of assuring by the collaboration of the judges a respect for the law and the necessities of repression.

The Application of the Penalty

When the finding on culpability is affirmative the judges and jury immediately resume their deliberation in respect of the penalty. This is followed by a secret ballot in the manner described above which is taken separately for each accused. It is obvious that the gathering of judges and jury is unlikely to reach agreement easily on the appropriate penalty. The Law provides therefore that if after two ballots no specific penalty has attracted a majority of the votes a third ballot shall be taken at which the highest penalty proposed in the preceding ballot is eliminated. If at the third attempt no penalty obtains an absolute majority of votes, a fourth ballot is held and, if necessary, a fifth and sixth, always continuing to withdraw the highest penalty proposed in the preceding round, until by such process of elimination some penalty succeeds in attracting an absolute majority

of votes. Furthermore, the tribunal can order the execution of the penalty to be suspended by applying the Law of 26 March 1891. If the accused is adjudged not guilty he is set free; and when found guilty of several crimes or misdemeanours the highest penalty is the only one pronounced. In case the act of which the accused is convicted does not fall within the penal law he is absolved. If he is declared excused (or pardoned) the court pronounces accordingly in conformity with the Penal Code. If the court admits that the culprit has acted without discretion it decides on the measures relative to his disposal (*placement*) and to his supervision.

Before the 1941 Law the foreman was required to set out the declaration of the jury which was then handed by him to the *président* of the court in the presence of the jurors. Since the disappearance of the foreman this procedure can no longer be followed, but a record of the decisions taken is made on the sheet of questions and signed by the *président* and by the juror whose name was drawn first from the urn in open court. The *Code d'Instruction Criminelle* also laid down that the foreman must read the declaration of the jury in public audience after which the *président* ordered the accused to appear and the registrar (*greffier*) repeated in the latter's presence the declaration of the jury. If the accused was found not guilty the *président* pronounced the acquittal; if guilty, the public prosecutor (*procureur général*) requested (*le réquisitoire*) the due application of the law. The civil party (*la partie civile*) then put forward his claim and the accused and his counsel had the right to make observations in respect of the penalty and of the damages (*dommages-intérêts*) claimed by the civil party. Those formalities became redundant once the judges and jury were together made responsible for determining culpability and the application of the penalty.

The 1941 Law provides that after deliberating the judges and jury must return to the court-room, the *président* recalls the accused and then proceeds to read the answers given to the questions and pronounces the judgment of condemnation, of discharge or of acquittal. The replies of the assize court to all the questions which they have to answer are irrevocable.

An accused who is discharged or acquitted is immediately set free unless retained in custody for some other cause and he cannot be arrested or accused in respect of the same acts.

The Civil Reparations (réparations)

Once the discussions are finally closed on the public issue (*l'action publique*) and after requisition (*le réquisitoire*) of the prosecutor and the pleadings (*plaidoiries*) of counsel, namely, before the declaration of culpability, it is no longer possible for the civil party to intervene; questions of civil reparation are taken after the court has given its judgment. All claims for damages, whether from third parties

injured by the accused or by the accused against the civil party in the event of his acquittal,[7] are submitted to the judges alone. The latter may delegate one of its members to hear the parties concerned, to examine any relevant documents and to submit a report at a subsequent hearing where the parties will be given the opportunity of presenting their observations and the public prosecutor may again be heard.

If the accused is acquitted and claims damages against his complainant (*dénonciateur*) for the act of calumny (*fait de calomnie*), the public prosecutor must notify the latter of the claim unless the court otherwise decides. But this kind of action cannot be pursued against members of an established authority (*autorité constituée*) in respect of evidence acquired by them in the exercise of their duty, provided it is not a case of their prejudging the issue (*à moins qu'il n'y ait lieu à prise à partie*). If the accused knows the complainant he must claim indemnity before judgment—if, on the contrary, he discovers the identity of the denunciator only after judgment but while the assize court is still in session he must, under penalty of default, bring his claim immediately before the court. It is only when he discovers the identity of his denunciator after the closure of the assizes that his claim can be brought before a civil tribunal.

The 1941 Law stipulates that if convicted the accused must be ordered to pay costs to the State and to the civil party; and that a civil party who recovers damages is never liable to pay costs. If he fails in his claim the civil party is condemned to pay costs only if he has himself set in motion the machinery of justice, and even so the court may, because of special circumstances, absolve him from the whole or part of the costs.

Such then are the principal changes in the organization of the assize court which it is hoped will do much to remedy the grievances so frequently voiced against the criminal jury in the past. Experience will reveal whether or not this reform is adequate or if it might not be preferable, as some have asserted, to suppress completely the popular jurisdiction in criminal matters and to confide only to the judiciary the task of enforcing respect for law and order and of upholding the public security.

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[7] Even in case of acquittal the civil party can claim compensation for damage caused by the fault (*faute*) of the accused provided the responsible acts have been the subject of the accusation (art. 372 *C.P.P.*).