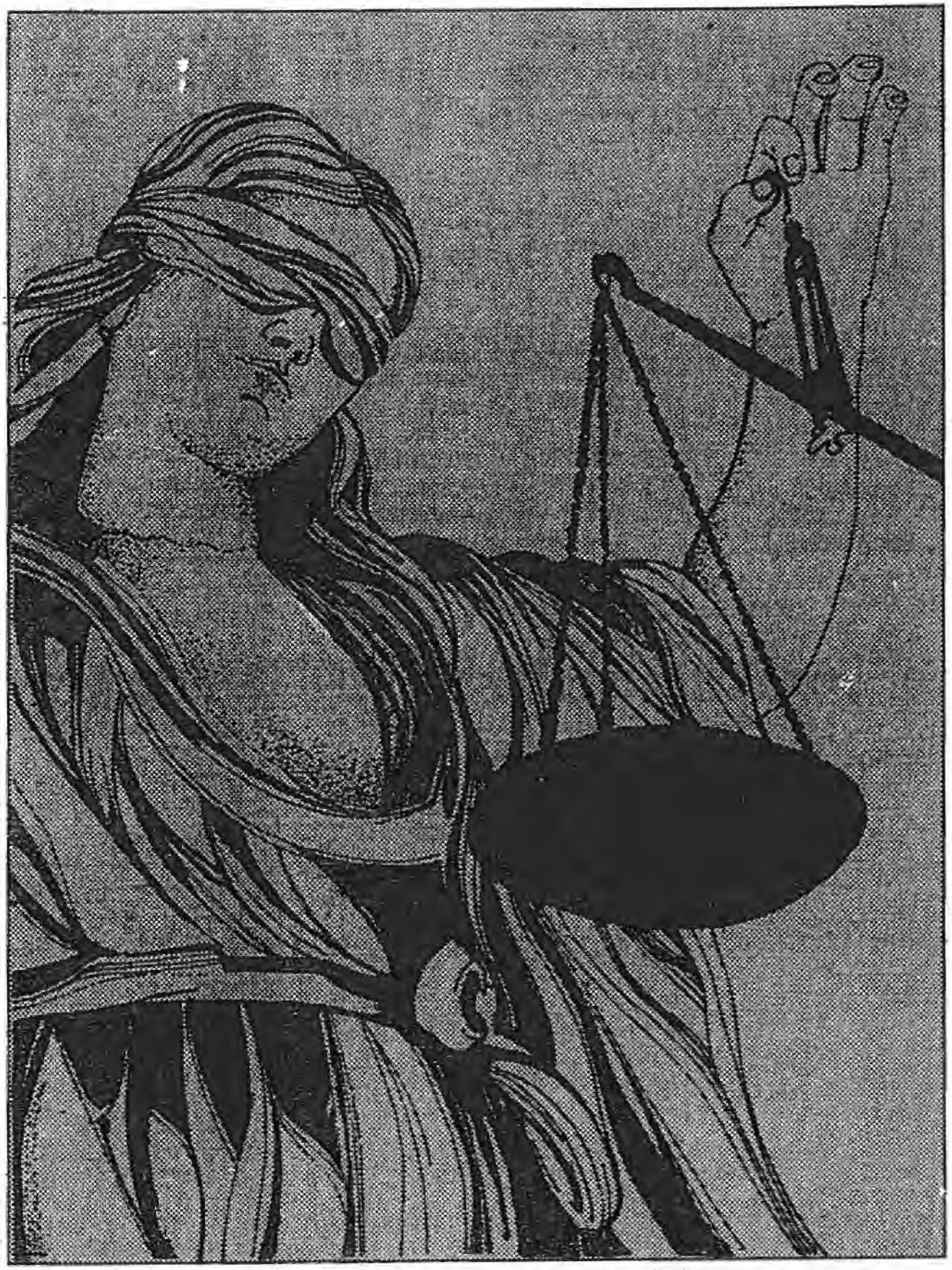
LAW JOURNAL

ID-DRITT



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VOL: IV. JAN 1975

ID-DRITT

LAW JOURNAL

organu uffiċjali ta' l-għaqda studenti tal-liġi
official organ of the university law society

We would like to thank J. Caruana Scicluna, L. Mizzi, A. Padovani, A. Pullicino, and A. Rutter Giappone for their help in the publication of the journal.

Nota Editorjali: Jannar, 1975

Din l-Edizzjoni tal-"Law Journal" ħarget wara gimgħat twal ta' xogħol iebes tal-Bord Editorjali. Ma nippretendux illi dan il-"Law Journal" hu perfett: jidhrilna biss illi ma stajniex nagħmlu aħjar fil-ħin limitat u bil-finanzi daqstant limitati li sibna quddiemna.

Il-għan tagħna kien u jibqa' illi noffru lill-Università u lill-professjonijiet legali ta' pajjiżna forum rispettabbli fejn jistgħu jiġu ippreżentati veduti u artikli fil-qasam legali. Għaldaqstant, il-Bord ħadem biex jibni għall-ġurnal sisien aktar sodi u dejjiema. Iżda Bord Editorjali ma jistax jilħaq dawn l-għanijiet waħdu. Jeħtieġ l-ewwel illi dawk kollha li jgħallmu jew jipprattikaw id-dritt f'dan il-pajjiż jifhmu li ġurnal b'ħal dan qiegħed jimla vojt li għandu jimtela. Imħallfin, Magistrati, Avukati, Nutara, Prokuraturi Legali, kif ukoll membri tal-Korp Akkademiku għandhom jagħmlu kull ma jistgħu biex il-ġurnal ma jmutx minħabba nuqqas ta' artikli. Hekk biss fil-pajjiż tista' titrawwem kuxjenza ta' Letteratura Legali Maltija. Fl-istudenti wkoll għandha titnissel dik il-kuxjenza meħtieġa sabiex iwettqu fil-kitba frott l-istudji tagħhom għall-ġid ta' kull ħadd.

Din il-ħarga tipprova tkun xhieda ta' kif il-Bord jaħsibha dwar x'għandu jkun il-ġurnal. Għamilna li stajna biex inżommu bilanċ bejn artikli ta' professjonisti u dawk ta' studenti. Ippruvajna wkoll nifthu l-kamp billi nkludejna kontribuzzjonijiet ta' "accountant", psikjatra u espert forensiku. Dan għandu jgħin lill-qarrejja biex ifittxu l-aspett legali f'dak kollu ta' madwarhom.

Il-Bord iddeċieda wkoll li jagħmel xi tibdil tekniku fil-ġurnal. Ċekkinna l-format għal daqs li nisperaw li hu aktar komdu. Għażilna wkoll disinn ġdid li, b'mod attrajenti, jippreżenta l-ideal li aħna lkoll għandna nsegwu. Fl-aħħar, biddilna l-isem: issa l-ġurnal jismu ID-DRITT. Filwaqt li żammejna d-denominazzjoni inġliża, dehrilna li isem Malti jagħti xbieha aħjar tal-kultura legali tagħna, li hija separata u indipendenti. Fl-istess ħin, l-isem ID-DRITT jesprimi bil-qawwa l-idejal tal-ġustizzja murija fl-istatwa li hemm fid-disinn.

Nisperaw li din l-edizzjoni togħġob lill-qarrejja. Fuq kollox, nittamaw li kull ħadd jikkopera f'dak li jirrigwarda artikli. B'hekk biss jista' l-entużjażmu ta' studenti jitwettaq f'edizzjonijiet oħra ta' dan il-ġurnal.

CHARLES DEBATTISTA

Editorial Note: January, 1975

This edition of the Law Journal is the result of long weeks of hard work by the present Editorial Board. It does not purport to be perfect: it purports only to be the best we could do with the limited time and funds at our disposal.

Our aim has been throughout to provide our University and our legal professions with a respectable platform for the airing of views and publication of articles in the legal field. With this in mind, the Board has set about giving the journal a stabler and more permanent basis. However, the attainment of these aims does not depend wholly on the efforts of an Editorial Board. It is imperative first of all that all those concerned with the practice and teaching of law in this country feel the necessity for the existence and maintenance of such a journal. Members of the Bench, Magistrates, Lawyers, Notaries, Legal Procurators as well as members of the Academic Corps should do their best to provide the journal with a steady stream of contributions: it is only thus that we can start to cultivate a proper sense of Maltese Legal Literature. Students too should shed all lack of confidence and get down to putting in writing the fruits of their studies for the benefit of all.

The present issue represents more or less what we mean by all this. We have attempted to maintain a balance between contributions by students and contributions by professionals. We have also widened the field by including articles from an accountant, a psychiatrist and a forensic expert. This will surely help readers 'to seek a legal aspect in the whole environment around them'.

The Board has also decided to make some technical alterations to the journal. The format has been reduced to what is hoped is a more convenient size. We have also chosen a new design which attractively puts forward the ideal we should all be following. Finally, we have changed the title to 'ID-DRITT'. While retaining the English designation, the Board has felt that a Maltese title would be a more appropriate expression of our separate and independent legal culture. At the same time, the name 'ID-DRITT' sets forth in bold black and white the ideal of justice expressed by the Statue below.

It is hoped that this issue meets with the support of our readers. Above all, we hope that co-operation will be forthcoming from all quarters in the way of contributions. It is only thus that willingness and enthusiasm of students can be translated into future editions of this journal.

CONTENTS

THE LEGAL PROCURATOR

(PART II)

MAURICE CARUANA CURRAN

The first part of this article was published in the last edition of the Law Journal.

III QUALIFICATIONS (cont.)

WHEN eventually the new Laws of Organization and Civil Procedure were promulgated (Ordinance No. IV of 1854) the qualifications set out at Sections 101 to 103 were the following: (a) Warrant from the Governor; (b) Oaths of Allegiance and Office; (c) good conduct and good morals; (d) a native born British subject; (e) possession of a Lyceum and University certificate of a good knowledge of arithmetic and handwriting, and of having, after being admitted to the University, attended therein the lectures prescribed for legal procurators; (f) practice for a period of not less than a year with a practising advocate; (g) examination by two judges and certification by them as being in possession of the above qualifications and competent to act as a legal procurator. The present Code contains no substantial divergences from the above, saving that the qualification at (c) has been adequately tightened in the sense that mere attendance at University lectures is not enough, but the applicant must be approved by the examining board of the Faculty of Law. This amendment was made by Ordinance No. IX of 1886. The qualification at (d) has been amended by the condition that the period of practice must be subsequent to the passing of the examination mentioned at (c). Approval in this examination entitles the successful candidate to a University diploma.

IV OTHER RIGHTS AND DUTIES

Now as to their various other rights and duties under the law advocates and legal procurators are subject to much the same principles and rules.

1. *Liability*

And first, taking the question of liability towards their clients the basic principle repeated in a string of judgments is that liability must be subject to the proof of malice *(dolus)* or fault *(culpa)*, and that a legal practitioner is not liable in damages merely because he is found to have acted in *error*, unless the error be so manifest

as to force to the conclusion that it was born of *culpable ignorance* or *evident incompetence* (Court of Appeal, *Cremona vs Cremona,* February 13, 1905; also *Barbara vs Notary Vella,* January 1, 1929, per Mercieca C.J., R.F. Ganado and P. Pullicino JJ., Vol. XXVII, Part I, p. 262; and more recently *Buttigieg vs Hirst noe,* February 16, 1945, per Borg C.J., Camilleri and Harding JJ.). This is by no means a far cry from para. 6 of Title VIII of the *Costituzioni di Manoel,* which, while rendering advocates and legal procurators liable in damages, costs and interest in favour of their client in the event of a cause being lost through their fault or ignorance, restricted such liability to cases of *supina, manifesta ed inescusabile colpa ed ignoranza principalmente ex defectu solemnium et formalitatis processus.*

2. *Privileged communications*.

Communications made to a legal procurator are privileged as in the case of an advocate, provided in both cases they have been made in professional confidence (Sec. 638 Criminal Code and Sec. 587 Code of Organization and Civil Procedure). The latter provision adds an important condition in the sense that the communication must be made 'in reference to a cause.' The inviolability of professional secrecy has also been extended to documents obtained in professional confidence (Law Reports, Vol. XXV, Part I, p. 799, and Vol. XXVI, Part I, p. 20). An interesting judgment is reported at Vol. III, p. 497 of the Law Reports, where the Civil Court allowed the plaintiff, in spite of objection raised by the defendant, to call as a witness a legal procurator in order to testify on facts learned from defendant's mother in the course of giving her professional assistance in certain judicial proceedings against defendant himself. The Court, admitting the evidence, held that the above quoted Section 587 of the Code of Procedure (then Section 599) referred only to circumstances learned from the parties to the suit or to facts which might affect the legal procurator's or advocate's client, but not to third parties. The legal procurator was in fact ordered by the Court to reply to all questions put to him as long as they did not affect the property or interests of defendant's mother. The point does not seem to have been tested again in any reported case and it is perhaps a matter for conjecture whether a similar ruling would be given to-day. The English practice does not seem to be in agreement with the view held by the Court, and Taylor (On Evidence, 12th Edit., Vol. I, p. 580, para 919), says that 'the pro-

tection afforded to professional confidence applies with equal force though the client be in no shape before the court.' In the case of a solicitor called upon by subpoena or otherwise to produce a document with which he has been confidentially entrusted by some stranger to the suit, if he claimed the privilege of the client, he would be protected not only from producing the document but from answering any questions with regard to its nature. He concludes by stating that though there have been precedents in which the Court has inspected the document and pronounced on its admissibility, it seems to be now settled that in strict law the judge ought not to look at the writing to see whether it is a document which may properly by withheld. Of course, in our case, the wording of the text seems to argue that the communication, to be privileged, must be made not only in professional confidence but also *in reference to the cause* and this last phrase is bound to play an important part in the determination of such an issue.

3. Pactum quotae litis

Legal procurators, like advocates, are debarred by Section 81 of the Code of Organization and Civil Procedure from entering into any agreement or stipulation *quotae litis*, which by Section 1029 of the Civil Code is declared to be void. This refers to agreements whereby an advocate or legal procurator stipulates that in the event of a successful outcome of the cause he shall receive a determined portion of the award, that is to say, he actually purchases the cause entrusted to him. In our law this was also prohibited by the *Code de Rohan* (Book V, Chap. IX, para. 1), and after the repeal of that Code, was re-introduced by Section 37 of Ordinance V of 1859, later incorporated as Section 692 of Ordinance No. VII of 1868 (now Section 1029 of the Civil Code) as far as concerns the civil law, and by Section 100 of Ordinance No. IV of 1854 as regards the law of procedure. The origin of this provision goes back to Roman Law (L. 1, para. 12 D. de extraordinaria cognitione (L. 13); L. 53, D. de pactis (II. 14). Micallef (op. cit. p. 155) describes it as an odious contract which is an impediment to the amicable settlement of lawsuits and it is, of course, absolutely below the dignity of the legal profession. In the case *Dr. G.M. Camilleri vs. W. Parkey noe* (7/9/1973) the Court of Appeal held that an agreement for fees payable to a lawyer in respect of extra-judicial services was not invalid by reason of the prohibition of the *pactum quotae litis*, there being no *lis*, and that the provisions of the Code of Organisation and

Civil Procedure relating to the taxing of fees for such services ap plied only where there is no such previous agreement.

While on this point it may be as well to recall that though ther is no express provision of law on the subject, legal doctrine ha extended the nullity of the pact *quotae litis* to any stipulation b which any legal practitioner agrees not to be paid any part of hi fees except in the event of the cause being won (Giorgi, Obbliga: ioni, Vol. III, para. 377; and our Law Reports Vol. XXVII, Part I, p 225).

V RULES OF PROFESSIONAL CONDUCT

As to the rules of professional conduct legal procurators a likewise subject to the same rules as advocates. The law on th point is to be found at Book III Title XVII of the Code of Organiz tion and Civil Procedure, entitled *Of Respect Due to the Court an of the Discipline of the Legal Profession,* the main provisions which are the following:

Section 990 provides punishment of fine (multa or ammenda) detention for contempt of Court by the use of indecent words gestures during the sitting or insulting any person.

Section 992 provides that in serious cases the Court may co demn the advocate or legal procurator to interdiction from his pr fession for not more than one month.

Section 993 provides against the use of insulting or offensi words if not necessary for the cause in any written pleading.

Section 995 directs the Courts to repress any excess on the pa of an advocate or a legal procurator in the discharge of his dutie and at the same time to ensure the most ample liberty to any adv cate or legal procurator in the discharge of his duties consistent with the law, and to repress any improper behaviour towards him.

These provisions, however, cover only cases of actual contem of court, and, saving Section 82 of the same Code and Sections 1 and 121 of the Criminal Code, which cover cases of extremely ra application, there was no provision in the law, at least up to 191 for the exercise of discipline over the profession by the Courts. Ordinance No. XV of 1913, due to the work of the Royal Commissi of 1911, which had shown an evident interest in the matter (*Minut of Evidence,* p. 218, questions 8071 to 8077 and *Report,* under t heading of The Legal Profession, para. 261, pp. 37, 38) an amen ment was brought to Section 995 empowering the Court of Appeal

inquire into any complaint made to it by the Attorney-General or by the President of the Chamber of Advocates regarding any *abuse* or *misconduct* attributed to any advocate or legal procurator in the exercise of his profession and in connection with his professional duties. The Court may repress such abuse or misconduct by reprimand, ammenda, multa, detention or temporary interdiction from the profession after allowing the practitioner full opportunity for his defence.

By a further amendment brought by Ordinance No. II of 1947 the employment of touts and any agreement between advocates, notaries and legal procurators for the sharing out between them of fees earned in respect of professional work were declared to be abuses within the meaning of the section. The right of bringing complaints before the Court of Appeal was by this Ordinance also extended to the Registrar of the Courts.

Thus between the promulgation of the law of procedure in 1854 and 1913 there was really no provision for the discipline of the profession in cases of misconduct not of a criminal nature. But it is interesting to note that by a Minute dated October 28, 1816, published in the Government Gazette, the Governor 'deemed it expedient to state to His Majesty's Judges' that they had power to suspend an advocate from his functions only for 'notorious, flagrant and evident corruption and misconduct or for actual contempt of Court', but that in all other cases they had to notify the Government of any exception taken against an advocate. The *Code de Rohan* (Book I, Chap. XL, paragraphs XXI, XXII) laid down that 'if any advocate or procurator shall put aside his integrity and honesty and shall have no other purpose but that of increasing the number of law-suits entrusted to him, or, to please litigants, shall give way too easily to their wishes, vexing others with delays and unjust claims, he shall be debarred from carrying out his functions. If he shall fall short of his other duties or fail to comply with the provisions of this chapter, he shall be liable to suspension, and all agreements entered into by him shall be void'. The Code, however, failed to state by whom these penalties were to be applied.

Under the present law both advocates and legal procurators are also subject to two provisions of the Criminal Code. Section 120 renders them liable to a fine and to temporary interdiction from their office, if, having commenced to act for one party, they shall in the same law-suit or in any other matter involving the same interest, in opposition to such party or any person claiming under him, change

over without his consent, and act on behalf of the opposite party. This provision of the Criminal Code was by no means an innovation as it was included, though in a somewhat different wording, in the *Code de Rohan* (Book I, Chap. XL, para. 10) as well as in the *Costituzioni di Manoel* (Tit. VIII, para. VII).

By Section 121 of the Criminal Code any advocate or legal procurator who shall betray the interests of his client in such a manner that in consequence of his *betrayal* or *deceitful omission,* the client shall lose the cause or any right shall be barred to his prejudice, is liable to hard labour from seven to eighteen months and to perpetual interdiction from his profession. There seems to have been no equivalent provision in the *Code de Rohan* and the provision of para. VI of Tit. VIII of the *Costituzioni di Manoel* (supra) seems to have contemplated only cases of *negligence* and not of malicious *intention.* Of course these provisions of the Criminal Code are quite formidable but there seems to be no reported case in which they have been applied.

Section 82 of the Code of Organization and Civil Procedure, moreover, provides that a conviction of any crime liable to imprisonment for a term exceeding one year other than involuntary homicide or a crime excusable in terms of the Criminal Code, shall be a cause of perpetual disability to practise the profession of advocate. The Governor may at any time remove the disability. Legal procurators are also subject to this provision (Section 86).

In paragraph V of Title VIII of the *Costituzioni di Manoel* we find a provision whereby an advocate or legal procurator, having embarked on a cause, was obliged, unless excused by a just cause, to continue his defence of it up to the last act of execution of the judgement. This provision was not reproduced in the *Code de Rohan* (Micallef, op. cit. p. 156) and finds no counterpart in the law of today, and indeed it appears to be in conflict with the principle that legal practitioners exercise their profession freely, so much so that Item No. 28 of Tariff G appended to the Code of Organization and Civil Procedure fixes a fee for the advocate who *abandons* or is abandoned by his client. Of course, there is nowadays the same restraint, but coming from a different source, that is, the ethics of the profession, as no self-respecting legal practitioner will abandon his client midway through a cause without a good reason, though he may, of course, refuse to accept any case without assigning any reason.

VI FEES

1. *How established*

As to the question of fees and other remuneration for the services of legal procurators the law thereon has also been evolved within the same framework as that concerning advocates.

Starting from the *Costituzioni di Manoel* we find therein a whole Title (XXIX) on the fees payable to judges, advocates and others, and Chapter IV of this title deals particularly with the fees of advocates and legal procurators. It contains a paragraph fixing their fees even in criminal matters, a field in which the present Criminal Code does not enter except in so far as concerns criminal cases before the Courts of Magistrates. Unfortunately, the relative Schedule C has not been revised since its first introduction in 1921 and the statutory maximum is therefore definitely on the low side. The provision of those *Constitutions* which is of greatest interest to the present subject is paragraph XVI which provided that the fee payable by the client was to be divided into three parts, two to go to the advocate and one to the procurator. As we shall see this proportion was later changed, the legal procurator becoming entitled to only a third of the fee due to the advocate. Paragraph XXIV of the same title laid down that any advocate or legal procurator who exacted a higher fee than that allowed by law was to be deemed guilty of *extortion.* The only corresponding provision in the law of to-day is Section 80 of the Code of Organization and Civil Procedure *(supra).*

In the *Code de Rohan* we do not find a separate provision dealing with fees, but the subject is taken together with the qualifications and duties of advocates and legal procurators at Book I, Chapter XL. The fees were not laid down specifically, but that there was some system of taxing them is obvious from paragraph XIII, which provided that advocates could not claim fees higher than those taxed in their favour, and that it was not lawful for them to agree with their clients in any other manner, saving their right to accept any higher reward offered spontaneously by a client.

Where, however, (para. XX) any of the parties to a suit wished to engage a procurator, such party and the procurator could come to a private agreement as to the fee payable to the latter. Micallef (op. cit. p. 160) emphasises this difference between the two branches of the profession, since advocates could not in view of the above mentioned provision of the *Code de Rohan* come to a similar pri-

vate agreement. In the absence of such an agreement the client had to pay the procurator one third of the whole fee payable to the advocate. This marked a substantial difference from the moiety of the whole fee for the case allotted to the procurator under the laws of *Manoel*, and the fee payable to the legal procurator in the Superior Courts has remained fixed at one third of the advocate's fee ever since. This provision of the *Code de Rohan* ended by stating that where the procurator was engaged by the advocate, the latter had to pay the former out of his own fee. This rule has not been reproduced. Indeed, as we have seen, the client has to meet the fee of the legal procurator engaged by his advocate.

Both the *Costituzioni di Manoel* (Title XXIX, Chap. IV, para. XXV) and the *Code de Rohan* (Book VII, Chap. XVIII, para. XXVII) contained a provision to the effect that in mercantile matters, where an advocate or procurator had been permitted to appear in the office of the *Consolato del Mare* his fee was taxable at only one third of that taxed in favour of the Consuls and Assessors.

We next come to the Proclamation of October 15, 1827 the main provisions of which have already been examined. As to the fees of the procurator it was provided therein (Section 6) that if he had carried out his duties with diligence, ability and honesty he was entitled to any reasonable fee which his client agreed to pay him, and, in the absence of such an agreement to a fee proportionate to the importance of the suit, to the time and labour devoted thereto, the financial condition of the client, such fee to be taxed by the Court of trial and to be recoverable even by an executive warrant.

It will be noted that this Proclamation did not specify any proportion between the fee of the advocate and that of the procurator. However, we have it on the authority of Micallef (op. cit. p. 160) that it was not the practice to tax the procurator's fee at more than one third of that of the advocate.

Now, as to the law today, the main provision is at Sec. 1003 of the Code of Organization and Civil Procedure which states that costs are taxed and levied in accordance with the Tariff in Schedule A annexed to that Code. Tariff G of this Schedule is entitled 'Fees Payable to Advocates, Legal Procurators and Official Curators', and No. 32 of the Tariff lays down that legal procurators shall receive one third of the fees allowed to advocates, with a few exceptions principally regarding work which either according to law or the custom of the profession is not done by procurators but by advocates. In the case of these exceptions, such as, for

example, an opinion or for drafting a deed or perusing a draft deed to be published by a notary, the law apparently does not fix any fee for the legal procurator, but it is equally true that if he does this kind of work he is not thereby doing anything which is against the law and he is therefore entitled to some remuneration as a non-gratuitous agent or as a *locator operum.* This was held in re *Parascandolo vs P.L. Lanzon* (Court of Appeal April 17, 1925 per Mercieca C.J., G. Agius and L. Camilleri JJ., Vol. XXVI Part I p. 83 of the Law Reports.)

The fees of legal procurators, together with those of advocates, when required to appear before the Inferior Courts, are fixed by No. 34 of the Tariff. Those in respect of sea-protests or proceedings concerning average in the Commercial Court are fixed by Tariff N.

As to the fees payable to advocates, legal procurators and notaries in respect of extra-judicial services, their taxation falls within the competence of the Court of Voluntary Jurisdiction under whose authority the Registrar taxes such services on the demand of any interested party, saving the right of appeal by a writ of summons, within one month, to the Court of Contentious Jurisdiction. The demand for the taxation is made by means of a note showing the services in respect of which it is demanded, and the note, if the demand is made by the creditor has to be confirmed by him on oath. (Sec. 555 Code of Organization and Civil Procedure).

The main difference between taxed bills obtained under the above-mentioned provision and taxed bills in respect of judicial fees and disbursements is that the latter provide, while the former do not, the advocate or legal procurator in whose favour they are issued with an executive title, that is, the right of recovery of the sum approved thereon may be enforced by an executive warrant after the lapse of at least two days from the service of an intimation for payment made by a judicial act, generally an official letter, provided, of course, the taxed bill has not in the meantime been impugned by the debtor. The time limit for impugning a taxed bill is also in this case one month [Secs. 251(c), 254(2), 274, 62 of the Code of Organization and Civil Procedure].

2. *Privilege*

In certain cases legal procurators, like advocates, have a privilege, that is to say, a right of preference over other creditors, even hypothecary ones, for the recovery of their fees and expenses. In our law privileges, of course, may exist over movables as well

as over immovables and they may be either general or special (Secs. 2103, 2104, 2105 Civil Code), and the privilege here under review is a special one. As far as it concerns movables it operates in favour of the advocate and legal procurator over the particular thing which is recovered by means of the action wherein they are engaged, and their fees and disbursements in respect of which are therefore so secured (Sec. 2113(d) Civil Code). As to immovables, it applies in their favour for the fees and expenses due to them in the action for the recovery of an immovable, over the immovable itself, if recovered (Sec. 2114(c) Civil Code). It was explained by G. Pullicino J., in *Dr. Caruana vs Sacco* (Civil Court, First Hall, October 13, 1899, Law Reports Vol. XVII, Part II, p. 125) that the justification of this right of preference is that it guarantees adequately to lawyers the honorarium due to them in so much as their services are beneficial to their debtor, and that it prevents the possibility of these services being exploited by third parties. This privilege was recognised in the practice of our Courts even before it was placed on the statute book by Sir Adrian Dingli through Ordinance No. XI of 1856 and is founded on the rule of equity *neminem licet locupletari cum aliena jactura* (Vide Micallef op. cit. p. 162; and Law Reports, Volume of Judgments January-June 1841 p. 166). In the first quoted judgment it was held that the privilege continues to exist even if the recovery is obtained as a result of a compromise, and in the second and older judgment the right of preference was placed higher than that of a wife claiming by a reason of dowry.

3. *Prescription*

And lastly the law regarding the prescription of the action of legal procurators for their fees and disbursements is the same as that touching advocates. Section 2254(c) of the Civil Code, in fact, states that their action, like that of notaries, architects and other persons exercising a profession or liberal art is barred by the lapse of *two years.*

The present law in this respect is somewhat divergent from the old law on the subject. The *Costituzioni di Manoel* (Title XII, para. LXVI) after laying down that the institute of prescription 'being founded on the canon and civil law,' was to be recognised by the Courts, went on to say that 'in the case of personal services such as Doctors, Surgeons, Advocates or Procurators or other privileged persons, in adherence to Chapter 62 of King Ferdinand, the right of

action for their services is prescribed by the lapse of five years'. The *Code de Rohan* (Book II, Chap. V., paras. 3, 4) fixed this period at five years during the lifetime of the debtor or one year from his death, the latter period to run *a die scientiae.*

As Micallef (op. cit. p. 315) points out this period of prescription is a 'brief' one, that is, it renders the right of action and the credit to which it relates ineffective but it does not extinguish them, and it is founded on the presumption of payment in view of the effluxion of the time determined by law. Consequently the advocate or legal procurator against whom this plea may be set up in bar may subject the debtor to the oath as to whether he can declare that he is not debtor or that he does not remember whether the sum has been paid. In the event of the oath being deferred to the heirs of the alleged debtor, the plea shall not be effectual if such heirs do not declare that they do not know that the sum is due. This rule is now laid down in Section 2365(1) of our Civil Code.

With regard to 'brief' prescriptions of this nature it is safe to state that it is now well settled that they may be set up by the official curators of an absent person or of a vacant inheritance without their being bound to take the oath under that section of the Code. There was for a long time much controversy on this point and the earlier judgments were in a contrary sense (*Law Reports* Vol. VI, p. 396; Vol. VIII, p. 471; Vol. XI, p. 254; Vol. XIII, p. 61; Vol. XXIV, II, 684; Vol. XXV, I, 624). Gradually, however, the Courts came more and more into line with the view that the right to subject the alleged debtor to the oath is only a means of rebuttal of the plea of prescription, of which the creditor is deprived in this case, thus leaving the plea unrebutted (*Law Reports,* Vol. IX, p. 459; Vol. XIII, p. 112, a judgment of Sir Adrian Dingli; Vol. XVI, p. 298; Vol. XX, I, 213; Vol. XXVIII, III, 1251; Vol. XXX, I, 27; and also *Baudry-Lacantinerie & Tissier,* Prescrizioni, p. 746; *Ricci,* Vol. V, p. 285; *Giorgi,* Vol. VIII, para. 398).

LES PROCÉDURES PÉNALES ET LEUR PUBLICITÉ DANS LA PRESSE

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J. J. CREMONA

LE problème de la publicité extensive et souvent excessive que l'on accorde de nos jours aux procédures pénales dans la presse se trouva placé au premier rang dans le monde de langue anglaise en 1949 lors de la cause célèbre américaine d'Alger Hiss. Le premier procès d'Alger Hiss se termina par un désaccord parmi les jurés et l'affaire dut être jugée à nouveau. On sait très bien que pendant le premier procès aussi bien qu'après l'acquittement du jury un déluge de commentaires éclata dans la presse américaine. De crainte que les jurés du second procès ne fussent influencés par tous ces commentaires, l'avocat de l'inculpé fit un recours en vue de renvoyer l'affaire devant le tribunal d'un autre district. Cette requête fut appuyée par un affidavit qui fit spécifiquement mention non seulement des attaques dirigées dans les journaux contre certains témoins à décharge ainsi que contre le juge et contre certains jurés, mais signala en outre 'la publication pendant les débats de prétendues preuves qui ne furent pas soumises au jury et qui, dans certains cas, furent de fait repoussées par le juge'. Le ministère public riposta en affirmant, par un autre affidavit, qu'une analyse de tous les articles parus dans les journaux pendant les débats montrait que 68% étaient entièrement basés sur des faits, 8% en faveur de Hiss, 6% contre Chambers (l'agent communiste à qui, disait-on, Hiss aurait remis des documents secrets) et 17% en faveur ou contre le juge.

Cette attitude de la presse n'est pas vue d'un bon ciel en Angleterre. Dans ce pays tout commentaire ou toute conjecture publiés dans un journal au sujet d'un procès criminel en cours sont punissables comme *contempt* (mépris à la cour) et les comptes rendus de la presse sont donc ordinairement limités à ce qui a lieu en pleine audience. Ainsi, dans un procès récent où un reporter, par suite d'une erreur de bonne foi, attribua à un témoin une déclaration que ce témoin n'avait pas faite et qui, en réalité, aurait dû être faite par un autre témoin, si la cour ne l'avait pas rejetée comme irrecevable, le tribunal décida que la déclaration du reporter se reduisait à un *contempt* en ce qu'elle constituait un faux exposé des débats d'un tribunal et aurait donc pu entraver le cours

de la justice. Alors même que la cour concéda que la déclaration incorrecte était due à une erreur de bonne foi et qu'aucun dommage ne fut causé (l'inculpé ayant été acquitté), le journal fut condamné à une amende de mille livres.[1]

La loi maltaise va plus loin encore. Tandis que la caractère public des procédures pénales reste un principe fondamental de la loi maltaise, une disposition expresse de la loi accorde aux tribunaux un pouvoir général et illimité d'interdire la publication des comptes rendus des procédures pénales *avant la conclusion des procès*. En pratique ce pouvoir est très rarement utilisé car la presse de Malte est généralement très prudente en de telles matières. Toutefois le pouvoir existe et il est clair qu'il est basé sur le désir d'éviter toute entrave dans le cours normal de la justice. Ceci s'ajoute à la doctrine du *contempt*.

En ce qui concerne la publication des comptes rendus des procédures pénales, la régle générale de la loi maltaise est contenue dans une disposition de la *Press Ordinance* (Chap. 117), qui faisant mention des actions émanant des infractions de la presse, décide que ne donne lieu à aucune action la publication des comptes rendus de tous débats dans une cour maltaise, pourvu que ces comptes rendus soient loyaux (*fair*) et que leur publication ne soit pas interdite par la loi ou par le tribunal (art. 36).

Cette immunité est basée sur des raisons d'intérêt public car c'est dans l'intérêt public que la justice s'administre publiquement. Il est d'ailleurs communément admis que le compte rendu des débats judiciaires qui ont lieu devant un tribunal exerçant sa juridiction à huis ouvert n'est qu'un élargissement de l'audience qui les entend dans la cour, audience naturellement limitée par les dimensions de la salle de tribunal. C'est en quelque sorte un élargissement de la superficie de la cour en vue de communiquer au grand public ce que le grand public a le droit de savoir.

La règle générale, établissant que la publication d'un compte rendu loyal des débats judiciaires est privilégiée, est soumise, comme nous l'avons vu plus haut, à deux conditions principales: (a) que la publication ne se trouve pas interdite par la loi, et (b) que la publication n'ait pas été interdite par le tribunal.

Toute cour de juridiction criminelle peut, par un ordre signé par le Greffier et affiché à la porte de l'édifice où se tient la cour, interdire la publication, avant la conclusion du procès, de tout écrit, qu'il soit imprimé ou non, concernant l'infraction faisant l'objet du

[1] *R. v. Evening Standard* (1954) 1 All E.R. 1026.

procès ou se rapportant à l'inculpé. Une telle interdiction ne s'applique pas, toutefois, à la publication d'un écrit contenant simplement une copie authentique d'acte d'accusation ou une simple indication du jour fixé pour la comparution, pourvu que rien ne soit ajouté qui impliquerait une expression d'opinion sur l'affaire, opinion qui aurait trait à l'inculpation de manière générale ou à l'inculpé. Si l'ordre est donné par la cour d'instruction et n'est pas annulé par elle avant la fin de l'instruction, il reste en vigueur jusqu'à ce qu'il soit révoqué par le tribunal supérieur (*Her Majesty's Criminal Court*) – après l'expiration du délai accordé à l'*Attorney-General* pour le dépôt de l'acte d'accusation – par un autre ordre signé par le Greffier du tribunal en question et affiché à l'endroit même où avait été affiché le premier ordre. Si la Police prend connaissance d'une publication en contravention d'un ordre de la cour, elle doit informer la cour qui avait pris cette mesure et agir conformément aux instructions de la cour en vue de poursuivre le contrevenant. Le simple fait de ne pas se soumettre à l'ordre de la cour rend le défaillant coupable de *contempt* et passible des peines prescrites pour un tel *contempt*, sans préjudice de toutes peines appliquables, à la suite d'un procès séparé, pour toute autre infraction émanant de l'écrit ou de sa publication.

Ces dispositions, contenues dans l'article 510 du Code Criminel, ne s'appliquaient originellement qu'à la publication des comptes rendus imprimés, mais elles furent étendues en 1880 à la publication de tout écrit, qu'il soit imprimé ou non. Elles s'appliquent nonobstant le fait que les débats aient lieu en public.

Dans d'autres cas, l'interdiction de la publication des comptes rendus des débats criminels découle indirectement de l'ordre de la cour de tenir de tels débats à huis clos. Quand le tribunal considère que si les débats avaient lieu en public ils seraient de nature à outrager les bonnes moeurs ou à entraîner le scandale, le tribunal peut faire une exception au principe général selon lequel les débats judiciaires doivent avoir lieu publiquement et ordonner alors le huis clos (art. 525 du Code Criminel).

Un pouvoir spécial est également accordé au tribunal d'ordonner l'exclusion totale ou partielle du public pendant les débats d'un procès en vertu de l'*Official Secrets Ordinance* (Chap. 82) si le ministère public fait un recours en vue d'obtenir un tel ordre, affirmant que la publication de tout témoignage qui sera donné ou de toute déclaration qui sera faite au cours du procès porteraient préjudice à la sécurité nationale. Le jugement doit toujours être prononcé en audience publique, mais le tribunal peut également

ordonner l'exclusion du public pendant l'exposé des raisons sur lesquelles est basé le jugement (ces raisons doivent, dans tous les cas, être soumises séparément par écrit), au cas où le ministère public fait un recours en vue d'obtenir un tel ordre affirmant que la publication de ces raisons serait ou pourrait être préjudiciable à la sécurité nationale.

Lorsque le procès a lieu a huis clos, le Code Criminel interdit la publication de tout compte rendu de tel procès sous les peines établies pour cas de *contempt* (art. 525). Il semble qu'en vertu de l'article 5 de la *Punishments (Interpretation) Ordinance* (Chap. 37), (qui stipule que les dispositions du Code Criminel s'appliquent à toute infraction visée par une loi particulière, sauf dans les cas de conflit) l'interdiction de la publication des comptes rendus s'appliquerait également aux procès faits en vertu des termes de l'*Official Secrets Ordinance*, lorsque le tribunal a ordonné l'exclusion du public. Il est à noter que, dans le cas où les débats ont lieu à huis clos, l'interdiction de la publication de tout compte rendu concernant ces débats n'est pas limitée à la durée même du procès, et à cet égard cette disposition est différente de celle de l'article 510 du Code Criminel qui semble considérer uniquement la sauvegarde des intérêts de la justice.

Outre les cas où la publication des comptes rendus des procédures pénales peut être interdite par le tribunal, soit directement par un ordre *ad hoc*, soit indirectement par une décision de huis clos, il est des cas où c'est la loi elle-même qui interdit ou restreint la publication de tels comptes rendus. C'est ainsi qu'un alinéa de l'article 36 de la *Press Ordinance* interdit la publication des débats ou de tout compte rendu de débats dans un tribunal maltais au cours d'un procès en diffamation lorsque la preuve de la vérité du fait diffamatoire n'est pas autorisée par la loi. L'objet évident de cette disposition est d'empêcher de porter toute autre atteinte à une réputation qui a déjà été atteinte.

Une disposition qui restreint la publication des comptes rendus des procédures pénales en vue d'empêcher tout outrage aux bonnes moeurs se trouve dans l'article 2 du *Judicial Proceedings (Regulation of Reports) Act* (Chap. 97):[2]

> 'Il est interdit d'imprimer ou de publier ou de faire imprimer ou publier:

[2]Cette loi fut modelée sur le statut du Royaume Uni portant le même titre et promulgué en 1926 (16 & 17 Geo. 5. c.61).

(*a*) Relativement à toutes procédures pénales, toute matière indécente ou tous détails médicaux, chirurgicaux ou physiologiques indécents dont la publication serait de nature à outrager les bonnes moeurs;

(*b*) Relativement à tout procès en nullité de mariage ou en séparation de corps ou concernant les effets émanant d'une telle annulation de mariage ou d'une telle séparation de corps, tous détails à l'exception des suivants:

1° Les noms, adresses et occupations des parties et des témoins;

2° Une exposé concis de l'accusation ou des accusations de la domande, des défenses ou des exceptions et des contre accusations ou des demandes reconventionnelles à l'appui desquelles des preuves ont été produites;

3° Soumissions sur tout point de droit se présentant au cours du procès, qu'il soit criminel ou civil, et la décision que le tribunal a prise sur ce point;

4° Le résumé de l'affaire par le juge et le verdict du jury (s'il y en a un) et le jugement du tribunal ainsi que les considérations contenues dans le jugement.

Pourvu que les dispositions de cette dernière partie de ce même article ne soient pas considérées comme permettant la publication d'aucune chose contraire aux dispositions du paragraphe (*a*) de cet article."

L'Ordonnance prescrit les peines pour les condamnations aux termes de cette disposition et soustrait à ses effets l'impression de toute plaidoirie, note, demande, transcription de témoignage ou tout autre document dont on se sert dans des procédures judiciares, la communication de ces documents aux intéressés du procès ou à leurs avocats ou à leurs avoués respectifs, l'impression ou la publication de toute notification ou de tout rapport conformémen aux instructions du tribunal et l'impression ou la publication de toute matière dans un volume à part ou dans un fascicule d'un recueil authentique de jurisprudence ou incluse dans une publication de caractère technique destinée de bonne foi à être diffusée parmi les membres de la profession de médecin ou d'avocat.

A propos des commentaires de la presse concernant les procédures pénales on devrait également signaler la doctrine du *contempt* et en particulier une disposition (art. 996) du Code d'Organisation et Procédure Civile qui s'applique aussi aux tribunaux de jurisdiction criminelle (voit l'article 681 du Code Criminel)

Cet article vient après plusieurs dispositions ayant trait à des cas spécifiques de *contempt* et prescrit une peine pour tous les actes ou omissions non spécifiquement prévus par ces dispositions et qui constitueraient également un *contempt*. C'est une disposition résiduelle à large portée et dont le but est d'englober tous les cas de contempt non spécifiquement prévus par la loi et en particulier tout acte ou toute omission qui entravent ou pourraient entraver le cours normal de la justice.

La question des commentaires dans la presse d'un procès en instance se présenta devant les tribunaux maltais en 1950 à l'occasion du procès de Maître Enrico Mizzi.[3] Alors qu'une action civile en dommages-intérêts intentée par lui contre l'auteur de certains articles diffamatoires dans un journal était encore en instance, Me Mizzi écrivit deux articles dans un autre journal où il refutait et méprisait les preuves du défendeur au procès. Dans son jugement, le tribunal de première instance décida que cela constituait un *contempt* et s'en rapporta à la doctrine anglaise du *contempt* dans les cas de même nature. Il cita avec approbation l'assertion de Blake Odgers que 'tout commentaire concernant une action en instance constitue un *contempt* quelque soit l'auteur; il en est particulièrement ainsi quand l'éditeur sait que le commentaire est fait par une des parties plaignantes ou par son avocat'.[4] Le jugement fut confirmé en appel, le tribunal soutenant, en vertu des principes généraux de la loi, que la publication de commentaires hostiles concernant un procès en cours constitue un *contempt* en raison du préjudice qu'elle pourrait entraîner à l'administration de la justice.

Le cas de Me Mizzi concernait des commentaires dans la presse au sujet d'une action civile en instance, mais le même principe s'applique, peut-être avec plus de force, à des commentaires de journaux ayant trait à un procès criminel. Le point fondamental est que les tribunaux ne peuvent rien permettre qui puisse dévier ou entraver le cours normal de la justice, car 'les cours d'eau de la justice' doivent, selon l'expression pittoresque de Lord Hardwicke, être tenus clairs et purs.[5]

La juridiction exercée par les tribunaux en cette matière se

[3] *The Court v. Dr. Enrico Mizzi*, décidé par la Cour d'Appel de Sa Majesté le 26 juin 1950 (*Law Reports*. Vol.XXXIV, Partie I, p.219).
[4] *On Libel and Slander*, 6 ème édition, p.431.
[5] *Re Read and Huggonson* (1742) 2 Atk. 469; 26 E.R. 683; sub nom. *Roach v. Garvan*, Dick. 794; 21 E.R. 480.

base sur le fait que tous *misreports* (comptes rendus incorrects), qu'ils soient sous la forme de commentaires ou d'informations incorrectes au sujet d'une cause qui va être entendue ou qui n'est pas complètement entendue, ou de prétendues histoires concernant l'inculpé dont le procès est en cours, sont des matières qui tendent à entraver le cours normal de la justice; mais cette juridiction ne devrait être invoquée et exercée que dans des cas graves.[6] Après le procès les débats peuvent, en tant que sujet d'intérêt public, être l'objet de commentaires loyaux et de bonne foi.[7] Il n'y aucun raison pour que ces principes qui prévalent en Angleterre ne s'appliquent pas également à Malte.

Les dispositions et les règles qui ont été mentionnées jusque-là ne sont pas toutefois incompatibles avec le principe primordial – qui est considéré comme fondamental dans la procédure pénale maltaise – de la publicité des débats criminels. Elles concilient en effet ce principe fondamental, qui est essentiel en vue de sauvegarder la liberté de l'individu, à certains intérêts vitaux de l'Etat. Les principes libéraux qui sont à la base de la procédure pénale maltaise exigent en général que rien de ce qui se rapporte à des procès criminels ne soit dissimulé à l'inculpé comme au grand public. En ce qui concerne l'inculpé, la règle est estrêmement sévère et c'est avec raison. Pour ce qui est du grand public, elle est plus flexible à cause de certaines considérations juridiques, morales et politiques. En vérité à la lumière des principes modernes de la politique criminelle, l'on doit se demander si la règle pour autant qu'elle concerne le grand public ne devrait pas être modifiée davantage.

En premier lieu la protection spéciale qui est accordée de nos jours aux enfants et aux adolescents ainsi que l'atmosphère spéciale que l'on crée dans les tribunaux pour enfants et adolescents tend à suggérer l'insertion dans la *Juvenile Courts Ordinance*

[6] *R. v. Evening Standard* (1954) 1 All E.R. 1026. Pour quelques cas s'y rapportant voir *Trial by Jury* par Mr Justice Devlin, pp. 44-45.

[7] A Malte les actes des tribunaux de juridiction criminelle ne peuvent être consultés sans la permission spéciale du tribunal, excepté lorsqu'il s'agit des parties en cause ou d'un avocat ou d'un avoué autorisés par ces parties. La même règle s'applique lorsqu'on veut se procurer des copies de ces actes; toute personne peut néanmoins examiner ou obtenir des copies d'un acte lu en pleine audience (art. 511 du Code Criminel). Voir également la disposition du paragraphe (2) de l'art. 18 de l'*Official Secrets Ordinance* (Chap. 82).

(Chap. 71 des lois de Malte) d'une disposition sur le modèle de l'art. 49 du *Children and Young Persons Act.*, 1933, du Royaume-Uni. Cette disposition porte qu'aucun compte rendu de journal concernant un procès dans un tribunal pour enfants et adolescents ne doit révéler le nom, l'adresse ou l'école d'un enfant ou d'un adolescent impliqué dans ce procès, que ce soit l'individu contre lequel ou à l'égard duquel a lieu le procès ou bien qu'il y figure simplement comme témoin, ou d'y inclure toute information qui pourrait dévoiler l'identité de tel enfant ou de tel adolescent, de même qu'il est interdit de publier dans un journal une photographie de tel enfant ou adolescent ou une photographie quelconque dans laquelle figurerait tel enfant ou adolescent. La publication de toute matière contrevenant à cette disposition constitue un délit. Toutefois une disposition remarquable confère au tribunal et au *Secretary of State* – s'ils sont convaincus qu'il est nécessaire de le faire dans l'intérêt de la justice – le pouvoir d'ordonner dans tous les cas la dispense des conditions requises par cette disposition dans la mesure spécifiée dans cet ordre. Cette disposition assume clairement que la publicité dans la presse peut être parfois désirable afin d'aider le cours normal de la justice.

En second lieu, il serait souhaitable d'effectuer quelques restrictions à la publicité accordée par la presse aux procédures pénales ou en vérité à toutes procédures judiciaires dans lesquelles se trouve contestée la santé mentale de l'inculpé ou d'une autre partie. Les effets d'une publicité sans restriction sont, dans de tels cas, et surtout dans de petits pays nuisibles non seulement à la personne dont la santé mentale est débattue, mais également – surtout lorsqu'on remonte au passé familial – à toute sa famille.

On se rend compte, toutefois, que si le principe de la publicité des procès judiciaires est abordé seulement sous l'angle de la sauvegarde de la liberté individuelle, il serait difficile de justifier une restriction quelconque à la publicité dans de tels cas car il est clairement désirable de sauvegarder la liberté individuelle de toute personne accusée devant les tribunaux, quels que soient son âge ou l'état de sa santé mentale. Au surplus on pourrait en général soutenir que les mineurs et les personnes dont la santé mentale est douteuse ont encore bien plus besoin de protection. Cette restriction nouvelle à la publicité dans les journaux ne peut être justifiée que si, en livrant des procédures pénales à un reportage etendu, on y décèle également un élément punitif on en tout état de cause un élément désavantageux à la personne dont il s'agit.

Un élément punitif est clairement perceptible dans une disposition de la *Presse Ordinance*, qui décide que dans le cas d'une condamnation pour diffamation commise par la voie de la presse le tribunal doit, à la demande de la partie lésée, ordonner dans son jugement la publication du jugement lui-même ou d'en publier un résumé comprehensif. Dans le cas d'un journal courant, la publication doit s'effectuer à titre gratuit au plus tard dans le second numéro qui suit la condamnation. Dans le cas d'un journal qui, lors du jugement ou immédiatement après, a cessé d'être imprimé ou dans le cas de toute matière imprimée autre qu'un journal, la publication doit s'effectuer, aux frais de la partie condamnée, dans un autre journal et dans un délai qui ne doit pas excéder un mois. Le défaut de se conformer à l'ordre du tribunal rend le défaillant passible d'une amende payable au plaignant. Une disposition similaire se trouve dans la loi italienne, mais pas dans la loi anglaise.

Une autre disposition de la loi maltaise concernant la publication des sentences pénales se trouve dans le *Supplies and Services Act. 1947*, qui, en énumérant les peines qui peuvent être établies par des règlements pris en exécution de cette loi pour des infractions à ces mêmes règlements, inclut parmi ces peines 'la publication des jugements prononcés contre un contrevenant aux règlements pris en exécution de cette loi, dans la manière qui y sera prescrite.' Mais en effet les *Sales of Commodities (Control) Regulations 1952*, pris en vertu de cette loi, n'ont pourvu qu'à la publication dans la *Government Gazette* (le Journal Officiel) et dans d'autres journaux locaux des noms des commerçants dont les licences ont été suspendues pour infractions à ces règlements. Il y a bien entendu d'autres lois qui pourvoient à la publication dans le Journal Officiel de la suspension de l'exercise de certaines professions à la suite de certaines condamnations ou irrégularités. De plus aux termes du Code Criminel tout jugement prononçant l'interdiction légale doit être publié dans le Journal Officiel par ordre de la cour.[8]

[8] Une autre disposition (art. 183) contenue dans la *Food, Drugs and Drinking Water Ordinance* (Chap. 54) concerne la publication, sous les instructions de la cour, des sentences pour infractions à cette loi, *mais pas dans la presse*, la publication s'effectuant en affichant un avis contenant le nom du condamné et un résumé du jugement à l'entrée du Commissariat de la ville ou du village où réside le condamné ou en d'autres places bien en vue dans cette ville ou ce village. Aux termes des *Sale*

Le fait est que, par suite de leur appétit vorace de nouvelles, les journaux d'aujourd'hui sont bien loin de se limiter uniquement à la publication des jugements dans les cas ordonnés par les tribunaux. En pratique on accorde partout une publicité extensive et souvent excessive aux procédures pénales, surtout dans les procès les plus sensationnels. On pourrait dire en effet que la publicité qui est accordée de nos jours aux débats pénaux dans la presse de la plupart des pays tend à se résoudre en une sorte d'exposition publique de l'inculpé, comme par le passé. Elle tend ainsi à prendre la forme d'une sorte de peine flétrissante. Au lieu de contempler les inculpés criminels au pilori sur une place publique parmi les cris des colporteurs et des flâneurs, on observe de nos jours d'un fauteuil confortable l'exposition des inculpés criminels dans les colonnes d'un journal. Dans un petit pays comme Malte le discrédit social que cette publicité attire à l'inculpé lui-même ainsi qu'aux autres membres de sa famille prend des proportions encore plus graves.

La question peut être posée sous la forme suivante. Est-ce que la publication dans un journal – qui n'est pas un périodique ayant un intérêt technique en la matière – d'un compte rendu fidèle d'un procès criminel (les comptes rendus infidèles sont généralement soumis aux sanctions pénales, il en est ainsi à Malte) peut être considérée comme indésirable du point de vue de la politique criminelle? Ou bien peut-on dire plutôt que la publicité accordée dans la presse en général aux procédures pénales tend en fin de compte à servir les intérêts de la défense sociale et dans quelques cas au moins se résout en une sorte de mesure de sûreté? On pourrait même voir dans cette publicité une fonction préventive. Assurément ce point peut être controversé car on pourrait soutenir qu'un compte rendu de journal concernant la perpétration d'un crime pourrait avoir l'effet de tendre d'autres personnes à commettre un crime similaire. Mais il est certain que le même danger existe dans certains films ou romans policiers qui jouissent d'une très grande popularité. Il est vrai qu'on pourrait également soutenir qu'au compte rendu de journal sur la perpétration d'un crime s'ajoute l'attrait de la réalité. Mais lorsque l'article concerne des débats judiciares on devrait toujours prendre en consideration la

of Commodities (Control) Regulations (reg. 14, para. 2) lorsque la licence d'un commerçant a été suspendue pour infractions à ces règlements, un avis notifiant une telle suspension doit être accolé à la porte de la porte de la place ou des places où il exerce son commerce.

réalité non moins incontestable de l'arrestation du délinquant et de la peine qui lui est infligée.

On pourrait aussi maintenir que même en dehors de toute fonction préventive qu'elle puisse avoir, cette publicité dans les journaux tend à fournir aux citoyens honnêtes une certaine protection en les mettant sur leurs gardes contre certaines situations dangereuses ou certaines façons d'opérer ou contre certains criminels, comme les escrocs et les imposteurs.

Ces considérations sembleraient peut-être militer en faveur de l'octroi d'un pouvoir plus etendu (plus ample que celui accordé par l'article 510 du Code Criminel de Malte) au tribunal d'interdire ou de restreindre *dans tous les cas et sans limite de temps* la publication des comptes rendus de journaux ayant trait à des proces criminels. Il appartiendrait au juge de considérer toutes les circonstances de chaque cas particulier, prenant en considération non seulement les intérêts de la justice et de la société en général mais également ceux de l'inculpé lui-même. Mais en plus des difficultés pratiques que comporterait l'exercice d'un tel pouvoir, une disposition si étendue serait peut-être considérée comme outrepassant les limites et lésant le principe de la publicité des procès criminels, qui est, et doit rester, un principe fondamental dans un pays démocratique.

La question reste donc essentiellement celle d'établir la propre mesure à laquelle la publicité des procès criminels doit être restreinte et l'on peut dire qu'à cet égard la loi maltaise n'est pas loin du juste milieu. Le problème consiste à trouver la juste mesure. Car il est indéniable qu'une publicité qui ne serait soumise à aucune restriction pourrait porter préjudice à la fois aux intérêts de la justice et à d'autres intérêts vitaux de l'état, de même qu'il est également certain qu'une publicité excessivement restreinte pourrait léser le principe fondamental de la publicité des procédures pénales. Mais une publicité réduite à une juste mesure peut même avoir des effets bénéficiaires s'étendant au-delà de la sauvegarde de la liberté individuelle. Dans une certaine mesure le condamné, en tant qu'individu, peut être – et dans la plupart des cas restera – probablement affecté defavorablement. Mais à cet égard il est bon de citer les mots prononcés par un juge anglais dans un ancien procès: 'Bien que la publication de tels débats puisse être désavantageuse à l'égard de l'individu intéressé, il est toutefois d'une grande importance pour le public d'être largement informé des débats des cours de justice. L'avan-

tage général dont jouit le pays, par suite de la publication de ces débats judiciaires, contre-balance largement l'inconvénient causé aux particuliers dont la conduite peut être l'objet du procès.'[9]

[9] Par Lawrence J. dans l'affaire *R. v. Wright* (1799) 8 T.R. à la p.298, cité avec appobation dans *Wason v. Walter* (1868) L.R. 4 Q.B. à la p.88.

SOME THOUGHTS ON NATURAL LAW AND CONTEMPORARY SOCIETY

VINCENT A. DE GAETANO

WAY back in 1950, William J. Kenealy S.J., then Dean of the Boston College Law School, delivered an address at a testimonial banquet in honour of twenty-six members of the Federal, State and Municipal Judiciary, alumni of the School of Law of Loyola University, New Orleans. The opening paragraph of the address ran as follows:

'The majesty of the law? In what does it consist? In marble columns or high-backed leather chairs or black silk robes? No. These are but external symbols of an inward majesty. Does it consist, then, in that invisible force which always lurks behind the bench: the battalions of police, the regiments of soldiers, the battleships and bombing planes, which can be summoned to put teeth into a nation's laws? No. It is not force. At least not physical force. For the true majesty of the law is more than its coercive sanction. It is a moral power, springing from a rational people's conviction that they see, enshrined in their courts, one of the few enduring elements of civilised life. It is a moral power, arising from a free people's realisation that the law is the means, under Divine Providence, of enjoying in security the inalienable rights founded in their human nature by the natural law. It is a moral power, flowing from a moral people's persuasion that the administration of just human law demands their conscientious obedience, because it is their human participation in the Eternal Law of God.'[1]

To many the whole tone and content of the above paragraph will sound archaic and overcharged with religious sentiment. It is not,

[1] *Loyola Law Review*, June, 1950.

of course, surprising that it does *sound* so. In an age where any notion of the 'Eternal Law of God' is bigotry and adherence to an objective moral code is narrow-mindedness, it might even be surprising to find anything along these lines in a modern law journal. It is, in other words, a question of fashion (using the word with all its post-Victorian connotations).

But fashion and taste, on their own, will not explain many things; they do not help us explain, for instance, the growing irreverence in certain sectors of Maltese society toward law and an increasing popular antipathy toward the judiciary, lawyers, and the legal profession generally.

A prejudice against lawyers is, of course, not an exclusively modern phenomenon. Lawyers have been excluded from every Utopia from the time of Plato to H.G. Wells. In the Middle Ages it was popularly said of St. Ives, the patron saint of lawyers,

> Sanctus Ivo erat Breto
> advocatus sed non latro
> res miranda populo.

Perhaps the traditional popular antipathy to the legal profession is a product of the natural tendency to blame human ills indiscriminately upon human leadership;[2] possible it arises from an instinctive distrust of many men toward minds more subtle than their own; maybe it springs from an unthinking resentment against the curbing of selfish desires in the interest of the common good and ordered liberty; certainly, some of it is born in an ignorance of the genuine public necessity of many legal rules which work undeniable hardship in particular cases; and undoubtedly, it is nurtured by the fact that law is still essentially the monopoly of lawyers. One will recall, for instance, the power enjoyed by, and the corresponding antipathy shown toward, the *pontifices* in the early period of Roman Law until its 'popularisation' with the *ius Flavium* and the *lex Ogulnia*.[3] Most of the adverse criticism of the legal profession is grossly unjust; some of it is richly deserved. And where such criticism is just, neither the lawyer nor the law student should emulate the ostrich and bury an unseeing head in the sand, but should face up to it and make an intelligent effort to evaluate it.

The substantial criticism can be viewed under two main head-

[2] There are twenty members of the legal profession in the present House of Representatives.

[3] Jolowicz (and Nicholas), *Hist. Introduction to the Study of Roman Law*, 3rd. ed., pp. 88-91.

ings: one of personalities and the other of philosophical principles.

One of history's most obvious lessons is this: that to the unthinking mind – which is more common than we like to admit – nothing so obscures high ideals as the unworthy personalities who falsely profess to defend them. Ex-President Nixon and some of his advisers are perhaps the most recent example of this in the field of public administration. Similarly, nothing so ruins the concept of family life and conjugal love than the selfish, cruel and unfaithful parent. Nothing so debases the beaury of the liberal arts as the skilled technician who distorts his artistry for ignoble ends. No one can harm the Church as effectively and as disastrously as unpriestly members of her own clergy. So also with the legal profession. Every lawyer, notary and legal procurator who looks upon his calling as a business instead of as a profession, and utilises his professional skill to prey upon the tragedies and conflicts of individual members of society, weakens the civic faith and loyalty of the ordinary man in the street by blocking from his sight the true nature and purpose of the law. Fortunately, since the commencement of British rule in Malta, we have had few, if any, cases of judges and magistrates removed from office for misconduct or for having forsworn their oath of office.[4] And although the legal profession does not lack members who use their profession as a screen and tool for huge financial dealings, personal revenge and political ambition, yet one may confidently assert that such persons are in a minority. Nonetheless 'legal' scandals have a shocking impact on the public mind precisely because they contradict the high ideals sincerely embraced and practiced by the overwhelming majority of the legal profession.

As harmful as such unworthy personal conduct may be, yet the second reason for the slow decline in respect for the law, the bench and the bar is probably far more dangerous, being more subtle and therefore less perceptible. I refer to the gradual infiltration of a philosophy alien not only to our legal system but to the Maltese way of life generally and the corresponding lack of enthusiasm shown in academic circles for Maltese Legal Philosophy.

I doubt, of course, whether I am justified in writing about *Maltese* Legal Philosophy as being distinct from, say, Italian, French or American Legal Philosophy. Scholasticism, utilitarianism, dialectical materialism, existentialism: these and a host of other 'isms' are philosophical currents not particular to any given ter-

[4] To-day sections 10 and 18, C.O.C.P.

ritory.[5] What distinguishes, say, American from Italian Legal Philosophy is not so much the content of that philosophy as the nationality – to use the word in its broadest and least technical sense – of the writers on the subject. Italian Legal Philosophy is distinct from American Legal Philosophy principally because there is a body of Italian writers on legal philosophy distinct from a body of American writers on the same subject.

The legal profession is both a learned and a practical one. Lawyers and judges have a responsibility both in thought as well as in conduct. The legal system of every nation is profoundly affected by the philosophy which dominates the leaders of its legal profession. Justice cannot be administered in vacuum, without regard to a fundamental philosophy of life, of law and of government. I confess to little patience with those who cannot see the place of philosophy in the law. Philosophy shapes the law, whether customary law, or case-law (*gurisprudenza*), or codified law, or Acts of Parliament. It may be difficult to see, at first glance, any philosophy in the decisions of our courts. But implicit in every decision, no less than in every sentence, where the question is, so to speak, at large, is a philosophy of the origin and aim of law and of its sanction; a philosophy which, however veiled, is in truth the final arbiter. Very often the philosophy is ill co-ordinated and fragmentary. Neither lawyer nor judge, pressing forward along one line or retreating along another, is conscious at all times that it is philosophy which is impelling him to the front or driving him to the rear. Nonetheless it is there. The same may be said of our codified law and the institutes therein contained: minority, tutorship, lease, sale, prescription, bankruptcy – philosophy moulds them all. It is not, therefore, a question of keeping philosophy out of the law, but of what philosophy shall go into the law.

It is pertinent, at this stage, to ask: what philosophy has, so far, gone into our legal system? I do not propose to draw a detailed picture of the philosophy which has shaped the legislation of these islands, and this, for three reasons. In the first place it is difficult to pinpoint with any degree of accuracy the moment in time when

[5] However, certain currents of thought can be identified with a particular territory by reference to philosophers who initially propounded or subsequently supported a particular philosophy. We still speak of, say, Continental Rationalists (e.g. Descartes, Spinoza) and German Idealists (e.g. Fichte, Schiller).

Maltese legislation properly begins.[6] In the second place neither time nor the research facilities available make possible a detailed and scientific analysis of the topic in issue. Finally, any detailed exposition would be beyond the scope of this short essay. Indeed, a general knowledge of the history of Western society from c. 700 A.D. to the time of the French Revolution would suffice for the present purpose.

The period comprised between c. 700 to 1550 A.D. (commonly known as the Middle Ages) is the period of the re-building of the Roman Empire. Western man sought to re-build this empire not on the strength of the Roman Legions but on the spiritual – and in due course of time, temporal – strength of the papacy, buttressed as it was by the Benedictine Rule and the monasteries which sprung up all over Europe. Eventually there emerged a community which was neither Church nor State, but Christendom, and which reached the apex of its internal stability in the twelfth century. It was within this political set up that the intellectual activity of Western Europe progressed, to culminate in the Renaissance. Along with the revival of literature and the arts in general we find the revival of law and of philosophy. The revival of the study of law must not, however, be attributed solely to the glossators of the eleventh and twelfth centuries. Professor Southern writes: 'Every notable pope from 1159 to 1303 was a lawyer. This fact reflects the papacy's pre-eminent concern with the formulation and enforcement of law. It was here that the papal position was strongest. At a time when the tradition of ancient law and government had been almost completely obliterated in Europe, the popes retained the elements of a legal system on which they could build. Besides this they could aim a legislative authority to which no other ruler of the West could aspire. Every circumstance of twelfth-century society favoured the rapid growth of papal law, and this growth was given a steady impulse by the great succession of lawyer-popes – Alexander III, Innocent III, Gregory IX, Innocent IV, Boniface VIII. The fundamental order of medieval, and to a large extent of modern, society owes a great debt to these popes. They brought to their

[6] Harding H.W., *History of Roman Law in Malta*, R.U.M., p. 24. But it must not be forgotten that even with the coming of the Knights the bulk of local law continued for quite some time to consist of Sicilian enactments, with the inevitable sub-stratum of Roman and Canon Law, and supplemented by the *jus commune* (itself Roman Law as interpreted through the centuries) and local customs.

task clarity of mind, firmness of principle, and a capacious practical wisdom.'[7] These factors, together with the immense authority wielded by the Roman Pontiffs and the extensive jurisdiction of the ecclesiastical courts, led to Canon Law interpreting the Civil Law itself where it was controversial, mitigating its rigour where necessary, and adapting it to the Christian outlook of life. Writing on the period immediately following the Norman conquest of these islands, Harding has this to say: 'It is (to this period) that we must look, rather than to the Roman occupation of Malta, if we wish to see the real influence of Roman Law. At that time the Roman Law had returned to its splendid heritage on the continent through the halls of the Bologna school. The religious reorganisation of Malta by the Normans contributed to its re-introduction in the Island since it placed our people, who had never completely forgotten the Roman Law and who still enjoyed a substratum of Latin culture and traditions, in continuous touch with ecclesiastics who were well versed in that law and followed its rules in many parts of the Canon Law, then, as now, applicable to Malta. In fact it was principally through the agency of Canon Law, which was partly a Romanisation of the Church's customs and partly an attempt to adapt Roman Law to Christian and Medieval customs, that Roman Law acquired predominance in Malta, for it must be remembered, in the words of Ferriere, that 'lo spirito del diritto romano, che, abbandonato a se stesso, sarebbe lungamente rimasto fuori dalle cose di questo mondo, diveniva una forza attiva ed operosa passando nei precetti del diritto canonico".'[8]

In short, as Judge Debono points out in his *Storia della Legislazione di Malta*, we owe to Canon Law 'il maggior rispetto al diritto dell'umana personalità'.

And it is precisely this philosophy, the philosophy of the individual human personality, of man as a rational being endowed with certain inalienable rights which is the target of a subtle but sustained and determined attack. Subtle because it is sweetened with words and administered in small doses; sustained and determined because of the immense energies involved in its administration. Up to a century ago man knew pretty well when a thing was proved and when it was not. And if it was proved he really believed it. He still connected *thinking* with *doing* and was prepared to alter

[7] Southern R.W., *Western Society and the Church in the Middle Ages*, 1970, p.131.
[8] Harding H.W., *op. cit.*, p.14.

life as a result of a chain of reasoning. But what with the weekly press and other such media, society has largely altered that. To-day's man has accustomed himself, ever since he was a boy, to have a dozen incompatible philosophies dancing about together in his head. He doesn't think of doctrines as primarily 'true' or 'false', but as 'academic' of 'conservative' or 'revolutionary'. Jargon, not argument, is to-day the best ally of any propaganda machine which wants to introduce a new philosophy. Make man think this new philosophy is strong or stark or courageous or that it is the philosophy of the future. The unthinking mind will accept it.[9]

In reality the conflict we are beginning to witness, on home ground, is the age-old conflict between the idea of the Absolute State (in its watered down version for the moment) and the idea of the Natural Law – a term which has been much distorted and the meaning of which has been greatly altered by both the positivist and the historical school of jurisprudence, and in our case, as in the case of most Catholic countries, by the interpretation of theocratic philosophers who saw it as a means of furthering the Church's temporal power.

We are all familiar with the philosophy of the Absolute State. Its modern name is totalitarianism, but its name is its only novelty. It is a retrogression to ancient Caesarism: the deification of the state upon the specious grounds of pragmatic public policy, to the annihilation of human personality. The public policy of the State is the alpha and the omega of all things, the ultimate criterion of truth and the last norm of right. The logical conclusion of such a philosophy is that human life, its origin and purpose, its dignity and value have significance only by the yardstick of State utility. Will is substituted for reason; law becomes organised force; might becomes right. There are no inalienable rights[10] and therefore *quod principi placuit legis habet vigorem*;[11] there are no inalienable rights because there is no natural law; there is no natural law because there is no eternal law; there is no eternal law because God is merely an appendage to political life, tolerated but not approved.

[9] See C.S. Lewis, *Screwtape Letters*.

[10] See E. Busuttil, *The Frontiers of Human Rights*, R.U.M., 1966.

[11] Ulpian, in Digest 1.4.1 pr. and 1. And the reason is: *utpote cum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem conferat.*

The origins of modern totalitariansim may be traced back to the middle of the seventeenth century and in particular to Thomas Hobbes' theory of the Leviathan State.[12] Subsequent philosophers contributed their share. David Hume's skepticism cast doubt upon the ability of the human mind to attain any objective truth. Jean Jacques Rousseau's anti-intellectualism cast aspersions upon any rational explanation of human life. Jeremy Bentham's utilitarianism repudiated the age-old norm of morality. Immanuel Kant drove a wedge between the legal and the moral orders. Herbert Spencer's sociological evolution cast aside fixed principles of morality and of the natural law. Austin's jurisprudence completed the legal bridge to the modern totalitarian State. These philosophies, and the positivistic concepts of Hegel, Marx and Spengler, melted down into an amorphous philosophy of so-called realism and pragmatism, are the ideas fighting for a secure bridgehead in Malta to-day.

That such a philosophy is essentially alien to our way of life should be patent to anyone in touch with the spirit of the Maltese people and their laws; it should be clear to anyone with an elemental knowledge of the language and substance of the declarations demanded (and often obtained, but equally often transgressed) from the rulers of these islands by the Maltese in defence of their laws and customs. In particular, the Declaration of The Rights of the Inhabitants of the Islands of Malta and Gozo (of 1802), which ushered in British Rule of Malta, contains, in a nutshell, what I submit are the essential principles of the legal and political philosophy of these islands.[13]

Modern legal pragmatists pooh-pooh the very notion of the Natural Law as a medieval fiction, which served a useful purpose in its day, but is now obsolete, and never had any objective existence. To them, therefore, inalienable rights are so much metaphysical nonsense. There are no duties in conscience because morality, in its last analysis, is merely current good taste. There are no principles; there are merely prevailing formulae of expediency. Above all there are no absolutes, that is, except pragmatic public policy, which means the Absolute State. If it works it's true; if it works it's right. A rudderless philosophy, which leads, logically and psychologically, to the philosophy of force.

[12]Hobbes propounded the theory that the ruler (Leviathan) is above the law and need not obey it. Kant was greatly influenced by the philosophy of Hobbes.

[13]See J.J. Cremona, *Human Rights Documentation in Malta*, R.U.M., 1966.

And, make no mistake about it, no philosopher in history has ever pointed out another alternative between the natural law and physical force. It has always been one or the other. If then we do not want human law, our law, to be measured by the yardstick of physical force the only alternative is the yardstick of the Natural Law. What does this latter yardstick entail?

There is involved in every practical judgement of the reason the claim that something is meet, good or right to be done.[14] That is a truth of psychology; but (to confine the discussion to a legal context) even in connection with Austin's Command Theory, which taken at its face value is brutally non-moral, Buckland says that 'he (Austin) would have agreed that the law is an outcome of many causes and that in the long run it expresses a morality ... That does not mean a moral code of conduct but a set of rules as to what the legislator thinks it desireable that people should be made to do – a very different matter.'[15] But not such a different matter that it is not similar in an important way. It is an admission that law is a judgement in terms of the good, whether that good is real or apparent. Just as every judgement, whether speculative or practical, contains an implicit claim to truth, so in particular the practical judgement claims *that it is true that it is good that something should be done.* This propositional truth, reflecting the being or nature of the situation, is what gives the ultimate form, definition or limit to the judgement. When the truth is absent the defining limit is breached; when an impossibility is asserted, openly or covertly, the judgement has passed into what the Pythagoreans called the *apeiron* – the boundless chaos where anything can be predicted of anything because everything is nothing.

Human law, therefore, presupposes and includes assertions that pretend to truth. We can account for the fact that it is not wholly reducible to them by saying that scientific laws describe being and do not depend on will, whereas human laws prescribe the good and are imposed by will in order that the good may be effected in and by the wills of the subjects. Both declare what might be called universal patterns of behaviour, but while the scientific pattern cannot but be realised, the human pattern may not be. It is this *potential* characteristic of human law which gives rise to questions about its obligation and scope, questions which ultimately boil

[14] See *The Limits of Law and Legislation* by Ivo Thomas, in *The King's Good Servant*, ed. R. O'Sullivan, 1948.
[15] Buckland, *Some Reflections on Jurisprudence*, p. 48.

down to the single question 'When is a law not a law?'

Logicians are accustomed to treat as a single 'null class' all classes which have no members, or, in some systems, those which involve contradictory notions. Similarly we may term 'null statements' in the speculative order those which state either mere falsehoods or impossibilities, and in the practical order those which prescribe as meet to be done what it is not or cannot ever be good for man to do. The law which prescribes something morally permissible but factually unsuitable has breached its defining, limiting boundary of goodness and truth; the law which is necessarily bad is altogether in the *apeiron*, the undefined, unlimited chaos of nothingness where no laws oblige, for there are no laws to oblige. It does not mean, however, that enactments which are not laws in this moral sense may not be laws in a purely legal sense, or that they may not have very practical consequences. In the logic of classes the 'null class', which by definition has no members, is a working convention which can be operated upon like other classes. The number '0' for instance may be defined as the class which has the null class as its sole member, a definition which enables the logician to generate the series of cardinal numbers. To the logic of classes the null class is as important as the cipher is to numerical calculation. The enactments of a legislator have a prima facie claim to be law in the moral sense and, even if they are outside the moral order, may make good their claim to be obligatory law in a purely civil sense.

This distinction between *necessary* and *factual* falsehood and badness is equivalent to that which Thomas Aquinas makes between laws that are contrary to divine good and those that are contrary to human good.[16] Even the latter he calls *magis violentiae quam leges*, and in their regard quotes St. Augustine: *lex esse non videtur quae justa non fuerit.*[17] Such a conception goes back to Cicero and ultimately to Plato. In fact it was Cicero who said that a commonwealth in which the common good, the *res populi*, is not being sought is no commonwealth.[18] These laws that are contrary to human good are not binding in conscience; but unlike the laws which are contrary to divine good it is sometimes permissible or even obligatory to obey them, for law is made to secure the order and peace of society. Bad law militates against that end, but dis-

[16] *Summa Theologiae*, I-II, 96, 4.
[17] *De Libero Arbitrio*, I, 5.
[18] Quoted in *De Civitate Dei*, II, 21.

obedience to it may militate against it even more. If it be not immediately contrary to divine good, bad law has broken its defining limits, but has not passed altogether beyond them. Many who will not allow jurisprudence to take account of morality fail to recognise this point, as do those who believe that insistence on a higher standard of human action than human law makes for anarchy. So far from holding that human lawas such is morally suspect, Thomas Aquinas maintains that it is in general an external source of moral principle. Even man-made law is binding in conscience. But human legislators are fallible and when their enactments are unjust they bind, if at all, in virtue of the law of nature which prescribes that a man should live at peace with his fellows in human society. To live at peace with God is a higher duty still which may involve a refusal of obedience to man-made law.

How can we assess this frontier of goodness which a law must have if it is to be genuine? No one with experience of human affairs would ask for a yardstick that would give public and uniformly acceptable assurance of the exact status of any law to which it might be applied. There are, however, some constants intrinsic to man which provide a matrix for the formation of law and a canon of its goodness. There are (a) the desire for the preservation of the self; (b) the desire for the continuance of the self; (c) the desire for the perfecting of the self. Since these desires are constants in man, it should not be thought that they represent a merely human good; they are features of human nature as it comes from the Creator. Hence, in so far as a law goes contrary to the general satisfaction of them, it will be contrary to what is good for man as such, contrary to the good of its subjects in whatever situation they may be, contrary therefore to its own nature as law, and hence lacking its due definition or limitation. It will further be contrary to what Thomas Aquinas calls a divine good.

One need hardly state that such ideas have been widely abandoned by legal theorists on a variety of grounds; partly perhaps because much of modern legislation might not show up well when compared with this standard, partly because the growth of law as a closed system has been accompanied by an independent abandonment of universally recognised moral standards by many people. If however legal theory is treated as a closed system with respect to moral theory, if legal rights are held to be ultimate and not finally to depend on moral rights, there seems no avoidance possible of making force the supreme arbiter of right and wrong.

Human law, then should be concerned with the common good of

the community. But again, the term 'common good' requires some explanation.[19]

In a multitude of ways we are all busy considering the relationship of the individual to the community and the adjusment of claims between them. The individual makes claims to rights and liberties which the community at times calls on him to sacrifice for the sake of the common welfare. Must he do so? May he resist the claims of the community? How far may he be coerced? Are the interests of the one and the many irreconcilable? How exactly are they related? These are questions of some immediate importance as we see the steady encroachment of the claims of the State on our own lives at the present time. In more concrete form the questions could be framed as follows: Is there a limit beyond which the State should not tax one or other class of its citizens? Has the Government the right to impose the closed shop by law? May the State confiscate private property? The final question which sums them all up is, of course, Is the State for the citizen or the citizen for the State?

It will help, first, to examine the nature of the group that is the State, and of its unity. Every group is constituted in view of some end. It is the end or purpose which determines the nature of a society, gives it its extrinsic form and provides its extrinsic unity, determining the direction of the society. The intrinsic unity follows, a product of that authority which arises in the society from the impulsion of the members toward a common end. This unity which exists in any society and particularly in the State is not an accidental unity such as exists in a heap of stones, or an artificial unity such as exists in a house or a machine; nor is it a unity of composition such as exists in a chemical compound. It is a unity of order, which comes into existence because of the end or the good which is being pursued. This unity does not absorb the activity of the individual members of the society, as other forms of unity do with their constituent parts, but supposes their activity, co-ordinated in view of the common end. This activity of the individuals in the society may be compared to that of soldiers in an army or to men towing a boat. There is an activity of the parts which is also the activity of the whole, such as the actual fighting or the towing. But this is not the whole of the activity of the parts.

[19] See *La Notion Thomiste du bien Commun*, by Suzanne Michel (1932), and *The Person and the Common Good*, by Jacques Maritain in *Review of Politics* (Notre Dame, Indiana), October 1946.

There is, so to speak, a residue of activity which may be concerned with other things, such as eating and sleeping, and need not be directed to the fighting or the towing.[20]

Hence a society, a group, or a State is not an organism or an organic unity in the sense that the activity of the organs is totally consumed in the activity of the organism. *It is not a substantial reality. It has no personality in the metaphysical sense.* It is not even something distinct from its members. It is simply the members themselves considered from a particular point of view, acting in a certain way. It is not an organism but an organisation. When a society comes into existence it is not a new thing that is born, but a new state of things. This point needs emphasis at the present time, particularly with regard to the power and claims of the State. The one natural God-given unit In human life is the family. Many families together make a State and the State enjoys what we call a moral personality. But the State is not and never can be a real person, nor can it enjoy a reality independent of its constituents, citizens and families. It is at most a 'fictitious personality'. As a moral entity the State exists to subserve the ends of the only realities – its citizens. And the common good of the community is the good of its constituent members and ultimately that good is the right of each to the free pursuit of the good life.

Now, as individuals, men possess certain goods, chiefly in the material order, such as wealth, health and bodily integrity. As persons they possess certain rights such as the right to life, the right to truth, the right to found and rear a family, the right to possess property. And since a society is a unity of order among not merely individuals but among persons, the good of the society must be related in some way to personal goods and rights. The common good of the group cannot be compared to the good of the one quite in the same way as the whole is compared to the part, or as a society is compared to its members. The society has no personality while the members are persons. Yet the society is in some way the support and defence of personal goods and the maintainer of personal values. Hence we cannot too easily say that the personal good of a single member must override the common good of society. There is a scale of values in which the protection of the personal rights of the totality takes precedence over the protection of those of the single person: while the personal good of the one transcends the individual good not only of the one but also of the many. We

[20] *Summa T.*, I, 3, 1.

should, therefore, say that the relationship between private good and common good is both quantitative and qualitative. The test of value is quantitative only in defect of a qualitative criterion, or rather, within each qualitative sphere or range. Hence, the good of the one, considered as an individual, is subject to the good of the many. There is a quantitative relationship, and in a conflict of interests the good of the one may be ogliged to yield to the good of the many. But the good of the one, considered as a person, can never be sacrificed for the good of the many.

How does one relate these ideas to modern legislation? Once more I will evade any detailed examination of recent drafting, proposing the application of the test of the common good in a general way.[21]

Let me take a couple of examples. The right to property, for instance. This is a personal right which the community may not deny to one of its members. Immediately one thinks of schemes of nationalisation. Clearly any form of nationalisation which would destroy the personal right to property, for example the total nationalisation of land, would be contrary to the common good. There are, on the other hand, forms of nationalisation which can be justified when *really necessary* for the common good: public utilities, communications, vital industries.

Take also the right to truth. Just as a single human being is bound to avoid the lie in treating with another because the other has a personal right to the truth, so is the government of a State in dealing with its citizens and more especially in dealing with other governments. This must be specially underlined at a time when the public lie has become a deliberate instrument of policy in the domestic and international practice of numerous governments.

The above are, briefly, what I believe to be the basis of the philosophy of the Natural Law, a philosophy as old as the thought of civilised man. Sophocles, Plato, Aristotle; Cicero, Tertullian, Justinian; Jerome, Ambrose, Augustine, Albertus Magnus, Thomas Aquinas, Vittoria, Suarez, Bellarmine; Bracton, Langton, Coke, Blackstone, Burke; Marshall, Storey, Kent, Maritain and a host of others have contributed to its development.

The philosophy of the Natural Law is not specifically Catholic, or Protestant, or Jewish. It is the philosophy which is logically *antecedent to the theology of every religion.* It is the philosophy of

[21] See *The Common Good in Law and Legislation* by Andrew Beck, in *The King's Good Servant*, ed. R. O'Sullivan, 1948.

the pagan, in the classical sense of the word pagan, namely, he who worships God although without the benefit of supernatural revelation.

This philosophy maintains that there is in fact an *objective moral order*, to which human societies are bound to conform, and upon which the peace and happiness of personal, national and international life depend. The mandatory aspect of the objective moral order we call the Natural Law. In virtue of the natural law, fundamentally equal human beings are endowed by their Creator with certain natural rights and obligations which are inalienable precisely because they are God-given. They are antecedent, therefore, both in nature and in logic, to the formation of civil society. They are *not* granted by the beneficence of the State.

The construction and maintenance of a *corpus juris*, implementing the Natural Law, is a perpetual and monumental task demanding the constant devotion of the best brains and the most mature scholarship of our legal profession. For the fundamental principles of the Natural Law, which are as universal and immutable as the human nature from which they derive, nevertheless require rational application to the constantly changing political, economic and social conditions of society. The application of the Natural Law *postulates* change as the circumstances of human existence change. It repudiates a naive and smug complacency in the *status quo*. It demands a reasoned acceptance of the good, and a reasoned rejection of the bad, in all that is new. It insists upon a critical search for the better. It demands an exhaustive enquiry into all the available data of history, politics, economics, sociology and every other pertinent front of human knowledge.

And, for primary importance, it insists that the construction of a better *corpus juris* be made in the light of the origin, nature, purpose and limitations of the State; and in the knowledge of the origin, nature, dignity and destiny of man.

THE MERITS AND DEMERITS OF THE JURY SYSTEM

ROGER DE GIORGIO

This is a short paper delivered by the writer at a forum on the jury system organised by the Royal University Law Society last year.

THE Jury system is a subject of great controversy. It has been enthusiastically praised and vigorously criticised. Advocates of the jury system proudly refer to it as the democratic institution par excellence by means of which justice is ideally administered. Admirers of trial by jury were full of praise for the system. Lord Camden said 'Trial by jury is indeed the foundation of our free constitution, take that away and the whole fabric will soon moulder into dust. These are the sentiments of my youth – inculcated by precept, improved by experience and warranted by example.' However the jury system has in recent years come under severe attack and eminent critics consider this system as being out of date. They claim that in many ways present day juries do not serve the true aims of justice.

The pre-eminent merit of the jury lies in its composition. Sec. 597 amended by Act 23 of 1972 states 'Every person of the age of 21 years or upwards residing in Malta or its dependencies being a citizen of Malta shall be qualified to serve as a juror provided such person has an adequate knowledge of the Maltese language, is of good character and is competent to serve as a juror.'

By opening the gates completely, our legislators quite rightly opted for a jury that would be truly representative of the whole community.

It consists of a group of independent members of the community, with no interest in the case under consideration. The jury may be considered the microcosm of the community, reflecting the attitude of society. The jurors are the representatives of the community. The people trust and sympathise with them, and as such their verdicts are more readily accepted by the public.

It is felt that since the judicature is appointed by the executive, the sympathies of the judges are likely to be on the side of the authorities. Thus the layman's conscience is more at ease when confronted with the verdict of the jury than that of a sole judge.

The jury prevents the state from manipulating the strings of jus-

ice to its own ends. This is of paramount importance in cases with political overtones. In such offences as treason, unlawful assembly and sedition the jury serves as a check on the state and police. This safeguard to political oppression was of more importance previously, since judges were held during the king's pleasure. It has lessened in importance nowadays that the impartiality and independence of the judges is an entrenched provision of our Constitution.

The Jury system ensures that power is not centralised entirely around one man. Being fearsome of granting power to one person, society willingly accepts this distribution and check on power by leaving the verdict entirely to the jurors. Indeed wouldn't the verdict as expressed in the isolated opinion of one man be highly undemocratic?

The presence of jurors ensures utmost clarity in the proceedings, thus making certain that the presentation of arguments are easily understandable to the ordinary man. This is in keeping with Lord Hewart's legal maxim that 'justice must not only be done but it should manifestly be seen to be done'. After all it is the lay conscience which must be satisfied.

The jurors are best suited to administer justice, for by being disinterested adjudicators they are highly qualified to reach the impartial verdict society expects from them. The jury system is closely linked with the liberty of the subject, indeed admirers have proudly referred to it in such glowing terms as the 'bulwark of liberty' and 'lamp of freedom'. The reason why it is regarded as a main liberty of the subject is that it guarantees that nobody shall undergo severe punishment until guilt has been proved beyond doubt in the minds of nine ordinary men and women.

The Jury system gets people involved in the administration of justice. It gives a certain amount of power and of popularity to the administration of justice which could hardly be derived from any other source.

However in spite of the above mentioned merits which are by no means an exhaustive list, the jury system has in recent years come under vigorous attack. It has disappeared almost completely from the civil courtroom and is only used in the more serious criminal cases. Indeed some authorities even doubt whether it will be with us in any recognised form by the end of this century.

Critics mainly question the sacrosanct principles of the secrecy

of deliberation and absence of declared reasons for verdicts reach ed. We possess no information on how and why juries arrive a their verdicts because no one is allowed to listen to the discus· sions in the jury room. Is therefore our confidence in our presen system essentially a matter of faith? Would public confidence it the system be undermined if an impartial investigation of how th system works were carried out? Why do we protect this social in stitution from rational enquiry? Could investigations reveal that i wasn't doing its job?

The jurors at times encounter great difficulty in comprehendin evidence in commercial fraud cases and cases when plea of insa nity is raised. In above cases I submit that the jury may at time be a hindrance rather than a benefit to the administration of just ice. In cases of commercial fraud the jury (if to be used at all should consist of a number of accountants chosen from a specia panel. To leave the verdict in the hands of ordinary men and wo men lacking a rudimentary knowledge of accounts could result in perverse verdict. Where plea of insanity is raised, a jury can even convict in the case of unanimous medical evidence that accuse was insane. Can the jury absorb the expert evidence given to then by medical experts? The sacrosanct principle of unreasoned ver dicts prevents us from answering this question. However, to allov doctors a final say in determining insanity of accused would b dangerous for by so doing the doctors would be substituting th jurors and would thus become judges of a point of fact themselves

Prejudices of jurors affecting verdicts could be a common occu rence. Indeed the high number of acquitals in motoring offence has strengthened the English bar council proposals that offence of dangerous and reckless driving should be tried solely in magis trates' courts. In sexual offences feelings of abhorence on part o jurors could give rise to prejudices against the accused leading t a conviction not justified by the evidence.

Prejudices against the police could lead to doubtful acquitals Indeed a man may be suspected of dishonesty merely because h is a policeman. At times jurors avenged themselves for a past in jury sustained at the hands of the police.

My intention in reviewing a number of merits and demerits o the jury has been simply in the hope that this will stimulate de bate, and provoke argument from the members of the audience wh I am certain have a lot to add and comment upon.

Ever since the introduction of the jury system by Maitland in 814 after our ancestors voluntarily petitioned for trial by jury, we Maltese have rightly been proud of the successful way in which his system has functioned. I submit that the jury system has unique advantages which outweigh its inconveniences and thus our way of administering justice in the criminal courts should not be changed without conclusive demonstration that it has ceased to work well. Everybody wants legal procedure to be just and I believe that the existing jury system has done great justice and should only be replaced when a more ideal system of administering justice emerges.

PAY AS YOU EARN – AN ADMINISTRATIVE OUTLOOK

C. A. FENECH

THE legislation which introduced Pay As You Earn in Malta came into effect in January of 1973 which is the basis year for year of assessment 1974.

It is not my task to explain the merits and demerits of the system as that is the province of the economist and politician. My chief concern is with laying down in simple terms its administrative aspects from the standpoints of the three parties involved, namely the CIR, the employer and the tax payer.

PAYE is a system of deduction of tax at the source whereby the employer deducts the appropriate Income Tax from the wages, salaries and other emoluments paid by him to his employees at the time of payment and accounts for the tax so deducted to the Inland Revenue Department. Late in 1972 all employers were asked to submit a list of their employees to include details of their current rate of pay. From these figures, or from the last assessment raised where available, the department computed each individual's estimated tax liability for the year of assessment 1974, expressed the result as a percentage of his annual pay and notified the rate so computed, to the employers.

As from the end of the first week of January 1973 the employer applied these various rates to his employees' remuneration, deducted the tax, paid out the balance to the employees, and re-

tained the tax so deducted for subsequent remittance to the CIR. An extract from the books will explain the accounting procedure involved.

DEDUCTORS LTD.

Wages Sheet W. E. Friday 5th Jan.

NAME	CLOCK NO.	I.T. REG. NO.	ORDINARY TIME	OVERTIME	GROSS
C. Borg	A 256	P.29913	£M10.00	£M10.00	£M20.00
A. Vella	A 257	P.28430	£M10.00	£M 10.00	£M 5.00

	PAYE RATE	TAX	N.I.S.	NET
C. Borg	8%	£M1.60	£M0.60	£M17.80
A. Vella	5%	£M0.75	£M0.60	£M13.63

A PAYE account is kept to which is credited the tax deducted during the month. On remittance the cash amount is debited.

PAYE ACCOUNT

31.1 To Balance c/d	£M8.60	5.1 By wages	£M2.35
		12.1 By wages	2.95
		19.1 By wages	1.50
		26.1 By wages	2.00
	£M8.60		£M8.60
10.2 To Cash	8.60	1.2 By balance b/d	8.60
		2.2 By wages	2.50
		9.2 By wages	1.50

Not later than the 10th day of every month, the employer is requested to submit to the Inland Revenue Department a return of all his employees' gross emoluments and deductions of tax made during the previous month. A specimen follows:

DEDUCTORS LTD.	*Return for month of February*			
C. Borg 1050, High Street, Qormi	I.T. No. P.29913	£M70.00	8%	£M5.60
A. Vella 902, Tower Road, Mosta	P.28430	60.00	5%	3.00
				8.60

Payment of the total tax accrued to the CIR will of course accompany the return.

The employer is also required to keep a TAX DEDUCTION CARD in triplicate for each employee. In it are entered details of gross remuneration, tax deducted and balance for each week (or month for salaries) of the year. The original is returned to the Inland Re-

venue Department early in the following year, one copy is given to the employee and the other retained.

The employer is further obliged to furnish his employees with details of tax deducted from each emolument paid. The tax payer i.e. employee is well advised to conserve these TAX DEDUCTION SLIPS for they may have to be produced on request.

All the above mentioned and any other necessary forms are supplied free by the department. In the case of a newly employed person who has not been 'rated' the employer is required to send in a REQUEST FOR RATE form containing the person's particulars and annual pay. The department normally takes the necessary steps to send for the employee, and after verifying his total income and applying his personal reliefs, the appropriate deduction rate is fixed and advised to the employer. If, at pay day, a rate will not have been advised the employer is bound to apply a flat rate of 10% after applying the test laid down in Rule 4 of L.N. 70/1972.

Therefore, in the case of persons who have never been taxed before and who are newly employed and whose tax liability is substantially lower than ten per cent of their yearly emoluments, it would be in their interest to apply beforehand personally to the Inland Revenue Department for a rate.

During January of every year every person is required to submit a return of income earned during the previous calendar year. Any PAYE deducted during that year is then set off against his assessment and any underpaid or overpaid tax is paid to and refunded by the DIR and the rate revised accordingly. Speed is of the main essence here and the practical results of this section of the system remain to be seen. The rest of the system seems to be working very smoothly and has been accepted generally.

The EMPLOYEE has come to regard PAYE as an escape from the past terror of being suddenly faced with the unexpected demand for a lump payment of tax.

To the EMPLOYER the administrative cost per employee is considered trivial and only a mere addition to an already existing series of statutory statistical returns.

The INLAND REVENUE DEPARTMENT receives the full benefits

1. Faster flowing revenue
2. Elimination of arrears
3. Practically total eradication of tax evasion by wage and salary earners
4. The shifting of a sizeable portion of a massive administrative burden on to the employer.

MEDICAL TESTIMONY AND THE MEDICAL WITNESS

By courtesy of the Editor, St. Luke's Hospital Gazette

J.L. GRECH

IN preparing this brief talk on 'Medical testimony and the medical witness', I could not avoid recalling the prevalent view that the court is indeed the best friend of honest men. I find it difficult to reconcile this belief with the other view that 'The honest witness is the lawyer's easy prey'. It is probably this element of contrast, and the adoption of surprise tactics perhaps, that renders the box between bench and bar so uncomfortably restrictive. It is also perhaps a lack of adaptation mingled with a touch of unpreparedness that leads to such a poor show before a full and critical gallery. At times too, it is made pretty obvious that the important role the medical witness was to play had to be taken up only through force of circumstance, seemingly a last minute imposition, rather than out of a desire for the fulfilment of an onerous responsibility.

It is superfluous for me to attempt to justify the necessity of the Courts to seek the aid of medical evidence and expertise in order to mete out justice clearly and possibly faultlessly. The Courts have had recourse to expert evidence, especially on medical matters, even centuries before Christ, and certainly the oldest known document which deals specifically with legal medicine is the manual Hsi Yuan Lu (Instructions to Coroners) first published in China in 1250 A.D. In the course of time, and with the foundations being well laid in Europe by Paolo Zacchia in the 16th century forensic medicine rapidly evolved as a distinct subject of study. The advances achieved in medicine and science were readily adapted with great profit to forensic problems so that modern legal medicine has come to play a very important role in Courts. This is so not only in Criminal Courts but also in Civil and Ecclesiastical.

In common law countries, but no less in Malta under our legal system, medical practitioners are often requested to present medical facts related to a case before the Courts. Such evidence, in general, may only be obtained in its entirety and in its specific context from the medical practitioner responsible for the care and treatment of the subject to whom such evidence relates. The problem of professional secrecy involved in revealing certain medical

data is not considered here. I wish to discuss briefly the element of uncertainty with which the medical witness may be faced. There is no doubt that the Courts in ascertaining facts concerning the the medical status of an individual will virtually consider such evidence as that of an ordinary witness, although the establishment of these facts requires more than common knowledge and ordinary experience. Thus the relating of such facts arising solely from the practitioner's professional activity should place him, I submit, in a class apart from that of the ordinary witness. This immediately raises a difficulty in so far as much of the medical information established in the course of medical practice, is by and large, also a matter of medical opinion. Thus, far too often, it is difficult even for the doctor himself to distinguish sharply where matters of fact end and where his sound opinion begins. It may therefore, be even more difficult for the presiding judge or magistrate to draw the line of demarcation. This places the medical witness in the uncertain position that at one moment he is just an ordinary witness, and an expert witness the moment he answers the next question. Medical practitioners often enough fail to appreciate their legal position in the witness box, so that their testimony becomes confused and loses much of its evidential value.

If the medical witness wishes to fulfil his duties honestly and with the dignity expected of him by reason of his profession, he must then appreciate what is the essence of good testimony. There is no doubt that it should reflect the high degree of care he employed at the time he attended his patient but also the degree of care with which he prepared his evidence. He must be fully aware of the facts without which it would be impossible to reason soundly and reach the valid and correct conclusions in which the Court is really interested. Sec. 649(2) of our Criminal Code lays down that it is 'the facts and circumstances on which the conclusions of the experts are based' which should be submitted in the report. The mere submission of a report, oral or written, does not terminate his responsibility as a professional witness. It is essential that simple, clear and careful explanations of the various factors on which opinions and conclusions have been based should be presented by the expert as required by the Courts. This may often call for an element of spontaneity and inspiration which leaves its indelible impact particularly on a jury. In the face of stiff cross examination, intelligent anticipation is an important requisite while utilising every opportunity offered to drive home the significant

and salient points on the matters in question. If the facts have been examined cursorily without proper study and evaluation, it takes little effort on the part of the defence or prosecution to expose the incompetence or unreliability of the witness.

Doctors are generally required to give their professional or expert evidence particularly in the Criminal Courts under our system as independent witnesses. This frees the witness from having to go the rounds to sell his wares of expert testimony as often happens in Common Law countries under the adversary system. He is thus at an advantage in so far as he then necessarily makes truth his objective and does not take a partisan attitude. Hence honesty and objectivity ought not to be difficult to achieve. He should however, not go beyond the implications of the facts which he is in a position to prove, or beyond an impartial opinion based on them. The innocence or guilt of an accused has nothing to do with him in his capacity as a witness, and any bias shown in either direction will serve to weaken the force and value of his evidence. As Judge Lord Campbell said at the trial of William Parker in 1856: 'It is indispensable to the administration of justice that a witness, an expert witness, should not be turned into an advocate, nor an advocate into a witness.'

Honesty cannot be dissociated from objectivity. Both should be revealed unmistakeably in the expert's approach to the exploration of the available facts as well as in their interpretation Medicine, we all agree, is not an exact science. This makes it more than essential that the medical witness should present a fair appraisal of his observations. It then becomes incumbent upon him to present a frank statement of the limits of accuracy within which he is speaking, and to indicate, whether he is asked to do so or not, what his evidence does not prove or suggest as likely. This implies that the expert witness should be capable of discriminating between what in his evidence is merely evidential from what is probative and therefore based on unassailable facts beyond any scientific doubt. It is essential that certain established facts which are not absolutely relevant should not be unduly emphasised so that the points at issue remain clearly understandable by anyone who learns them even at second hand. The purpose and attitude should be such that they leave no shades of doubt as to the unimpeachable ethical conduct of the medical witness in the stand. The admittance of doubt or of possibilities in the light of new established facts does not detract from the competence of the witness, but

serves to add credit to his impartial conduct, and to his credibility.

It may be useful at this juncture to remark that at times even when a medical witness achieves this ideal in medical expertise, personal pride may be hurt. He may end up disillusioned because even though his testimony was unassailable and unimpeachable it may be relegated to a mere few sheets of transcription in a voluminous document. It must be appreciated that medical, scientific or expert evidence need not of necessity prove of paramount importance as the proceedings evolve. Even circumstantial evidence in some cases may dominate the case for the defence or prove incriminating, or may even go so far as to contradict unequivocally the expert evidence. This is acceptable because the Court is bound by Sec. 558 of the Code of Organisation and Civil Procedure wherein it is laid down that 'in all cases the Court shall require the best evidence that the party may be able to produce.' And further, Sec. 652 of the Criminal Code explicity lays down that 'those who are to judge are not bound to abide by the conclusions of the experts against their own convictions.' This possibility should not detract from the merit which such evidence has in itself, and in turn may in time prove useful for guidance in juridical decisions. Comprehensiveness without over elaboration and outright objectivity are the hallmark of good expert evidence. It is rewarding to realize that scientific evidence, including medical evidence, even though falling short of proof may be conclusive when it is added to the other elements of the case.

Having set the ideal scene both for the medical witness and expertise, I now venture to examine the workings of medical evidence in practice in Malta.

Without any reservation, both professions, medical and legal, agree that although both aim at protecting the interests of an individual, a human being, each profession distinguishes itself by referring to the same individual in diverging terms: the first as the patient, the second as the client. In proferring their services they find it difficult to discard an approach that is essentially predetermined by their training and which neglects to a large extent this basic fact. There exists a conflict of purpose as well as of methods that often divides the two professions both in and outside the courtroom. A case might be made for establishing a better inter-disciplinary relationship through joint meetings between the two professions to exchange ideas and discuss problems of com-

mon interest. It is, to my mind, only through such a dialogue that we may begin to understand each others' attitudes and manner of speaking and spare each other unhealthy and frustrating criticism. Each profession stands to gain through such amicable exchanges, and thereby help to serve patient and client better, and in the best interests of justice.

The medical witness is by and large a sttanger in the court-room where formality and publicity pervade the air. For him this is very different from the private and casual atmosphere that prevails in the ward or the clinic. Facing his patient he may have to extempo-rize to meet an emergency and expects a quick response, very dif-ferent from what he can prudently do in or expect of the Courts. Yet he has to resign himself to his inescapable responsibilities which he may fail to recognise or to accept. There is much to be said for fulfilling these responsibilities in much the very same way that a doctor is expected to meet his medical ones. Undoubtedly such an attitude considerably lessens the burden.

It is with some regret that I register what I consider to be the prevailing failings that antagonize the medical witness. Firstly, the first contact is very often with a uniformed police officer. Po-lice officers rend to place the force's interests well before those of the patient whose safety is the primary concern of the attending doctor. The doctor, anxious to treat his patient, may be battling to save his life, cannot afford the luxury of completing formalities at the same time. This order of priorities sets the scene for a clash of personalities that may go beyond a harsh exchange. I have no hesitation in admitting that sometimes this is attributable to a lack of understanding, a lack of communication, and possibly lack of mutual respect. These difficulties can only be overcome through proper education in recognizing better each other's responsibilit-ies.

A more common cause which increased the reluctance of doctors to give evidence is the fact that a summons to the court is given only short time before the hearing is due and the information given in the summons is too brief and uninformative which prevents the witness from identifying the case and preparing his evidence. Few doctors realize that they are legally entitled not to answer the summons, except in urgent cases, unless the summons is served 'at least two working days previous to the day fixed for his appear-ance' – Sec. 373 Code of Criminal Procedure. This two day notice is too short and very disturbing for doctors, particularly when they

are now very frequently required to appear in court. Lateness in appearing or failure to attend at all have brought on several doctors, particularly on junior doctors in hospital, the rough treatment that reflects a lack of appreciation on the part of the Courts of the doctors' position, duties and commitments. The Ministerial circular recommending that doctors be summoned after 10.30 a.m. has helped but only insignificantly to solve the problem. Casualty officers admitting a victim are usually sub-poenoed to give evidence relating to the diagnosis, treatment and final assessment even though they have been responsible solely for the patient's admission. This is discovered at the time he is called to present his evidence and when he has to admit that he can neither provide the information nor express the opinions required by the Court. The apportioning of medico-legal responsibilities is far from being clearly defined. This is a matter of concern and demands urgent attention both from the legal as well as from the hospital administrative aspect. I shall refrain from entering into details but undoubtedly responsibility in hospital cannot be at all times equated with legal responsibility. A quick resolution of this problem would benefit not only doctors, but also the hospital administration and would certainly prove time-saving and less disruptive to Court proceedings.

Unnecessary waiting because of postponements of hearings is an annoying experience for doctors who may be hard pressed to cope with an urgent workload in hospital or in their practice. Many such delays can be avoided if there is intelligent sorting out of cases and if medical witnesses are summoned only when their presence is really necessary. Doctors understandably resent 'the Courts display of the law's delay'.

I fully share the general feeling of futility that many medical witnesses experience when their attendance amounts to a sheer formality, such as when they are required to identify a document bearing their signature when no party is contesting its authenticity. I suggest that in such cases ways and means be found whereby such confirmation may be dispensed with as Sec. 642(2) provides for in some respect. It is understood that any party retains the right to call the doctor concerned as a witness for any good reason. This in fact may amount to amending the law to provide for such agreed evidence, as has been done in England by the enactment of the Criminal Justice Act 1967.

The availability to the defence of all the evidence collected by the prosecution at the compilation of evidence in our Criminal

Courts helps considerably to dispense with the need for the appearance of all the witnesses at the trial. Unless the presence of witnesses is essential and unless their absence interferes with the legal rights of the accused or jeopardises the case for the prosecution, then medical witnesses ought not, I submit, to be summoned. If however, their evidence is necessary either to confirm or to elucidate some points in the evidence submitted, or if cross examination is planned, they could then be so heard at a pre-appointed stage of the trial. I am pleased to note that a change in this direction has occurred in recent years.

The Criminal Code (Sub-Title II) speaks of experts and regulates the conduct of expertise including expert medical evidence. It appears however, that the provisions of Sec. 646 Sub. (2) whereby the Minister for Justice is empowered to create panels of experts from amongst whom the Courts must choose, are not availed of. I submit that failure to provide according to this section is not conducive to the raising of the standard of medical expertise, and may constitute a risk of miscarriage of justice. It is rather disconcerting to note that most lawyers fail to understand that even a specialist in one field of medicine cannot be considered as equally expert in another speciality. Neither should the misconception persist that a successful practising doctor can speak with authority on surgical problems or is adequately equipped to deal with complicated forensic cases. It is utterly ludicrous for instance, to believe that an analyst trained in food analysis or a chemist expert in the synthesis of drugs, be expected to be able to cope with a forensic science problem involving expertise in trace evidence such as that yielded by paints, fibres or glass fragments. Admittedly, given enough time to study a particular problem there exist well qualified specialists who can do much to help the Courts or the Police in their investigation. But in many cases delay in completing an analysis may be crucial. It is, I suggest, high time that an organised effort were made to recruit qualified and willing experts in various fields, to elicit their interest and to urge them to maintain their activities with a view to equipping themselves to be able to tackle the forensic problems that may be entrusted to them.

The amount of remuneration, if any, which is stintingly granted for any expertise is not conducive to attract the best and therefore the most busy of specialists. The recollection of the Biblical philosophy that the labourer in the vineyard is worthy of his hire may not be out of place. It is understandable that the services of the

best experts are often lost because of the lack of this proper acknowledgement. Bureaucracy should not be allowed to jeopardise the proper and efficient administration of justice.

The purpose of medicine is to maintain the patient in the best of health, to overcome the disease or injury, and to prolong his life span. The purpose of law is to maintain peace and order in the community, to respect the human personality through human rights, and to provide equality of opportunity. To achieve these purposes, medicine emerges from the laboratory by the scientific process: law emerges from the community by the process of experience. 'People follow medicine, law follows people.' Both professions are thus committed to safeguard the ultimate and common purpose – humanity.

If at any stage of this brief review I have been instructive, it is merely incidental; If I have been constructive it is quite essential, and if I have been provocative, it is absolutely intentional.

SOME GENERAL CONSIDERATIONS ON THE DEATH AND DONATION DUTY ACT 1973

CARMELO MIFSUD BONNICI

ON 1st January 1974, the Death and Donation Duty Act, 1973 came into force. Its stated object is 'to provide, in place of the Succession and Donation Duties Ordinance, for the imposition of a duty on property passing on death or transferred gratuitously by way of *inter vivos* disposition, and for the collection thereof'.

The Act is based on the draft law which was prepared by a Commission set up in September 1971. The Commission was chaired by Mr. Justice Agostino Gauci Maistre, and had the following members: Professor Felice Cremona, Dr. Joseph Borg (later on substituted by Dr. Carmel Testa), Architect André Zammit, Architect Joseph Leone Ganado, and Mr. Edwin Vella.

COMMISSION'S TERMS OF REFERENCE

The terms of reference of the Commission were:

'To prepare a new draft law levying Succession and Donation

Duties with special reference to the following requirements:

(i) The simplification and tightening up of the machinery provisions of the law.

(ii) The updating in general of the provisions of the law and, in particular, those connected with valuation.

(iii) An increase in the limit of exemption in the case of minor transmissions.

(iv) The introduction of any changes that may be required in order to achieve an equitable and fair distribution of the tax burden on individual members of the community: provided, however, that the yield to revenue as arising out of the current provisions of the law be not adversely affected.

(v) The creation of a Board to take cognisance of appeals on points of law and of fact against assessments raised by the Department.

(vi) Reference to Her Majesty's Court of Appeal to be restricted to appeals on points of law against decisions delivered by the said Board'.

Sources and Title of New Law

In its Report filed in June 1972, the Commission stated that the major source of its draft law was the 1918 Succession and Donation Duties Ordinance itself, and that reference was made to the appropriate laws existing in Italy, the United Kingdom, Canada, Cyprus, and South Africa, and that many of the machinery provisions of the draft law were obtained from the Malta Income Tax Act, 1948.

The change in the title, from 'Succession and Donation Duties' to 'Death and Donation Duty', was proposed by the Commission for two reasons. It was argued that since both the 'estate duty' and 'succession duty' aspects of the duty were being retained, neither of those terms should be used to describe the death duty aspect of the law, and the basic term of 'Death Duty' should be adopted. It was also stated that the singular term 'Duty' was chosen to emphasise that although the tax under the Act was leviable following death or donation or consolidation of the usufruct with the *nuda proprietas*, and although it is calculated according to the provisions of two separate tax schedules, it is intrinsically one single duty which is chargeable in the case of transfer of property not under an onerous title. It was further argued that although the case of consolidation of usufruct and *nuda proprietas* does not fit exactly the title

suggested by the Commission, in the vast majority of cases consolidation may be said to happen on death because it took place following the death of the usufructuary.

METHODS OF TAXATION

The 1918 Ordinance referred to estate duty, succession duty, legacy duty, donation duty, consolidation duty, and duty payable on the termination of emphyteutical grants. The 1973 Act refers to only one duty, death and donation duty, but the two methods of taxation found under the 1918 Ordinance, one based on the amount of property involved in the transfer or transmission without regard to the number of beneficiaries and to their relationship to the person possessing the property, and another based on that relationship and on the amount acquired by each beneficiary and not on the total amount, are both retained under the 1973 Act. The Act thus charges one duty under two separate schedules applicable equally to property acquired on death, to donations, and to consolidations of usufruct and *nuda proprietas.*

However, in the methods of taxation under the 1918 Ordinance and the 1973 Act there is a radical difference in the manner of computing the duty. Under the former law, the rate of duty based on the value of the property was applied to the entire value and therefore a change in the rate brought about by a higher value meant that the entire amount was charged at the higher rate. The 1973 Act, while retaining the principle of progressive rate of taxation, does not apply the higher rates to the entire amount but the graduated rates continue to apply in relation to their relevant portions of the value of the chargeable transmission. Furthermore, under the 1973 Act, the rates of the Second Schedule are graduated not only in relation on the basis of the relationship between the person acquiring and the person from whom the property is acquired, but also in relation to the amounts involved.

The exemptions granted under the 1918 Ordinance and under the 1973 Act differ in many respects but the most significant differences refer to the limits and to the effects on the exemptions when the values exceed the limits. Thus, under the former law, transmissions happening on death below £M1,000 in value were exempt from all duty, but in the case of a transmission over that limit, the exemption applicable to the first £M1,000 was lost and the entire amount was charged to duty. Under the 1973 Act, in all transmissions happening on death, the first £M3,000 are exempt from duty and remain

exempt whatever the values of the transmissions.

Situs of Property and Domicile

The Commission set up to prepare the draft law acknowledged that problems connected with the determination of the 'situs' of property and of related rights are on the increase because of the 'internationalisation of life', and that it is desirable that the law deals with the matter more fully than the 1918 Ordinance did. The Commission stated that 'it borrowed rather heavily from the law of Canada' in the rules it suggested for the determination of the 'situs' of specific categories of property and related rights, and in default of specific rules applicable to other property and related rights, the Commission suggested that the property or right is to be deemed to be situated in the place of the last domicile of the person from whom the chargeable transmission originated.

Under the 1973 Act, domicile of the beneficiary remains a relevant consideration in the case of property situated outside Malta and of related rights, but a major change is effected in respect of the concept of domicile. The Commission took the stand that the notion of domicile obtaining in Malta in accordance with the principles of Private International Law should be applied to the law on death and donation duty in the same way that it is applied to other laws. The Commission, therefore, did away with the 'deeming' provisions of the 1918 Ordinance by virtue of which persons born and residing in Malta and persons who took up their permanent abode in Malta were deemed to be also domiciled in Malta.

Consolidations

A significant measure is the elimination from the new law of the duty which was chargeable under the 1918 Ordinance in certain instances on termination of emphyteutical grants. The Commission held that the relevant provisions of the Ordinance were rather obscure and that the amount of revenue yielded did not warrant the amount of work involved. Moreover, the Commission did not think it logical to tax the reversion of the *Utile* to the *Directum Dominium* when the happening of the contingency must have already affected the consideration paid to the owner when he made the emphyteutical grant.

On the other hand, the consolidation of the Usufruct with the *Nuda Proprietas* has been retained under the 1973 Act. While the general principle is laid down that the consolidation is taxable in all

circumstances except where it takes place for an appropriate consideration, the two exceptions of the 1918 Ordinance have been maintained: that duty is not charged when consolidation takes place in the hands of the person who constituted the usufruct, and when consolidation takes place on the termination of a usufruct established by law.

Valuation of Property, Usufruct and of Consolidations

The Commission was specifically required to update in particular the provisions of the law relating to the valuation of property and related rights.

A major problem in this respect is the valuation of immovable property on lease the rent of which is statutorily controlled and consequently below the commercial value. To establish the value of the property without taking into account the restricted yield would be unrealistic, and to establish the value on the basis of the yield only would also be unrealistic. The Commission confessed that in this matter it did not find much help in the legislation of other countries, which generally refer to the market value of the asset. It was not found possible to suggest a more specific formula than that based on the one found in the 1918 Ordinance: that the value of the full ownership of any property, movable or immovable, on the relevant date shall be 'the average price which such property would fetch if sold on the open market on that date', with, however, the additional rider, 'due regard being had to all the circumstances affecting such property'. Controlled rent would presumably be one of the relevant circumstances to be taken into account.

While the valuation of usufruct for life is still based on a proportion of the value of full ownership of the property subject to usufruct, the method under the 1918 Ordinance of taking one-fourth of the value if the usufructuary was over forty years and one-half of the value if he was under forty years, is replaced by a graduated percentage related to the age of the usufructuary and starting with ten per cent when the usufructuary has completed seventy years of age and rising to seventy per cent when he has not completed twenty years of age. In this matter the Commission based itself on the more recent life expectancy tables prepared by the Central Office of Statistics.

The 1973 Act makes a radical change in the method of valuation of the consolidation of the usufruct and the *nuda proprietas*. Under the 1918 Ordinance, in the case of consolidation taking place in

the hands of the bare owner, since one had to take the full value of the property at consolidation and deduct the value of the *nuda proprietas* at the commencement of the usufruct, any increase in the value of the *nuda proprietas* between the two dates was also taxed. The Commission argued that since the *nuda proprietas* already belonged to the person in whose hands consolidation was taking place, the method was unfair because at consolidation, the person acquired further only the right of enjoyment of, or of income from, the thing and it was the value of that right which should be brought to charge. Therefore, under the 1973 Act, the value of consolidation is taken to be the value of the usufruct at the time of consolidation worked out on the value of full ownership of the property at that time but based on the relative percentage proportion related to the age of the usufructuary at the time of the commencement of the usufruct.

In the method of valuation of consolidation which takes place in in the hands of the usufructuary, the 1973 Act also makes a significant change in that from the value of full ownership of the property at the time of consolidation, one has to deduct the value of the usufruct but not that obtaining at the time of its commencement as was the case under the 1918 Ordinance, but the value at the time of consolidation and established 'as if the usufruct had devolved on the usufructuary on the date of the consolidation'. Consequently, since at the age of commencement of usufruct the age of the usufructuary must be lower than that at consolidation, the proportion of the value of the usufruct to the value of the full ownership would be higher at commencement than at consolidation, and inversely, the proportion of the value of the *nuda proprietas* would be higher at consolidation.

Appeal Facilities

The simplification and tightening up of 'the machinery provisions' of the law was the first requirement referred to in the Commission's terms of reference, and the Commission considered the 1918 Ordinance provisions regarding assessments, objections, and appeals to be the main machinery provisions 'which radically required amendment and modernisation'.

The fifth and sixth requirements detailed in the Terms of Reference stipulated the creation of a Boatd to take cognisance of appeals against assessments on points of law and of fact and the right of appeal from the Board's decisions on points of law only to

the Court of Appeal. The Commission read into these requirements a clear reference to the appeal procedure obtaining under the Malta Income Tax Act, 1948 and the Commission declared that, in formulating its proposals in this respect, it 'borrowed heavily' from the Income Tax Act.

Under the Death and Donation Duty Act, the Board of Special Commissioners and the Court of Appeal have power to increase an assessment. An identical power exists in Income Tax appeals. The Commission, however, added a qualification which is not expressly found in the Income Tax Act but which the Commission acknowledged to have been established in Income Tax cases: any increase ordered in an assessment may refer only to those heads of the decision on the assessment against which an appeal is entered.

Although the Income Tax Act does not specify the qualifications of the Chairman and substitute Chairman of the Board of Special Commissioners for Income Tax, the practice has always been to appoint serving Magistrates to the posts. The Commission thought it advisable for the law to specify that the Chairman and substitute Chairman of the Board of Special Commissioners for Death and Donation Duty shall be Magistrates or retired Magistrates.

Security of tenure of Office of the Special Commissioners should, according to the Commission, be spelt out in the law, and the Commission suggested that every Special Commissioner should hold office for a period of three years. The 1973 Act, however, provides that every Special Commissioner shall hold office for such period as may be specified in his appointment. The position is therefore different from that of the Special Commissioners for Income Tax who hold office during the President's pleasure. Furthermore, the Death and Donation Duty Act does not contain the provision obtaining in the Income Tax Act, that the President 'may, without assigning any reason, revoke the appointment of any Special Commissioner and he may appoint new Special Commissioners whenever necessary'.

The above general considerations are only but a few of the manifold points of interest raised by the Death and Donation Duty Act, 1973 and, it is hoped, would help to encourage further and more detailed studies which the provisions of the Act merit.

INSANITY AS A DEFENCE IN CRIMINAL LAW

By Courtesy of the Editor, St. Luke's Hospital Gazette

J. PULLICINO

I am glad to have this opportunity to speak on the psychiatric aspects because I feel that I have something to say which needs to be said. But let me explain at the very outset that my main object in ptesenting these comments is to contribute towards restricting the areas of misunderstanding which sometimes arise between the judicature and the psychiatrist.

Problems of forensic psychiatry are the most complex because of the very nature of the field of study. For here we are concerned not with fixed anatomical structures or physiological functions but with all the vagaries of human conduct and behaviour, both normal and abnormal.

This is indeed a very vast subject which cannot be condensed in a brief introduction without creating mental confusion. It is for this reason that I have chosen just one of the most outstanding problems of forensic psychiatry which is the issue of insanity as a defence in criminal law. The legal issues involved in determining responsibility, in convicting and in sentencing have corresponding medical issues in the diagnosis, care and treatment of the abnormal offender and it is in this area that mutual understanding and cooperation between law and medicine present the greatest challenge.

Criminal Responsibility

It is a fundamental doctrine of criminal law that if a man is sane he is responsible for his criminal acts and if insane he is not responsible. In Malta this doctrine is entrenched in Sec. 34 of the Criminal Code which states as follows: 'Every person is exempt from criminal responsibility if at the time of the act or omission complained of such person (a) was in a state of insanity or frenzy.' This is in line with the provisions of the Criminal Code of various European countries. Pasquale Tuozzi in his book 'Corso di Diritto Penale' traces the developmental stages of the concept of culpability and responsibility from the Sardinian Code of 1859 to the present Sec. 46 of the Italian Penal Code. The relevant section (Sec. 94) in the *Codice Sardo* states: 'Non vi è reato se l'imputato trovasi in stato di assoluta imbecillità, di pazzia o di morboso furore

quando commise l'azione.' ('There is no criminal offence if the accused was in a state of complete imbecility, insanity or morbid frenzy when he committed the act'). The corresponding section in our criminal code is practically identical with the Sardinian Code except that it did not include imbecility or mental subnormality as it is now known. According to Tuozzi this section in the Sardinian Code was thought to be too restrictive in its application. The concept was therefore expanded to embrace a wider category of abnormal mental conditions and to define the terms in law which determine responsibility. The present Sec. 46 of the Italian Penal Code states: 'Non è punibile colui che nel momento in cui ha commesso il fatto era in tale stato di infermità di mente da togliergli la coscienza o la libertà dei propri atti.' (No person is liable to punishment who at the time when he committed the act was in such a state of mental infirmity as to be deprived of consciousness or of freedom of action). The concept of 'Infermità di mente' encompasses a vaster field than the concept of insanity. The Italian code defines the two ingredients for determining criminal responsibility namely intelligence, knowledge and awareness of the act or omission and volition including freedom of choice.

In Malta we have no legal definition of insanity or frenzy but the mental attributes which exempt a criminal offender from punishment are contained in Sec. 35 which deals with intoxication and was amended as recently as 1956 by Act 5 and now reads as follows: 'Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of was incapable of understanding and volition, etc. This makes the legal test of culpability and responsibility in Malta dependent on the same mental attributes applicable to the Italian and other European penal codes.

In England the legal test of insanity is based on the McNaughten rules which state that in order to be acquitted of criminal responsibility by reason of insanity it must be proved that the accused was suffering from a defect of reason due to disease of the mind such that (a) he did not know the nature and quality of his act (b) that he did not know that he was doing wrong – and the word 'wrong' in England means wrong in law and not morally wrong and, (c) that the disease of the mind resulted in a delusion which if true would have justified the accused doing what he did.

The McNaughten rules put all the emphasis on reason, knowledge and understanding of the nature of the act and of its illega-

lity and do not take into account the concept of volition or the impairment of the ability to control conduct. Even the delusion clause depends on reason and understanding. The law accepts the delusion but requires the accused to reason about it as a sane man. As an American Judge put it, the prisoner must not only be mad but must use sufficient reason in his madness so as to tailor his criminal action to fit his delusion. It has been rightly said that nobody is hardly ever mad enough to be within the definition of the law (Baron Bramwell) and most psychiatric offenders evaded conviction because the rules were stretched and interpreted in a charitable way.

In comparatively recent times an attempt to break the rigid distinction between McNaughten insanity and full responsibility had been made through the introduction of the doctrine of the Irresistible Impulse and that of Diminished Responsibility. In many American states as well as in Scotland the right or wrong test of the McNaughten rules has been supplemented by the doctrine of the Irresistible Impulse which is based on the assumption that men can make a deliberate choice to act or refrain from acting but that insanity can give rise to impulses which cannot be resisted; but whether an impulse is truly irresistible or has not been resisted cannot be scientifically proved. It is not a distinction that anybody can make about anybody else.

English law does not recognise the irresistible impulse as a defence. The passing of the Homicide Act 1957 however introduced the doctrine of diminished responsibility and Sec. 2 of the act reduces guilt from one of murder to manslaughter if an abnormality of the mind substantially impairs the accused's responsibility for his acts.

Legal and medical concepts of mental disorder

The legal concept of mental disorder is at variance with modern psychological and psychiatric concepts and the attempts to keep notions of culpability in step with the growth of medical knowledge does not seem to have produced the desired result.

In practice there are two fundamental issues in which psychiatry cannot satisfy the demands of legal principles governing culpability and responsibility. One is the concept which views individual characteristics as falling into distinct classes rather than continuous scales, and the other is the concept which views the mind as

composed of separate and distinct functions or faculties rather than a number of interdependent ones.

In psychiatry, as in all biological sciences we learn to think in terms of continuous scales rather than clear cut classes. In all biological variables there is a continuum between two extremes. We do not classify human beings on an either/or basis as tall or short, thin or fat, idiots or geniuses, sane or insane. Just as there is a continuous scale for height and a continuous scale for weight so one finds all shades and gradations from idiocy at one extreme to genius at the other and from the well adjusted to the raving psychotic. Some psychiatrists have in fact today come out with the theory of a continuum of deviation from a normality which shades gradually into psychoneuroses and psychoneurosis shading gradually into psychosis.

The law in its doctrine of criminal responsibility shows little respect for this concept of a continuum of deviation. The traditional legal view works in terms of black or white whereas as one author puts it 'the minds of men are shades of grey.' Indeed one of the most frustrating experiences of many expert witnesses is that court officials demand impossible yes or no answers to their questions and ignore all the uncertainties and all the ambiguities of behaviour which we as psychiatrists have learned to accept in practice.

Today it is well recognised that there is no clear-cut line between the legally sane and the legally insane. Between these two extremes there are many so called twilight conditions which are not serious enough for an accused to be acquitted of criminal responsibility under the present tests nor to require that he be indeterminately confined to a mental hospital, but which at the same time render him incapable of sound and calm judgement. All of us who have acted under conditions of emotional stress know how foolish our actions appeared when seen in retrospect. Certain criminal offences are committed under the stress of emotional tension when forces are unleashed which under normal conditions are inhibited or at least damped down. Thanks to Freud even the man in the street now knows that we often act for reasons which we do not understand. Persons with hysterical personalities are particularly prone to these twilight states (when they are apt to go on a fugue, in a state of dissociation) when their behaviour becomes dominated by unconscious forces but cannot in all fairness be said to satisfy the legal tests of insanity even if we were to butcher the facts

to fit the theory.

One other concept in which criminal law and modern psychiatric thinking have drifted apart is that contained in the theory of distinct faculties of the mind functioning independently. This is apparently derived from the theory of phrenology when it was believed that each function of the mind had its own water tight compartment in the brain with its respective bump on the skull. One still hears talk in legal circles of partial delusion or partial insanity or monomania. In psychiatry we do not recognise such conditions. The mind works as a whole and a delusion is a symptom of a disease affecting all aspects of mental life. We cannot divorce cognition from affection and conation as the McNaughten rules would have us do. The idea that part of the mind can be diseased while the rest is completely normal is pure legal fiction. A mental illness interferes with the patient's thought, feeling and conduct, and brings about a breakdown in the harmonious psychological connections and a disorganization of the personality as a whole. Intellect, feeling and striving are constantly interacting between themselves and the environment to produce the behaviour we know and in our assessment of this behaviour we must take stock of all this interaction. A mother, who in the abyss of a melancholic illness kills her new born baby, knows what she is doing and that it is against the law to do so but her thoughts and her judgement are influenced by the outlook of hopelessness and despair which a severe depression brings into her mental life. In fact Sec. 258A of the Maltese Criminal Code changes such a crime from one of wilful homicide to one of infanticide liable to imprisonment for a term not exceeding 20 years. This section conforms ro the doctrine of diminished responsibility of many continental countries and accepts a degree of mental disorder which comes between sanity and insanity. The law is apparently recognizing what has been accepted teaching in psychiatry for a long time now. But this recognition is apparently limited in Malta to cases of infanticide only. The doctrine of diminished responsibility has not received general acceptance in the Maltese criminal code notwithstanding that a proposal for the introduction of limited responsibility was twice made in the Council of Govemment first by Sir Adrian Dingli in 1850 and then by Sir Arthur Mercieca in 1909.

Pleading and court procedure

From the somewhat academic concepts of insanity at law I would

ow like to pass on to the more practical considerations of the me-
ico-legal procedures involved in criminal trials where the plea of
ısanity is raised.

In Malta this plea can be raised either by the prosecution or by
he defence and in cases where the plea is supported, the Court
ends the accused for a period of observation at Mount Carmel Hos-
ital and appoints one or more medical experts, (usually three), to
ubmit a written report on the mental state of the accused during
he time of the alleged offence and during the trial. In the case of
ex vs Giuseppe Cauchi determined on 24th September, 1942, rules
ere given by the Court for the guidance of medical experts where
ıe issue of insanity was referred to them. One of the recommenda-
ions made by the Court states that 'A regular proces verbal of
he interrogatory of the patient, when made by the experts, should
e kept and filed together with the report.' In an explanatory note
n this rule Judge Harding states: 'It would appear that the result
f the interrogatory is a very important consideration in guiding
he experts to their conclusions. It seems proper that some sort of
ontrol be made possible by the keeping of a process verbal and
ıe filing thereof with the report.'

This rule runs counter to ordinary psychiatric practice of history
aking and psychiatric examination in which the patient submits in-
ormation willingly in an atmosphere of trust and confidence in his
hysician. In examining a Court patient the psychiatrist is con-
erned solely with arriving at a fair opinion of the accused's state
f mind at the time of the alleged crime and at the time of the trial.
Ie is not concerned with determining innocence or guilt. But if
his rule were to be strictly applied one would have to warn the
ccused that anything he says would have to be filed in the report
) the Court. This would very likely give rise to an atmosphere of
uspicion and mistrust which in the case of a patient with paranoid
tends would often end up compelling him to remain mute and un-
esponsive. In ordinary psychiatric practice one is already handi-
apped by the problem of establishing rapport with some patients.
3ut how can you communicate meaningfully with someone who sees
ou as part of the oppressing establishment when you warn him
ıat anything he says may be repeated in Court?

As the psychiatric interview is essential for a psychiatric referee
) form a sound opinion of a person's mental condition and as this
annot be had if the patient refuses to talk, it would appear that if
ıis rule is insisted upon it is likely to defeat its own ends. There

are, of course, other considerations emanating from the defendant's constitutional privilege not to be a witness against himself. It seems that the objections to this rule of procedure have not so far been given their due weight.

In accordance with present laws of criminal procedure applicable in Malta as in many other countries, any allegation of insanity shall first be determined by a jury whose members are not bound to accept the findings of the referees. This raises a point of principle of great importance and one which appears to be at variance with the principles of expert evidence applicable to medical or surgical cases. No court of law would accept the testimony of a group of laymen as to whether a person was affected with heart disease, tuberculosis or cancer. Why therefore should there be a different rule regarding mental disorders? Why indeed are laymen with no special knowledge or experience of mental illness ever qualified to express an opinion on the sanity or insanity of another person? How, may one ask, can nine men selected at random be assumed to be capable of conceiving the intricate elements of psychiatric disorder and form an opinion, based on one fact without having examined or observed the patient for any length of time? Insanity, whether in law or in psychiatry is a condition of the mind and not a mere lack of self control; it cannot be recognised from any one act however atrocious, anti-social or impulsive it happens to be. The process of establishing a clinical diagnosis of insanity is similar to that of constructing the picture of a jig-saw puzzle. The pieces acquire meaning only if they fit together into a coherent whole, but one piece by itself is absolutely meaningless.

With this situation we have to consider not only the risks involved in condemning a sick man but also the risk of sending a sane person to pass the rest of his life within the strict custody imposed on insane offenders. This is as terrible a punishment as any known in the annals of the martyrdom of man. As one author mildly puts it 'To have a sane man found insane may be a forensic triumph but it has little else to commend it.' To my mind such a finding would impose a change in the role of the hospital from one of care and treatment to one of custody and detention and a change in the role of its staff from one of doctors and nurses to that of white coated jailers.

These remarks are meant to highlight the difficulties of the jury verdict of sanity or insanity and the heavy responsibility which lies with their decision. It has to be admitted however that although

the system may at times fail to attain the good intentions of the legislator no better alternative is yet in sight. The last word on the question of criminal responsibility must rest with the law.

Methods of disposal

From conviction we now pass on to sentencing and it is here that cooperation between law and medicine is most important. Unfortunately in Malta this is the area in which we lag far behind other countries. The most serious weakness in our system is in my opinion, the lack of flexibility in the disposal of the accused found to be insane. This disposal is prescribed in Sec. 619 of the Maltese Criminal Code where it is stated that if the accused is found to be insane the Court shall order the accused to be kept in strict custody in Mount Carmel Hospital and shall cause information thereof to be forthwith conveyed to the Governor who will give such directions as he may deem fit for the care and custody of such insane person.

In practice this amounts very often to an indeterminate sentence and is applicable not only to major crimes but also to minor offences; so that if insane behaviour finds expression in petty thefts or in raking unauthorized joy rides or in any other form of minor delinquency the offender may be sent to hospital for the same indefinite period as in the case of the patient who has maimed or killed. There is apparently no provision in our legislation to enable the judge or magistrate to obtain the experts' opinion on the most appropriate psychiatric disposal. Neither is there any provision to ascertain that facilities for treatment are available or that the condition from which the accused is suffering is susceptible to medical treatment or should better be dealt with within the penal system. In my experience once the jury's verdict of insanity is given the accused is invariably dealt with in accordance with Sec. 619.

In many developed countries with progressive mental health legislation a number of possibilities are open to the court after sentencing. In England for example, according to the Court's assessment of the case, an abnormal offender may be dealt with in several ways:

1. As in Malta he may be compulsorily admitted to hospital with a restriction order on discharge – detention being for an indefinite period unless overruled by the Secretary of State;

2. He may be compulsorily admitted to hospital without any restriction on discharge – discharge is determined by the responsible medical officer in much the same way as that of a certified patient;

3. He may be admitted to guardianship of relatives or others;

4. He may be put on probation and required to undergo treatment;

5. He may be conditionally or absolutely discharged if he agrees to receive treatment voluntarily either as in-patient or out-patient.

6. He may be made subject to normal penal sentence such as imprisonment or fine.

This last provision may sound harsh and unorthodox when applied to abnormal offenders but I would like to go back to the concept of continuous scales mentioned previously and emphasize the fact that abnormal offenders cannot be classified into the two categories of the utterly irresponsible and the fully responsible. Apart from those who suffer from severe psychiatric disorders the majority of offenders retain some element of responsibility and although medical treatment is necessary during overtly unstable phases, discipline and character training still have a role to play. This applies particularly to severe forms of psychopathic personalities whose main symptom is violence in an apparently normal person. They are unlikely to benefit by any kind of mental hospital treatment because their needs are different. Indeed in the conventional mental hospital they receive no treatment – they are admitted solely for board and lodging, they become a nuisance and a danger to other patients, monopolize the staff's attention and prevent the development of therapeutic community attitudes. You do not admit a criminal psychopath to a conventional mental hospital for the same reason that you do not admit a patient with smallpox to the general hospital. In most countries they are cared for in special hospitals or in special units in prisons known as prison hospitals.

It is because of such considerations that measures have been introduced in most courts abroad to enable them to obtain further information so as to assess whether the condition is susceptible to medical treatment or whether the hospital has facilities for dealing with serious criminal propensities. In the modern mental hospital where the milieu has been freed from the old restrictions, the requirements of this type of patient are at variance with those of the majority. This being the case, it is advisable in Malta in or-

der not to restrict the many because of the needs of the few, to provide a special unit in the form of a small prison hospital where the needs of the criminal patient could be adequately met. However, for the courts to continue to commit to conventional hospitals such offenders whose abnormal behaviour constitutes a real threat to other patients and staff is unrealistic, to say the least.

I would like to conclude with a plea to all my legal and medical colleagues not to allow my list of shortcomings and criticisms to overshadow my praise and admiration for the way in which justice is done and is seen to be done in the Maltese Courts of Law.

CIVIL PARTNERSHIPS AND JURIDICAL PERSONALITY

GUIDO SALIBA

IN regulating Civil Partnerships the Maltese legislator certainly did not intend conferring on them legal personality. This can be concluded by reference to Italian law of the same period i.e. the Civil Code of 1865, and by analogy from a consideration of the historical aspects of the question in the case of commercial partnerships.

Before examining the status of civil partnership in the Italian Civil Code it may be apposite to explore the antecedents of the definition of the contract of partnership contained in Sec. 1738 of our Civil Code – originally Art. 1404 of Ord. VII of 1868.

> Partnership is a contract whereby two or more persons agree to place a thing in common, with a view to sharing the benefit which may derive therefrom.

This is basically the same definition as that of the Roman *societas*, as indeed is the notion of civil partnerships in practically all continental codes including the English Partnership Act of 1890. Under Roman Law the *societas* was considered to be a con-

sensual contract, bilateral and plurilateral. By means of this contract two or more persons agreed to pool goods or services, or both, having as their object the exercise of an economic enterprise in common with the intention of dividing the benefits according to an established proportion or, in the absence of an agreement, in equal parts. Voet held that *Societas est contractus juris gentium, bonae fidei, consensu constans, semper re honesta, de lucri et damni communione.* Still in classical times it was not essential that the purpose of the *societas* be profit nor that there be an economic activity, as there could be a *societas* for the common enjoyment of property or service. In the modern concept, the intention of sharing the profits and specifically of becoming partners is essential. Yet this does not affect the status of partnership.

In Roman Law a partnership was not an incorporated association. Roman Law only bestowed on the *societas* an internal contractual bond existing between two or more parties to the contract. Though *societas* was distinguished from *condominium,* the legal relationship between the parties was considered to be that existing between co-owners. There were no special tribunals to which matters arising out of *societas* were referred. The debts of a *societas* were apparently joint though not joint and several. The *heres* of a deceased partner could not succeed to the rights of the deceased even by express stipulation. All this makes it quite clear that no juridical personality was attributed to a *societas.*

The general provisions of our contract of partnership have been inspired by the French Civil Code. Our section 1738 is in fact a literal translation of section 1832 of the French Civil Code. In its turn the French institute owed its ancestry to Roman Law though by that time it was a rather distant relative. Still BAUDRY-LACANTINERIE and WAHL rightly assumed that in 1804 there was no manifest intention in the Code Napoléon to change the status quo ante namely that civil partnerships did not constitute a *personnalité morale.* POTHIER who was the source of the definition of the Code Napoléon considered the partners as co-owners in regard to the indivision of things held in partnership. He recognizes in each partner the right to create obligations in regard to and also alienate, things belonging to the partnership, if not in their entirety, at least in regard to that part which is equivalent to his share. He gives to the division a retroactive effect by means of which each partner is deemed to have been always owner of things or property constituting his share, whatever other solution may be compatible with the

personification of a civil partnership.

It is safe to argue, in the circumstances of both its immediate and remote ancestry, that by direct analogy and inference the civil partnerships envisaged in our code were not intended by the legislator in 1868 to have juristic personality.

According to the Italian Code of 1865 partnership is a contract (Art. 1697) which produces solely a bond of obligation between the parties; there is a coming together of individuals who enter into reciprocal obligation to co-operate through their combined activity or through financial means to pursue a common policy, to divide profits, and therefore it is a contractual reunion of a number of individuals, not a new entity.[1] There existed reciprocal obligations between individuals, but this internal state of obligation does not alter their juridical status of owners of property, of contracting parties, of parties in judicial proceedings. It is the parties in their own name who perform juridical acts, who acquire rights individually, who personally assume obligations, being responsible thereto with their own property. While the internal partnership bond can produce effects between those whom it binds together, it does not actually have any effects on third parties. In regard to these, the partners do not present themselves as such, but as individuals, as persons having rights and entering into obligations and not as an entity distinct from them as individuals.

Italian doctrine used to deny the grant of juridical personality to civil partnerships. Among these were Giorgi, Pacifici-Mazzoni, Chironi, Vighi and Cuturi. RODINO, however, tended to recognize in partnerships an external efficacy to which third parties granted recognition which was binding in their regard. VITALEVI[2] declared that partnership was not a legal person, but actually an abstract juridical unit. DE ROSSI asked himself *Sono le Società Civili Enti Collettivi Distinti Dalle Persone Dei Soci?* (Napoli, 1899) and replied in the negative. Yet he criticised the legislator for falling short of a logical ptinciple of law: partnership presented all the essential characteristics of juridical personality in that recognition, he asserted, was not an essential element but a condition so that the institute could function.

The primary reasons adduced by the draftsmen of the 1882 Italian Commercial Code for Art. 8 which 'included any commercial

[1]Dernberg, Bürgerliches Recht, Vol. II, 2, 335

[2]Communione Vol. I pp. 77, 81 e Vol. II p. 620

partnership' in the definition of the term *trader* was to remove any doubt about the legal personality of commercial partnership, a personality that was denied to *associazioni in partecipazione.* It is therefore quite in order to deduce that such personality was denied even more emphatically in the case of civil partnerships. It was only by Act XXX of 1927 that this amendment was introduced in our Commercial Code. Yet even in these instances, recognition of legal personality was only indirect. The Maltese legislator finally made the situation juris et de jure in 1962 when in Sec. 3(2) of the Commercial Partnerships Ordinance it was provided that 'a commercial partnership has a legal personality distinct from that of its members.' Up to date the law ut sic has been singularly silent on the question of making a civil partnership a legal *persona.*

One feature peculiar to the English law of partnership, and distinguishing it from the laws of other European countries and of Scotland, has been and (in large measure) still is, the persistency with which the *firm,* as distinguished from the partners composing it, was ignored both at law and in equity.[3] As no one can owe money to oneself, it was held that no debt could exist between any member of a firm and the firm itself. This non-recognition of the firm was a defect in the law of partnership, declared LINDLEY.[4] He said that, had English law assimilated Scots Law, the difficulties of suing and being sued, and of dealing with partners abroad, would have been greatly diminished. The firm is not a corporate body in England because it is a joint enterprise, all partners are taken to be each other's agents in respect of all acts done in or about the partnership business, and, for convenience they may sue and be sued in the name of the *firm.* Thus, as a general rule, any act done in furtherance of the business by one partner binds the rest even though he has done it without their authority. This rule is, in the nature of things, subject to certain exceptions.[5] In Scotland a firm is a legal person distinct from the partners of whom it is composed, but an individual partner may be charged on a dec-

[3]Sec. 4(1) of the Partnership Act, 1890, gives the meaning of *firm* as those 'persons who have entered into partnership with one another.' Sec. 1 defines *partnership* as 'the relation which subsists between personal carrying on business in common with a view of profit.' Sec. 45 provides that 'the expression *business* includes every trade, occupation or profession.'

[4]On Partnership, 12th Edition, 1962 p. 5.

[5]Philip Jones, Introduction to English Law p. 96

ree or diligence[6] directed against the firm, and on payment of the debts is entitled to relief pro rata from the firm and its other members.'[7]

The Italian Civil Code of 1942 practically annulled the two motives justifying the existence of civil partnerships in the previous Code, and which in fact still exist in other countries, including ours. The first consideration was the fact that the notion of the enterprise was more or less limited to that of commercial enterprises with the result that the activities of production, that could be either of a commercial or of an agricultural nature, became juridically extraneous to such sphere of activities. The second reason was based on a wider notion of partnership that was extended to include – as Art. 1697 of the Repealed Civil Code of Italy provided – every contract by means of which 'two or more persons agreed to place something in common with a view to sharing the benefit which may derive therefrom'. Note the use of the exact words of our own section 1738.

The present general notion is that by means of the contract of partnership two or more persons contribute things or services for the exercise in common of an economic activity with a view to dividing the profits (Art. 2247). The 1942 Civil Code achieved a masterly stroke in regulating together commercial partnerships and a single type of civil partnership – the *società semplice*.

The new Code substituted the old variety of civil partnership by a completely new type. Like the *società civile* of the 1865 Code, the new type of partnership can be best explained in a purely negative manner in that it can be defined as a partnership which is not intended to exercise acts of trade. It is obvious from the provisions of Art. 2247, that the *società semplice* does not have elements that are identifiable with the generic ones of the other types of partnership. These have at least one common denominator, that is the exercise of a commercial activity. The 'commercial' partnerships are established in accordance with one of the types regulated by Chapter III and other subsequent chapters in Title V. Unless the partners had decided to establish their partnership to conform to one of the seven types envisaged by the new Code[8] the partnership

[6] diligence = security for a debt

[7] Sec. 4(2) of the Partnership Act

[8] società in nome collettivo (Art. 2291), in accomandita semplice (art. 2313), in accomandita per azioni (2462), per azioni (2325), a responsabi-

is that of the new concept — *società semplice.*

Therefore the *società semplice* is one which does not cater for nor is it connected with commercial activities or enterprises. This, in effect, excludes from the sphere of activities, functions or interests of the *società semplice* such economic activities that are qualified by Art. 2195 as being of a commercial character. These are (a) industrial undertakings connected with the production of wealth or of services, (b) the acts of an intermediary in the circulation of wealth, (c) any undertaking relating to transport by land, sea or air, (d) banking and insurance transactions, and (e) other acts auxiliary to the transactions or undertakings previously mentioned. So that a *società semplice* can be directed to an unlimited number of uses that range the whole gamut of economic acts, which must, however, exclude completely and irrevocably those listed above and which fall under the description of 'commercial' or 'act of trade'. It is almost essential that not only must the activities of the *società semplice* be non-commercial but in addition it must not be organized on the lines of any of the other seven types of commercial partnerships.

The *società semplice,* as a type of partnership, is an invention of the 1942 Italian Civil Code. It is a type that does not have precedents in Italian legislative tradition nor has it a counterpart in corresponding figures of other legislation.

Though the *società semplice* can only be described, as has already been pointed out, in negative terms, as was the case with the *società civile,* yet it has a structure that is radically different from civil partnerships and such as to interrupt every continuity between the two institutes.

The *società civile* was still substantially the ancient *societas* of Roman law preserving throughout its long existence its pristine characteristics of satisfying the needs of transactions connected with agriculture and, by and large, of non-commercial acts.

It has been possible for the *società semplice* to become, in the present Italian Code, the prototype of the entire category of the so-called 'personal' partnerships. In fact the Civil Code attributes to it norms and notions that are, in principle, meant also to regulate

lità limitata (2472, 2476), cooperativa a responsabilità illimitate, and cooperativa a responsabilità limitata per quote o per azioni (2511, 2513, 2514, 2541). The series is completed by the società di armamento fra comproprietari di navi (Art. 278-286 cod. navig.)

partnerships en nom collectif (Art. 2293) and, in so far as applicable with regard to this latter type of partnership by analogy or contrast, also those norms applicable to the *società in accomandita semplice.*

It appears to be based on the commercial partnership pattern though essentially it cannot have any commercial connections. The *società semplice* has become once again – as had the old civil partnership – an edifice, and an important one, in the agrarian and economic structure of Italy.

According to Art. 2266 the *società semplice* acquires rights and assumes obligations through the partners who have the power to represent it, and appears in judicial proceedings in the person of such partners. The things contributed by the partners and the successive increments thereto form the *patrimonio sociale* that serves to satisfy the claims of creditors of the partnership with the exception of those personal creditors of the partner who will have to request anticipated separation of the assets of the debtor partner from those of the partnership if it is proved that the other assets of the debtor are insufficient to meet the claim (Art. 2270). Moreover creditors of the partnership could sue not only the *patrimonio sociale* but also the individual partners, all held personally and jointly and severally liable for the debts of the partnership. The creditor of the partnership does not have the duty to enforce his rights first on the assets of the partnership: however the partner called upon to settle the debts of the partnership may exempt himself from paying by indicating the partnership's assets over which the creditor's claim can easily be enforced.[9]

The *società semplice* is very similar to commercial partnerships yet in comparison to their abundant variety, but which in effect are hardly distinguishable in essence one from the other, it is a singular and unique type.[10] It is not correct, therefore, to say, argues Brunetti,[11] that the *società semplice* corresponds to the old civil partnerships, as was claimed by Potzulu.[12] Brunetti holds that

[9]Prof. Francesco Calgano: Nuovissimo Digesto Italiano Vol. XVII pp. 545-61

[10]Mossa, 'La Nuova Scienza del Diritto Commerciale' in Rivista del Diritto Commercial, 1° p. 144

[11]Trattato del Diritto delle Società, p. 335

[12]in Panorama del Codice Civile in Giurisprudenza Italiana, 1941 IV, c. 137.

structurally the *società semplice* resembles the commercial partnership of persons.

The Minister piloting the new code declared that the *società semplice* is the most elementary type of partnership.[13] Yet, if it is correct to say that a group of partners or a partnership and the *patrimonio sociale* are clearly distinct from the individual partners and their own *patrimonio,* it can hardly be called an elementary organization. In a later statement[14] the Minister said 'the patrimonial autonomy is recognized within determinate limits.' This is proved by the fact that in its internal relations the partnership recognizes the right to the individual partner of his own share, which at the liquidation stage is attributed to him after that the partnership's debts are paid. Now Brunetti agrees, with Potzulu, that the autonomy of the partnership funds is less rigid than in any other type of partnership since the particular creditor of a partner cannot exercise his rights on the common funds but can only exercise an action on the share due to his creditor in accordance with Art. 2270. Yet there is without doubt autonomy, and this can hardly justify calling the new type of partnership the 'most elementary'.

The Minister stated that it was exactly in the recognition of patrimonial autonomy that there is substantial difference between the regulation of the *società semplice* and that of the società civile of the code of 1865.

The *società semplice* is a true and proper partnership, the characteristic feature of which is undoubtedly derived, within certain limits, from the features of traditional commercial partnerships. However certain fundamental differences exist between the *società semplice* and other types of partnership, among which *in primis,* absence of publicity, and other decisive differences are met regarding the contract of partnership, regime of responsibility, dissolution, winding up and so on.[15]

This explains why provisions have been adopted as Art. 2267, 2268, 2270 and 2271 that were limited to commercial partnerships in the Codes of 1865 and 1882.[16]

Finally it ought to be noted that the partnership property of the *società semplice* as is the case with other partnerships of a per-

[13] Rel. Min. n. 931
[14] Rel. Min. n. 932
[15] Romano-Pavoni, Teoria delle Società, p. 134
[16] Brunetti, Trattato del Diritto delle Società p. 347 & n. 24

sonal nature, belongs to the group: rights thereto or relative to it do not pertain to A and B, and C etc. but to A, B, C *together* i.e. collectively; no one possesses a share of the things forming the *patrimonio sociale* but each one naturally has an interest in it.[17]

The German Code regulates civil partnerships.[18] Some associations, though formed for commercial purposes e.g. associations of artisans or professional people (which are only civil partnerships), ad hoc syndicates and many cartels, are governed by the Civil Code. Civil partnership is not in fact a legal person since the Civil Code deals only with two types of juristic persons in private law: Associations *(Vereine)* and Foundations *(Stiftungen)*. These are considered as corporations in German law. Unincorporated associations, according to Sec. 54, are legally treated as if they were partnerships. Members of the association acting in the unregistered association's name are held to be personally responsible since the association does not enjoy the benefit of the personality distinct from that of its membets.

The 'open' commercial partnership is not a legal person, yet it can under, and because of, the *firma* acquire rights, including real property, and incur liabilities, and sue and be sued. As a rule an unregistered association cannot be a plaintiff in civil proceedings. Still it appears that it is being accorded the same benefit as the 'open' commercial partnership. The Federal Supreme Court has since the late Fifties begun to relax the rule of incapacity to be plaintiffs. On the other hand unincorporated associations can be defendants in accordance with a special rule of the Code of Civil Procedure (Sec. 50(2)). Their property can be the subject of bankruptcy proceedings. They are therefore treated as if they were incorporated associations like the *Vereine,* but they cannot be entered as owners of real property in the Land Register. Since civil partnerships are, in all the aspects that matter, similar to unregistered associations that in turn are given treatment identical to the 'open' commercial partnership, it follows that civil partnership too enjoys the same benefits.

It appears therefore that though civil partnerships, 'open' commercial partnerships, and unregistered associations are not endowed with juristic personality in German law, the Courts are directing these bodies along the road to becoming legal *personae.* If this is

[17] idem

[18] Gesellschaft des bürgerlichen Recht in sections 705-740

not exactly the case, and even if it may not actually be the intention of the German Courts to do so, yet such partnerships and associations are being allowed to enjoy some of the more important qualities of a juristic person, at least in judicial proceedings.

The idea of legal personality of civil partnership prevails in French doctrine and jurisprudence,[18] but, warns FERRARA,[19] one must really be on one's guard against this apparent authority not only because such doctrine is not based on any serious argument, and is in fact admitted as being a jutisprudential creation, but because French writers speak of personality in such a wide and far-from-precise sense, that it is not possible to give it a juridical content.

THIRY[20] and other writers put forward the theory that civil partnerships have a patrimonial autonomy, implying thereby a position analogous to that of legal personality. This, of course, does not necessarily follow.[21]

The French Law of 24th July, 1966 expressly recognizes *personnalité morale* in all types of partnerships. So both Civil and Commercial partnetships have this common characteristic. An analysis of the notion of juridical personality in respect of partnership in modern French legal doctrine shows:

(a) the present concept is that juridical personality has been linked from the beginning to the notion of the *patrimoine d'affectation.* According to this concept the possession of a *patrimoine,* meant for the realization of a purpose, supposes a *personnalité morale.*

There are also two other concepts: either (i) juridical personality actually exists whereby from the moment that a group of persons constitutes a distinct centre of interest, it has a collective will and a particulat activity directed towards an end and so it has a real personality analogous to that of individuals, or (ii) juridical personality does not actually exist except by means of a fiction; personality is conceded by the legislator to certain groups that have to fulfil certain functional conditions without having recourse to this or that element which could justify the presence of a juridical person.

[19] Planiol et Ripert. Droit Civil Vol. II n. 1956 et

[20] Des apports existants dans les societés civiles entre les associés et les tiers.

[21] but see 'Conclusion', last para.

(b) the French concept in fact varies in doctrine according to jurists. Yet it is held from the very start that an association is endowed with *personnalité morale* if it possesses a patrimony. The next argument is that there is no patrimony without there being a person; that a person has of necessity a patrimony, and that a person, has but one patrimony. It follows then that a *Societé* is presumed to have a patrimony distinct from that of the partners and so it is a persona.

It seems then logical to assimilate the *personnalité morale* of partnerships with the physical personality of individuals. Just as the physical personality has a name, a residence, a capacity, a nationality, so the French partnership, both civil and commercial, has a name, a partnership residence (which is its domicile), a capacity, and equally a nationality.

Article 5 of the law of 24th July, 1966 established the date of assumption of juridical personality from the date of registration in the commercial register. The French legislature introduced this provision out of consideration for the laws of common market countries such as Germany, Italy, Holland. But the French solution concerns only commercial partnerships and not civil partnerships. These continue to acquire in full right the *personnalité morale* at the moment of conclusion of the contract. Civil partnerships are in effect not subject to the formalities of commercial partnerships.[22]

It is worthwhile considering the advantages and disadvantages of recognition of moral or juridical personality in civil partnerships.

If civil partnership is a juridical person, the capital or assets of the partnership will constitute surety for the creditors of the partnership. In regard to the social assets such creditors will have preference over the personal creditors of the partners. This is the position relating to commercial partnerships.

But if civil partnership is just a mere group of individuals, personal creditors will have equal rights over the assets of the partnership.

In the case of a civil partnership being a *persona juridica* it will be this 'person' that will be the owner of the partnership's assets. As a result of this notion immovables of the pattnership cannot be subjected to hypothecation by the partners.

[22]Michel de Juglart, Benjamin Ippolito, Cours de Droit Commercial 2[e] Vol. pp. 65-68

If the civil partnership is not vested with personality the partners are co-owners of things placed in common in such manner that each of them is reputed, at the dissolution of the partnership, to have had ab initio ownership of the things which the division of assets has attributed to his share.[24]

Another point that is to be very carefully examined in all its possible aspects and implications is the liability of the civil partnership qua *persona* in relation to damages. In a somewhat analogous case, the German *Verein* is held responsible for any act giving rise to a claim for damages done by the board or a member of the board or any agent of the *Verein* provided that the act was done in the exercise of the official duties of such member or agent. This applies alike to contractual or delictual damages.[25]

There had been at one time a discussion on whether it was advisable to introduce limited liability in civil partnerships. The notion of 'limited liability' in this regard is frought with dangers. Arguments for and against are many and it is not at all clear that any party will actually benefit by such limited liability. In fact nothing was done in this respect. It may be a good exercise to go deeply into the problems involved in an attempt to update not only the notion but also the actual functions of the civil partnerships. The specific point was one of the subjects of discussion in the Congresses of the International Bar Association since 1968 and a negative vote was given to it in the 1970 Tokyo Conference. It is said that the only country in which professional partnerships with limited liability have been created is Holland, but, even here, there has been an objection raised by the State lawyers and it is now unlikely that such limited liability partnerships will be allowed.

Our Courts have held the view that a civil partnership is not a juridical person. This is deduced from a decision which held that a civil partnership, just as an association, can be represented judicially by persons named as mandataries. Their representation is in any such case confined to the limits of their relative mandate. This is the substance of the judgement of A. Parnis, J. in *Grech vs Darmanin (15 Gennaio 1907 – Vol. XX – III – 1)*

Such mandate is to be expressly stipulated in the statute of the association or contract/agreement of partnership. In the absence

[24] Marcadé et Pont, Spiegazione del Codice Napoleone Vol. VIII parte 2na pp. 105-7

[25] Sec. 31 of the German Civil Code.

of such express mandate then the *società civili* is represented by the entire committee or by a person that is so chosen or authorized by the committee in a committee meeting. This was held by the Court of Appeal in *Joseph Fenech ne vs Fortunato Petroni et. (L.A. Camilleri C.J., Montanaro Gauci, Harding JJ. – 5 ta' April 1954 – Vol. XXXVIII-I-125)*

In 1953 in *re Francis Sarè vs Salv. Cacciattolo et (9 ta' Jannar 1953 – Vol. XXXVII-II-617)* the late Judge Alberto Magri held: *'il-General Workers Union, bħala enti morali... M'hemmx dubbju li l-G.W.U. hija waħda minn dawk li jissejjħu "società civili", rikonoxxuta jew permessa mill-liġi; kull min jinkiteb fiha jidħol f'rapporti kontrattwali magħha.'* Apart from the merits of the case, the learned Judge must have somehow confused the issue. The General Workers Union is not and cannot under the circumstances of its existence be a civil partnership. It is a trade union and it is from this status that it assumes its juridical personality granted to it legislatively by the Trade Unions and Trade Disputes Ordinance 1945.

Both doctrine and jurisprudence, as well as the more recent codes, have fallen in line with the spirit of the changing times. It is considered that the time has come to revise the old concept of civil partnership as being a type radically different from commercial partnerships, corporations, or registered associations.

The exigencies of modern life, where specialisation is a sine qua non, render it almost imperative for professionals such as lawyers, doctors, architects, engineers to form associations or partnerships. In this way they can give better and quicker service to their clients. The community at large will be much better off with the improved standard of service. However, since it will often be the case that a person seeking the service of a partnership of professionals may be served by different members of the partnership, there ought not to be the financial burden on such members to bear responsibility either individually or jointly and severally. In any case this notion is neither strange nor revolutionary. A patient claiming damages that he has suffered because of the negligence of the house surgeon or house physician or nurse at a hospital sues the board of governors of the hospital and not the individual concerned. Such cases are commonplace in the U.K.

It is submitted that there are in actual fact many more advantages and benefits accruing from granting legal personality to civil partnerships than withholding such personality even though this

may be considered by theorists as a legal fiction.

Finally it may be agreed that by definition a civil partnership has the principal attributes of a juridical personality: (a) plurality of members; (b) common purpose i.e. a will of its own; (c) social patrimony i.e. since it has assets it will also have to have liabilities, and so has debtors as well as creditors. What is missing is the will of the legislator that as RICCI points out, is necessary to put the official seal on what already exists. Since this official blessing in the form of grant of legal personality, even though it may be called juridical fiction, had been granted at first by the Courts and later by a law ad hoc on commercial partnerships, the next logical step would be to grant by statute legal personality to civil partnerships.

TAQSIR TAS-SENTENZI TAL-BORD TAT-TAXXA TA' L-INCOME (1956)

Kawża Nru. 1/1956 deċiża fid-19 ta' Novembru, 1956

L-appellant neguzjant ta' textiles appella mill-assessment għax deherlu li kien eċċessiv.

Il-Bord f'dan il-każ iffissa l-gross profit fuq kalkolu tar-rata medja fuq is-sales.

F'dan il-każ il-Bord ma ammettix tnaqqis ta' l-ispejjeż ta' car, u osserva li l-ispiża għax xiri ta' cash:registrar kienet ta' natura kapitali. Inoltri l-Bord ammetta d-deduzzjoni ta' l-ispejjeż ta' vjaġġ l-Ingilterra għax l-ammont ma kienx eċċessiv.

Kwistjoni ta' kontijiet.

Kawża Nru. 2/1956 deċiża fl-14 ta' Frar, 1956

Dan l-appell ġie dikjarat irritu u null għax preżentat xhur wara li għalaq it-terminu legali.

Appell – fuori termine – null –

Kawża Nru. 3/1956 deċiża fl-4 ta' Mejju, 1956

L-appellant, pulizija, fi żmien erba' snin kien iddeposita l-Bank £M1700, u l-Kummissarju kien intaxxah fuq dan l-ammont għax ikkunsidrah bħala income minn undisclosed sources.

Il-Bord irriteniena li l-appellant kien iġġustifika dawk id-depositi. £M1100 kien ilhom għandu minn qabel il-gwerra.

Irriżulta li l-appellant, fil-kors tax-xogħol tiegħu kien jaqla xi rigali żgħar, b'medja ta' £M3 fix-xahar. Għalhekk il-Bord ordna li l-income ta' l-appellant jiżdied b'£M36 fis-sena; għax: "On the analogy of tips to waiters and stewards, any monetary gifts to public servants in appreciation or anticipation of particular services may be treated as part of their earnings".

Rigali lill-public servant – income.

Kawża Nru. 5/1956 deċiża fis-17 ta' April, 1956

L-appell ġie dikjarat null għax kien ġie preżentat wara li għaddew it-tletin ġurnata preskretti fl-art. 57(1) tal-Income Tax Act.

Appell – terminu – null –

Kawża Nru. 6/1956 deċiża fid-19 ta' Novembru, 1957

L-appellant, neguzjant bl-ingrossa u bid-dettal tad-drappijiet u ħwejjeġ appella mill-likwidazzjoni tat-taxxa għax eżaġerata.

Il-Bord osserva li ma kienx hemm elementi suffiċjentement attendibili għall-likwidazzjoni sodisfaċenti tal-profitti sena b'sena. Għalhekk il-Bord ikkalkola l-profitti minn negozju, mill-awment flattiv ta' l-appellant miżjud bil-ħruġ personali tiegħu kollu, u ddivida dan l-ammont bin-numru ta' snin in kwistjoni.

Inoltri dwar is-sena ta' stima 1949 billi ma kienx hemm elementi li jistgħu jservu biżżejjed ta' bażi għall-likwidazzjoni tal-profitti, il-Bord fid-diskrezzjoni tiegħu iffissahom fuq l-istess ċifri tas-sena 1950.

Kwistjoni ta' kontijiet.

Kawża Nru. 7/1956 deċiża fl-24 ta' Marzu, 1956

It-taxpayer appella (i) għax ma ġietx dedotta mill-profitti tiegħu s-somma li hu nefaq meta fetaħ ħanut, u (ii) għax meta sar l-istock-taking fl-aħħar tas-sena 1953, ittieħed xi żball li kabbar il-profitti tiegħu.

Il-Bord ċaħad l-appell, għax l-ispejjeż ta' armar u t-twellija talħwienet kienu ta' natura kapitali u għalhekk mhux deduċibbli.

Kwantu għat-tieni parti ta' l-appell, l-appellant ma kienx f'pożizzjoni li jgħid fejn kien l-iżball, u dan kien biss suppożizzjoni li ma ġietx korroborata minn ebda prova jew bidu ta' prova.

Spejjeż kapitali –
Ħanut – spejjeż ta' armar u twellija ta'.

Kawża Nru. 8/1956 deċiża fit-23 ta' Diċembru, 1956

It-taxpayer, neguzjant, appella mill-assessments fissati mill-Kummissarju għas-snin 1949-1953.

Il-Bord iffissa l-profitti fuq reconstructed statement of affairs.

F'dan il-każ qamet il-kwistjoni jekk kienetx deduċibbli s-somma li ġiet misruqa mill-manager imqabbad mill-appellant. Il-Bord irritiena li in vista tal-konklużjoni li wasal għaliha, la ċ-ċirkostanza tas-serq u inqas il-kwistjoni subordinata tal-kwantum, ma kellhom importanza, għaliex kien kemm kien l-ammont, dan ma jistax jiġi magħdud ma' l-attiv li effettivament kien jeżisti fl-aħħar tas-sena, f'kalkolu ta' profitt bażat fuq l-awment tal-kapital.

Awment tal-kapital.
Serq minn manager.

Minn din id-deċiżżjoni sar Appell – Ara deċiżżjoni tal-Qorti ta' l-Appell ta' l-14 ta' Marzu 1957 (Każ Nru. 16)

Kawża Nru. 9/1956 deċiża fil-25 ta' Mejju, 1956

It-taxpayer, bin-negozju ta' oġġetti tad-deheb appella minn ex-officio assessment.

Il-Bord, wara li osserva li l-kotba miżmuma mill-appellant ma kienux jagħtu idea ċara biex l-income tiegħu jiġi stabbilit, iffissa l-profitti. F'dan il-każ, l-appellant kellu erbat itfal impjegati miegħu fil-ħanut. Il-Bord iddeduċa biss il-paga ta' tnejn minnhom għax irritiena li t-tnejn l-oħra kienu żejda.

Ex officio assessment.
ulied neguzjant, impjegati miegħu.

Kawża Nru. 10/1956 deċiża fit-12 ta' Ġunju, 1956

It-taxpayer appella billi ppretenda d-deduzzjoni ta' spejjeż ta' xi kawżi u danni.

Il-Bord ċaħad l-appell għax ma kienx ittieħed ebda benefiċċju minn dawk l-ispejjeż. Il-kawża kienet tivvesti dwar lokazzjoni ta' ċinema, u l-appellant kien tilef il-kawża. Kawża oħra kienet għarresa ta' kontijiet ta' amministrazzjoni antekedenti għas-sena bażi in kwistjoni. Dwar id-danni li tagħhom inralbet id-deduzzjoni dawn ġew miċħuda għax kienu ta' natura kapitali.

Deduzzjoni – spejjeż ta' kawża.

Case 11/1956 preliminary decision of 27th October, 1956

Appellant was a shareholder of a private limited liability company. The Company had appealed to the Board regarding the assessment 1949, and the Board decided that the stock at the end of the basis year 1948 srood at £M8479 againsr £M7074. The Company again appealed regarding the assessment for the year of assessment 1950, but this appeal was rejected by the Board owing to the lapse of time.

Appellant now contended that for the year of assessment 1950 he ought to be taxed only on his share of the Company's profits reckoned at £M3663 and not £M4978 the lower figure mainly resulting from the overvaluation by £M1404 of the closing stock in 1948.

The Board gave a preliminary ruling and decided that appellant should not be taxed on the actual dividends declared if these include capital, and allowed him to bring evidence to prove that the real profits of the Company were actually lower.

The Board observed that the actual withdrawal of the dividends is equivalent to a formal declaration, and the Profit and Loss Account of the Company is another form of declararion of dividends.

Final decision of the 5th April, 1957

The Board accepted the appeal for it is unquestionable that the value of the opening stock of one year is the same as that of the closing stock in the preceding year. It was therefore obvious that the net profit really earned by the Company was not £M5067 but £M1404 less, namely £M3663, and that any distribution of dividend to appellant which is in excess of his share, could only have been paid out of capital. As no dividends were, in this case, properly declared, and personal drawings may have exceeded the profits, it was necessary for the Board to decide the amount of dividend which, for the purposes of taxation, appellant must be held to have received.

Dividend – and capital.
Opening stock – closing stock of previous year.
Drawings which exceed profits.

Kawża Nru. 13/1956 deċiża fid-9 ta' Lulju, 1956

L-appellant bil-ħanut tax-xorb, appella minn assessments ex-officio. L-appellat in vista tal-awmenti ta' kapitali tal-appellant, ma kienx aċċetta l-income kif dikjarat.

Il-Bord ikkalkola l-awment ta' kapitali, iddividieh bin-numru ta' snin in kwistjoni, u żied din is-somma ma' l-income dikjarat għal kull sena.

Awment ta' kapitali.

Kawża Nru. 14/1956 deċiża fil-11 ta' Settembru, 1956

L-appellanti li kellhom fabbrika ta' għamara u ħwienet għal bejgħ ta' ġugarelli appellaw minn ex officio assessments.

Il-Bord wasal għall-konklużżjoni li l-profitti ma kienux superjuri għal dawk li ġew dikjarati mill-appellanti u kif riżultanti mill-kotba tagħhom.

Ex officio assessment –

Kawża Nru. 15/1956 deċiża fid-9 ta' Lulju, 1956

Appell minn assessment ta' wieħed bil-ħanut tal-laħam.

Il-Bord irritiena li l-profitti li jagħmlu l-butchers huwa ta'(10%) għaxra fil-mija fuq is-sales bil-cost.

Profitti ta' butcher –
Butcher – profitti ta'.

Kawża Nru. 16/1956 deċiża fid-29 ta' Mejju, 1956

It-taxpayer appella għax kien ġie taxxat fuq il-free meals lilu mogħtija waqt li jkun qiegħed jaqdi d-dmir tiegħu bħala Offiċjal tad-Dwana fl-Ajrudrom ta' Ħal Luqa.

Il-Bord jirritiena li l-valur tal-free meals provduti lilu waqt li jkun fuq ix-xogħol mhumiex taxxabbli. Il-Bord irritiena li f'dan il-każ ma kien hemm ebda rimunerazzjoni imma speċi ta' risarċiment antiċipat tad-danni li seta' isofri t-taxpayer, minħabba l-eżiġenzi tas-Servizz.

Free Meals –

Kawża Nru. 17/1956 deċiża fis-27 ta' Ottubru, 1956

It-taxpayer, bil-ħanut għal bejgħ ta' toys, valiġġi, twapet, etc. appella mid-deċiżjoni tal-Kummissarju li kien illikwida ex-officio l-income ta' l-appellant għas-snin bażi 1949/1953.

Il-Bord laqa' l-appell, billi irriteniena li l-kotba miżmuma mill-appellant kienu regulari, u ma kienx hemm awment ta' kapitali għax l-appellant fil-1949 kellu £M6000 id-dar.

Ex-officio Assessment –

Kawża Nru. 18/1956 deċiża fl-24 ta' Novembru, 1956

It-taxpayer, li kien jinnegozja f'textiles wearing apparel, appella minn assessment ex-officio għas-snin 1949/1954.

It-taxpayer beda jżomm kotba mill-1 ta' Jannar, 1949; il-Bord irriteniena li r-rati ta' profitti riżultanti mill-kotba kienu baxxi wisq, u għalhekk ikkunsidra l-awmenti tal-kapitali li kellu l-appellant. Il-Bord irriteniena li l-appellant kellu £M7000 id-dar fil-bidu tal-1949. L-awment ta' kapitali ġie diviż bin-numru ta' snin u miżjud ma' l-income kif dikjarat.

Ex-officio Assessment.
Awment ta' kapitali.

Kawża Nru. 19/1956 deċiża fid-19 ta' Diċembru, 1956

Skond kuntratt ta' kostituzzjoni ta' soċjeta l-appellant kellu idaħħal £M450 fis-sena "bħala kumpens għax-xogħol tiegħu fl-amministrazzjoni tas-soċjeta", u l-Kummissarju ikkunsidra dawn l-£M450 bħala income ta' l-appellant.

It-taxpayer appella, għax skond skrittura privata kien jirriżulta li dawk l-£M450 kienu dovuti lill-ommu, talli din ħarġet minn negozju, u dan sar biex iktar jikkawtelaw lil ommu.

Il-Bord laqa' l-appell wara li l-appellant esibixxa l-iskrittura in kwistjoni.

Income –

Kawża Nru. 20/1956 deċiża fit-18 ta' Diċembru, 1956

Dan l-appell ġie trattat kontestwalment ma' dak 19/1956.

Il-Bord iddeċida li l-£M450 kienu income ta' l-appellanti (l-omm).

Il-Bord irriteniena li: "Għalkemm l-art. 21(3) ta' l-Income Tax Act jiddisponi li 'dispożizzjoni' tinkludi kull 'trust, għoti, rabta, ftehim

jew rangament, jew trasferiment ta' attivi', b'dana kollu din l-interpretazzjoni ghandha dejjem tiftihem fis-sens ta' dispożizzjoni, u dispożizzjoni fil-fehma tal-Bord ghandha tiftihem biss bhala trasferiment u titolu gratwitu. Jigifieri dan l-art. 21(3) jopra dejjem, tkun xi tkun il-forma tal-att. ta' trasferiment, purche dan ikun a titolu gratwita".

F'dan il-każ l-appellanti kienet ittrasferit sehma minn negozju lill-uliedha, kontra l-pagament ta' renta, u l-Kummissarju ikkunsidra l-income ta' whud minn uliedha f'dan in-negozju, bhala taghha. Il-Bord laqa' l-appell tat-taxpayer fuq dan il-punt.

Trasferiment –
Art. 21(3) Income Tax Act, 1948

Kawża Nru. 21/1956 deciża fid-29 ta' Jannar, 1957

L-income totali tal-appellant kien jinkludi il-profitti mix-xoghol li hu kien jaghmel mad-ditta "X". Fil-kors tal-kawża gew ezibiti il-Balance Sheets ta' dik id-ditta, muejn irrizulta s-sehem ta' l-appellant, li kien jaqbel ma' dak fissat mill-Kummissarju.

Ghalhekk l-appell gie rigettat bl-ispejjeż.

Income –

Kawża Nru. 23/1956 deciża fil-11 ta' Settembru, 1956

Il-Bord iddecida li la darba t-taxpayer kien jghix separat, u l-mara ma kienetx mantnuta minnu, ma kienx hemm lok ghal deduzzjoni kontemplata fl-art. 22(1)(a).

Dwar l-ispejjeż imhallsa lil wahda mara li kienet tehodlu hsieb id-dar, din ma kienetx tigi mill-appellant, u kwindi l-ispejjeż imhallsa lilha ma kienux deducibbli fit-termini tal-art. 22(1)(c).

L-ispejjeż legali ta' kawża ghall-manteniment lil martu, kienu ta' natura personali, u kwindi eskluzi mill-art. 11(a) ta' l-Income Tax Act.

Miżżewweġ jew għażeb – deduzzjoni.
Housekeeper –
Spejjeż ta' kawża.
Art. 11(a), 22(1)(a)(c) Income Tax Act, 1948.

Kawża Nru. 24/1956 deciża fil-15 ta' April, 1957

L-appell kien jirrigwarda l-kwistjoni tal-profitti mill-kuntratti

al-"hire purchase sales".

Il-Bord iddeċida li l-profitti derivanti mill-kuntratti tal-"hire urchase" tal-appellant għandhom ikunu mqassma matul il-perjodu ollu li fih għandhom jitħallsu l-instalments, b'mod li jittieħed in onsiderazzjoni r-riskju ta' telf, bil-fakolta lill-Kummissarju li addotta kwalunkwe sistema ta' konteġġjar alternativ għal dak rattikat l-Ingilterra.

Li għas-sena ta' stima 1949, fl-assessment tal-profitt, jaqgħu r-rati kollha tal-1948 anki jekk il-ħlas tar-rati jkun beda qabel dik s-sena.

'rofitti –
lire purchase sales.

Kawża Nru. 25/1956 deċiża fid-9 ta' Frar, 1957

It-taxpayer, foreman tal-istevedores, għas-snin 1951 u 1952 kien ddikjara telf ta' £M909, u £M52, u għal 1953 iddikjara qliegħ ta' £M220. Il-Kummissarju ex officio iffissalu income ta' £M1462 fis-sena.

Il-Bord, wara li osserva li l-kotba tal-appellant u x-xhieda tiegħu ma waslux biex jippruvaw li l-qliegħ minnu dikjarat jista' jiġi aċ-ċettat, osserva li l-irriżultanzi proċesswali wrew li ma setax kien hemm dik il-qabża fix-xogħol tiegħu li tiġġustifika ċ-ċifra iffissata mill-Kummissarju, u iffissa l-qliegħ ta' l-appellant f'£M783 li kien ġie fissat mill-Kummissarju għas-sena 1950 u aċċettat mill-appel-ant.

Ex officio assessment.

Kawża Nru. 26/1956 deċiża fit-8 ta' Novembru, 1956

Appell dwar deduzzjoni għat-telf ta' £M691 inkors f'negozju do-uti mid-ditta "X" u li hija ineżiġibli.

Il-Bord irriteniena li biex kreditu jiġi dedott mill-income, hemm żonn li apparti l-ineżiġibilita tiegħu ikun twieled fil-kors ta' perazzjonijiet diretti għall-produzzjoni tal-income. F'dan il-każ l-kwistjoni kienet tirrigwarda mhux debitu ta' klienti li ċċevew xi merkanzija u ma ħalsuhix, imma flux inkassati regolarment minn wieħed mis-soċji u minnu trattenuti għad-dannu ta' soċji oħra. Għalhekk it-telf ma kienx sar fil-produzzjoni tal-income, u ma kienx deduċibbli.

Deduzzjoni –
Bad debts.

Kawża Nru. 27/1956 deċiża fid-19 ta' Diċembru, 1956

L-appellanti, li kellha negozju, b'att pubbliku iddonat xi flus, id-dritt tal-avvjament u inkwilinat tan-negozju tagħha, lit-tliet uliedha ġuvintur. Inoltri hi biegħed lil uliedha, bil-prezz ta' £M25,000 il-merkanzija kollha li kienet tinsab fil-ħanut u stores, bil-fixtures u l-oġġetti mobbli oħra. L-ulied wara ikkostitwew soċjeta għall-ġestjoni ta' dak in-negozju.

Il-Kummissarju ikkunsidra l-profitti derivanti minn dik is-soċjeta bħala kollha tal-appellanti in bażi għall-art. 21(2).

Il-Bord irritiena li għandhom jaqgħu taħt id-dispost tal-Art. 21(2) dawk id-drittijiet li ġew trasferiti b'titolu gratwita, imma mhux dawk li ġew trasferiti b'titolu oneruż.

Trasferimenti lil ulied.
Art. 21(2) Income Tax Act, 1948.

Din id-deċiżżjoni ġiet konfermata mill-Qorti ta' l-Appell fil-11.3.57 (Appell Nru. 18).

Kawża Nru. 28/1956 deċiża fit-23 ta' Awissu, 1957

Appell dwar il-profitti derivanti mill-ġestjoni ta' ħwienet tad-drappijiet u ta' ġojjellerija.

It-taxpayer kien akkwista l-inkwilinat ta' ħanut u l-avvjament u l-isem tad-ditta, oltre l-"stock in trade", mobbli, fixtures, etc. bil-prezz ta' £M6800, li minnhom £M4800 kellhom jitħallsu f'rati mensili. Il-Bord irritiena li dawk il-pagamenti annwali kienu kollha ta' natura kapitali u kwindi mhux deduċibbli mill-profitti.

Dwar il-ħanut ta' ġojjellerija l-kotba miżmuma kienu irregolari, u l-Bord fid-diskrezzjoni tiegħu kkalkola li għas-sena ta' stima 1950 gross profit ma setax kien ta' inqas minn tal-10% li minnhom kellhom jitnaqqsu t-trade expenses.

It-taxpayer ħallas xi interessi fuq overdrafts, u dawn id-djun kienu fl-interess tad-diversi impriżi tat-taxpayer u ma setgħetx issir ripartizzjoni bejn id-diversi ħwienet tiegħu. Il-Bord irritiena li l-interessi totali mħallsa minnu jiġu għaldaqshekk imnaqqsa mill-profitti totali tad-diversi negozji li kellu.

Akkwist ta' ħanut – spejjeż kapitali.
Ġojjellerija – gross profit 10% (1949).
Interessi – għal diversi impriżi.

Kawża Nru. 29/1956 deċiża fil-25 ta' Marzu, 1957

Appell ta' wieħed bil-ħanut tal-laħam. It-taxpayer ma żammx kotba regulari. Għas-snin 1948-1954 il-Kummissarju ppretenda profitti a' 12½% fuq is-sales bil-cost.

Il-Bord irriteniena li l-profitti kienu, fuq iċ-ċanga u l-porku, sitt soldi u ħames soldi r-ratal rispettivament; u għall-muntun, ħaruf u artikoli oħra il-Bord diskrezzjonalment ikkalkola profitt ta' 10% uq is-sales bil-cost.

Ħanut tal-laħam – profitti.

Kawża Nru. 30/1956 deċiża fis-6 ta' Frar, 1957

Appell ta' wieħed distributur tas-sigaretti.

Il-Bord aċċetta l-kotba ta' l-appellant, u laqa' l-appell bl-ispejeż, u iffissa l-profitti, u dawn għal tliet snin kienu inqas minn lawk dikjarati mit-taxpayer.

Ex-officio assessment.

Kawża Nru. 31/1956 deċiża fis-27 ta' Diċembru, 1957

It-taxpayer, neguzjant ta' njam, hardware u żebgħa, għas-snin ta' stima 1951-1954, iddikjara profitt ta' 9.7% media. Il-Kummissarju ntaxxah 25% at cost.

Il-Bord, in vista li l-kotba ġew miżmuma fenn tajjeb, u li parti kbira tal-bejgħ issir bil-wholesale, iffissa l-gross profit għal 11½% uq is-sales at cost. Billi fost l-ispejjeż l-appellant kien niżżel ħafna ta' natura kapitali, l-Bord iffissa diskrezzjonalment l-ammont ta' spejjeż ta' kull sena.

Ex-officio assessment –
Neguzjant ta' njam, hardware u żebgħa –

Kawża Nru. 32/1956 deċiża fit-12 ta' April, 1957

L-appellant, bin-negozju ta' aġent, wholesale u retailer ta' artikoli farmaċewtiċi u għamel soċjeta ma' tliet uliedu. Il-Kummissarju in bażi għall-art. 21(1) injora s-soċjeta u iffissa lit-tliet ulied salarju, lil A tah £M380 lil B u C, £M320 kull wieħed.

It-taxpayer appella u talab li lil A jingħata salarju ta' £M500, u lil B u C, £M450 kull wieħed.

Il-Bord laqa' l-appell rigward is-salarju ta' A, u ċaħad rigward dak ta' B u C.

F'dan il-każ A kien spiżjar, u kien imexxi x-xogħol kollu.

Soċjeta ma' l-ulied –
Salarju lil ulied.

Kawża Nru. 33/1956 deċiża fid-29 ta' Awissu, 1957

L-appellant bin-negozju tad-drappijiet ta' rġiel appella mill-assessment tal-Kummissarju.

Il-Bord wara li ħa in konsiderazzjoni tal-awment ta' kapitali iffissa hu l-income minn negozju għas-snin 1953-1955.

Ex-officio Assessment.

L-appellant sussegwentement b'rikors talab il-korrezzjoni tassentenza mħabba żball ta' aritmetika.

Il-Bord ċaħad it-talba, salvo u impreġudikat kwalunkwe dritt ieħor tiegħu si et quatenus, għax ma kien hemm ebda żball ta' aritmetika. Pero il-Bord ma kienx ħa in konsiderazzjoni fil-kalkolu tal-Attiv ta' somma Fixed Deposit il-Bank, għax l-appellant ma kienx ippreżenta d-dokumenti relativi. Dan ma kienx żball aritmetiku, u għalhekk fit-termini ta' l-art. 57(8) ma setgħetx issir din il-korrezzjoni.

Żball ta' Aritmetika.
Art. 57(8) Income Tax Act, 1948.

Kawża Nru. 34/1956 deċiża fis-16 ta' Marzu, 1957

Appell ta' wieħed naġġar mill-assessment fissat mill-Kummissarju.

Il-Bord wara li qies iż-żieda ta' kapitali, awmenta l-income ta' l-appellant.

Il-Bord irritiena li l-introjtu mill-logħob tal-ażżard mhux taxxabbli.

Ex-officio assessment –
Logħob ta' l-ażżard.

Kawża Nru. 36/1956 deċiża fil-31 ta' Diċembru, 1957

L-appellanti, midwife, appellat mill-income fissat mill-Kummissarju.

Il-kotba miżmuma mit-taxpayer kienu irregolari.

Il-Bord iffissa l-income, billi wara li kkunsidra l-awment ta' kapitali, iddividieh bin-numru tas-snin.

L-appellanti kienet tħallas xi ħaġa fix-xahar lil ommha u oħtha talli kienu jgħinuha. Il-Bord irritiena li parti minn dak il-ħlas ma deduċibbli għax ma kienx għax-xogħol res, imma kontribuzzjoni ta' natura volontarja.

Ex-officio assessment –
Awment ta' kapitali –
Kontribuzzjoni lill-ġenituri u aħwa –

INDIĊI

tad-deċiżjonijiet tal-Bord ta' Kummissarji Speċjali tat-taxxi
(Kumpilat minn Tonio Azzopardi)

INDIĊI

ta' artikoli tal-liġi ta' l-Income Tax 1948 msemmijin

BOOK REVIEW

Governmental Liability in Malta – Dr. WALLACE PH. GULIA LL.D. B.A. B.Sc. Ph.C. M.A.(Admin)(Manch.) D.P.A.(London). Senior Counsel to the Republic, Lecturer in Admin. Law, RUM. [M.U.P. xvi & 260 pp. 1974 £M1.50]

Dr. Wallace Gulia was born in Paola on the 4th of March 1926. In 1945, he took his first degrees from University, the B.Sc; and Ph.C., finishing first in order of merit. In 1947, he obtained, through a correspondence course the Diploma in Public Administration (London). He obtained his B.A. from the Royal University of Malta in 1949, again finishing up first in order of merit. In 1952, he graduated as a lawyer.

In the meantime he had obtained a 2 year travelling scholarship from the R.U.M., which he chose to utilize in order to obtain his M.A.(Admin) from Manchester University. Dr. Gulia was bestowed his M.A.(Adminis)(Manchester) in 1953.

In 1955, he became a Crown Advocate.

Dr. Gulia was married in 1955, and in that year also he benefitted from a British Council Bursary which enabled him to travel to London. During his stay there, he kept up his interests in Administrative Law.

Since 1959, too, Dr. Gulia has been lecturing on Administrative Law at the University of Malta.

In 1966, Dr. Gulia was the R.U.M. representative at the Beirut Conference on 'Local Government Institutions in Commonwealth Countries'. In 1967, he attended another international Conference, this time in New Delhi on 'Public Administration in Commonwealth Countries'.

In 1969, Dr. Gulia again utilized another Bursary – this time from the Italian Government – in order to continue his studies in Administrative Law at the Istituto Di Diritto Pubblico of Rome. The topic he chose for research was Governmental Liability.

Dr. Gulia has given a valid contribution to Maltese Legal Literature.

This, he started giving from his student days – in fact, while still a student, he was a regular contributor to the Law Journal. His literary works on Public Administration include 'L-Amministrazzjoni Pubblika' (1957), 'Il-Bniedem u l-Organizazzjoni tax-Xoghol' (1958) and 'Id-Demokrazija' (1961).

Dr. Gulia's publications also include 'Local Government in Malta', and 'The Board of Special Commissioners for Income Tax Purposes' and 'The Public Corporation in Maltese Experience.'

Dr. Gulia has also given a valid contribution to Maltese literature.

It is proposed now to have a brief look at Dr. Gulia's 'Governmental Liability in Malta', commenting on its contents and their relevance to Maltese legal literature.

Dr. Gulia's lecturing at the University inspired the publication of the book, which is a result of five years of hard work.

Dr. Gulia says in his preface: 'This work is in part a Source book of a very significant part of Malrese Administrative Law and in parr an account and an appreciation thereof'. By and large, therefore, the book can be divided into two parts: a brief critical survey of Governmental Liability in Malta to be found in the Introduction to the Book; and the various sources quoted – these include the most important parts of Maltese jurisprudence on the subject, a Table of Laws (Maltese, Italian and French) and Proclamation I of 1815.

In the Introduction to his book, Dr. Gulia has purported to examine the evolution of Governmental Liabiliry in Malta from the turn of the century to the present day.

To what extent can it be said that he has achieved his aim? Dr. Gulia starts by condemning the Legislature for never performing its duty – that of legislating – on the matter. This attack is fully justified and the Legislature is to assume half the responsibility for the confused state of the law in Malta on Governmental Liability.

By whom is the other half of the responsibility to be borne? Undoubtedly, by the Judiciary which in 80 years has yet failed to lay down any coherent doctrine on the matter. Dr. Gulia explains the Judiciary's failure by the fact that in Malta there is no doctrine of binding precedent. This might be an explanation, but it certainly falls short of a justification. The Conseil d'Etat in France, too, is not tied down to the doctrine of binding precedent; this notwithstanding, it has succeeded in formulating a doctrine of Droit Administratif which, in the present writer's view, is so far unparalleled in Europe.

Besides, the Judiciary has been responsible for two grave mistakes, which seem to have been detected and pointed out for the first time in Malta by Dr. Gulia in his book: the first is the importation into the Maltese system of an outdated doctrine from the

Continent – that of the dual personality of the State; the second is a complete misunderstanding of the scope for which this distinction between acts *jure imperii* and acts *jure gestionis* was made in Italy.

As Dr. Gulia points out, the distinction between act *jure imperii* and act *jure gestionis* was introduced into the Maltese legal system in the case Busuttil v Laprimaday (1894) decided in the Court of First Instance by Baron Chappelle and confirmed in Appeal presided by none other than Sir Adrian Dingli.

The Court in that case held that the State can act in two different capacities: firstly it can act *jure imperii* in its sovereign capacity. In this capacity, the State's acts are not subject to review by the Courts, which can only inquire into whether the act was performed by the competent organs and in the manner, with the formalities and under the conditions prescribed by law. This would exhaust the jurisdiction of the Court in a case instituted against the Administration, if its act is decreed as one *jure imperii* by the Courts. The injured party could only sue the public officer, who was the author of the injury, personally. Secondly, the State can act *jure gestionis* in which case the State acts like a bonus *pater familias* and is therefore subject to the same rights and obligations as any other individual.

This doctrine has been applied time and time again by our Courts. Its latest application was in the case Buhagiar v Mangion, confirmed on Appeal as late as the 26th January 1973.

Now what are the two defects inherent in this doctrine as applied by our Courts?

As has been pointed out, they were first detected by Dr. Gulia during the studies he conducted in the University of Rome in 1969.

The two defects are the following:

(i) As Dr. Gulia points out in his introduction, by the 1920's the doctrine of the dual personality of the State had been thrown overboard both by Italian commentators, as well as by the Italian Courts. How our Courts still insist on applying this doctrine is to say the least, beyond comprehension.

(ii) The second mistake in the application of this doctrine by our Courts lies in the total misapprehension of the scope for which the distinction was made, in Italy from which country it had been imported. In the words of Dr. Gulia himself:

'Indeed it now appears clear that the distinction in Italy had

not been made for the purpose of excluding governmental liability, but merely in order to ascertain which Courts had jurisdiction – whether the Ordinary Civil Courts, culminating in the Corte di Cassazione, or the Administrative Court – the Consiglio di Stato: .... The Ordinary Courts had jurisdiction where an act *jure gestionis* was the subject matter of the dispute, but the Administrative Court – the Consiglio di Stato – had jurisdiction where an act *jure imperii* was under consideration.'

In Malta, on the other hand, the same distinction has been imported in order to exclude Governmental Liability when it is decided that the State has acted *jure imperii*.

Dr. Gulia admirably succeeds in summarizing in one paragraph (Intro pp. 8-9 'In the meantime... may be traders'), the cases in which this doctrine was applied and the slight modifications which were made to it.

However, in all fairness to our Judiciary not all the cases involving Governmental Liability which came up before our Courts were decided on the basis of the dual personality of the state. Some judges admirably succeeded in avoiding the application of this firmly-rooted doctrine. This they did by basing themselves on private law concepts, or on the British Public Law system.

As an example of this trend of Maltese case – law – that which imported private law concepts into the Public Law field – we can mention the case Camilleri v Gatt (1902) per Pullicino J. As Dr. Gulia points out, an act – the changing of the level of public streets – which would normally have fallen within the traditional characteristics of an act *jure imperii* (vide Farrugia v Borg Olivier – 1953) was judged on the basis of a private law concept, namely the notion of quasi-contract.

The two classical examples of the second trend of case – law – that which based itself on British Public Law – are undoubtedly Cassar Desain v Forbes (1935) and Lowell v Caruana (1972).

In Cassar Desain v Forbes, the doctrine of the dual personality of the State was categorically declared to be inapplicable to Malta on the basis of the following syllogism: British Public Law is Maltese Public Law where the latter has a lacuna.

British Public Law does not recognize the dual personality of the State. Therefore, the concept of the dual personality of the State is also alien to Maltese Public Law.

In the present writer's view, this case is important not so much in itself, as much as in that it paved the way to what, in my opinion, is the hallmark of jurisprudence on governmental liability in Malta. I am referring to the case Lowell v Caruana, decided by Mr. Justice Caruana Curran on the 14th August 1972. This judgement went a step further than Cassar Desain v Forbes and this in two senses:

(i) Mr. Justice Caruana Curran was not merely satisfied with attacking the doctrine of the dual personality of the State indirectly – by showing that it was alien to the Maltese legal system. He went a step further and attacked the doctrine directly by showing that is an outdated doctrine – 'it-teorija *antikwata* tal-*jure imperii*' as he calls it. Mr. Justice Caruana Curran has thus made reparation for the mistake of those of his fellow judges who insist on deciding our cases on the basis of an obviously antiquated theory.

(ii) This judgement also goes further than Cassar Desain v Forbes in the sense that it introduces the modes of control of executive discretion which are used in British Public Law.

It is indeed a pity that this judgement was delivered when the introduction on Dr. Gulia's book had already been written, thus making it impossible for Dr. Gulia to comment on its relevance and importance.

Dr. Gulia has done very well to include in the Introduction to his book, a study of the Italian System. Besides serving to show the above mentioned mistakes incurred into by our judges, this study can serve as a source of comparative study on which our judges can base themselves in deciding cases on govemmental liability.

It would have been equally useful had Dr. Gulia included a study on the workings of the French system. To take just one example, a more detailed explanation of the doctrine of the Administration's liability for 'risk' as evolved by the Conseil d'Etat could have served to acquaint better Maltese legal minds with this concept, with a view to its possible introduction into the Maltese legal system.

We will pass now to consider the value of 'Governmental Liability in Malta' as a source book. The book includes a reproduction of the reports of the most important Maltese case-law on the subject – as famous examples of which one can mention Busuttil v Laprimadaye (1894) Camilleri v Gatt (1902), Cassar Desain v

Forbes (1935) and Lowell v Caruana (1972).

It also includes the reports of two cases decided by the Corte di Cassazione di Roma, which prove Dr. Gulia's thesis that the doctrine of the dual personality of the State has since long ago been debunked in the neighbour peninsula.

It also includes a unique reproduction of Proclamation I of 1815 of Sir Thomas Maitland, which first declared the principle that the Public Law of Britain is the Public Law of Malta where the latter has a lacuna. It will be recalled that it is on the basis of this principle that the cases Cassar Desain v Forbes and Lowell v Caruana were decided. The reproduction of this Proclamation is unique in the sense that one has no other access to it – except by finding a copy of the Government Gazette of 1815!

Besides, the book includes a table of laws and regulations cited therein – not merely Maltese Law and regulations, but also foreign ones, British, Italian, and French. This could prove to be indispensable to anyone conducting a comparative study on the subject of Governmental Liability.

Another unique characteristic of this work is the 'analytical index'. This, be it noted, was compiled by the purely personal efforts of Dr. Gulia himself. The utility of such an index is much too obvious to require any comment.

The importance of this book in the field of Governmental Liability should be obvious from the above comments on the Introduction. The criticism that one could propose that Dr. Gulia's book is not comparable to, for example H. Street's 'Governmental Liability' is a totally unfounded one for the simple reason that the two writers had different scopes in mind: Street intended to write on the subject of Governmental Liability, while Dr. Gulia intended to publish a source book. Both have succeeded in achieving their aims, admittedly in different ways; but the explanation of this lies in the fact their aims were different. Dr. Gulia's work is of great utility in the field of Administrative Law in general and this for two reasons. In the first place, Governmental Liability constitutes one of the most important and extensive spheres of Administrative Law. In the second place, together with the books and papers already available on Maltese Administrative Law – noticeably those on Public Corporations and the Board of Special Commissioners for Income Tax Purposes, by the same author, and on the Public Servant, by Mr. Justice Oliver Gulia – this book has provided a

very valid contribution to Maltese legal literature on Maltese Administrative Law.

One appreciates that one cannot possibly comment in such a review on all the points dealt with by the writer of the book. Accordingly I have chosen to comment on those points which have struck me most. Other readers of the book might be struck by different points, or by the same points differently. If this is the case, then Dr. Gulia's aim has been achieved, since the scope of any source – book is that of stimulating study, thought and discussion on the particular subject on which its writer has compiled the relevant material.

JOSEPH CARUANA SCICLUNA

KORRISPONDENZA

Għażiż Sur Editur,

Qiegħed nibgħatlek tagħrif fuq il-*World Peace Through Law Center*, u nkunlek grat jekk tippubblikah fil-*Law Journal*.

Il-*World Peace Through Law Center* huwa organizzazzjoni internazzjonali ta' studenti, avukati, mħallfin u nies oħra interessati fil-liġi bħala mezz paċifiku ta' progress, ta' ftehim, u ta' għaqda.

L-għan ewlieni taċ-Ċentru huwa li jgħin biex tissaħħaħ is-sistema legali dinjija. Tishiħ kemm ta' l-Istituzzjonijiet, bħalma hija l-Qorti Internazzjonali tal-Ġustizzja, kif ukoll tal-liġijiet. B'hekk jintlaħaq l-idejal fejn id-dinja jkollha ordni fil-ġustizzja għallbnedmin u n-Nazzjonijiet kollha. Fit-twettiq ta' dan, il-professjonijiet legali għandhom sehem kbir x'jagħtu.

Iċ-Ċentru twieled fl-1963 f'laqgħa f'Ateni, il-Greċja. Illum il-membri taċ-Ċentru jiġu minn aktar minn 130 nazzjon u fl-aħħar Konferenza Dinjija organizzata miċ-Ċentru attendew madwar 4,000 ruħ. Iċ-Ċentru s'issa organizzża konferenzi bħal dawn f'Ateni (1963), f'Washington D.C. (1965), f'Ġinevra (1967), f'Bangkok (1969), f'Belgrade (1971) u f'Abidjan (1973).* Bosta problemi kienu diskussi fosthom hijacking, it-terroriżmu, il-jeddijiet tar-refuġjati, l-ambjent, u r-regolazzjoni ta' drogi perikoluzi.

Iċ-Ċentru għamel ukoll studji fuq għadd ta' suġġetti, fosthom: Konvenzjoni fuq it-terroriżmu; Abbozz ta' Statut fuq il-jeddijiet tar-Refuġjati; Konvenzjoni fuq il-Ko-operazzjoni dwar l-Ambjent; Trattat fuq it-Tifrix u l-Użu ta' Qiegh il-Baħar; Abbozz ta' Statut fuq it-Tinġiż ta' l-Arja.

Fuq ir-rezoluzzjonijiet meħuda fil-konferenza ta' Abidjan, iċ-Ċentru beda Proġett fuq it-Trattati. Dan il-Proġett huwa bbażat fuq il-fatt li ħafna drabi Gvernijiet ma jissieħbux jew idumu biex jissieħbu f'konvenzjonijiet internazzjonali mhux minħabba xi interessi nazzjonali, iżda minħabba raġunijiet oħra estranei. Il-Proġett m'għandux bħala għan tiegħu illi b'xi mod iġiegħel gvernijiet isiru firmatarji ta' strument internazzjonali, iżda biss illi jiġbdilhom l-attenzjoni tagħhom għal konvenzjonijiet internazzjonali li jistgħu jiffirmaw. Bħalissa l-Proġett qiegħed jikkonċentra fuq Konvenzjonijiet dwar id-drittijiet tar-Refuġjati. Għal dan il-għan jitwaqqfu ukoll *Treaty Acceptance Committees* sabiex jaħdmu fin-nazzjonijiet tagħhom.

* Il-Konferenza li jmiss ser issir f'Washington D.C. mit-12 sas-17 ta' Ottubru 1975.

Iċ-Ċentru jżomm kuntatt ma' libreriji, assoċjazzjonijiet internazzjonali tal-Liġi, u ċentri ta' studji legali billi jsir bdil ta' pubblikazzjonijiet u tagħrif ieħor. Il-pubblikazzjonijiet taċ-Ċentru jinkludu *World Legal Directory, Law and Computer technology, Religion and the Law* u *International Control of Dangerous Drugs.* Iċ-Ċentru jippubblika wkoll *The World Law Review*, u l-bullettin informattiv tiegħu *The World Jurist.*

Iċ-Ċentru huwa apolitiku u l-membri jitkellmu bħala individwi aktar milli bħala rappreżentanti ta' pajjiż jew ideoloġija. Iċ-Ċentru għandu rappreżentanza uffiċjali fil-Ġnus Magħquda bħala *non-governmental organization.*

Fi ħdan iċ-Ċentru nsibu Assoċjazzjoni Dinjija ta' l-Imħallfin, Assoċjazzjoni Dinjija ta' l-Avukati u Assoċjazzjoni Dinjija ta' Professuri tal-Liġi.

Għoddni dejjem tiegħek,

(Michael Frendo)
Chairman Nazzjonali,
World Peace Through Law Center
