# THE LEGAL PROCURATOR

## *A Study of the Historical Background, Status and Functions of the Profession*

MR. JUSTICE M. CARUANA CURRAN, LL.D.

THE designation 'legal procurator' as known to us appears to have crept gradually into use towards the closing years of the eighteenth or in the first quarter of the nineteenth century. It may, in fact, be stated with some certainty that no reference to procurators as 'legal' is to be found in the Code de Rohan of Diritto Municipale di Malta which was promulgated in 1784 and as closely as it seems possible to ascertain, the earliest evidence of legislative recognition of this professional title is to be found in Proclamation No. XII of October 15, 1827.

Prior to this Proclamation a member of this branch of the legal profession in these Islands was known simply as a 'procuratore' or 'curiale', the latter name conveying, it appears, not so much the idea of representation of a client, as is suggested by the former term, but rather one who moves litigation in Court. Gradually the former term became more and more widely used to the extent that the word 'curiale' disappeared from current legal parlance. In this connection it may be interesting to note that though the term 'legal procurator' is now strongly embedded in the language not only of the Courts but also of the people, and though it has not been claimed for them that our legal procurators enjoy the status of solicitors in England, it is perhaps due only to one of these strange twists of history for which there is no accounting that the members of the Maltese profession are not called by the same name as their colleagues in England. Indeed we find in the Leggi e Costituzioni Prammaticali of Grandmaster Manoel de Vilhena (promulgated in 1723 and the first code to the printed in Malta) in Title VII para. 3 a provision to the effect that there had to be exposed in every tribunal a list of all 'Dottari e Sollecitatori approvati'. The word 'sollecitatori' in this context may be taken as synonymous with 'procuratori', for the next section (para. 4) debars 'Avvocati Procuratori e Sollecitatori' from entering into any agreement with their clients regarding causes entrusted to them; while any remaining doubt on this score is easily banished by para. XXVI of Title XII which, after laying down that all executive warrants had to be signed by an advocate (giurisperito) went on to concede to 'procuratori e sollecitatori approvati' the rights to obtain such warrants in cases of contumacy or cases involving sums not exceeding five 'onze', which in present day currency would be equivalent to one pound sterling. In the Code de Rohan we do not come across the term 'sollecitatore' but both 'procuratore' and 'curiale' are maintained therein.

### I – INTRODUCTION: AN ANCIENT INSTITUTION

As to the time to which the existence of this profession goes back, Sir Antonio Micallef, in the admirable comments to the Code de Rohan which he published in 1843, (Vol. I, p. 158) state that we have here a very ancient institution, and he points out that it must have existed even prior to the promulgation of the Prammatiche of Grandmasters Carafa (1681) and Lascaris (1640). This is desumed from Title 1 of the Prammatiche (or Constitutions) of Lascaris (MS No. 148 Public Library) which deals with the Mode of Proceeding in Civil Causes and contains a provision roughly similar to para. XXVI of Title XII of the Costituzioni di Manoel (supra) regarding the signature of executive warrants, here also the term 'sollecitatore' and 'procuratore' being used synonymously. Further references to the profession are to be found in the Prammatiche of Carafa (MS No. 150 Public Library), and in the Consolato di Mare di Mal-

ta of Grandmaster Perellos, promulgated in 1697 (MS No. 392 Public Library). Thus the profession may safely claim to have served the community for well over three centuries and this is no doubt a circumstance which neither the members of the profession itself, in upholding its dignity, nor the authorities, in applying such reforms as may be judged consonant with the times, can afford to overlook.

1. *The element of representation*

And as to the functions and status of legal procurators in our system of law, while only a brief outline may be attempted here, it is not hazardous to start from the fundamental point that a procurator is generally one who acts for another. In Roman Law it was recognised that even in the solemn juridical transaction of the 'iudicium' it was possible, as in any private transaction, for one person to be represented by someone else, and the term 'procurator ad litem' was applied to a person who maintained and defended an action on behalf of another. Thus there arose side by side with the representation of the tutor and of the curator, that of the 'procurator', whether 'omnium bonorum' or nominated for the occasion, such as the 'procurator ad litem' who eventually came to be placed almost on a level with the older institution of the 'cognitor'. Hence the word procurator has, in different degrees in different countries, continued to be used in codes which, like ours, bear the stamp of the Roman civil law, to denote court officials having more or less a representative character. The term is not unknown even in other countries. In Scotland the term 'procurator' still means a 'law agent' practising in the inferior courts, the Faculty of Procurators in Glasgow having a considerable membership. In England a practitioner in the ecclesiastical and admiralty courts is still called a 'proc'tor', which is after all only a syncopated variant of the term so familiar to us.

Tnis characteristic of representation goes some way, though not all, in determining the main functions of the legal procurators in our Courts. The legal relationship between legal procurator and client is similar to that between advocate and client, that is, juridically speaking it is a relationship quite 'sui generis', though it partakes both of the contract of mandate (involving representation) and of the contract 'locatio operum' (not involving representation).

The theory of the quantum of representation to be found in this juridical relationship was clearly expounded by the Court of Appeal in re Dr. Alf. Mercieca et vs. F. Bonaci pro. et noe. (per R.F. Ganado, E. Ganado and L.A. Camilleri JJ., Law Reports Vol. XXX, 1, 625) in which it was held that the employment by a trader of an advocate and legal procurator to defend him in a cause before the Commercial Court did not render the two legal practitioners persons auxiliary to the trader, in spite of the mandate conferred upon them. However much this institute has lost of its representative character there seem to be some good grounds for holding that procurators came into existence originally as representatives or agents of their client for the purpose of instituting and proceeding with a law-suit. Title XII of the Costituzioni di Manoel, which dealt with procedure and was modelled on the 'rito siculo', laid down at para. 12 that no person was to be admitted to file any written pleading or other judicial act, whether on behalf of plaintiff or defendant, unless he had exhibited his appointment as agent or procurator for that purpose. And in the preamble to Proclamation No. XII of October 15, 1872, the first attempt made under British rule to legislate for the profession, we find that one of the main objects of the law was that of providing 'for the appointment of skilful and honest Procurators to manage suits at law for those persons who have not leisure or ability to conduct their own legal concerns'.

II – Functions and Status of the Profession

Of this representative character there are still sufficient traces in our law and

procedure to warrant its being described as perhaps the main feature of the juridical relationship between legal procurator and client. Except, however, in so far as concerns the courts of inferior jurisdiction and the court of voluntary jurisdiction to which his right of audience is limited, the legal procurator must work under the direction and instructions of the advocate engaged by the client, and we do not have therefore the same relations as exist in England between solicitor and client or solicitor and barrister, the latter in that country being not only engaged but also briefed (i.e. has a summary of the facts and law-points of a case drawn up by him) by the former.

2. *Evidence before the Royal Commission*

The Royal Commission of 1911, which enquired, inter alia, into the judicial administration of these Islands, was evidently interested in the status of the profession and perhaps it would be difficult to provide a clearer and more concise illustration of what that status is than by reproducing some questions put to the Hon. Dr. Vincent Frendo Azzopardi, (later Sir Vincent Frendo Azzopardi) then Crown Advocate, and the latter's replies thereto:

'10,031. Now will you tell us about the procurators?'

The local solicitors are styled 'legal procurators'. Their status is different from that of the English solicitors. Legal procurators are admitted to the practice of their profession by a Governor's warrant, as in the case of advocates. The conditions for obtaining the warrant, are mutatis mutandis, the same as in the case of advocates. The legal procurators are not required to go through a regular course of legal studies or to obtain a university degree in law. They have to pursue a special course of study of the rudiments of civil and criminal law and of the practice of the Courts. The principal duties of the legal procurators are to assist the advocate with whom they are retained, in the proceedings of the case: to file written pleadings in the Registry on behalf of the clients, and to perform generally other services in connection with the preparation of cases by the advocates. Legal procurators are admitted to plead in the Inferior Courts. They are entitled to the same privileges, and are subject to the same disqualifications, as the advocates. Their fees in civil matters are regulated by the 'tariffi' annexed to the Laws of Organization and Civil Procedure, and in criminal matters, as in the case of advocates:

'10,033. You say that one of the duties of the procurator is to assist the counsel in the proceedings. Does that include what we call in England getting up his brief for him?'

No, that is done by the advocate, generally speaking. In some cases it may be done by the procurators when they are able to help in that line.

'10,034. But that is a question between the procurator and the advocate?'

Yes, exactly. It is not part of their duties'.

(Minutes of Evidence of the Royal Commission of 1911, H.M. Stationery Office, 1912, page 276)

The Court of Appeal in re Tabone vs. Farrugia et (per A. Dingli C.J., Naudi and Xuereb J.J., Law Reports, Vol. XI p. 506) put the situation this way: 'In law, the functions of the legal procurator are to do for his constituent, in the business committed to him, all that which according to law appertains to his profession under the direction of the advocate (where one has been engaged) and this mandate has no limits other than those flowing from the legal procurator's professional duties (Sec. 1635, Ord. VII of 1868, now Sec. 1970 of the Civil Code)'. This section states that where a person has been employed to do some thing in the ordinary course of his profession or calling, without any express limitation of power, he shall be presumed to have been given power to do all that which he thinks to be necessary for the carrying out of the mandate, and which, according to the nature of the profession or calling aforesaid, may be done by him. Thus, in the case above-mentioned, the

Court of Appeal ruled that according to Sec. 208 of the Laws of Organization and Civil Procedure) (now sec. 181(1) of the Code of Organization and Civil Procedure) the legal procurator for respondent must accept service of an appeal petition in continuation of the carrying out of the mandate (unless already revoked) in virtue of which he filed the act instituting the law-suit.

3. *Duties in Superior Courts*

In the Superior Courts the main functions of the legal procurator is to assist the advocate, to file the written pleadings, and generally to make himself useful by attending sittings, obtaining adjournments where necessary, and to await on the Court in the absence of counsel. A curious case in connection with this last-mentioned point is reported in Vol. XX, Part I, p. 59 of the Law Reports. In giving judgement, the court of first instance had decided that no fee should be taxed in favour of the legal procurator for the plaintiff as, on the cause being called, the plaintiff's counsel being also absent, the legal procurator did not appear 'to request an adjournment to do anything else that might be required of him'. An appeal was entered and a doubt arose as to whether the judgement was appealable, it being contended that the judgement was given in terms of the provisions of the then Title XVI of Book III of the Laws of Organization and Civil Procedure (Respect due to the Court). The judgement was held to be appealable and actually reversed on the grounds that (a) even if the legal procurator's omission was a contempt of court it was punishable by ammenda, multa or detention; (b) the said Title did not provide for the forfeiture of fees, nor did it contemplate such an omission by a legal procurator. The judgement, in spite of its reversal, is useful because it states in no uncertain manner a duty which no legal procurator working in the Superior Courts should transgress.

In the Superior Courts the right of the legal procurators to file the written pleadings in a case (Sec. 180(b), Code of Organization and Civil Procedure) has now come to be considered as one of his main duties, for an advocate may not file such pleadings in the Registry, and in the absence of a legal procurator, the client would, as a general rule, have to go to the Court himself for that purpose. Hence the engagement of a legal procurator has become, at least in practice, an almost unavoidable necessity. The right of an advocate to employ a legal procurator without the latter being directly engaged by the client was challenged in Dr. Ant. Caruana vs. Scerri (Law Reports, Vol. XXVI, Part I, p. 533, June 18, 1926) but the Court of Appeal (Mercieca C.J., Agius and L. Camilleri J.J.) held that according to our system of law the party who entrusts an advocate with his defence in a law-suit implicitly entrusts him also with the duty of employing a legal procurator, unless he has shown the advocate a wish to the contrary. The assistance of the legal procurator, the Court went on to say, is indispensable to the advocate in the filing of judicial acts, and the client who allows such acts to be filed by the legal procurator tacitly recognises the services rendered to him by the latter even though there have been no direct relations between them.

The signature of the legal procurator, once his services have been taken up, is required on all written pleadings together with that of the advocate, barring in commercial matters where they may be signed by the Parties (Section 178, Code of Organization and Civil Procedure). It may be interesting to compare the present state of the law on this subject with somewhat corresponding provisions of our past laws. The Code de Rohan (Book I, Chap. 7, para. 5) provided that the Maestro Notaro (the former title of the present day Registrar) of the Tribunale della Gran Corte della Castellania could not allow the filing of any act which was not signed by an advocate or by a 'curiale abilitato' and a similar duty was imposed on the Maestro d'atti of the Supremo Magistrato di Giustizia by para. 10 of Chap. XIII of Book I of the same Code. And as to commercial matters

it is well-known that though under the Consolato di Mare di Malta of Perellos, which created a special tribunal for the determination of mercantile disputes, parties could be assisted by advocates or by 'procuratori matricollati'. (Title II, Chap. XVII) the chapters appended subsequently to 1697 established severe penalties against advocates and legal procurators who held up the speedy determination of a cause (Vide Riniero Zeno, il Consolato di Mare di Malta, Casa Editrice Jovene, Naples, 1936, pp. 18, 44, 57). This was perhaps logical for a Court which had to proceed 'sine strepitu et figura iudicii'. Title XXVIII, para. 3 of the Costituzioni di Manoel, which also dealt with the Consolato and is modelled on the law of Perellos, went even further and prohibited advocates and legal procurators from taking part in proceedings before the Consolato without the special permission of the Grandmaster, and the same provision was repeated in the Code de Rohan (Book XI, Chap. I, para. 27).

An important part of the duties of a legal procurator in the Superior Courts is that he may, (and most legal procurators serve for some period in this capacity) be appointed by the Governor, in terms of Section 87 of the Code of Organization and Civil procedure, to perform in those Courts the duties of an official curator and of a legal procurator for the poor. In the former capacity he has, jointly with an advocate, to appear in and defend proceedings in the interest of a variety of persons, such as absent or interdicted persons, minors not legally represented, imbecils, uncertain persons entitled to succeed to a vacant inheritance, and others (Sec. 928, Code of Organization and Civil procedure). His responsibilities in this capacity may render him personally liable to the party represented by him and his duties are clearly set forth at Section 936 of the abovementioned Code, which provides that he has (a) to obtain for the advocate such information as to facts as the advocate shall require, (b) to file the written pleadings, (c) to be present at the hearings and (d) to afford all other necessary assistance to the advocate. Every aspiring legal procurator however, should make these aims his target not only in the official capacity above-mentioned but also when he is privately engaged.

It has been stated above that the legal procurator works under the direction and advice of the advocate. There is, semble, one case in which a legal procurator may dissent from the opinion of his advocate and this exception occurs in the case of his appointment by the court of voluntary jurisdiction under Section 502 of the Code of Organization and Civil Procedure in proceedings for the disencumberment of immovable property by the procedure of edicts (Law Reports, Vol. VII, p. 82, in re Neg. Vzo. Bugeja vs. Not. A.A. Fabri, H.M. Civil Court First Hall, per F. Pullicino J., April 18, 1874).

The only court of superior jurisdiction before which legal procurators have audience is the Second Hall of H.M. Civil Court, which is the court of voluntary jurisdiction, and as to the signature of applications filed in this court the law states (Sec. 470(2). Code of Organization and Civil Procedure) that they may be signed by the applicant himself, or by an advocate, notary or legal procurator.

### 4. *Duties in Inferior Courts*

Apart from such duties as he may take up in the Superior Courts a legal procurator is an independent practitioner in his own right in the Inferior Courts, that is, the Courts of Magistrates of Judicial Police. Indeed though advocates are by no means precluded from appearing before these Courts, and they do in fact frequently appear there the general practice is for litigants whether in civil or criminal matters brought before those courts to engage a legal procurator.

## III – Qualifications

Having traced some, if not all, of the historical background of this profession, its status, and its duties in our system of law, it would not appear irrelevant to enquire into the qualifications for its exercise, and to compare these qualifications

with those required of advocates. In the Costituzione di Manoel and in the Code de Rohan its members were often referred to as 'procuratori o curiali approvati'. There seems to be no doubt, therefore, that even in those days the profession could not, at least in theory, be practised except by those who were in possession of certain qualifications, which entitled them to a licence or warrant to that end. This licence or warrant was called the 'matricola', a word which denoted a diploma given to those who were registered as entitled to exercise an act or a profession, and hence they were also known as 'procuratori matricolati'. (Sir Antonio Micallef, loc. cit.)

What the qualifications for the exercise of the profession were is not very clear, though some light may be shed thereon. The Costituzioni di Manoel contained a Title (VIII) called 'Of Advocates and Procurators', and the first two sections thereof dealt with the qualifications of Doctors of Laws. From these provisions it appears that advocates had to obtain a warrant from the Grandmaster, and for this purpose it was required that after having qualified as a Doctor of Laws it was also necessary for the advocate (a) to register his 'privilegio' in the Gran Corte della Castellania; (b) to have practised continuously for two years with a senior advocate; and (c) to take the oath prescribed for advocates at Title I, para. XIV, before the Castellano. Unfortunately the third section quite abruptly mentions 'sollecitatori approvati' without saying what 'approvati' really meant, and there does not appear to be any elucidation of this point in any other part of Manoel's Constitutions.

A partial solution is offered by Title VII, para. 7 of the Prammatiche of Caraffa which laid down that the only persons who were entitled to carry out the 'procura ad lites' were those who were 'matricolati con gli altri procuratori o sollecitatori ed abilitati da Noi' (i.e. by the Grandmaster). Even so this provision did not indicate the qualifications required for the Grandmaster's approval.

The Code de Rohan was at least more explicit in this regard Chapter XL of Book I (also entitled 'of Advocates and Procurators') providing at para. XIX that any person seeking to be allowed to act as a procurator in the tribunals had to be of known honesty (nota probità) and sufficiently experienced in judicial procedure and in the compilation of records. The qualifications required of advocates by this Code may be briefly summed up in the words of Debono (Sommario della Legislazione in Malta, p. 241) as (a) knowledge of the civil canon and statutory laws, (b) court practice, (c) honesty and (d) warrant of the Grandmaster.

By 1827, evidently the situation in regard to the observance of the law as to the qualifications of legal procurators had deteriorated so much so that on October 15 of that year a Proclamation was published for the purpose of regulating the conditions under which the profession could be exercised. Both its preamble and its substantive part makes interesting reading. The first part of the preamble has already been quoted, but the preamble ended by saying that the Lieutenant-Governor was 'resolved to put a stop to the injurious practices of a class of men, who, without any professional skill or character, make a trade of promoting litigation, and live by harassing others with frivolous and vexatious actions or unjust defences'. The Proclamation then provided that:

1. No person would be allowed to sue out any warrant or other writ as Procurator in any of the Superior Courts or before the Supreme Council of Justice, unless he were in possession of a licence from the Head of the Government to practise generally in the Courts or Council as a legal procurator, or unless he had received from the Government an official licence to act as such in a particular cause.

2. Permission to practice generally as a legal procurator was to be granted to those who were of known honesty, furnished with sufficient experience in judicial proceedings and competently skilled in the English language.

3. The general licence under No. 1 was valid also for the Inferior Courts but these

Courts could grant special licences for particular causes coming before them to persons of known probity and sufficiently experienced in judicial proceedings.

4. Any Court had power (a) to suspend the licence of any legal procurator, in so far as it related to the same Court, on proof of fraud or malpractice in the profession, or gross negligence or incapacity; (b) to order the legal procurator to pay costs to his client in case of neglect and to the opposite party for vexatious conduct; and (c) to report the occurrence to the Government.

5. The offence of acting as a legal procurator without a licence was punishable by a penalty of 100 Scudi.

6. The final clause dealt with fees.

The Proclamation has to be read together with a Notification of June 18, 1814, whereby applications for the warrant or licence to practise the legal profession in any of its branches had to be made to the Governor and to be accompanied by a certificate signed by two judges regarding the applicant's character and ability, a provision which we still find in our law.

Knowledge of the English language had already been provided for by a minute published in the Government Gazette of May 17, 1820 and by a Proclamation of October 1, 1827, but by a subsequent Proclamation dated October 25, 1830, it was declared that, without prejudice to the Proclamation of October 15, 1827, the Head of the Government could grant the necessary licence independently of the knowledge of this language.

In substance this Proclamation brought little or no change to the qualifications as set out in the Code de Rohan, but emphasis was placed on the control and discipline of the profession.

It is also worth mentioning that by means of a letter from the Government dated November 23, 1827, the Registrars of the Courts were informed that the provisions of the Proclamation were not to be interpreted in such a way as to exclude from appearing on behalf of their constituents and principals the mandatories of absent parties, the legitimate representatives of minors, the administrators of 'luoghi pii' and others entitled by law to represent their constituents in judicial proceedings. This letter is relevant to the present subject not, of course, for its legislative value, which is nil, but as it lends strength to what has been stated above in the sense that, in its beginnings, the profession found its main element, if not its raison d'etre in the idea of representation.

Writing at a time when this Proclamation was the only law governing the qualifications of legal procurators, (in fact it was not repealed until Ordinance No. IV of 1854) Sir Antonio Micallef (op. cit. p. 160), states than on obtaining the Governor's licence for the practice of their profession legal procurators were, like advocates, to take the Oaths of Allegiance and of Office before the President of the Court of Appeal. The reference by Micallef to the Oath of Allegiance clearly indicates an innovation brought about under British rule, for under the Costituzioni di Manoel and the Code de Rohan there was only the oath 'Formula Juramenti Praestandi Per DD. Advocatus', the wording of which referred only to professional duties and this was not administered to procurators. Debono (loc. cit.) makes no reference to the need of taking any oath by procurators under those laws. It is perhaps strange that in the General Constitution of all the Superior Courts of Justice, brought into effect under the then Governor, Sir Thomas Maitland, that great contributor towards the advancement of the administration of justice in these Islands, by Proclamation No. XV of May 25, 1814, there is no mention of these oaths. But in the Constitution of the Commercial Court, which came into force, together with that of the other Courts, by virtue of the same Proclamation, we find that para. 7 provided as follows:

'All Advocates, Attornies, (procuratori in the Italian text) and other officers of the Court, shall, on their appointment to their said offices, take the Oath of Allegiance and the following oath for the due execution of their respective duties ...'

The Oath of Office was worded in substantially the same manner as the oath nowadays prescribed by section 84 of the Code of Organization and Civil Procedure.

In his comparison of the status of advocates with that of legal procurators in his time Sir Antonio Micallef (loc. cit.) states that they both occupied offices of a public rather than a private nature. Today we still find this principle enunciated in Section 31 of the Code of Organization and Civil Procedure which provides that both advocates and legal procurators when they appear before the Superior or Inferior Courts shall be deemed to be officers of the Court. He also points out these differences: (a) that legal procurators, unlike advocates, could agree with their clients regarding the fees payable to them while advocates could not demand more than was taxable to them. Section 80 of the Code of Organization and Civil Procedure provides also that an advocate may not by agreement fix his fees at an amount higher or lower than that fixed in the Code, saying when for some particular purpose of the contending party the action is restricted to an interest smaller than that on which the decision will have a bearing. This section, however, does not mention legal procurators; (b) that advocates wore a silk gown and legal procurators woollen ones. Nowadays legal procurators do not wear a gown.

*(to be continued)*