Introduction

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I The trial in history

Five of the contributions to this volume arise from papers delivered at the Manchester conference on the theme of the trial in history; four chapters, those of Daniel Klerman, Maureen Mulholland, Anthony Musson and Brian Pullan, have been added to them. A companion volume, *Domestic and International Trials, 1700–2000*, edited by R. A. Melikan, will be published simultaneously.

In compiling this collection, as in planning the conference, it was necessary to consider several possible approaches. Would the papers be primarily concerned with the notion of ‘trial’ in the abstract, or would each essay be on particular kinds of trial, or on individual trials? If the latter, would these be famous trials or typical examples of a genre? Would they concentrate on procedure and on the jurisprudence of trial, on social context and background, on politics, or on trial as ritual, as drama or as symbol?

The approach of the lawyer and legal historian to the subject of trial or trials will be different from that of the social, political or economic historian; the lawyer is particularly concerned with the nature of the court or tribunal conducting the trial, its composition, its constitutional validity, its procedure and the extent to which it applies substantive principles according to existing legal rules. For the social and economic historian, the formalities and rituals of trials are not as important in themselves as for what they reveal of the lives, the mores, and the circumstances of the participants, in such a way as to throw light on their society and their era. The prime concern for political historians will be the politics of trials and their significance in the community and in the movements of history. Happily, however, the divisions between the different approaches are not rigid and the legal historian’s discipline is no longer perceived as divorced from the social, the economic or the political.

This book does not purport to give an exhaustive account of so vast a subject as ‘The Trial in History’. Rather, it sets out to provide a few illuminating

examples of the operation in the past of different legal systems, applied by differently constituted courts, royal and manorial, secular and ecclesiastical, which adopted different procedures, adversarial and inquisitorial. Some used juries and some did not; some looked to accusers, others to informers. The chapters in this volume discuss the principles which governed both the common law of England and the Roman and canon law of the Church and of some of the states of continental Europe. Some are written by scholars who are, by training, lawyers and members of law faculties and schools, others by historians interested in the application of the law and the functioning of the courts in past times. This collection of studies begins with a chapter by a legal theorist, Joseph Jaconelli. It explores the concept of trial, and particularly the modern notion of a fair trial, in order to analyse the assumptions which many readers will make about the nature of legal process. The issues which it raises are relevant to both volumes, but it has been placed at the beginning of Volume I as an opening conceptual analysis, against which all the cases discussed can be measured. Some meet Jaconelli's criteria for a fair trial and others do not.

Chapters 2 to 5, ranging from the thirteenth to the seventeenth century, consider criminal trials and civil litigation conducted in royal, manorial and Church courts in late medieval and early modern England. They concentrate on the structure, jurisdiction, functions, and procedures of the courts and on the roles of the judges of fact and of law, both amateur and professional, who composed them. By way of contrast, chapters 6 to 9, on the legal history of continental Europe, shift the emphasis from the judges and jurors to the prisoners arraigned before the courts, to the victims of prosecution or to the highly questionable images of them created by their enemies. These later chapters do not ignore the mentality of the judges or the procedures which they followed; to neglect such things would be to misinterpret the records which enable historians to reconstruct the lives of ordinary people or to analyse (as in chapter 6) the charges levelled at famous men. But they focus more sharply on the character and outlook of the deviants and on their efforts to defend themselves.

In its widest meaning the word 'trial' is synonymous with 'test'. In the Judaeo-Christian tradition the trials of believers are part of their relationship with God; in the Old Testament, Abraham, Job and the prophets suffered 'trials' which tested their faith and the same tradition is evident throughout Christian theology, especially in relation to suffering and ultimately to martyrdom. This meaning is still common in the expressions 'These things are sent to try us' or in the phrase 'trials and tribulations'. We commonly speak of 'trials' in the sense of tests conducted to determine the quality of something,¹ to discover the effectiveness of medicines, the mettle of athletes or the fitness of products or machinery. However, in this volume, the term 'trial' is used in its forensic sense, which, in addition to involving a test of an issue, implies a procedure or ritual to try that issue in a forum whose authority and validity are accepted as

binding by the community subject to its jurisdiction. Both these meanings of trial – the test and the forensic ritual – were combined in trial by ordeal, including trial by corsned,² where the subject of the trial underwent a test and the outcome was deemed to be decided by divine intervention. Trial by combat was merely a different form of trial by ordeal, since the protagonists were subjected to a test of military skills, but judgment was likewise deemed to go, by divine intervention, to the victor. Although these ordeals were tests, they can legitimately be described as trials within the meaning of this collection since they took place in a forensic context, albeit a religious one, and they were conducted by representatives of authority whose jurisdiction was accepted by the participants, and whose definitive decision or judgment would be accepted as binding by them and by the society in which they functioned.³

One of the most striking features of medieval and early modern society was the widespread influence and consciousness of law.⁴ Far from being a lawless society, medieval and early modern Europe was interwoven with a complex web of legal systems. The villein on the manor, the tradesman in the village, the feudal lord and the city merchant all inhabited a world governed by a number of different judicial systems. Throughout Christendom the jurisdiction of the Church was acknowledged overall, though this did not prevent constant battles between the ecclesiastical and secular courts, just as there were conflicts between the Church and European secular rulers, such as the great conflicts between the papacy and the holy Roman emperors and, in England, between Henry II and Thomas Becket. All classes were subject to the jurisdiction of the Church courts. Their authority extended not only to matters of discipline in faith and morals (including questions of heresy, validity of marriage, legitimacy and succession) but also to litigation between parties in complaints such as slander or breach of faith.

In England, the villein was also subject to the law and courts of the manor and to the king's justice, administered by the sheriff and later by the justices of the peace, or by the justices of oyer, terminer and gaol delivery. When he had a claim relating to land he was denied the protection of the common law but could seek the justice of the manor or, in some cases, the Church. The feudal lord could seek the justice of the king, and was also subject, at least in theory, to the criminal law and to Parliament, as well as to the jurisdiction of the Church. The tradesman and the merchant in England might find themselves arraigned before the court of the manor or the sheriff, and later the justices of the peace or the assizes, and might also be charged before the Church court with a moral transgression such as adultery or dishonesty. If such a person had a complaint he might pursue a claim for trespass, debt or defamation in the court of the manor, the church or the common law. In addition merchants and traders could bring their actions in a court of pie powder,⁵ a court attached to a fair or market, or to a court of a port, such as the Tolzey Court of Bristol – one of a network of special commercial courts, much favoured by the mercantile community throughout Europe.

It was not only the Church courts which presumed to censure and to punish moral offences. All the courts of the period claimed jurisdiction over moral conduct – from the English manorial courts to the courts of great cities and states, such as those of Venice and Geneva, described in chapters 7 to 9 of this volume. In considering the relationship between law and morality, medieval and early modern courts were not affected by the dualism which now informs the legal systems of most countries with liberal democracies. The famous debate between Professor H. L. A. Hart⁶ and Lord Devlin⁷ in the 1960s on the division between law and morals would no doubt have seemed strange to medieval man and woman. At all levels of society, public order and State security were closely linked with Christian morality and religious orthodoxy. All the cases discussed in chapters 6 to 9 involve scandalous behaviour: heresy or the suspicion thereof; gross immorality; blatant defiance of ecclesiastical discipline; violations of sacred space or ventures into unholy space at inappropriate times; disrespect for Lent, the season *par excellence* when sins should be purged by self-denial and not compounded by self-indulgence. Some of them demonstrate how fine the distinction could be between scandalous conduct and heresy, especially where the transgressions were committed by people of great prominence who enjoyed the power to mislead by bad example (chapter 6). Should a state tolerate blasphemy, heresy, gambling, sodomy or laxity in nunneries it would risk incurring the wrath of God, which might well be expressed through visitations of plague, harvest failure or military defeat. Hence the prosecution of such excesses became a matter of protecting public safety, as well as a concern of the Church and its courts. The trial of Laura Querini, described by Mary Laven in chapter 8, demonstrates the powerful connection between the courts of the Venetian State and the Church – she is tried under canon law but her lover, if apprehended, would be tried in the courts of the State for his offence of breaking into a convent. The inquisitorial proceedings against Giorgio Moreto, described by Brian Pullan in chapter 9, show the Venetian State supporting the rules of the Church and enforcing morality as part of its carefully balanced relationship with the power of the Church.

The manorial courts, both seignoral and franchise courts, punished conduct which we would now consider purely moral offences – adultery, fornication, cheating, breaking faith – all of which were regarded as appropriate for manorial justice⁸ as well as for the courts of the Church. Inevitably the overlapping of jurisdictions had consequences which were on occasions used by litigants and defendants to their own advantage. A merchant, denied a remedy under common law for breach of contract, might seek the aid of the Church courts for breach of faith or that of the mercantile court, where customs of merchants might give him a remedy. In criminal trials, choice of forum might work to the advantage of an accused person, the classic example being the use of benefit of clergy to obtain the milder punishments of ecclesiastical courts. Laura Querini's case also illustrates a division of jurisdiction

according to the status of the parties; she was subject to the courts of the Church, her lover to the law of the Venetian State, and her wholehearted acceptance of guilt for their behaviour may perhaps have been more fulsome since her punishment would be milder than his.

There were, of course, conflicts of jurisdiction between the courts of Church and State and of Church and manor.⁹ These conflicts were expressed in England in the statutes of *praemunire* and in disputes over jurisdiction between the common law courts and the courts of the Church – in defamation or in contract, and in the long running rivalry between common law and Chancery over injunctions and prohibitions. At a humbler level, the manorial courts, too, were jealous of their jurisdiction and punished those who sought justice from the wrong feudal lord or from the Church courts.¹⁰ These conflicts seem to have been political rather than philosophical. The common law courts guarded their exclusive jurisdiction over freehold land and denied other courts the right to impose a death sentence. They also bitterly resented the claims of the Church courts, the mercantile courts and the court of Chancery to give remedies – especially damages – to those who sought the justice of those courts rather than of the common law, particularly where the Church courts gave remedies in cases where the common law did not. Indignation at jurisdictional conflict proceeded from the judges and officials of a court rather than from the individuals in dispute. For them, jurisdictional boundaries were unimportant compared with accessibility and effectiveness of the remedy sought. It would be too simplistic to suggest that the only motive for judges jealously guarding their jurisdiction was financial, but it must at least have been a part of the common lawyers' motivation.

II The nature, structure and systems of trial

Trial was described by Chief Justice Coke in the seventeenth century as 'the finding out by due examination of the truth of the point in issue or the question between the parties whereupon judgment may be given'.¹¹ As Jaconelli indicates in chapter 1, the popular concept of trial is the criminal trial. The greatest human interest is inevitably attracted by trials where the outcome will put the person on trial in jeopardy – possibly suffering loss of life or other grave penalty – and this will include trials of individuals for breaches of religious laws, where the penalty may range from penance to excommunication or death. But any analysis of trial must also include civil cases where the protagonists face each other before the court and the aphorism that 'law is the reconciliation of conflicting interests' is seen most clearly. This book refers, not only to criminal trials, but also to trials for religious offences and to civil litigation. This includes pleas of debt, trespass, slander and disputes over land heard in the manorial courts; claims of breach of faith, defamation and testamentary disputes in the Courts of the Church; and litigation between subjects in the common law courts at Westminster and on

circuit. The term 'civil litigation' may be anachronistic, but these cases are all examples of disputes between individuals and are therefore arguably within the term.

Rationality

The first requirement of a fair trial analysed by Joseph Jaconelli is rationality, both of procedure and of content. The outcome should be judgment according to law in the broad sense. Different tribunals may interpret this in different ways. In the common law the rules of procedure and of evidence have developed with the aim of ensuring a fair trial and striking an appropriate balance between the interests, in the criminal courts, of State and suspect and, in civil cases, between contesting parties. There has been particular emphasis on this even-handedness in the common law, in which, even from its early days, the judge's role was that of a presiding umpire between two sides, especially in civil cases. Examples of rules of evidence developed over the centuries by the English criminal law to achieve this balance were the hearsay rule, the rule against self incrimination, the refusal to allow the prosecution to produce evidence of past convictions and the insistence that the burden of proof lies on the prosecution to establish guilt in criminal cases. Whether a trial takes place in a common law or civil law jurisdiction, a proper trial must always be directed to a judgment in the light of legal rules and principles, not made capriciously or merely to serve a particular purpose. The 'show trial' is conspicuously lacking in this requirement.¹² As Jeffrey Denton demonstrates in chapter 6, the threatened trial of Pope Boniface would have been a classic 'show trial', had it taken place.

In other trials, however, the judges and their advisers respected the standards of proof demanded by Roman and canon law. As William Naphy explains (chapter 7), Genevan courts considered it improper to convict an accused person, at least of a capital offence, unless two believable eyewitnesses testified to a criminal act or unless the accused person confessed to it. Confession became the queen of proofs in a legal system which protected the accused against condemnation on the strength of circumstantial evidence and allowed little discretion to amateur judges. To apply torture to obtain a confession might be a legitimate move, but only if certain conditions were met: there must be signposts (*indicia*) pointing to the guilt of the accused persons and amounting to partial proof thereof, or the accused must be changing their stories or contradicting themselves. As Naphy shows, 'not proven' verdicts delivered in cases of serious crime might allow accused persons to escape judgment of death, but not to avoid the severe penalty of exile meted out to those who had incurred deep suspicion but had not been formally convicted according to law.

Throughout this book questions arise about the significance in trials of amateur and professional, lay and ecclesiastical judges and of the role of other professional lawyers and lay people in the proceedings. The essays in this

collection by Klerman, Mulholland, and Musson (chapters 2 to 4), are concerned with trials in medieval and early modern England and reveal that one of the notable features of English justice, then as now, was the continuous importance of lay participation in the judicial process. Indeed, even at the present day, trial in the English magistrates' court is trial by lay people, albeit with a legally qualified clerk to guide them, and many tribunals which in practice conduct trials, such as employment or disciplinary tribunals, have on their decision-making body some non-legal personnel. The chapters on late medieval English courts, whether of common law or of the manor, and even the courts of the Church in post-Reformation England,¹³ reveal the importance of non-lawyers in their proceedings.

On the face of it, the judicial benches of Venetian secular courts, including that of the *Provveditori sopra Monasteri* (chapter 8), were entirely occupied by elected lay judges of noble rank who had no legal training and judged solely by equity. Critics of Venice sometimes represented her judges as hopelessly gullible and easily swayed by the rhetoric of vociferous and none-too-scrupulous advocates (one thinks of *Voltore* in Ben Jonson's Venetian play *Volpone*, whose 'soul moves in his fee'. 'This fellow', as his victim complains, 'For six sols more, would plead against his Maker.').¹⁴ Unlike the English jurors of Daniel Klerman's chapter, Venetian judges reputedly never undertook their own inquiries or did homework of any kind, but relied entirely on evidence presented in court and argued about by advocates.¹⁵ It should be said, however, that as a sub-commission of the Council of Ten, Venice's most powerful magistracy, the *Provveditori sopra Monasteri* consisted of senior and experienced magistrates who were unlikely to be ill-educated time-servers.

Another feature of late medieval and early modern English law was the development of the legal profession which, having been a purely clerical group in the formative years of the common law, gradually became a secular elite. This elite had its own identity, separated from clerical judges and lay participants by training and tradition – a development particularly fostered in the Inns of Court. Anthony Musson discusses this progress from amateurism to professionalism especially in the judiciary. The same trend can be seen in chapter 4 (Maureen Mulholland), which notes the central role of lay people in the administration of manorial justice, but also points out that the important office of steward had become the preserve of lawyers by the fourteenth century and that the power of the steward was then increased at the expense of the jury.

The development of the common law was profoundly influenced by the emergence of the legal profession, trained in the common law tradition in the Inns of Court and skilled in oral argument and in the extraordinary technicalities which developed around the forms of action. One important feature of the English system, however, was that in the formative years of the common law, the use of advocates was limited almost entirely to civil litigation and was virtually absent from criminal trials. Indeed the typical criminal trial in

the common law was for centuries extremely harsh on the accused, who was not allowed counsel in felony cases until 1837.¹⁶

Inquisitorial procedures, on the other hand, at least in ecclesiastical courts, did not preclude the retention of advocates for the prosecution and for the defence. Professional advocates, however, played little part in the trials discussed in the later chapters of this volume. Instead, the persons on trial seem to be raising certain defences (or pleading mitigation) on their own account, but in a manner which suggests that they received some coaching outside the court room. William Naphy shows how the amateur criminal judges of Geneva were advised by a trained lawyer. In the Venetian courts, the clerks might claim to be mere executors of the orders of their superiors, or mere civil servants with no will of their own, but it was they who ran many of Venice's law courts, often interrogating witnesses and drawing up the record of the proceedings.¹⁷ The tribunal of the Roman Inquisition in Venice, described by Brian Pullan in chapter 9, consisted of both amateur and professional judges who were present at the formal interrogation of witnesses on which the legal process depended.

The importance of the jury in the English courts provides a striking example of lay participation in the trial process. The grand jury, descended from the jury of presentment, was a fundamental aspect of communal responsibility for law and order in medieval England.¹⁸ After the Lateran Council in 1215 had forbidden the clergy to participate in the ordeal, the English trial jury – the 'petty jury' – developed to become all-important in deciding issues of fact in the courts of the common law,¹⁹ and its importance was to last until the present day in criminal cases. In civil cases it was to last until the twentieth century and still survives in a few cases, such as defamation actions. The concept of trial by a band of neighbours, whose local origin was reflected in the phrase 'to put oneself upon the country',²⁰ has been seminal in developing the Anglo-American common law trial, in which questions of fact and questions of law are analysed and separated for the jury, which has the final say in decisions of fact. It must be remembered that, despite its status as the great institution of Anglo-American law, there was another side to jury trial. It has been a proud boast of English common lawyers that torture was never part of its trial procedure, but the imposition of the barbaric procedure of the *peine forte et dure* to compel a defendant in a criminal trial either to accept trial by jury or to be pressed to death²¹ can hardly be characterised by any other term. However, once that barbaric procedure became obsolete, the jury gradually achieved its status as a precious jewel of the common law²² and became one of its most marked features. This body of neighbours which was ultimately to become the final deciding body in trials, became the backbone of the common law trial, civil as well as criminal, and is still regarded with sentimental affection by common lawyers all over the world. In England and Wales there has been a diminution in its use, especially in civil cases where it is limited to very few causes of action. Even in criminal cases its use is diminishing, but it

survives and flourishes in the USA in both civil and criminal trials, as does the 'grand jury' descended from the jury of presentment.

Much has traditionally been made of the fundamental differences between the common law and the civil law, procedurally and substantively. In English jurisprudence, the term 'civil law' is used in two senses. When contrasted with 'common law', it is used to denote legal systems based on Roman law or within the Roman law tradition, including most of those in continental Europe (civil law is also a marked feature of the Scottish legal system).²³ The second meaning, common to most (if not all) legal systems, contrasts 'civil' with criminal law and procedure. Criminal law is concerned with offences against society, punishable by that society if guilt is established. Civil law is concerned with all other proceedings, especially those between individuals. The great division of trial procedures is between the adversarial mode, beloved of the common law, and the inquisitorial mode, employed in the courts of civil law jurisdictions²⁴ (including the ecclesiastical courts administering canon law). A historical examination of trials is a reminder that, in their origins, the common law and the civil law were both concerned with the finding of fact by the court. In seeking to discover and reveal the true facts, English law, in the king's courts, later the common law courts, and in the manorial courts, chose to use the inquest (jury), whose very name, *inquisitio*, reminds us that its function was to investigate and to reveal the true facts for the court to enable it to decide.²⁵ Both methods of trial are devoted to discovering the true facts so as to come to a just judgment. Perhaps the historical division between the two procedures has been exaggerated. Anthony Musson, in his chapter on the common law judges, demonstrates that they sometimes acted in an inquisitorial manner, and Daniel Klerman argues that common law juries conducted their own inquiries into the relevant facts of the case. Maureen Mulholland also shows that some of the proceedings in the manorial courts, especially the courts leet, gave to the steward what was in effect an inquisitorial role.

In both systems, common law and civil law, an important role was played by persons who were informers or accusers. In the common law, there were three ways in which a suspected criminal might be brought to trial – first, by appeal, where the person offended complained of the offence and challenged the offender before the court; secondly, by indictment; and thirdly, by information from 'approvers' or from informers, a system strengthened up to the nineteenth century by statutory payments for information. In the continental trials a similar role was played by delators – informers who denounce rather than accuse. Very often the delators, who were frequently protected by anonymity, were not themselves the victims of the alleged crime, although they might profess to be scandalised by it. If they were acting properly and not maliciously they were regarded as relieving their own consciences by passing to the court information which might be of interest to the judges as guardians of public order, Christian morality, religious orthodoxy and ecclesiastical discipline. The decision to proceed lay with the court. As J. H. Langbein has

put it, the vital characteristic of inquisitorial procedure was ‘officialization of all the important phases except initiation’, ‘the duty of governmental organs to conduct the entire proceedings *ex officio*, by virtue of office’.²⁶

The English or American common lawyer, accustomed to the adversarial system of conducting proceedings, has tended to assume that this is the best method of trial, but there is an equally powerful argument to be made for an inquisitorial system,²⁷ where it is perhaps easier to reach the truth. In the last twenty years there has been an interesting trend towards a critical re-examination, at least by English lawyers, of the adversarial system of trial, including that revered common law institution, the jury, and a corresponding interest on the other side of the channel in varying the inquisitorial system.

Another feature of the Anglo-American common law, which is perhaps closely related to the adversarial nature of the court, has been the ‘staggering orality’ of its procedure. This characteristic is well illustrated in the Year Book trials described by Klerman and Musson and can even be seen in the rolls of the manorial courts described by Mulholland. This is in marked contrast to the courts of canon law and the Inquisition, described by Laven and Pullan, and to the courts of Geneva described by Naphy. In all of these legal systems the importance of written evidence, and of oral evidence transcribed by a notary, was much greater. Again, however, the division between the systems is not as great as it might seem; the oral submissions of the parties in the courts of the Church, such as those described by Richard Helmholz, were vitally important.

Inquisitorial process is typically commenced by the gathering of evidence by or under the direction of an official – an examining magistrate or ‘juge d’instruction’ – or a panel of judges, who then compile a dossier on which a court, often a higher court, arrives at a decision or sentence when the oral stage of the procedure is over. The oral evidence of accused persons and witnesses was nonetheless vitally important in the early stages of the Venetian trials of Laura Querini and of Giorgio Moreto, and in the courts of Geneva discussed by William Naphy. In England, although the common law courts were little affected by written evidence, the courts of the Church as well as proceedings in the conciliar courts of Chancery, Admiralty and Star Chamber – whose origins lay in the civil law and which were in their heyday in the fifteenth and early sixteenth centuries – were predominantly based on written submissions.

Openness

The second requirement, identified as essential for a proper trial, is publicity or openness.²⁸ Even international conventions and human rights law accept that a trial may be held *in camera* for special reasons, such as national security, or where the interests of community require a closed trial for the protection of the vulnerable, but a society which holds all its trials in this form is rightly stigmatised as failing to apply proper principles of justice. Must a proper

trial be conducted in a 'court'? Jaconelli considers the meaning of the term,²⁹ noting that it is the character of the tribunal and its proceedings, rather than its physical context, which determine its legitimacy. Thus trials in the past have been conducted in churches, in manor houses, on the field of battle and in the open air. However, the setting of an open trial is part of its dramatic and symbolic importance. The language of the court, the costumes, the formalities and especially the ceremonial and language surrounding a trial, emphasise the authority of the court and the community in which it sits. This has a powerful psychological impact on that community as well as on those who appear before it.³⁰

Openness is not only a requirement of justice being seen to be done; there are also many messages and signals given by both sides in a trial, and this very publicity may be an advantage to the prosecution or to the defendant. A trial of an individual, or group, for a criminal offence (or, where relevant, a religious one) signals to the community that the person before the court is charged with offending against society's norms and that the community will enforce those norms – with sanctions if necessary. Thus the whole ritual is designed to have a deterrent effect, but the defence may also use the trial to draw attention to a cause, a personal passion or an aspect of the law which is unsafe or unjust. Some of the great orations in history have been of this kind.³¹ In Mary Laven's chapter, Laura Querini seems to have used her trial under canon law as an occasion for her apologia and to express her true feelings about the life of an early modern nun. This would, no doubt, have its effect, but would not have been widely circulated except among Church officials.

The courts described in chapters 7 to 9 indulged in various degrees of secrecy designed to conceal the full extent of scandal and to protect witnesses and informers. When promulgating sentences, the Genevan and Venetian magistrates showed some reluctance to reveal full details of the crimes committed. In Venice the commissioners in charge of convents (chapter 8) were authorised to publish in two prominent places the sentences pronounced on offenders who had illicitly entered the cloisters of Venetian nunneries. In the words of a decree of 1584, 'they shall say in general terms that [these persons were condemned] for infringing the laws about visiting female religious, but they are not to name the convent concerned (*dicendo in general per haver contraffatto alle leggi in visitar Monache senza nominar il Monasterio*)'.³² The transcript of the trial of Giorgio Moreto indicates not only that the proceedings were conducted in private and the witnesses sworn not to disclose what had occurred, but also that the court did not generally examine the witnesses in the prisoner's presence, and that he therefore had to rely on what the interrogating judges chose to tell him. Had his case been more complex and serious, he would have received a written account of the evidence given against him, edited in such a way as to conceal the identity of the witnesses. This procedure was intended to protect informers and hostile witnesses against retaliation by the prisoners or by their friends, families and supporters, and

was justified by the conviction that unless it provided such safeguards the court would never arrive at the truth about a matter so threatening as heresy.³³

Bias

The third requirement, and in many ways the most basic to the concept of a proper trial, is the principle that there must be no bias in the tribunal which decides the issue. Freedom from bias is an essential characteristic of the judicial function.³⁴ The exception to this view of that function is that of the judge in a totalitarian state, such as Stalin's Russia or Hitler's Germany, where the role of the judge consisted of supporting and applying the political ideology of the State, an objective which ranked higher than the disinterested application of the law or the protection of the individual's rights. The most blatant and obvious form of bias is corruption, which is repugnant to all legal traditions, lay and religious. The figure of the corrupt judge is a classic figure of contempt and dislike, in the Bible and in literature.³⁵

The prevention of other forms of bias in judges is less straightforward. The question 'what is bias?' in the context of the courts is not easy to answer. Applying the principle 'no one to be judge in his own cause (*nemo iudex in causa sua*)', the English courts have decided that two kinds of bias are objectionable. Venality and the taking of bribes clearly invalidate the proceedings, as does evidence of a financial bias in the judge. Thus in *Dimes v. Grand Junction Canal Company*³⁶ the fact that the judge, Lord Chancellor Cottenham, had shares in the Canal Company (unknown to himself), made his judgment insupportable. The least financial bias disqualifies a judge.

In the case of non-pecuniary bias the courts have developed a stricter test: if actual bias cannot be shown, was there a real likelihood of bias? If it would appear to a reasonable onlooker that there was, or might be, bias, then the decision can be attacked by way of judicial review. Justice must not only be done but must be seen to be done. The example of Lord Hoffman in the Pinochet case was a reminder of the strictness with which this rule may be interpreted today.

Although the grosser forms of prejudice can be easily perceived, what about inherent views derived from the judge's own background and experience?³⁷ In the trials considered in this volume there are several cases in which the judges' independence might be suspect. In the courts of the State of Venice the same judges seem to act as examining magistrates and as sentencing judges. The Venetian lay judges who took part in the trials of Laura Querini and Giorgio Moreto were not members of an independent judiciary, appointed for life, but representatives of the Council of Ten, Venice's supreme committee of public safety, and served only short terms in office. The manorial stewards in the manorial courts discussed in chapter 4, were not in any formal sense 'independent' of the manorial lord and it is perhaps surprising that so little open partiality is evident in the rolls. The judges of the common law courts (chapter 2), had a reasonably good reputation for impartiality, but it was not

until 1701 that English judges achieved constitutional independence from the executive under the Act of Settlement. This provided that judges should henceforth hold office during good behaviour (*quamdiu se bene gesserint*) subject to a power of removal by the Crown on an address by both Houses of Parliament. The Act also stated that their salaries were to be fixed.

There can surely be no society in history which has avoided the effects of bias entirely – whether the grosser form of corruption or the subtler prejudice of mind, background and philosophy – and this must have been true of the medieval and early modern period.³⁸ Although there will undoubtedly have been prejudice and corruption at times in all the courts examined in this volume, there remained at least an aspiration to apply justice in an even handed manner (see the remarks on the judicial oath in chapter 2). However, this aspiration was hardly realised, especially in the early criminal law.³⁹ The reader must judge the extent to which the trials under examination here passed this test.

One of the considerations which affect the fairness of trial is the ever present influence of politics in both the micro and the macro sense. Examples of what must be seen as political were the trials in Tudor England of Thomas More, Anne Boleyn, the proceedings concerning the marriage of Henry VIII to Catherine of Aragon, and later the trials of Charles I and of the Seven Bishops. Political influence is seen at its most blatant in Jeffrey Denton's chapter where the preparations for the trial of Pope Boniface were primarily influenced by the tensions between the papacy and the French Crown, and between Boniface's own family and the rival Colonna clan. However, politics in the broad sense of the term are also evident in several of the other chapters. The trials of Giorgio Moreto and of Laura Querini were influenced by the politics of the Venetian State and its ongoing and highly charged relationship with the power of the Church. Trials in the medieval manorial courts were also imbued with political significance; the relationship between lords and their vassals was played out in the courts of the manor, as the late-medieval manor became a hotbed of social unrest and, in some places, a catalyst in the forging of new social relationships. In a broad sense all law and all legal proceedings can be regarded as political expressions, in that they consciously, or unconsciously, reflect the social and economic policies of the society in which they operate. If that society is based on (and closely linked with) a religious creed or view, then that will be expressed in its courts. Thus trials in the courts of seventeenth-century Geneva, discussed by William Naphy, were inevitably expressions of the character and moral climate of Calvinist Geneva.

Records

The accounts of the varied trials discussed in this volume depend on the records of the courts' proceedings. There are considerable variations in the fullness of these records, which reflect to some extent the differences between the two great legal traditions of the common law and the civil or Roman law. The

manorial rolls, which are the sources of research on manorial justice, are plentiful and, with the 'courtkeeper's guides' published for the guidance of manorial stewards, provide a vivid picture of trials in the manorial courts. There is plenty of human interest but little detail about the way in which the courts elected their juries or reached their decisions. The records of the common law courts – which provide the sources for the chapters by Anthony Musson and Daniel Klerman – have immediacy, clarity and human interest, but complete accounts of trials are elusive. Even the Year Books, which date from the reign of Edward I, are not 'law reports' but rather sketches and notes of aspects of trials which interested the writer, for educational or reference purposes. The civilian tradition, with its emphasis on written proceedings and records, which applied both to the Church courts and the courts of secular states, provides a more accurate record, though here the record may conceal – as well as reveal – motivation, political influences from Church and State, and human instincts which are recognisable in any century.

Some chapters in this volume raise questions about the extent to which historians can use trial records to construct biographies of the people investigated, or to compose narratives of events which throw light on hidden ways of life. Or is the vision of the courts so distorted, their preoccupations so narrow, the conduct of judges so intimidating, that the transcripts can only provide evidence of the way in which courts conducted their business? Much depends on the amplitude of the records. Legal systems which depend heavily on the composition of dossiers are at an advantage over those which do not. So are systems which take a generous attitude to the kind of evidence they will admit or at least record, and are not too hostile to hearsay. As the elderly narrator says in Martin Armstrong's story 'Sombrero', 'to my mind the plain, unadorned report of this Court Martial [published in *The Sporting Magazine* for 1810], with all it implies of human suffering and inhuman cruelty, recording the very words – almost, it seems, the very intonations – of men dead and gone these hundred years, is more moving, infinitely more moving, than the finest fiction ever penned'.⁴⁰ This story itself shows how much imaginative interpretation, how much reconstruction of events and situations outside the court room, may be needed for the purpose of fleshing out the spare, dry narrative of the court's proceedings; writers of fiction enjoy far more licence than do historians. Arguments for and against the use of trial records to provide narratives are well described by Mary Laven (chapter 8). The transcript of Giorgio Moreto's trial, which provides an appendix to this book, may permit readers to try their own hands at interpreting the evidence. It may enable them to hear the voices of prisoners and witnesses, even if the judges generally hide behind the impersonal bureaucratic language and no one can tell who is asking the questions.

This volume, then, provides a few telling episodes from the history of the trial, like fragments from a grand narrative which has yet to be written, and these range from the high Middle Ages to the early modern centuries. The

companion volume carries the story from the late eighteenth to the late twentieth century. It likewise asks how the trial functions, and examines the legal principles, scientific knowledge, societal norms and political practice, that contribute to the judicial process. Several chapters of the later volume are concerned with the trial in the context of the military conflicts of the twentieth century and have common grounding in the modern experience of war.

Notes

- 1 As in the 'trial of the pyx', a procedure formerly used to test the metal of the coinage at the Royal Mint. See chapter 1, p. 25 below.
- 2 Trial by 'accursed morsel', which was used primarily in cases of the clergy. The person on trial was required to swallow a piece of bread or meat in which a foreign body, such as a feather, was concealed. If he choked he was adjudged to be guilty.
- 3 Thus they can truly be regarded as fulfilling the present meaning of 'trial', whereas so-called 'trials' in the medieval courts of love cannot.
- 4 This is well described in A. Musson, *Medieval Law in Context. The Growth of Legal Consciousness from Magna Carta to the Peasants' Revolt* (Manchester and New York, 2001), especially chapters 1–3.
- 5 Probably so called because of the 'pieds poudrés' of the travelling traders who appeared before them. See T. Plucknett, *Concise History of the Common Law* (fifth edition, London, 1956), p. 660; W. Holdsworth, *A History of English Law* (17 vols, London, 1903–1972), I (revised 1956, reprinted 1969), pp. 526–44. These courts, attached to fairs and markets, were sometimes owned by a manorial lord. There were equivalent commercial courts throughout Europe.
- 6 H. L. A. Hart, *Law, Liberty and Morality* (Cambridge, 1965).
- 7 P. Devlin, *The Enforcement of Morals* (London and New York, 1965).
- 8 The manorial courts even went beyond 'offences' to prescribe good behaviour, e.g. in one of the courts in St Albans Abbey William atte Grave is sternly admonished to 'bear himself chastely'. See A. E. Levett, *Studies in Manorial History* (Oxford, 1938), pp. 236–7.
- 9 See J. A. Brundage, *Medieval Canon Law* (London and New York 1995). Also R. H. Helmholz, 'Conflicts between religious and secular law: common themes in the English experience', *Cardozo Law Review*, 12 (1991), 707–28. Such conflicts were not, of course, limited to England but occurred throughout Europe. See e.g. M. E. Perry, *Crime and Society in Early Modern Seville* (Hanover, New Hampshire and London, 1980), pp. 54–67.
- 10 See M. Mulholland, chapter 4 in this volume.
- 11 Co. Litt. 124(b). Also see Section 212, Common Law Procedure Act 1852. The English courts have often had to decide whether a particular procedure is or is not a 'trial', e.g. in *Hall v. Brand* 12 Q.B.D. (1883).
- 12 Arguably, the term can apply to a legitimate and properly conducted trial which is widely publicised by the relevant authority to deter others or to emphasise the importance of the law. However, the 'show trial' is often descriptive of a trial unfairly conducted and instituted purely for propaganda purposes, such as Stalin's 'show trials' in the 1930s.
- 13 See R. Helmholz, chapter 5.

- 14 Ben Jonson, *Volpone, or the Fox*, ed. D. Cook (London, 1967), IV.ii, 122–4.
- 15 See the texts translated in D. Chambers and B. Pullan, with J. Fletcher (eds), *Venice: a Documentary History (1450–1630)* (Oxford, 1992), pp. 102–4.
- 16 See Plucknett, *Concise History*, pp. 434–5; S. F. C. Milsom, *Historical Foundations of the Common Law* (second edition, London, 1981), p. 412.
- 17 For examples see J. Shaw, ‘The Scales of Justice. Law and the Balance of Power in the World of Venetian Guilds, 1550–1700’, unpublished Ph.D. thesis, European University Institute, Fiesole, 1998, especially pp. 38–9, 46, 68.
- 18 Especially as provided for in the Assize of Clarendon 1166. See W. Stubbs, *Select Charters* (ninth edition, ed. H. W. C. Davis, Oxford, 1913, reprinted 1951), pp. 167–73; Plucknett, *Concise History*, pp. 112–13.
- 19 See Plucknett, *Concise History*, pp. 120–31; J. H. Baker, *An Introduction to English Legal History* (third edition, London, 1990), pp. 84–96, especially pp. 94–6.
- 20 Originally self informing – i.e. the jury spoke from their own knowledge, a completely different approach from the present rule that the jury must base their decision purely on the evidence before the court. See D. Klerman, chapter 3.
- 21 See Plucknett, *Concise History*, pp. 125–6.
- 22 For a romantic view of the jury in the common law see Lord Devlin’s Hamlyn lectures, P. Devlin, *Trial by Jury* (London, 1956).
- 23 See especially the discussion by R. Helmholz, chapter 5.
- 24 An excellent analysis is given by N. Vidmar, ‘A historical and comparative perspective on the common law jury’ in N. Vidmar (ed.), *World Jury Systems* (Oxford, 2000), pp. 1–52.
- 25 . . . and whose links with the continent of Europe are strong since its true origin was probably the Frankish inquest.
- 26 J. H. Langbein, *Prosecuting Crime in the Renaissance: England, Germany, France* (Cambridge, Massachusetts, 1974), pp. 130–2.
- 27 It may be for historical reasons that the term ‘inquisition’ is associated in the mind of the British with religious intolerance and foreign interference.
- 28 See J. Jaconelli, chapter 1.
- 29 *Ibid.*
- 30 See M. Loughlin, *Sword and Scales. An Examination of the Relationship between Law and Politics* (Oxford and Portland Oregon, 2000), pp. 55–63, where the author discusses the iconography of justice.
- 31 E.g. the great oration by Erskine, defending Tom Paine. See T. B. and T. J. Howell (eds), *A Complete Collection of State Trials* (vols XI–XXXIII of *Cobbett’s Complete Collection of State Trials*, 33 vols, London, 1809–1826), XXII, pp. 357–522.
- 32 Archivio di Stato, Venice, *Compilazione Leggi*, busta 288, fol. 373. Information supplied by Mary Laven.
- 33 Cf. B. Pullan, *The Jews of Europe and the Inquisition of Venice, 1550–1670* (Oxford, 1983), pp. 112–15. For the procedures adopted by the Roman Inquisition in Malta, see the recent work of F. Ciappara, *Society and the Inquisition in Early Modern Malta* (San Gwann, Malta, 2000), pp. 422–6.
- 34 See chapter 1, pp. 27–32.
- 35 See William Langland, *Piers Plowman*, Passus II–IV, trans. E. T. Donaldson, ed. E. D. Kirk and J. H. Anderson (New York and London, 1990), pp. 15–39; J. Lawlor, *Piers Plowman. An Exercise in Criticism* (London, 1962), pp. 21–40. Also see

- A. Musson and W. M. Ormrod, *The Evolution of English Justice. Law, Politics and Society in the Fourteenth Century* (Basingstoke and London, 1999), pp. 166–8.
- 36 (1852) 3 H.L.C. 759.
- 37 For an example of this view see J. G. Griffith, *The Politics of the Judiciary* (fourth edition, London, 1991).
- 38 See Musson and Ormrod, *The Evolution*, pp. 38–41, pp. 166–93.
- 39 See Milsom, *Historical Foundations*, pp. 403–28.
- 40 M. Armstrong, 'Sombrero', originally published in *The Fiery Dive and Other Stories* (London, 1929); reprinted in D. L. Sayers (ed.), *Great Short Stories of Detection, Mystery and Horror*, Third Series (London, 1934), pp. 519–38.