

Legal Interpreter for the Jury: The Role of the Clerk of the Court in Spain

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Abstract

The Clerk of the Court (*secretario judicial*) in Spanish provincial courts is an important legal actor in the proceedings of the modern Spanish jury, introduced in 1995. In contrast to the general verdicts of traditional common-law juries, Spanish juries must answer an often lengthy list of specific questions, and must provide the reasoning supporting these responses. Early on, many Spanish juries found the task of providing legally acceptable responses and reasons challenging. Because the law permits the clerk to enter the deliberation room to assist the jury in its writing of the verdict, the clerk has come to act as a principal intermediary between the formal demands of the law and lay citizens serving on the jury. The purpose of the present study is to analyze the role of the Clerk of the Court in Spanish jury proceedings, including the jury selection phase and the verdict writing process. Drawing on interviews with Clerks of the Court, we find that clerks' views of appropriate intervention and clerks' practices differ significantly across jurisdictions.

Key words

Jury; Spanish jury; reasoned verdicts; clerk; Spain; lay participation; comparative legal systems

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Resumen

El secretario judicial de los tribunales provinciales españoles es un importante actor legal en los juicios por jurado modernos españoles, introducidos en 1995. Frente a los veredictos generales de los jurados tradicionales del derecho consuetudinario, los jurados españoles deben responder a una a veces extensa lista de preguntas específicas y deben proporcionar una justificación razonada a estas respuestas. En un primer momento, muchos jurados españoles encontraron difícil la tarea de proporcionar respuestas y razones legalmente aceptables. Como la ley permite entrar al secretario en la sala de deliberaciones para ayudar al jurado en la redacción de la sentencia, el secretario se ha convertido en el intermediario principal entre las peticiones formales de la ley y los ciudadanos que sirven de jurado. El propósito del presente estudio es analizar el papel del secretario judicial en los juicios por jurado españoles, incluyendo la fase de selección del jurado y el proceso de escritura del veredicto. A partir de entrevistas con secretarios judiciales, llegamos a la conclusión de que las opiniones de los secretarios sobre intervenciones adecuadas y las prácticas de los secretarios difieren de forma significativa entre jurisdicciones.

Palabras clave

Jurado; jurado español; veredictos razonados; secretarios judiciales; España; participación de legos; sistemas jurídicos comparados

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1. Introduction

In Spain, the contemporary right to a jury trial is stipulated in the Spanish Constitution, enacted in 1978 after the fall of the Franco regime. It specifies: "Citizens may engage in popular action and take part in the administration of justice through the institution of the jury, in the manner and with respect to those criminal trials, as may be determined by law...." (Spanish Constitution 1978, Section 125). Two decades later, on May 22, 1995, the Spanish Parliament passed *Ley Orgánica 5/1995, del Tribunal del Jurado* (abbreviated *LOTJ*), or the Organic Law on the Jury Court (1995), henceforth Jury Law.

To the surprise of many observers, when Spain introduced trial by jury in 1995, it followed the Anglo-Saxon independent jury trial model (Paúl Velasco 1995a, p. 5, García *et al.* 2002, p. 68) rather than the *escabinado* or mixed court approach of many of its continental neighbors. Rather than having lay assessors and professional judges apply the law and impose the punishment collaboratively, as in France, Portugal, Italy, Germany, and many other countries, in Spain, lay and professional decision makers constitute two distinct and separate teams. On one side, the judge and the Clerk of the Court (*secretario judicial*) are practitioners dealing with the law; on the other side, jurors determine the facts. Even so, as we describe below, the modern Spanish jury differs in several ways from the classic Anglo-Saxon model.

The Clerk of the Court is the civil servant charged with the task of managing the judicial office (*oficina judicial*) in Spain, and is in a unique position to assist the jury. Although the role of the Clerk of the Court is not specifically discussed in the laws relating to jury trial, there is evidence that the clerk has come to play an essential role during the jury selection process and in the jury's writing of the verdict (Jury Law, Article 61 (2)). The Clerk of the Court is law-trained and works alongside the professional judges in all Spanish court proceedings. The clerk has the duty of providing general assistance in all judicial proceedings in the Criminal Section, including jury proceedings.

Most importantly, the Clerk of the Court alone is permitted to enter the jury deliberation room to provide assistance to the jury. Reviewing the jury's collective answers to written questions and providing help in crafting written justifications before they are submitted to the judge, the Clerk of the Court operates as principal intermediary between the requirements of Spanish legal procedure and jurors' lay participation. The Clerk of the Court is well positioned to understand the ways in which Spanish trial procedures facilitate or frustrate the contributions of citizens. Through these activities, the clerk has become a highly significant legal actor in the Spanish jury process.

Yet, aside from Thaman's (1998) excellent initial exploration of the issue in the 1990s, there is little systematic research on the clerk's role in Spanish jury trials. Our article aims to contribute to greater understanding of the role of the Clerk of the Court in all steps of the Spanish jury trial. We provide details about the Clerk's formal role and duties in the jury trial. In addition, we describe results from a small number of interviews with clerks. Definitive conclusions shall have to wait for the collection and analysis of additional data. However, our early analysis already confirms the key role of the Clerk of the Court in Spanish jury trials and offers a picture of the diversity of approaches that Clerks of the Court take to managing the complex interaction of lay decision makers and legal requirements.

This article first provides general background on jury proceedings in Spain, and describes the Clerk's formal role in jury trials, especially with respect to two specific phases of the jury trial, the process of jury selection and the Clerk's assistance in verdict reasoning during jury deliberation. The article reviews Thaman's research on the first set of Spanish jury trials, which examines in part the initial difficulties that juries experienced in fulfilling the legal requirements of reasoned verdicts. The

article offers some results from our interviews with Clerks of the Court, and how they assist juries in their task of writing the verdict reasons. The article concludes with a summary of the findings and suggestions for further research on the Clerk of the Court in Spain.

2. Background: jury proceedings in Spain

Spain's modern jury system marked a return to a previous form of lay participation that once was employed in the country (Gleadow 2000, Jimeno-Bulnes 2004). Spain first introduced a jury system in 1820, as many other European countries did at the time (Hans and Germain 2011). There may be even more remote historical antecedents, as suggested by the medieval text *Fuero Juzgo* and the Municipal Rule (*Fuero Municipal*) in Toledo, granted by King Fernando III el Santo in 1222 (Alejandre García 1981, Fairén Guillén 1983, Pérez-Cruz Martín 1992, p. 124). But there is broad agreement that the most prominent legal precedent regarding the jury trial in Spain was the Pacheco Law (1888), which with several comings and goings was in force until the beginning of the Spanish Civil War in 1936. Around that time, the dictator Francisco Franco suspended the jury courts, replacing juries with professional judge tribunals, which remained in place until his regime ended.

After the 1978 adoption of the Constitution with its provision for a jury, there were two substantial debates in Spain. The first was whether the constitutional provision calling for laws providing for lay participation was mandatory or optional. The mandatory rule theory saw the provision as "a constitutional mandate of obligatory nature" (Gimeno Sendra 1981, p. 345, Belloch Julbe 2000, p. 323). Others debated whether the provision *permitted* but did not *require* the implementation of citizen participation in law (Vidal Zapatero and Rey Martinez 1995, p. 20).

The second debate concerned which specific form the jury would take. In particular, there was heated discussion about whether the classic Anglo-Saxon all-citizen jury, or the *escabinado* (mixed court) combining lay and professional judges as found in many other European countries, was preferable for Spain (Thaman 1998, pp. 250-253, Jimeno-Bulnes 2004, p. 169, Marder 2011, Hans *et al.* in press). Strong arguments for both forms of lay participation were advanced but ultimately those advocating for an independent fact-finding jury won the day.

The first jury trials under the new jury law started on May 27, 1996 in three Spanish locations: Palencia, Palma de Mallorca and Valencia (Thaman 1998, pp. 250-253). The early trials involved three different types of offenses: murder, trespass on a dwelling, and bribery. The jurisdiction of the Spanish jury court includes these crimes and others, such as threats, failing to render aid, arson in forestlands and several other offenses against public administration (Jury Law, Article 1).

The Spanish jury court is composed of nine citizens and is headed by a magistrate-president, a law-trained judge from the Provincial Court's Criminal Section (Jury Law, Article 2 (1)). The all-citizen jury hears evidence and then engages in deliberation to arrive at its collective responses. Unlike the jury in most common-law countries, which are asked to deliver only general verdicts of guilty or not guilty, the Spanish jury answers a list of written questions called the "verdict subject matter" or *objeto del veredicto* according to the Jury Law, Article 52 (Garberí-Llobregat 1996). The magistrate-president prepares this list of questions, and gives it to the jury along with other judicial instructions and his or her summing up of the case (Paúl Velasco 1995b, Jimeno-Bulnes 2001, p. 373, Pérez Cebadera 2003, p. 117). The jury votes on the answers to each of these questions. A majority vote is required. There is an asymmetrical vote requirement: Votes from five of the nine jurors are required to prove a fact that is favorable to the accused, but seven are required to prove a fact that is unfavorable (Jury Law, Article 59 (1)).

For those who are familiar with the common-law model of the jury, perhaps the most unusual aspect of the Spanish jury is that it must provide the reasoning underlying its responses to the written questions (García *et al.* 2002, p. 75, Martín and Kaplan 2006). Article 61(1) (d) lays out the requirement: “a brief explanation of the reasons which justify the declaration of certain facts as proven or unproven.” This requirement of a reasoned decision is derived from Article 120 (3) of the Spanish Constitution, which provides for the reasoning of judgments (Paúl Velasco 1995a, p. 115). It is also consistent with the European Court of Human Rights’ *Taxquet* decision emphasizing the desirability of reasoned determinations in legal cases (*Taxquet v. Belgium* 2009, 2010).

However, there has been considerable controversy over the provision for reasoned judgments. Some argue that a jury decision is spontaneous by nature (Hastie *et al.* 1986, pp. 114-132) and requiring jurors to generate formal legal reasons after the fact is inconsistent with its nature. For the debate over this issue, see arguments in support (Lorca Navarrete 2003a, p. 2) and in opposition (Esparza Leibar 2000, p. 457). Regardless, others maintain that the requirement for a reasoned verdict contained in the Jury Law is derived from an incorrect interpretation of constitutional rules. Article 120 (3) of the Spanish Constitution requires that judges set forth grounds for their judgments. However, Pedraz Penalva (1992, p. 31) argues that this rule literally refers solely to the professional judges’ judicial determinations, not to the verdicts given by lay persons. In this interpretation, the magistrate-president’s (or judge’s) decision, including the verdict and any criminal penalty, must be supported by reasons.

Requiring lay juries to provide written justification or reasoning for their responses to the verdict questions has proven to be problematic in practice, as we describe below. An inadequately reasoned verdict may be reversed by the magistrate-president (Jury Law, Article 63 (1) (d)) and appealed to the Regional Supreme Court (Act on the Criminal Procedure, Article 846 bis (c) (a)). Even before the initial jury trials were held, many legal commentators believed that it was unrealistic to expect that lay citizens would be able to characterize the basis for their conclusions in a manner that would pass judicial scrutiny. (For a summary of the scholarly literature and judicial practice, see Lorca Navarrete 2003b, Vélez Rodríguez 2006, Jimeno-Bulnes 2007, pp. 765-773). After Spain’s introduction of trial by jury in the 1990s, the requirement that juries provide the reasons underlying their responses to the magistrate-president’s written questions created substantial problems for the courts (Thaman 1998, 2011, pp. 628-643).

Another problematic issue that appeared right from the start was the magistrate-president’s preparation of the verdict subject matter, or questions for the jury. Magistrate-presidents experience difficulties in preparing written questions that are legally accurate and are also understandable to lay citizens. Thaman described the challenge: “The problem Spanish judges face in applying the [Jury Law] is the conversion of the parties’ pleadings, which often contain factual assertions necessary for the proof of the elements of the charged offenses, into questions which are both understandable to lay judges and sufficient vehicles for determining the proof, or lack thereof, of the elements of the charged offenses and of any circumstances which mitigate, aggravate, justify or excuse the crimes.” (Thaman 1998, p. 323).

Judges reported struggling with crafting question lists that fulfilled these characteristics (Thaman 1998). Is it best to begin with a global question that includes all the necessary facts? Should each specific underlying fact be included? Thaman observed that a number of judges in the early years showed a penchant for narrative. Or, they adapted the factual assertions from the prosecutors’ pleadings. The question lists varied from simple and straightforward inclusion of a handful of questions to close to one hundred questions (Thaman 1998, p. 352). Whatever the approach, inconsistencies in jury responses to written questions and

inadequate written justifications that did not pass judicial scrutiny led to rejection and overturning of jury verdicts in a number of cases in the early years after the Spanish jury's introduction (Thaman 1998, pp. 364-376).

It may be useful to consider some examples of the types of written responses and reasoning that Spanish jurors must produce. Some magistrate-judges may find acceptable the enumeration of simple, fact-based sentences. However, even simple factual conclusions may appear contradictory to the judge. Consider an example drawn from a jury trial in Burgos, Spain, in which a jury decided a gun license case (Appeals Court of Burgos 2007). In Spain, the possession of a gun without a license is punishable by law (Criminal Code, Article 564). The jury must vote on two statements provided to them by the judge. Recall that favorable statements require only five votes and unfavorable statements require seven votes. The first statement, "the shots were made with a semi-automatic pistol, and the accused had no gun license as required," would qualify as unfavorable to the defendant, and is proven if a minimum of seven jurors agree with the statement. At the same time, a second statement, "the defendant is not guilty of possessing a pistol without a license," would be characterized as favorable to the defendant and thus would require only five votes. One can see how different constellations in a nine-person jury could agree with both the first and second statements, yet because pronouncements related to the facts included in the verdict subject matter are indeed contradictory, the jury's verdict could be reversed following Article 63 (1) (d) of the Jury Law.

Even when jury courts employ different practices, asking jurors for the reasoning underlying a smaller number of questions, contradictory pronouncements can also occur. Consider an illustrative example presented at the Oñati Institute workshop (Subijana 2014). Fact number 3 declares that "The defendant Manuel killed John, whom he knew, and who had no opportunity to defend himself, for John was not expecting to be attacked by Manuel; Manuel took advantage of John's surprise to cut him in the neck with a knife and avoid John's defensive reaction." If that unfavorable fact is considered proven, it would be illogical to declare as proven another unfavorable fact number 4 that "the defendant Manuel did not intend to kill John, but acted recklessly, as he should have foreseen that in the course of the fight with John, carrying a knife, wounding him could end up in a vital area, killing him, as indeed occurred." To avoid contradictory pronouncements, experienced judges may direct the jury to consider some questions only if the jury has reached particular decisions on others. So, for example, a judge might instruct the jury: "if fact number 3 is declared proven, then consider and vote on fact number 6. Vote on fact 4 only if you have concluded that fact 3 is unproven."

The most famous Spanish jury trial in the early years was the Otegi case, a 1997 trial that implicated Basque terrorism. The jury concluded that the defendant was not guilty, but appellate courts faulted the jury's verdict reasoning. The jury acquitted the defendant, a young Basque nationalist named Mikel Mirena Otegi Unanue, of the murder of two Basque policemen, finding that the killings were excused because of his "temporary mental disorder." The magistrate-president pronounced an acquittal. However, the decision was appealed. The Supreme Court of the Basque Country found that the jury's reasoning underlying its responses was inadequate, and ordered a retrial (STSJ País Vasco 1997, June 26th). That decision was upheld by Spanish Supreme and Constitutional Courts (STS 364/1998, March 11, STC 246/2004, December 20). The Otegi jury verdict and the subsequent appeal were highly controversial at the time (Igartúa Salaverría 1998, Pavía Cardell 2005).

A retrial was long delayed. The defendant escaped in 1997 and Spanish criminal law requires as a general rule the presence of the accused in criminal proceedings. Otegi was eventually arrested in France and returned to Spain for a new trial in 2012. This time, however, a professional court designated to hear terrorism cases

rather than a jury, decided his guilt. Otegi was convicted and sentenced to 34 years of imprisonment (SAN 63/2012, July 31).

The Otegi case appeared to shift public views about the suitability of the jury as an institution in Spain. Roberts and Hough (2009) assembled the findings of several surveys of the Spanish public after the jury was introduced in the country. In 1996, one year after the new jury system was introduced, nearly half of the Spanish public reported that they would rather be tried by a jury than by a judge (49% favoring a jury versus 37% preferring a judge, with 14% having no preference). However, after the Otegi jury trial, public preference to be tried by a jury dropped to 32%. The public's agreement that "a jury comprised of members of the public with better experience of the problems of everyday life is better able to arrive at a more just verdict than a judge" also declined after the Otegi trial. Thus, legally inadequate verdict reasoning statements by juries loomed as a barrier to successful implementation of the Spanish jury trial.

The role of the Clerk of the Court expanded to address this problem. Article 61(2) of the Spanish Jury Law provides for the Clerk of the Court to assist the jurors and the spokesperson of the jury, who is in charge of the verdict writing during the elaboration of the verdict. As we will see, clerks' practices of assisting juries differ. Some clerks are reluctant to assist the jury and only do so when a concrete question is posed. In contrast, others assist the jury throughout the verdict writing process.

3. The Clerk of the Court's formal role in Spanish jury trials

The role exercised by the Clerk of the Court belonging to the Criminal Section of the Provincial Court is a key element of jury proceedings, and as we argue, has become essential. Nevertheless, scholars have practiced what amounts to benign neglect of the clerk's position, focusing much more research attention on the admittedly very significant role of the magistrate-president since the enactment of the Jury Law (Almela 1997, Porcellar 2000). The magistrate-president is part of the jury court itself. He or she presides over the Jury Court in Spain, although the jury deliberates and arrives at responses to the written questions independently of the magistrate-president (Jury Law, Article 2 (1)). In contrast to the traditional Anglo-Saxon common-law jury, the Spanish jury is a "jury of facts" and not of law (Jury Law, Article 3). The magistrate-president determines the application of the law and decides on the defendant's punishment, which must be added to the verdict written by the jury (Jury Law, Article 4).

The view persists that the clerk's contribution to the process is secondary to the judicial one. Indeed, one of the few book-length treatments on the clerk's role is subtitled *Enigma o Realidad de una Profesión Jurídica Devaluada* or *The Enigma or Reality of a Devalued Judicial Profession* (Escudero Moratalla *et al.* 1999). The subtitle emphasizes the widespread devaluation of the contributions made by court clerks to legal proceedings. Yet clerks, judges, and prosecutors all hold similar qualifications in Spain. A law degree is required for all three professions. In addition, clerks must pass an official exam, with their performance on theoretical and practical exercises evaluated by a national commission composed of Clerks of the Court, academics, and other civil servants in the justice system (*Ley Orgánica del Poder Judicial* [Spanish Act on the Judiciary], Article 442, Escudero Moratalla *et al.* 1999, p. 100). They are also expected to obtain further theoretical and practical training in an appropriate institution such as the Centre of Legal Studies associated with the Ministry of Justice (*Centro de Estudios Jurídicos*; see <http://www.cej-mjusticia.es>).

Nonetheless, until an important legislative amendment in 2003, described below, the Clerk of the Court was still included in the list of civil servants in the "service" of the administration of justice. Not long ago, the clerks of the court themselves appeared to share a common sentiment that they were second-class law

practitioners, a sort of secretary or clerk, not of the court, but of the professional judges (Martín Ostos 1994). José de los Santos Martín Ostos (1994) confirmed these views in interviews and questionnaires addressed to Clerks of the Court throughout Spain. Most clerks indicated that the public treated them as personal assistants to the judges.

In 2003, a legislative amendment created a specific chapter relating to the Clerk of the Court's role in the Spanish Act on the Judiciary (Organic Law 19/2003, Book V, Arts. 435-69). It regulated "the Clerk of the Court and the judicial clerkship" as a separate institution. Escudero Moratalla *et al.* (2004) discuss the significance of this amendment for the clerk's role.

Although the clerk's role became more important after the passage of the amendment, there is little scholarship in Spain or elsewhere that examines and evaluates the role of the Clerk of the Court, the clerk's procedural tasks, and the clerk's contribution to the jury trial. The most recent academic book-length analysis on the Clerk of the Court and the clerk's procedural functions in the Spanish language was edited in 2001 (Rodríguez Tirado 2001).

The clerk's role is especially relevant in jury proceedings. The Clerk of the Court is charged with overseeing and managing the entire jury selection process (Jimeno-Bulnes 2011). And even more significant, in our view, the clerk can make an important contribution to the decision-making process of the jury with respect to the completion of the jury's verdict form. As we indicated earlier, the Jury Law provides that the Clerk of the Court can assist the jury spokesperson "*strictly in the writing of the verdict form*" (Article 61 (2), italics added). In practice, however, a clerk could provide more extensive assistance, which consciously or unconsciously could influence the jury's interpretation of the case or the content of the verdict.

4. Jury selection

It is useful to understand the specific tasks of the Clerk of the Court in a jury proceeding (Cancio Fernández 2001). First, as mentioned, the Clerk of the Court is charged with overseeing the selection of the jury panel for a particular case. The clerk has this task when the criminal cause for judgment under the rules of Jury Law is referred to the Provincial Court (Criminal Section) from the Office of the Investigative Judge, who conducts the pretrial investigation (Jury Law, Article 24; see also Spanish Act on the Judiciary, Article 87 (1) (a)). Every two years, jury lists are drawn from the electoral census and sent to the Provincial Court. Clerks of the Criminal Section of the Provincial Courts communicate with prospective jurors identified through this electoral census, notifying them that they are on the jury list, and providing them with information about potential disqualifications and excuses (Jury Law, Article 13 (4)).

When there is a jury trial, the Clerk of the Court or an assistant to the clerk uses a computer program to select randomly a panel of 36 prospective jurors from the list drawn from the electoral census. The clerk presides over the selection, which takes place at an oral hearing to which the parties (prosecution and defense counsel) are summoned (Jury Law, Article 18). Parties are summoned to appear, but the law expressly provides that there is no adjournment of the random selection if one or both parties do not appear. Both of us observed the selection of a jury panel in one of the provincial courts in November of 2013. The clerk and lawyers for both sides were present to observe the procedure. A court assistant performed the computerized random selection of 36 names from the jury list.

Second, once the jury panel has been selected, the Clerk of the Court sends a summons and questionnaire along with a jury handbook to the 36 prospective jurors. The jury handbook contains useful information about the institution of the jury and the role of the juror, written in language that is easy to understand (*Manual del Jurado* 1996). The aim is to give prospective jurors information about

their role as jurors as well as an opportunity to give reasons why they cannot serve (Jury Law, Article 19). Each prospective juror must complete the questionnaire and provide lawful grounds for any disqualification or excuses (Lorca Navarrete 2009). The questionnaire must be returned to the Clerk of the Provincial Court, along with any supporting documentation (Jury Law, Article 20). The parties are given copies of the completed questionnaires in order to identify bases for challenges for cause (Jury Law, Article 21).

Legal rules provide for challenges for cause. These include prospective jurors who lack the necessary qualifications or who suffer from incapacity, incompatibility or prohibition. Excuses are not a ground for challenges for cause. However, in practice, based on our interviews and observations, most of the reasons given by prospective jurors why they cannot serve are from a specific list of excuses (Jury Law, Article 12, Jimeno-Bulnes 2011).

Third, the Clerk of the Court plays a significant role in other procedures related to the selection of the jury panel. He or she must be present during the *vista de excusas* or excuses hearing.¹ This hearing occurs behind closed doors; only court officials, the parties, and the prospective jurors are permitted to attend. In practice, the Clerk of the Court helps to facilitate the excuses hearing. The clerk calls jurors one by one and provides information to the magistrate-president, if necessary. The magistrate-president formally presides over the excuses hearing, resolving the excuses offered by the prospective jurors as to why they cannot serve on a particular case, and deciding on challenges for cause (Ríos Cabrera 2005, p. 139).

The Clerk of the Court orders payments to prospective jurors if they are challenged by parties or if they offer an acceptable excuse. By US standards, the pay is generous (Mize *et al.* 2007, pp. 11-13). There is a daily payment of 67 euros for each juror and 33.50 euros for prospective jurors. Jurors also receive a travel allowance (0.19 euro/km by car), lodging (65.97 euros, breakfast included) and a food stipend of 18.70 euros for their lunch and evening meals (Resolution by the Assistant Secretary of the Presidency 2006, p. 2819).

Fourth and last, the Clerk of the Court has an essential role during the selection of the jury that will try the case. The Jury Law provides for a closed hearing, limited to court officials, the parties, and the prospective jurors, in order to select the nine jurors and two alternates who shall serve on the jury (Jury Law, Article 40). Typically, jury trials, open to the public, are scheduled to begin two hours after the start of the closed door jury selection session. A minimum of twenty prospective jurors must attend the closed session; otherwise a computer-assisted random selection process shall take place in order to complete the list. The Clerk of the Court conducts this process too (Jury Law, Article 23).

According to law (Jury Law, Article 38) and current practice, during the in-court jury selection, the Clerk of the Court reads one by one the names of the prospective jurors. The magistrate-president engages in a round of questioning of each of the prospective jurors, supplemented by questions by the parties. The parties are able to exercise their peremptory challenges. Every party may challenge up to a maximum of four jurors without cause. However, if several prosecutors or accused participate, they must agree on the four jurors to be challenged. Otherwise, the magistrate-president conducts a lottery to decide on the order of the challenges. Note that in Spanish criminal procedure, in addition to actions brought by the public prosecutor, victims and citizens are allowed to bring private actions (Jury Law, Article 40 (3), Spanish Constitution 1978, Article 125, Pérez Gil 2003).

Thus, the clerk's role during Spanish jury selection is central. The clerk performs a combination of duties that in other jurisdictions, such as the United States, would

¹ On some occasions, an alternative written procedure substitutes for the hearing, and the information is shared with the parties. This possibility, though recognized as irregular, is permitted by the Supreme Court; see, e.g., STS 837/2009.

be carried out by jury commissioners, trial judges, and court staff. The clerk's omnipresence during jury selection means that the clerk will be a familiar figure to the jurors who are eventually selected to try the case.

5. The Clerk of the Court's role in assisting the jury with verdict reasoning

But even more important and challenging than jury selection is the role carried out by the Clerk of the Court at the end of the jury trial. As noted earlier, the Spanish Jury Law permits the Clerk of the Court to participate in the writing of the reasoning underlying the verdict subject matter, according to Article 61 (2) of the Jury Law. According to this provision, the jury spokesperson should undertake the writing of the verdict form. However, a subsidiary rule allows the assistance by the Clerk of the Court if the spokesperson requests it and the magistrate-president authorizes it. The text is as follows:

[The] verdict form shall be drafted by the spokesperson, unless he or she dissents from the majority view, in which case the jurors appoint the editor. If the spokesperson requests it, the magistrate-president may authorize the clerk of the court or an officer to help him or her, **strictly on the writing or the recording**. The same terms may apply to whoever has been appointed editor in replacement thereof. (Jury Law, Article 61 (2), emphasis added).

Although the law limits assistance by the Clerk of the Court to "the writing," it is sometimes difficult to draw the line between writing and reasoning. Article 61 (1) (d) sets out the requirement that a "brief explanation of the reasons which justify the declaration of certain facts as proven or unproven" appear in the verdict. As long as this verdict reasoning is compulsory according to Spain's Jury Law, if clerks are asked to assist, they must be especially careful to avoid influencing the verdict. Problems arise because of the need to determine whether the verdict form fulfils this requirement and whether it offers an acceptable "brief explanation of the reasons" (Jimeno-Bulnes 2007, p. 769). The jury also must avoid contradictions between answers to different written questions contained in the verdict subject matter. The Clerk of the Court may spot inconsistencies between answers or other problems in the reasons provided that could lead to a contradictory or otherwise unacceptable verdict. The clerk, by assisting the jury in avoiding such contradictions, could affect the jury's thinking about the case.

Judges review the adequacy of the jury's reasons provided on a case-by-case basis (Spanish Constitution 1978, Article 24 (1), Montero Aroca 1996, Arangüena Fanego 1997, Villagómez Cebrián 1998). The Spanish Supreme Court has taken different approaches in evaluating the reasoning in jury verdicts. These positions vary from the strictest interpretation (the "maximalist thesis"), which requires the jury to generate a thorough description of its entire deliberation process, to the most flexible interpretation (the "minimalist thesis"), which permits the jury to make general references to the evidence without more detail. The Supreme Court appears to prefer an intermediate position (Vegas Torres 2006, STS 455/2005, April 8, STS 786/2005, June 13, STS 894/2005, July 7, respectively). The intermediate position takes into account the fact that jurors are lay citizens rather than professional judges. It permits the jury to provide points relevant to the evidence, rather than requiring the jury to produce detailed judicial reasoning, like the magistrate-judge provides in the announcement of the verdict and sentence.

The Clerk of the Court can play an important role in helping the jury to avoid challenges to its verdict reasoning. The clerk is the first person to read the verdict before it is presented to the magistrate-president (Jury Law, Article 62). The magistrate-president can return the verdict to the jury to correct deficiencies following Article 63 of the Jury Law. For example, a verdict form might be returned if the verdict does not incorporate all the facts; the verdict does not make reference to the culpability of the accused persons; the majority vote requirement has not been satisfied; or there are contradictions among responses to different factual

questions. Our interviews with Clerks of the Court suggest that they are most concerned about contradictions in the jury's responses to the questions in the verdict subject matter. The Clerk of the Court reviews the verdict subject matter in detail to ensure that it avoids such contradictions before the final verdict is given to the magistrate-president. As we describe below, clerks' practices in assisting juries vary. Some clerks are reluctant to appear in the jury deliberation room, while others embrace a more active role.

6. Thaman's research on the early set of Spanish jury trials

Thaman's interviews with court officials in the 1990s, after the first year or so of Spanish jury trials, revealed some of the challenges clerks faced in assisting jurors with the writing of their verdicts (Thaman 1998, pp. 374-376).² He reported that in a few of the earliest trials, the Clerk of the Court answered the jury's legal questions directly. In one murder trial, for example, the jury asked for the clerk, and requested that the clerk explain the difference between a complete and a partial excuse attributable to psychic disturbance, and to explain clemency and suspended sentence recommendations (Thaman 1998, p. 375 (O-2, Lastra case)). After the clerk's assistance, the jury convicted the defendant of murder, rejecting the defense's insanity plea (Thaman 1998, pp. 481-482 (O-2, Lastra case)).

In another trial on a murder charge in which the defendant pleaded temporary insanity, the jury asked the Clerk of the Court if it could remove the words "intent to kill" from its response to a key factual question. The clerk responded by explaining that if it did that, then the defendant would not be guilty of murder (Thaman 1998, p. 375 (GR-4, Perez case)). Interestingly, the jury left the phrase intact. The jury subsequently convicted the defendant of murder with the partial excuse of temporary mental disturbance, and recommended a suspended sentence and partial amnesty (Thaman 1998, p. 460).

In a drug-related murder trial, the jury asked for the clerk's assistance four times:

One time was to explain the unclear formulation of two questions in the verdict form, concerning an allegation that the defendant had bought poor quality heroin from the victim, which caused him "grave psychic and physical effects" and that it was in this state that he went looking for the victim. According to the jury, the secretary [clerk] "told them how they had to proceed." The secretary [clerk] later spent forty-five minutes with them to help draft their verdict. (Thaman 1998, p. 375 (SE-2, Garcia case)).

The defendant Garcia was convicted of homicide but partially excused because of drug consumption and drug addiction (Thaman 1998, pp. 506-507).

Spanish law limits the clerk's role to one of assisting in writing or drafting, not assisting in legal reasoning. And not all juries call in the Clerk of the Court for assistance. But Thaman insightfully remarks that the substantive role of clerks "signals a lack of antipathy toward giving Spanish juries the kind of tutelage their cousins on 'mixed courts' in other western European countries receive from the professional bench. Time will tell whether this portends a slow transformation of the Spanish jury into such a 'mixed court.'" (Thaman 1998, p. 375).

7. Results from our interviews with Clerks of the Court

Thaman's remarks suggest that the clerk's role has the potential of shifting the Spanish jury into a body that resembles a mixed court. We employ this insight as a

² Thaman writes: "During research sojourns in Spain in the summers of 1996 and 1997, the author observed the first trials [in four Spanish cities], and conducted numerous interviews with the presiding judges, public prosecutors, lawyers, and other court personnel who participated in the first year of jury trials, from May 27, 1996 until June 1, 1997. The author has also collected and analyzed pertinent trial documents...from the overwhelming majority of the seventy-five to eighty cases subject to the jury law, in which a jury was actually selected" (Thaman 1998, p. 246 n.18). Thaman's article includes an Appendix (Thaman 1998, pp. 413-537) that provides detailed information about these trials.

springboard for investigating the current role of the Clerk of the Court in Spanish jury trials. We have interviewed a small number of Clerks of the Court acting in the Criminal Section of Provincial Courts in Spain. Although definitive conclusions must wait until more interviews are collected, some of our findings are intriguing.

We identified this initial set of clerks through personal contacts, recommendations by other clerks, and an outreach email sent to a listserv of clerks. We asked questions about the clerk's perceptions of the ways in which jury trials and judge-only trials differ, the distinctive strengths and limitations of jury trials, and their overall views of the Spanish jury. We asked them specifically about how they assisted the jury with the writing of their responses to questions. We also asked about their views of desirable changes or reforms to the Spanish jury trial procedure. Some interviews were recorded and transcribed, with the individual clerk's permission. In other instances, we made detailed notes of the interview responses.

The clerks differed in their experience with Spanish juries, ranging from six or seven jury trials to close to eighty trials. They also varied in their overall favorability toward the jury system. One recommended as a desirable reform the "suppression of the institution of the jury itself" (interview 2014-2). Another clerk's enthusiasm for the jury recalled that of the French jury advocate Alexis de Tocqueville: "In my opinion, the principal benefit and strength of trial by jury is the participation of citizens in the administration of justice. Even when initially they are reluctant to participate, at the end, after their exercise as jurors, they show a very satisfying experience because of their role. They go out with a deeper and more realistic knowledge of the functioning of the administration of justice." (interview 2013-1)

Even though we interviewed a small number of clerks, we observed some common reactions among the clerks, which are worthy of comment. All of them mentioned the way in which the jury slows down the trial procedure, compared to trials involving only legal professionals. One clerk estimated that a trial proceeding before a judge would take up a morning session of the court, whereas a jury proceeding would last five days. Another clerk expressed what she felt as a heavy burden of administrative work related to jury trials that was "without any procedural and/or judicial character," including communicating with prospective jurors who do not respond to their summonses, telephone calls addressing concerns of prospective jurors, and so on" (interview 2014-2). We note that by way of contrast, the varied tasks that the Clerk of the Court performs in jury trials in Spain would normally be handled by several different judicial staff in other countries such as the United States (Marder 2011). Jury commissioners and their staff handle the selection of the jury pool and scheduling of their service; court clerks manage some parts of the in-court jury selection process; and bailiffs are assigned to each jury during the trial.

A central interest is in exploring with the clerks their approach to communicating with juries that asked for their assistance in drafting. The clerk with the most experience acknowledged the key role that he plays:

The secretary is very necessary. Why? Because they [jurors] are people that are far away from the law; they do not know the law. Even though there is intent to avoid any legal terms, inevitably for them, it is difficult to understand, even if it is a very simple question. (interview 2013-1)

The same clerk also realized that his role was one that required the utmost neutrality:

Always with the intention to maintain great impartiality and great objectivity....You are shutting the door, the lawyers are in front, and our honesty has to be a priority.

The Clerks of the Court all had experience with assisting the jury in writing the verdict form. Here is how one described his experiences:

Generally my assistance was related in order to help the jury to express their reasoning. It was clear for jurors, but they were not able to write in order to make coherent all the statements included in the verdict form. (interview 2014-3)

Another clerk was insistent that she answered “only very slight and small questions, most of them related to legal language and/or meaning of the statements.” She noted that from her perspective, the only legally appropriate intervention was to translate legal terms or to make the jury aware of the need to avoid contradictory statements in the verdict draft (interview 2014-2).

The Clerk of the Court with the most experience was also most expansive about the limitations of the lay fact finders:

A professional magistrate or professional judge is used to daily evaluating circumstantial evidence and coming to logical and rational conclusions.... [In contrast, the jury consists of] nine people and each one has their own judgment and there, it makes it most difficult. And the other element that is very difficult is evaluating the circumstances that modify the defendant's culpability, such as aggravating and extenuating circumstances and *modificativas* of their personalities....to value such modifying circumstances is very difficult for them. (interview 2013-1)

In addition, he observed that jurors sometimes complete the verdict form in a contradictory fashion. He recalled telling jurors:

Look, if you answer white here, here you cannot answer black because it's black, it's white. It is not possible to be culpable and not culpable and it is not possible to have choices completely void and partially void. I can't prove facts if they are exclusory (or contradictory).... They give me the verdict before it is given to the magistrate and I look and I read it calmly. I see that it is not ok. If they said white here it can't be black. [I tell them that they must choose] one of the decisions because the fifth, the seventh, and the ninth, they are linked to each other. (interview 2013-1)

The clerk insisted that “*me quedo afuera*” or “I remain outside.” He can point out a problem, but he cannot offer a solution. The jury is free to say what it wants. Nonetheless, in his interview with us, he reported that he encourages the jury to engage in deep thinking about the evidence:

One of the things that I insist on the most that is fundamental is that they explain and every, and each one of the questions about everything that is being considered by the verdict, the guilt, the questions, rule this, this, and this. And one has to measure 7, 8, or 10 lines minimum. It's to say, this, the witness evidence testimony said that, the expert said that, the witness corroborated that, the forensics say that, the scientific evidence says that. And one has to put it in because it is the reasoning that the judge is going to use to make the sentence. You can't use other reasoning. Those facts that have been proven. And why? I always say to them, you would like to know why, right? Well, tell them. You are the judge. There is no expert. (interview 2013-1)

Even though we have interviewed a small number of clerks, and reflecting on what they suggest about the clerk's role and the strengths and limitations of trial by jury in Spain, we find our interview participants' perspectives fascinating. At the least, they indicate that it is essential to understand the clerk's role to assess the performance of the jury in Spain.

8. Conclusion

In conclusion, the Clerk of the Court has up to now been the forgotten person among all the participants in jury proceedings, especially in comparison with the judicial authorities such as the magistrate-president. Yet clerks have a unique vantage point from which to observe the complex interaction between lay persons and the law. Our analysis thus far suggests that the clerk is critically important to the jury proceeding, in particular because of his or her unparalleled opportunity to assist the jury in its writing of the jury verdict. This duty cannot be carried out by

the magistrate-president. It is an under-examined and under-researched role. We look forward to remedying the situation through additional scholarly research.

Mindful that our conclusions can be only preliminary at this point, we wish to share some observations about the role of the Clerk of the Court. First, it seems clear that different Clerks of the Court vary in their interpretations of Article 61 (2) of the Jury Law. Some clerks interpret the law narrowly, others more broadly. Based on our interviews, the clerks' behavior varies in line with their interpretations. Some who interpret the law narrowly limit themselves to offering assistance only when it is requested in order to answer specific questions. This narrow approach appears to be linked to the view that limited assistance is necessary to preserve the impartiality and objectivity of the jury. Other clerks provide broader and more expansive assistance in the writing of the verdict. They try to help the jury to avoid contradictory statements and unacceptable verdict subject matter. We have not yet observed whether and how these differences in the clerks' interpretation and action affect the verdicts reached by Spanish juries. Exploring these links should be the focus of future research.

In closing, we believe that an analysis of the Clerk of the Court's contributions in Spanish jury trials has the potential to inform comparative theory and research on juries and other forms of lay participation in law. Among the variety of forms of lay participation, two types – the independent common-law jury and the mixed court of professional and lay judges – are the most frequently observed (Jackson and Kovalev 2016). The Anglo-Saxon jury is prized for its independence in fact finding, yet at times it struggles with understanding and applying judicial legal instructions to the facts of the case (Vidmar and Hans 2007). The mixed court can potentially avoid this problem because it combines the expertise of professionally-trained judges and the community insights of lay citizens in one decision-making body. However, research on mixed courts confirms that the professional judges play a dominant role in decision making (Kutnjak Ivković 2015). Thus, the two most typical forms of lay legal decision making are compromised to some degree in integrating legal and lay perspectives. The role of Spain's Clerk of the Court, as intermediary between the jury of lay persons and the professional judge, offers a third and distinctive variation. The Clerk of the Court offers an alternative approach to the incorporation of law into lay judgment. Research that examines Spain's approach promises to contribute significantly to comparative law in action.

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