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JURY SELECTION AND JURY TRIAL IN SPAIN: BETWEEN THEORY AND PRACTICE

MAR JIMENO-BULNES*

INTRODUCTION

Spain has adopted the classic system of trial by jury, as opposed to the European—particularly the French—model that consists of a mixed court of professional judges and lay assessors.¹ Constitutional provisions on the subject of lay participation, under Article 125, were formulated almost twenty years ago, after the approval of the Spanish Constitution, in the *Ley Orgánica del Tribunal del Jurado* (L.O.T.J.), the Spanish Jury Law.² Nevertheless, certain features of the jury system in Spain are to some extent unique, such as the selection process and the proceedings in the jury court. Most of the jury systems' peculiarities concern the verdict phase. Under Spanish legislation, the jury's verdict must be decided by majority rule³ and, perhaps more unusually, it must also be "reasoned" in a similar way to

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1. See generally Francois Gorphe, *Reforms of the Jury-System in Europe: France and Other Continental Countries*, 27 J. CRIM. L. & CRIMINOLOGY 155 (1936). In contrast, for a general view of the jury in common law countries, see Symposium, *The Common Law Jury*, LAW & CONTEMP. PROBS., Spring 1999, at 1, and WORLD JURY SYSTEMS (Neil Vidmar ed., 2000). For a general global approach, see Symposium, *Le jury dans le procès pénal au XXI^e siècle [Lay Participation in the Criminal Trial in the 21st Century]*, 72 REVUE INTERNATIONALE DE DROIT PENAL 1 (2001) (Fr.). And for a discussion of the United States jury system, see Symposium: *The Jury at a Crossroad: The American Experience*, 18 CHI.-KENT L. REV. 907 (2003), and NANCY S. MARDER, *THE JURY PROCESS* (2005).

2. The L.O.T.J. has been in force since November 24, 1995, and has been amended twice by Organic Law 8/1995 (November 16th), B.O.E. 1995, 275, and Organic Law 10/1995 (November 23rd), B.O.E. 1995, 281, of the Criminal Code. Juan Alberto Belloch, the Minister of Justice at that time in the Socialist Government of Felipe González, saw the traditional jury model as a personal challenge. Many commentators supported Belloch's preference of a mixed-court model, such as prestigious professors Victor Fairén Guillén, Vicente Gimeno Sendra, José Martín Ostos, Ernesto Pedraz Penalva (who wrote on whether the jury court is necessary at all!), and Agustín-Jesús Pérez-Cruz Martín. For a list of several works by these professors, see Mar Jimeno-Bulnes, *Lay Participation in Spain: The Jury System*, 14 INT'L CRIM. JUST. REV. 164, 181–85 (2004). See also Stephen C. Thaman, *Spain Returns to Trial by Jury*, 21 HASTINGS INT'L & COMP. L. REV. 241, 253 (1998) (considering the mixed court to be the best solution for Spain).

3. L.O.T.J. art. 59(1).

the judicial decision itself, albeit expressed in the language of the layperson.⁴

In relation to the Spanish jury, there is significant literature in English discussing special features in the Spanish legislation as well as the great controversy over the selection procedures under the L.O.T.J. in the application of constitutional provisions.⁵ The debate over the appropriateness of the classical jury pattern in a civil law system did nothing to stop the enactment of the L.O.T.J. in Spain, nor was the L.O.T.J.'s enactment derailed by the existing lay participation in the administration of justice.⁶ The literal wording of Article 125 of the Spanish Constitution contemplates the right to become a juror, rather than framing jury service in terms of a mandatory duty: "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."⁷

4. L.O.T.J. art. 61(1)(d) (requiring "a succinct explanation of the reasons why the members of the jury have declared, or refused to declare, certain facts as having been proved" to be one of the contents of the verdict form); see also Mar Jimeno-Bulnes, *A Different Story Line for 12 Angry Men: Verdicts Reached by Majority Rule—The Spanish Perspective*, 82 CHI.-KENT L. REV. 759 (2007). For a comparative view of Spanish and U.S. legislation, see ENRIQUE VÉLEZ RODRÍGUEZ, *LA MOTIVACIÓN Y RACIONALIDAD DEL VEREDICTO EN EL DERECHO ESPAÑOL Y EN EL DERECHO NORTEAMERICANO* (2006).

5. See Jimeno-Bulnes, *supra* note 2, at 169–72. For a longer Spanish version on the issue, see Mar Jimeno-Bulnes, *La participación popular en la administración de la justicia mediante el jurado* (Art. 125 CE), 2 DOCUMENTOS PENALES Y CRIMINOLÓGICOS 297 (2004). Also, for an article on the history of the Spanish jury, see CARMEN GLEADOW, *HISTORY OF TRIAL BY JURY IN THE SPANISH LEGAL SYSTEM* (2000), as well as relevant literature such as Thaman, *supra* note 2. For a selection of Spanish and Latin-American bibliographies providing comparative views of jury proceedings in different Spanish-speaking countries, see generally JUICIO POR JURADOS EN EL PROCESO PENAL (Julio B. J. Maier et al. eds., 2000), with contributions by Ernesto Pedraz Penalva at 239–333 and Agustín-Jesús Pérez-Cruz Martín at 335–388.

6. See Perfecto Andrés Ibáñez, *PRÓLOGO: JURADO: EL DEBATE DEBE CONTINUAR*, in ALBERTO JORGE BARREIRO ET AL., *JUICIO POR JURADO: CUESTIONES TEÓRICAS Y PRÁCTICAS (PRUEBA. VEREDICTO. SENTENCIA. RECURSOS)* 11, 17 (2004).

7. CONSTITUCIÓN ESPAÑOLA [C.E.], B.O.E. n. 311, Dec. 29, 1978 (Spain), available at http://www.congreso.es/constitucion/ficheros/c78/cons_ingl.pdf (last visited Mar. 4, 2011). Hence, "nobody can think that a jury is obligatory" according to ERNESTO PEDRAZ PENALVA, *Sobre el significado y vigencia del Jurado*, in CONSTITUCIÓN, JURISDICCIÓN Y PROCESO 59, 65 (1990). As stated, the author is very critical of the jury institution and its social legitimacy. See, e.g., Ernesto Pedraz Penalva, *Notas sobre el jurado que viene*, REVISTA DEL ILUSTRE COLEGIO DE ABOGADOS DEL SEÑORÍO DE VIZCAYA, Jan./Mar. 1996, at 74; Ernesto Pedraz Penalva, *EL JURADO COMO VÍA DE PARTICIPACIÓN POPULAR*, 2 LA LEY 1006, 1007 (1994). In contrast, other authors at the time argued that Article 125 established "a constitutional mandate of obligatory nature." See, e.g., RAMÓN SORIANO, *EL NUEVO JURADO ESPAÑOL* 129 (1985); Ramon Soriano, *EL DERECHO A LA JUSTICIA POPULAR: EL NUEVO JURADO ESPAÑOL*, 1 LA LEY 1024, 1031 (1985); Jose Vicente Gimeno Sendra, *El artículo 125 de la Constitución, los Tribunales de Jurado y de escabinos*, REVISTA GENERAL DE LEGISLACIÓN Y JURISPRUDENCIA, Oct. 1981, at 343, 345. Also, the Minister of Justice, who promoted the introduction of the jury system in Spain, Juan Alberto Belloch Julbe, *LA LEY DEL JURADO*, 12 REVISTA VASCA DE DERECHO PROCESAL Y ARBITRAJE 323, 323 (2000).

Thus, Article 125 permits, but does not require, the legislature to regulate the jury within the criminal process.

Legislative regulation of this constitutional provision came in the form of the L.O.T.J. in 1995, but the purpose of this Article is not to revive the debate over its introduction. Instead, the time is ripe for an evaluation of the Spanish experience in terms of theory and practice⁸ in order to verify adherence with the law from both an institutional and procedural perspective. First, in relation to the institutional perspective, this Article will review the fulfillment of the “duty/right”⁹ of Spanish citizens, insofar as the task to participate in the administration of justice is remunerated yet compulsory. The second perspective concerns procedural aspects, and here, the legal gap between theory and practice is due to several circumstances, such as areas outside the competence of jury courts,¹⁰ the assignment of cases to professional judges, as well as plea bargaining between the accused and the prosecution when, in the best judgment of the magistrate-president of the Jury Court, the case is cut and dry. This cut and dry assessment puts an abrupt end to the criminal proceeding even before the selection of the jury panel.

We begin by examining the role of the Spanish Jury Court, both in theory and in practice, from an institutional and a procedural perspective.

I. JURY SELECTION IN THEORY AND PRACTICE: EXCUSES AND CONSCIENTIOUS OBJECTION

In Spain, nine citizens constitute a jury that is presided over by a Provincial Court magistrate. All jurors participate in the tasks of the jury

8. See JUICIO POR JURADO: EXPERIENCIA Y REVISIÓN (Enrique Bacigalupo Zapater & Miguel Carmona Ruano eds., 2007); JOSÉ CANO BARRERO, LA LEY DEL JURADO. JURISPRUDENCIA COMENTADA. DIEZ AÑOS DE APLICACIÓN DE LA LEY DEL JURADO (2007). Also, for an interesting and systematic approach, see MAGDALENA GONZÁLEZ JIMÉNEZ, LA INSTITUCIÓN DEL JURADO: LA EXPERIENCIA ESPAÑOLA (2006).

9. L.O.T.J. art. 6 (“La función de jurado es un derecho ejercitable por aquellos ciudadanos en los que no concurra motivo que lo impida y su desempeño un deber para quienes no estén incurso en causa de incompatibilidad o prohibición ni puedan excusarse conforme a esta Ley.” [Jury service is a right that may be exercised by all citizens for whom there is no reason that might prevent them and its performance is a duty for whoever is not subject to any incompatibility or ban or who is unable to excuse themselves in accordance with this law.]).

10. The jury court is the lawful court, according to Article 24(2) of the Spanish Constitution, for certain offenses that are legally prescribed in Article 1(2) of the L.O.T.J. Thus, these provisions that specify the right to trial by jury are unlike those in common law countries, the most representative guarantees for which are the procedural guarantees provided under the Sixth Amendment of the U.S. Constitution or the Jury Waiver in Rule 23(a) of the Federal Rules of Criminal Procedure. For a comparative view between the systems in Spain and the United States, see BEATRIZ SANJURJO REBOLLO, LOS JURADOS EN USA Y EN ESPAÑA: DOS CONTENIDOS DISTINTOS DE UNA MISMA EXPRESIÓN 173–74, 318–19 (2004).

throughout the trial: they reach a verdict in light of which the magistrate-president pronounces judgment and, when necessary, imposes a sentence.¹¹ However, one of the most controversial jury issues centers on the precise way in which the right to trial by jury is regulated in the L.O.T.J., which establishes lay participation in a jury in terms of a “duty/right” in a very particular way.¹² Insofar as it is a right, the law offers remuneration¹³; inasmuch as it is a duty, the law also contemplates certain sanctions for failure to participate as a juror in the tasks given by the magistrate-president.¹⁴

Moreover, the most controversial aspect of this duty to act as juror is the absence of any regulation that refers to conscientious objection.¹⁵ Initially, the Constitutional Court appeared to look favorably on conscientious objection, allowing the complainant the possibility of lodging an

11. See L.O.T.J. arts. 2–4. Among the works in Spanish, see basic remarks by Juan-Luis Gomez Colomer, *EL JURADO ESPAÑOL: LEY Y PRÁCTICA*, 72 *REVUE INTERNATIONALE DE DROIT PÉNAL* 285 (2001), and, more extensively, JUAN-LUIS GÓMEZ COLOMER, *EL PROCESO PENAL ESPECIAL ANTE EL TRIBUNAL DEL JURADO* (1996) [hereinafter GÓMEZ COLOMER, *EL PROCESO PENAL ESPECIAL*]. Specifically, regarding the composition of the Jury Court, see Agustín-Jesús Pérez-Cruz Martín, *ANOTACIONES A LA COMPETENCIA Y COMPOSICIÓN DEL TRIBUNAL DEL JURADO. ESPECIAL CONSIDERACIÓN DE LOS ARTS. 1 A 5 DE LA L.O. 5/1995, «IN DATADA»*, 95 *JUSTICIA* 63 (1995), as well as Julián Sánchez Melgar, *CONSTITUCIÓN DEL TRIBUNAL DEL JURADO*, 1 *LA LEY* 1616 (1996).

12. See *supra* note 9 and accompanying text; see also Göran Rollnert Liern, *El derecho-deber de participar en la Administración de Justicia (Ley Orgánica 5/1995, de 23 de mayo, del Tribunal del Jurado): su problemática constitucional*, 616–17 *REVISTA GENERAL DEL DERECHO* 221 (1996); Juan Luis Gómez-Colomer, *Aproximación al Estatuto Jurídico de los Jueces Legos en el Proyecto de Ley del Jurado*, *ACTUALIDAD JURÍDICA ARANZADI*, Apr. 13, 1995, at 1; Antonio Gilbert, *La Obligatoriedad de la función del jurado*, 15 *PODER JUDICIAL* 35 (1985). For a more recent approach, see ANTONIO MARÍA LORCA NAVARRETE, *JURADOS: LA CAPACIDAD, INCAPACIDAD, INCOMPATIBILIDAD, PROHIBICIÓN Y EXCUSA PARA ACTUAR COMO JURADO. LA GARANTÍA DE LA DESIGNACIÓN DE LOS CANDIDATOS A JURADOS Y DE LA COMPOSICIÓN DEL TRIBUNAL DEL JURADO. SANCIONES POR NO ACTUAR COMO JURADO. LA GARANTÍA DE LA FUNCIÓN DE LOS JURADOS* (2009).

13. The Resolution of July 21, 2006, by the Assistant Secretary of the Presidency authorizes a daily payment of €67 for each juror and €33.50 for each prospective juror, as well as a travel allowance (€0.19/km by car), lodging (€65.97, breakfast included), and a food stipend of €18.70 (lunch and evening meal). B.O.E. 2006, 177.

14. According to Article 39(2) of the L.O.T.J., fines amount to €150 if a person summoned to do jury service fails to appear in court without any justification after the first summons, and fines amount to between €600 to €1,500 if that person fails to appear after the second summons. Further penalties are contemplated in other situations, such as the refusal to take the imperative oath or promise according to Article 41(4) of the L.O.T.J., in which case the penalty rises to €300. The highest penalties are imposed on jurors who fail to take part in the verdict-voting and register an abstention; according to Article 58(2) of the L.O.T.J., a penalty of €450 may be imposed by the magistrate-president, who will advise over criminal liability ensuing from persistent abstention. On these administrative and criminal penalties, see especially LORCA NAVARRETE, *supra*, note 12, at 186–97, and on criminal liability, see ANTONI LLABRÉS FUSTER & CARMEN TOMÁS-VALIENTE LANUZA, *LA RESPONSABILIDAD PENAL DEL MIEMBRO DEL JURADO* (1998).

15. See Juan Manuel Bermúdez Requena, *La Objeción de Conciencia y el Jurado*, 27 *ACTUALIDAD PENAL* 489 (1998); Javier Martínez-Torron, *LEY DEL JURADO Y OBJECCIÓN DE CONCIENCIA*, 48 *REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL* 119 (1996).

appeal of last resort or a “defense appeal” (*recurso de amparo*) on the grounds of a breach of fundamental rights. In the only decision on this issue, the Constitutional Court declared that it was “too soon” to evaluate a possible breach of the fundamental right to conscientious objection, because an opportunity to allege the legal causes of qualification had yet to arrive.¹⁶ Consequently, given the lack of guidance from the Constitutional Court on the merits of conscientious objection, it remains unclear whether it should in theory have any legal weight. In judicial practice, however, conscientious objections operate as one sort of excuse, as will be shown below. First, however, some references to legal rules should be mentioned in relation to the juridical status of Spanish jurors and the jury selection process.

A. Legal Status of Jurors in the L.O.T.J.: Causes for Qualification and Disqualification

With regard to the legal status of Spanish jurors, the L.O.T.J. establishes a complicated system of causes for their qualification and disqualification,¹⁷ involving more than just one category in the latter case. In relation to the legal conditions for Spanish citizens to qualify for jury service, Article 8 lists five points: jurors must be over eighteen years of age¹⁸; possess the right to vote; have the ability to read and write; reside in any part of the province in which the offense was committed; and lack physical, mental, or sensory disability that would prevent them from acting as jurors. Four points are listed as causes for disqualification, each of them with different headings that contemplate various personal and professional circumstances:

(1) *Incapacities*: These circumstances, described in Article 9, provide for the traditional causes for disqualification: a person involved in criminal proceedings, held on remand or serving a prison sentence, with a criminal conviction, or temporarily suspended from public office pending criminal proceedings.

16. S.T.C., Nov. 29, 1999 (R.G.D., No. 216). In this case, the defense lodged an appeal against the decision of the senior judge, which rejected the removal of the complainant from a list of prospective jurors. The Constitutional Court’s decision declared that the complaint was still “premature” inasmuch as any violation of the plaintiff’s rights had not yet taken place because at that moment he was still a prospective juror and had not taken the oath as a juror in a specific criminal trial.

17. See Gómez Colomer, *supra* note 12; LORCA NAVARRETE, *supra* note 12, at 29.

18. For a discussion on this minimum age, see LORCA NAVARRETE, *supra* note 12, at 34–37. The author himself defends proposals to raise the minimum age to thirty years old, as in a previous Spanish Jury Law promulgated by Minister of Justice Alonso Martínez on April 20, 1988, known as the “Pacheco Law.” For another proposal to fix this minimum age at twenty-four years old, see Manuel Miranda Estrampes, *El jurado*, REVISTA DEL PODER JUDICIAL 419, 426 (2006).

(2) *Incompatibilities*: Listed in Article 10, these causes refer to people unable to perform jury service because of their public position,¹⁹ such as the King, the Royal Family and other family members,²⁰ national and regional Prime Ministers, Members of Parliament, Senators,²¹ magistrates of the Constitutional Court,²² the ombudsman, judges, prosecutors,²³ civil servants working in the justice administration, penitentiary institutions, delegates of the Governor's office, lawyers in general, lecturers at law schools,²⁴ members of the armed forces and the security services, and diplomats in general.

(3) *Prohibitions*: Listed under Article 11 and common to all judicial proceedings, these prohibitions bar the participation of certain people because of their positions in the process.²⁵ Pertinent positions in this case include being a party to the same criminal proceeding, participating in the same criminal proceeding as a witness or expert, having a relationship with any of the parties in the proceedings, and having a direct or indirect interest in the same criminal cause.

(4) *Excuses*: Contemplated in Article 12, these causes concern people who are over sixty-five years of age, have acted as jurors in the past four years or are experiencing serious family-related problems, perform work of relevant public interest, are resident in a foreign country, serve in the armed forces, or affirm and justify any other causes that would be a serious hindrance to their role as jurors.

Concerning the jury selection process itself, the preparation of jury lists is regulated in the L.O.T.J. under the heading "Designation of the jurors," although other terms are used,²⁶ including the "organization of the

19. See Consuelo Ríos Molina, *LAS INCOMPATIBILIDADES DEL ARTÍCULO 10 DE LA LEY DEL JURADO*, 3 LA LEY 1566 (1998).

20. As well as their spouses. B.O.E. 1981, 297.

21. In central, regional, and local Assemblies, as well as in the European Parliament. This applies to the entire executive and legislative groups at all administrative levels (i.e., mayors).

22. Or individuals linked to them, as well as members of General Council of Judiciary Branch (*Consejo General del Poder Judicial* or CGPJ) and the Office of the Attorney General. Members of the Court of Auditors (*Tribunal de Cuentas*) are also excluded, as are members of the Council of State (*Consejo de Estado*).

23. Those belonging to martial courts are also included, as Spain has a separate jurisdiction for military forces regulated by Organic Law 4/1987 (July 15th). B.O.E. 1987, 171.

24. With the inclusion of procurators as a legal profession that is separated from the provision of legal counsel under Spanish procedural rules. Lecturers in Legal Medicine at medical schools are also included in this category.

25. General reasons in this sense for judges and magistrates are provided in LEY ORGÁNICA DEL PODER JUDICIAL [L.O.P.J.] [Law on the Judiciary] art. 219 (Spain).

26. L.O.T.J. § 3, arts. 13–23. See in this context Antonio Gisbert Gisbert, *Designación de candidatos a jurados para cada causa (Algunas reflexiones sobre los artículos 18 a 23 de la Ley Orgánica del Tribunal del Jurado)*, 621 REVISTA GENERAL DEL DERECHO 6571 (1996). See the use of the term "selection" in D. José Martín Ostos, *LA SELECCIÓN DEL JURADO*, 2 JUSTICIA 405 (1997), and

Jury Office” which is employed by some authors.²⁷ Jury selection procedures are extremely complicated and critics have proposed their simplification,²⁸ though to no effect for the moment. Starting with these selection procedures, the Provincial Electoral Offices make an initial random selection of jurors from the local electoral census,²⁹ which is publicly available at every town hall and appears in the official Journal of each Province.³⁰ This availability allows prospective jurors to request disqualification if they consider themselves unsuitable according to any of the causes outlined in Articles 9–12 discussed above. Such claims must be presented in printed form with copies of any necessary supporting documentation and should be addressed to the senior judge of the judicial circumscription, who will either uphold or reject them.³¹ Once the senior judge has dealt with these claims, the definitive list will be published in every province in November and sent to the provincial court. The prospective jurors on that list may be summoned to the Jury Court at any time over the two-year period starting on January 1st of the following year.³²

The jury selection process takes place when a criminal cause for judgment under the rules of the L.O.T.J. is referred to the Provincial Court from the Office of the Investigative Judge.³³ At that point, the selection of the panel for a particular case takes place, during which the clerk of court

José Luis Vázquez Sotelo, *LA SELECCIÓN DE LOS JURADOS*, 3 JUSTICIA 813 (1997). P. Casanovas Romeu uses both terms, *Intervención de las partes en el proceso de selección de los Jurados; atención al criterio de decisión de los candidatos, estrategias de comunicación*, in ESTUDIOS JURÍDICOS. CUERPO DE SECRETARIOS JUDICIALES V-1999 383 (1999).

27. See, e.g., Carmen Galipienso Calatayud, *La organización de la Oficina del Jurado. Proceso de conformación del jurado. Sorteo y selección del Tribunal del Jurado*, 16 LA LEY PENAL 5 (2005).

28. See, e.g., Francisco Javier A. de Frutos Virseda, *HACIA UN NUEVO PROCESO DE SELECCION DE LOS JURADOS*, 4 LA LEY 1632 (2001).

29. See criticism on this point by Vicente Gimeno Sendra, *La segunda reforma urgente de la Ley del Jurado*, 39 PODER JUDICIAL 419, 421 (1995) (making the argument to attribute these competences to the municipalities as that is where the public may consult the lists of prospective jurors).

30. There is a special rule on the selection process of prospective jurors in Royal Decree 1398/1995 (August 4th). B.O.E. 1995, 186.

31. L.O.T.J. arts. 14–15. According to Articles 14 and 15, any citizen may present a motion to dismiss a prospective juror grounded in any of the legal causes for disqualification. This sort of motion differs from those that the public may present within seven days after the initial selection process, which may be challenged by any citizen in the Provincial Courts according to Article 13(3) of the L.O.T.J. Also, Article 13 contains a formula for the calculation of the number of prospective jurors to be selected from the electoral census in each Spanish province, based on the number of jury trials held in the preceding year and those estimated for the following year.

32. L.O.T.J. art. 16(2). For this reason they are attached to the Provincial Court and it is their obligation to communicate any changes of address or circumstances that might affect their status as jurors.

33. Article 87(1)(a) of the LEY ORGÁNICA DEL PODER JUDICIAL [L.O.P.J.] [Law on the Judiciary] (Spain) invests the Investigative Judges with competence to conduct the preliminary criminal proceeding or investigative phase. The same provisions are also included in Articles 24–28 of the L.O.T.J.

plays an essential role.³⁴ A new random selection process using a computer program chooses the thirty-six prospective jurors from the definitive list for every criminal cause. Once selected, the clerk gives a questionnaire along with a jury-handbook³⁵ to the thirty-six prospective jurors³⁶ in order to ensure that they are fully informed. They therefore have a second opportunity to allege reasons against their inclusion in the panel as prospective jurors, in accordance with the causes for qualification and disqualification. Each juror has to complete the questionnaire, which will contain responses that relate to the lawful grounds for disqualification,³⁷ and return it to the Provincial Court, providing supporting documentation if necessary.

Article 21 states that copies of the questionnaires completed by the prospective jurors will be delivered to the parties in the jury trial, including the prosecutor, parties to the prosecution, private prosecution where applicable,³⁸ and defense counsel. The parties in the jury trial then present any allegations and challenges, which are decided by the magistrate-president of the Provincial Court³⁹ by judicial order after a preliminary hearing be-

34. See Raúl César Cancio Fernández, *La intervención del Secretario Judicial en el Tribunal del Jurado*, 1890 BOLETÍN DE INFORMACIÓN DEL MINISTERIO DE JUSTICIA 1117 (2001).

35. This handbook contains useful information on the institution of the jury and the role of the juror written in easily understandable, non-juridical language. MANUAL DEL JURADO [JURY MANUAL], B.O.E. 1996.

36. L.O.T.J. art. 19. In fact, the envelopes addressed to the prospective jurors are identified by a number. Every envelope includes a list of instructions in order to fill in the questionnaire and some legal provisions concerning causes for disqualification determined by the L.O.T.J. and others (e.g., those related to family or to other kinds of relationships), as well as the above-mentioned jury handbook and a self-addressed stamped envelope to return the completed questionnaire to the Provincial Court.

37. L.O.T.J. art. 20. In particular, the questionnaire contains aspects related to the requirements to act as a juror as well as the causes for disqualification drawn up in separate paragraphs, following the same order as in the legal rules (incapacities, incompatibilities, prohibitions, and excuses), with spaces in which to put the answers. It also includes questions on distances to travel to the court and the candidate's personal data. This personal data refers to the candidate's name, identity card number, date of birth, sex, address, telephone number, professional degree, civil status, occupation, educational level, and secondary address or telephone numbers, and includes a space in which to list any attachments or copies of any documents.

38. Note that Article 125 of the Spanish Constitution allows private individuals "to initiate the prosecution of an offense whether or not they are the victims of an offence." For an extensive discussion on this issue in the English language, see Julio Pérez Gil, *Private Interests Seeking Punishment: Prosecution Brought by Private Individuals and Groups in Spain*, 25 LAW & POL'Y 151, 155 (2003). Pérez Gil defines this popular accusation in Spain as "an accusation exercised by a person who does not have a direct relation to the legal goods that are endangered or damaged." *Id.* However, Spanish law imposes strict requirements on those wishing to exercise this right, which is reserved for Spanish citizens acting in a private capacity; foreigners are not granted this right. See LEY DE ENJUICIAMIENTO CRIMINAL [L.E. CRIM.] [Code of Criminal Procedure] arts. 101, 270 (Spain). Contrary opinions are expressed on the rights of European citizens in this respect by Vicente Gimeno Sendra, *La acusación popular*, 31 PODER JUDICIAL 87, 90 (1993), translated in 4 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ 739 (1994) (Fr.).

39. Ana María Ríos Cabrera, *LA RECUSACIÓN DEL PERSONAL JURISDICCIONAL POPULAR CONFORME A LA LEY ORGÁNICA 5/1995, DEL TRIBUNAL DEL JURADO*, 1-2 JUSTICIA 139 (1998).

hind closed doors in the presence of the parties, the clerk of the court, and the magistrate-president.⁴⁰ In theory and textually, legal rules provide that challenges may only refer to the absence of qualification or the existence of any cause of incapacity, incompatibility, or prohibition, and none of the excuses are foreseen as grounds of challenge.⁴¹ It should be noted that, at present, for the selection of jurors, Spanish legislation only provides challenges for cause and never for peremptory challenges. In contrast, legal provisions for such challenges are possible once the nine jurors that will form the jury and the two substitutes have been selected.⁴²

The jury selection process ends with a list of twenty prospective jurors constituting the panel. If less than twenty remain, a new random selection is carried out according to the instructions in Article 23. The organic regulation of the jury ends at this point, and the trial by jury procedure begins. Prior to discussing this phase, some references to current judicial practice on this topic are necessary.

B. Judicial Practice: Allegations and Excuses by Prospective Jurors. The "Hidden" Conscientious Objection Clause

We turn to the aforementioned allegations and excuses that take place in judicial practice by examining some examples taken from the Provincial Court of Burgos. In this context, most but not all of the causes that prospective jurors enter in the questionnaires sent by the clerk of the Provincial Court relate to the list of excuses under Article 12. Sometimes, incompatibilities or even causes for prohibition are also cited, and, not uncommonly, in compliance with the conditions for qualification. Nevertheless, one-third of all prospective jurors generally present excuses, bearing in mind that the questionnaires are sent to a total of thirty-six prospective jurors.⁴³

40. On some occasions, this hearing does not always take place and is substituted by a written procedure, the information on which is shared with the parties. This possibility, although recognized as irregular, has been guaranteed by the Supreme Court. See, e.g., S.T.S., July 22, 2009 (R.G.D., No. 4911).

41. See L.O.T.J. arts. 8–11. In practice, most of the reasons given by prospective jurors are in the specific list of excuses in Article 12, as will be set out. Other arguments fall under Article 22's title "resolution of excuses," a hearing that is usually known as "*vista de excusas*" or "excuses hearing."

42. Article 40 of the L.O.T.J. allows peremptory rejection of four jury members by the defense and a further four by the prosecution, bearing in mind that the prosecution may be jointly composed of public, private, and popular accusations and various legal representatives may constitute the defense.

43. As an example, eight prospective jurors at the Provincial Court of Burgos presented allegations and excuses in Jury Proceeding n.2/2000, Jury Selection File n.304/2006. Documentation on each jury selection process is held on a separate file. Thirteen prospective jurors presented reasons and excuses in Jury Proceeding n. 2/2009, Jury Selection File n. 303/2010.

An examination of the judicial files reveals that some of the causes put forward are not exactly excuses but are causes for disqualification, such as disability or incompatibility. For instance, a prospective juror charged with mistreatment and abuse in a family context was, as contemplated in Article 9(2), “subject to indictment” and as such was unable to become a juror.⁴⁴ Because he presented a copy of the respective judgment, the cause was approved *ex officio* without any need for further discussion at the “excuses hearing.” Another commonly alleged incompatibility is the status of mayor or town councilor under Article 10(4), which, when justified by supporting documentation, is automatically approved without further consideration by the parties or the magistrate-president.

More surprising still is incomppliance with the conditions for qualification required by Article 8. This might suggest that the electoral census is erroneous to some extent in Spain, especially the data on residence, age,⁴⁵ educational level, and even the death register. Speculation of this nature is prompted by the number of statements made by prospective jurors to the effect that they live in a different province supported by proof of residency from a town council,⁴⁶ that they are illiterate,⁴⁷ or even that the person summoned to do jury service is dead, supported by a death certificate presented by a relative. All these and similar cases are upheld by the magistrate-president in a judicial order whenever the documentary evidence is sufficient.⁴⁸ Further difficulties and a reluctance to do jury service are behind statements that affirm physical and/or mental disabilities that would prevent a person from doing jury service in accordance with Article 8(5).

44. See CÓDIGO PENAL [C.P.] [Criminal Code] arts. 153, 172 (Spain), which was enacted by Organic Law 10/1995 (November 23rd), B.O.E. 1995, 281, and amended by Organic Law 1/2004 (December 28th), B.O.E. 2004, 313. This topic has acquired enormous importance in Spain, and legislation has established special courts in order to deal with these kinds of gender-related offenses against women in or following a sentimental relationship; i.e., Judges of Violence against the Women—a sort of Investigative Judge with competence for certain civil matters related to civil status. For more details, see Mar Jimeno Bulnes, *JURISDICCIÓN Y COMPETENCIA EN MATERIA DE VIOLENCIA DE GÉNERO: LOS JUZGADOS DE VIOLENCIA SOBRE LA MUJER. PROBLEMÁTICA A LA LUZ DE SU EXPERIENCIA*, 1–2 JUSTICIA 157 (2009), as well as Mar Jimeno Bulnes, *VIOLENCIA DE GÉNERO: ASPECTOS ORGÁNICOS Y COMPETENCIALES*, in TUTELA JURISDICCIONAL FRENTE A LA VIOLENCIA DE GÉNERO: ASPECTOS PROCESALES, CIVILES, PENALES Y LABORALES 299 (Montserrat de Hoyos Sancho ed., 2009).

45. The most frequent age-related reason of being over sixty-five years old is presented as an excuse, as described in Article 12(1) of the L.O.T.J., and is not a qualification condition.

46. L.O.T.J. art. 8(4).

47. L.O.T.J. art. 8(3).

48. Thus, illiteracy was not upheld as a reason to disqualify the prospective juror who was unable to present any justification. This could be described as a case of “*diabolica probation*.”

Medical certificates are not always accepted by the different parties and the judge, on whose discretionary criteria a great deal depends.⁴⁹

In any event, the high number of statements to support disqualification relates to the number of excuses provided under Article 12, especially those involving people over the age of sixty-five, the performance of family tasks, work of general interest, or work that may not be delegated. The first reason, being over the age of sixty-five, causes few problems as it will obviously be upheld when accompanied by supporting documentation taken, for example, from the civil registry or even the national identity card held by all Spanish citizens. The performance of family chores is still alleged in Spain as an excuse—mostly in cases of prospective female jurors who wish to refuse jury service on the grounds that they need to care for elder relatives or young children⁵⁰—which usually involves the presentation of the *Libro de Familia* (Family Book). However, these kinds of excuses are generally neither upheld by the parties nor, in the end, by the magistrate-president. The same judicial criteria are usually applied to the excuses that stress the importance or public interest associated with the prospective juror's employment. Different kinds of jobs are put forward, such as self-employed truck drivers who own their own vehicle, lecturers and teachers, or even, in some cases, farmers claiming that their livestock will go unfed, supported by proof of farming activity. All these excuses are rejected by the parties as well as by magistrates, as those jobs or activities are not expressly excluded in the L.O.T.J. as reasons for avoiding jury service.

Finally, a last-ditch excuse is used in most of the applications that allege causes other than those specifically listed. Some are based on Article 12(7),⁵¹ but this provision, as already mentioned, is commonly used in practice as a conscientious objection "escape" clause.⁵² Specifically, the sentences "I do not feel capable of acting as a juror" and "I am not a suitable person" are very often given as reasons by prospective jurors to avoid

49. For example, medical reports have been accepted that referred to anxiety and depression, which were the cause of a potential juror's loss of employment. Certification has also been presented on physical disability due to diabetes and indispensable medical treatment. In another case, physical disability due to a heart operation and subsequent disability certified in a medical report were upheld. On the contrary, the sequels to a kidney transplant were turned down as a reason.

50. Information held on file refers to home care for a ninety-six year-old relative, babies, and children of six and eight years old.

51. One example was an excuse used by the wife of a penitentiary director where the accused was held in custody; an excuse that was rejected by the parties and the magistrate-president on the basis that she would not enter into contact with the prisoner held in preventive custody. In another example, a potential juror attached a copy of a public transport timetable to the excuse to demonstrate the impossibility of attending court for geographical reasons, which was also dismissed by the magistrate-president.

52. In defense of "hidden" conscientious objections, see LORCA NAVARRETE, *supra* note 12, at 73.

jury service.⁵³ In practice, the criterion applied by the Provincial Court of Burgos rejects this reason, as there is no evidence of any impediment that might prevent or hamper the fulfillment of jury service from a literal reading of Article 12(7). However, the same cause put forward by a prospective juror sometimes prompts a peremptory challenge under Article 40,⁵⁴ when selecting the jury before the trial starts from the twenty prospective jurors (which is the minimum required under Article 23). Both the parties and the magistrate-president wish to avoid reluctant jurors whose presence on the jury is considered by experience to be “disturbing.”⁵⁵

II. JURY TRIAL: GENERAL REMARKS ON THEORY AND PRACTICE

Let us now turn to the development of the jury proceedings. A summary description of the jury trial rules in the L.O.T.J. will help us understand the theoretical development of jury trials in Spain. Even though not all judicial practitioners fully adhere to these legal rules—practices described by the General Council of the Judiciary Branch as the “avoidance of jury trial”⁵⁶—they are operative in most Spanish Provincial Courts, helped by particular jurisprudence from the Supreme Court. This aspect will be examined through the prism of two important issues: (1) the restriction of the competence of jury courts, and (2) the settlement of particular agreements between the accused and prosecution in the form of “plea bargaining,” when fundamental aspects of the case are cut and dry, although this particular approach is not expressly contemplated in the L.O.T.J.

A. Jury Trial Rules

The first point relates to the kind of proceedings envisaged in the L.O.T.J., which considers jury proceedings as “special proceedings” de-

53. This excuse is used at least once or twice in every case reported and sometimes even more.

54. Both the defense and the prosecution can challenge a maximum of four jurors without cause, although it may be recalled that several parties can join the prosecution (public prosecutor, private prosecutor, and even popular prosecutor) in Spain. For this reason, if several prosecutors or the accused participate, they should firmly agree on the four jurors to be challenged. Otherwise, the magistrate-president will raffle the order in which the different defense and prosecution teams may present their challenges, until the quota of four is reached, as detailed in Article 40(3) of the L.O.T.J.

55. Manuel Miranda Estrampes expresses the same opinion. See Estrampes, *supra* note 18, at 428.

56. CONSEJO GENERAL DEL PODER JUDICIAL [C.G.P.D.] [GENERAL COUNCIL OF THE JUDICIARY BRANCH], MAY 5 REPORT ON LEY ORGÁNICA DEL TRIBUNAL DEL JURADO 5/1995 (1999) [hereinafter C.G.P.D. 1999 REPORT]; C.G.P.D., JANUARY 14 REPORT ON LEY ORGÁNICA DEL TRIBUNAL DEL JURADO 5/1995 (1998) [hereinafter C.G.P.D. 1998 REPORT]. These reports were approved in the plenary sessions of January 14, 1998, and May 5, 1999, on the practical application of the L.O.T.J. in Spain.

spite authoritative opinions to the contrary that defend its ordinary nature.⁵⁷ The jury proceeding's special nature can be seen in its exclusive competence to pass judgment on criminal matters, specific offenses, and crimes according to the rules described in Article 1(2): cases of murder and homicide, threats with menaces, failure to render aid, trespass in a dwelling, arson in forestland, and several kinds of crimes against the Public Administration, such as mishandling official documents, bribery, influence peddling, embezzlement of public funds, fraud and illegal levies demanded by public officials, prohibited negotiations by public officials, and mistreatment of prisoners.⁵⁸

The general characteristics of the Spanish jury trial are those common to all of the criminal procedures in this country. Perhaps the most expressive feature is the enforcement of the adversarial system⁵⁹ because every piece of evidence must be presented at the oral hearing (*juicio oral*). The Preliminary Recitals of the L.O.T.J. are careful to point out that the adversary principle is envisaged throughout the jury court proceedings: "The current Law intends that trial by jury should result in the complete eradication of this procedural deformity through the presentation of the entirety of the evidence before the jury."⁶⁰ This is certainly not new for trial procedure but it is for the preliminary investigation.⁶¹ For this reason, it has been argued that procedural safeguards throughout this investigative phase are much more strictly observed in jury proceedings than in any other criminal proceedings.⁶²

Likewise, instead of regulating only the trial procedure—usually called "plenary" or "oral trial"—before the Jury Court, the L.O.T.J. contemplates the development of pretrial procedures before the Investigative

57. Among the selected handbooks on Criminal Procedural Law, see VICENTE GIMENO SENDRA, *MANUAL DE DERECHO PROCESAL PENAL* 460 (2d ed. 2010). Alternatively, as previously mentioned, GÓMEZ COLOMER, *EL PROCESO PENAL ESPECIAL*, *supra* note 11.

58. See comments by Agustín-Jesús Pérez-Cruz Martín, *La competencia del Tribunal del Jurado*, 49 *REVISTA DEL PODER JUDICIAL* 543 (1998).

59. For a presentation on the issue as it relates to Spain, see TERESA ARMENTA DEU, *PRINCIPIO ACUSATORIO Y DERECHO PENAL* (José M. Bosch ed., 1995). In relation to the jury proceeding, see Jaime Suau Morey, *LA LEY DEL JURADO Y EL MODELO ACUSATORIO*, 2 *JUSTICIA* 251 (1999).

60. L.O.T.J. pmbl. III(1), para. 5, *translated in* Thaman, *supra* note 2, at 272.

61. With regard to this pretrial procedure, as in most continental European criminal legal orders, the general system is the inquisitorial system, which is followed by the 1882 Spanish Criminal Procedural Law. As is well-known, the mixture of both systems produces the formal or mixed accusatory model in continental European countries. In this general context, see *EUROPEAN CRIMINAL PROCEDURES* (Mireille Delmas-Marty & J. R. Spencer eds., J. R. Spencer et al. trans., 2002), as well as *CRIMINAL PROCEDURE IN EUROPE* (Richard Vogler & Barbara Huber eds., 2008).

62. This opinion is supported by Antonio María Lorca Navarrete, *La garantía de la instrucción sumarial en el proceso penal con jurado*, 22 *REVISTA DE DERECHO Y PROCESO PENAL* 13 (2009).

Judge (*Juez de Instrucción*)⁶³ as well as the so-called “intermediate phase.” The intermediate phase has become an essential step in the Spanish criminal process and entails a discussion prior to the opening of the “oral phase of the trial” or the dismissal of the case before the trial, once the criminal investigation has been evaluated. In the L.O.T.J., this phase is called the preliminary hearing because it is developed orally in a session with the parties to the case.⁶⁴

In this brief analysis of the L.O.T.J., this Article will focus on the trial procedure side-stepping the pretrial procedure.⁶⁵ It is beyond the scope of this Article to comment on the whole trial by jury; rather, this Article will focus only on some of the Spanish jury trial’s peculiarities. In this regard, respectful of the procedural guarantees of orality and publicity generally provided for in the “oral phase of the trial,” as opposed to during the investigative phase, with the aforementioned exceptions in the L.O.T.J., the jury trial also takes place in a public session, the date for which is fixed in the “writ on justiciable facts” (*auto de hechos justiciables*).⁶⁶ This writ is delivered by the magistrate-president of the jury court and contains the basic facts to be judged as well as their legal descriptions together with a decision on the evidence proposed by the parties.⁶⁷

Of course, the trial itself must begin with the constitution of the jury panel, which occurs after the jury selection has taken place, as noted above. This is logically the most representative part of the proceedings since regulation of the development of the trial defers to ordinary procedural rules, which operate as subsidiary laws,⁶⁸ except for some evidential peculiarities,

63. See Jaime Vegas Torres, *Las actuaciones ante el juzgado de instrucción en el procedimiento para el juicio con jurado*, in LA LEY DEL JURADO: PROBLEMAS DE APLICACIÓN PRÁCTICA 59 (Luis Aguiar de Luque & Luciano Varela Castro eds., 2004).

64. L.O.T.J. arts. 30–35. See also Antonio del Moral García, *La fase intermedia en el proceso ante el Tribunal del Jurado*, 1 ACTUALIDAD PENAL 99 (1996).

65. For a complete treatment of pretrial procedure, see, e.g., Manuel Pascual Ortells Ramos, *Sobre la instrucción previa en el procedimiento ante el Jurado*, 2 TRIBUNALES DE JUSTICIA 165 (1998); José Antonio Díaz Cabiale, *La fase preliminar en el procedimiento ante el Tribunal del Jurado*, 2 REVISTA VASCA DE DERECHO PROCESAL Y ARBITRAJE 149 (1996); J.A. Martín y Martín, *Consideraciones sobre la instrucción en el procedimiento regulado en la nueva ley del Tribunal del Jurado*, 1 ACTUALIDAD PENAL 231 (1996); Agustín-Jesús Pérez-Cruz Martín, *Reflexiones sobre la instrucción en el nuevo proceso penal ante el Tribunal del Jurado. Especial consideración de los arts. 24 a 35 de la L.O. 5/1995, del Tribunal del Jurado*, 610–11 REVISTA GENERAL DEL DERECHO 8085 (1995). See also ESTHER GONZÁLEZ PILLADO, INSTRUCCIÓN Y PREPARACIÓN DEL JUICIO ORAL EN EL PROCEDIMIENTO ANTE EL TRIBUNAL DEL JURADO (2000); Luciano Varela Castro, *LA INSTRUCCIÓN DE LOS PROCESOS ANTE EL TRIBUNAL DEL JURADO Y EL JUICIO DE ACUSACIÓN*, in JUICIO POR JURADO: EXPERIENCIA Y REVISIÓN, *supra* note 8, at 71.

66. L.O.T.J. art. 37(e).

67. A full description of its content is provided in Article 37 of the L.O.T.J.

68. L.O.T.J. art. 42(1). Also, Article 24(2) makes general reference to the rules of Criminal Procedural Law without specifying which kind of procedure, ordinary or fast-track, but the clear mention of

all of which are prescribed in Article 46. Essentially, this precept contemplates the right of the jurors to evaluate the evidence by themselves and, for instance, to pose direct questions to witnesses, experts, and the accused and to examine documents and papers.⁶⁹

The appointment of the jury panel for the trial usually takes place in the presence of the parties to the trial and the clerk of the court, according to the procedures contained in Article 38.⁷⁰ The law requires that there be twenty prospective jurors to constitute the panel from which the trial jury is composed.⁷¹ The magistrate-president will submit the twenty jurors to a new round of oral questioning that relates to the previously examined causes for qualification and disqualification.⁷² Once the nine trial jurors who will form the jury and the two substitutes have been balloted according to Article 40(3), the parties will once again have the opportunity to challenge the jurors; first with cause and then in a peremptory challenge without cause. Every party can challenge a maximum of four jurors without cause; however, if several prosecutors or accused participate, they should agree on the four jurors to be challenged, otherwise the magistrate-president will conduct a raffle to decide the order of the challenges.⁷³ Finally, once the jury has been selected, all the jurors must take the oath or promise⁷⁴; otherwise, they face a €300 fine that is imposed by the magistrate-president.⁷⁵

A jury court may be dismissed in advance, if either the counsel or the magistrate-president considers there to be insufficient evidence⁷⁶ following

some prescriptions regulating the ordinary procedure, such as Articles 25(2) and 26, and the general character of the former justifies the application of its regulations as a subsidiary regulation.

69. See José María Planchat Teruel, *El juicio oral ante el Tribunal del Jurado*, 1 ACTUALIDAD PENAL 371 (1996). For more recent articles, see Alberto Jorge Barreiro, *CUESTIONES PROBATORIAS EN LOS JUICIOS ANTE EL TRIBUNAL DEL JURADO*, in ALBERTO JORGE BARREIRO ET AL., *supra* note 6, at 19, 19–85, as well as Raquel López Jiménez, *LA PRUEBA Y EL JUICIO ORAL EN LA LEY DEL JURADO*, in JUICIO POR JURADO: EXPERIENCIA Y REVISIÓN, *supra* note 8, at 149–96. See also RAQUEL LÓPEZ JIMÉNEZ, *LA PRUEBA EN EL JUICIO POR JURADOS* (2002).

70. For more on this topic, see Miguel Gutiérrez Carboñell, *Sinopsis de la constitución del tribunal del jurado y del juicio oral: arts. 38 a 51, excluido el art. 46*, in JUICIO POR JURADO: EXPERIENCIA Y REVISIÓN, *supra* note 8, at 202.

71. L.O.T.J. art. 38(1).

72. L.O.T.J. art. 38(2).

73. L.O.T.J. art. 40(3).

74. The legal prescription reproduced in Article 41(1) of the L.O.T.J. is as follows: “Do you swear or promise to perform well and faithfully the function of juror, with impartiality, without dislike or affection, examining the accusation, considering the evidence and deciding whether the accused is guilty or not guilty of the offenses that are the object of the proceeding . . . , as well as to keep the deliberations secret?” See Juan Luis Moreno Retamino, *EL JURAMENTO O PROMESA DE LOS JURADOS EN ESPAÑA*, 5 LA LEY 2015 (2000).

75. L.O.T.J. art. 41(4).

76. For example, this was the case of judgment number 227937 in the Provincial Court at Burgos pronounced on June 8, 2001. S.A.P., June 8, 2001, (J.T.S., No. 227937). Of course, Article 65 of the

a motion from the defense counsel, as provided for in Article 49. Alternatively, a jury court may be dismissed when a consensus with the defense is reached on the charges to which the accused will plead guilty (*conformidad*, similar to plea bargaining in the United States)⁷⁷ and the penalty does not exceed six years imprisonment, as described in Article 50. Unless these circumstances arise, a jury trial will end with the description of the “verdict subject matter.” The verdict subject matter’s form is determined by law⁷⁸ and it will be given to the jurors with the usual “instructions” or summing up,⁷⁹ bringing the jury trial to an end and starting the deliberation procedure to pronounce the verdict. In this respect, the L.O.T.J. is peculiar in that it contemplates a verdict of a special kind or *sui generis*, far removed from common law procedures.

In short, Article 59(1) specifies the legal requirement of five votes to prove a fact that is in the accused’s favor, but seven votes if it is not favorable to the accused, which reflects a logical consideration that the latter is of greater seriousness.⁸⁰ But, certainly, the most astonishing rule for those familiar with a conventional jury system is the need for the verdict to be reasoned. 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

L.O.T.J. also contemplates subsequent dismissal of the jury when the verdict does not reach the legally required number of votes, in which case a new trial with another jury will be held.

77. See, in Spain, NICOLÁS CABEZUDO RODRÍGUEZ, *EL MINISTERIO PÚBLICO Y LA JUSTICIA NEGOCIADA EN LOS ESTADOS UNIDOS DE NORTEAMÉRICA* (1996). See also SANJURJO REBOLLO, *supra* note 10, at 213–59; NICOLÁS RODRÍGUEZ GARCÍA, *LA JUSTICIA PENAL NEGOCIADA. EXPERIENCIAS DE DERECHO COMPARADO* (1997). On jury proceedings, see Luis-Alfredo de Diego Díez, *LA CONFORMIDAD EN LA LEY DEL TRIBUNAL DEL JURADO*, 2 LA LEY 1304 (1996).

78. See L.O.T.J. art. 52. See also comments by José Garberí Llobregat, *FORMACIÓN Y CONTENIDOS DEL «OBJETO DE VEREDICTO» EN LA NUEVA DE LA LEY ORGANICA DEL TRIBUNAL DEL JURADO*, 3 LA LEY 1431 (1996); Daniel de Alfonso Laso, *La determinación del objeto del veredicto: problemas prácticos y reales que se pueden llegar a plantear*, 16 LA LEY PENAL 27 (2005); and more extensively, JUAN MANUEL BERMÚDEZ REQUENA, *EL OBJETO DEL VEREDICTO EN LA L.O. 5/1995, DE 22 DE MAYO, DEL TRIBUNAL DEL JURADO* (2004). For more recent articles, see Angel Luis Hurtado Adrián, *OBJETO DEL VEREDICTO E INSTRUCCIONES*, in ALBERTO JORGE BARREIRO ET AL., *supra* note 6, at 87, 87–162, as well as Lorenzo del Río Fernández, *EL VEREDICTO Y LA SENTENCIA. FORMULACIÓN DEL OBJETO DEL VEREDICTO. MOTIVACIÓN Y CONTROL JUDICIAL*, in JUICIO POR JURADO: EXPERIENCIA Y REVISIÓN, *supra* note 8, at 297.

79. See L.O.T.J. art. 54. On this issue, José Manuel de Paul Velasco, *Instrucciones al Jurado. Observaciones prácticas con alguna incursión teórica*, in PROBLEMAS DEL JUICIO ORAL CON JURADO 203 (1999), with some suggestions and examples in this respect. A particular reference to summing up in common law is included in Mar Jimeno Bulnes, *La institución del jurado en el Reino Unido y el régimen especial de Irlanda del Norte*, 1–3 REVISTA DE DERECHO PROCESAL 343, 373–404 (2001), and MARÍA-ÁNGELES PÉREZ CEBADERA, *LAS INSTRUCCIONES AL JURADO* (2003). For a more recent and general view on recent proposals see Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449 (2006).

80. See Javier López Sánchez, *El veredicto de culpabilidad del Jurado*, 12 TRIBUNALES DE JUSTICIA 1159 (1999).

unproven” appear in the draft verdict. Problems arise because of the need to determine whether the verdict forms fulfill this requirement and how the expression “brief explanation of the reasons” can be interpreted.⁸¹ There are arguments for⁸² and against⁸³ this provision and it is one of the most debated points of the L.O.T.J. among Spanish scholars. The jurisprudence delivered by the Supreme Court has enounced three alternative theses by which the suitability of the reasoning in jury verdicts may be assessed.⁸⁴

Moreover, this issue also has important and practical consequences. An unreasoned or poorly reasoned verdict may be legally submitted for judicial review in two ways: either to the jury college by the magistrate-president according to Article 63(1)(e), or to the Regional Supreme Court for appeal,⁸⁵ which will proceed to nullify the whole sentence as a real cassation.⁸⁶ After an appellate judgment from the Regional Supreme Court, only an ordinary cassation before the Supreme Court in Madrid is possible,

81. See Yolanda Doig Díaz, *Sobre la motivación del veredicto del Tribunal del Jurado: jurisprudencia aplicada a la práctica*, 16 LA LEY PENAL 88 (2005); Antonio María Lorca Navarrete, *LA MOTIVACIÓN DEL VEREDICTO EN LA DOCTRINA Y EN LA RECIENTE JURISPRUDENCIA: EN CONCRETO LA DENOMINADA “DUDA RAZONABLE,”* 1 LA LEY 1540 (2003). See also criticism by Iñaki Esparza Leibar, *Algunas cuestiones sobre el veredicto en la Ley del Jurado*, 4 TRIBUNALES DE JUSTICIA 451 (2000).

82. See, e.g., Antonio María Lorca Navarrete, *LA DELIBERACIÓN DEL JURADO EN LA DECLARACIÓN DEL HECHO PROBADADO Y PROCLAMACIÓN DE LA CULPABILIDAD O INCULPABILIDAD DEL ACUSADO EN LA DOCTRINA Y EN LA RECIENTE JURISPRUDENCIA*, 2 LA LEY 1413 (2003).

83. In particular, Esparza Leibar, *supra* note 81, at 457.

84. These positions vary from the strictest interpretation (the “maximalist thesis”), which requires a thorough description of the whole deliberation process and that concludes with a declaration that certain facts have or have not been proven, to the most flexible interpretation (the “minimalist thesis”), which permits general references to the evidence with less detail. Nevertheless, the intermediate position is preferred by the Supreme Court, which supports an itemized specification of all points relevant to the evidence without requiring the accuracy of judicial reasoning (which in any case is provided afterwards by the magistrate-president when pronouncing the sentence). See more extensively, with references to jurisprudence by the Supreme Court, Jimeno-Bulnes, *supra* note 4, at 769–73, see also, for Spain, Jaime Vegas Torres, *LA MOTIVACIÓN DEL VEREDICTO EN LA JURISPRUDENCIA DEL TRIBUNAL SUPREMO*, in JOSÉ ANTONIO MARTÍN PALLÍN ET AL., *LA LEY DEL JURADO EN SU X ANIVERSARIO* 85 (2006).

85. Provisions for this are contained in ordinary procedural rules, such as Article 846(a) of the L.E. CRIM. For more on the topic, see Coral Arangüena Fanego, *El recurso de apelación contra sentencias en los procesos ante el Tribunal del Jurado*, 47 PODER JUDICIAL 207 (1997), and MARCO VILLAGÓMEZ CEBRIÁN, *LA “APELACIÓN” DE LA SENTENCIA EN EL JUICIO CON JURADO* (1998).

86. See María Luisa García Torres, *El control judicial de los defectos del veredicto*, 3 TRIBUNALES DE JUSTICIA 65 (2003). For more on judicial review, see José Manuel Maza Martín, *LOS RECURSOS EN EL PROCESO ANTE EL TRIBUNAL DEL JURADO*, in ALBERTO JORGE BARREIRO ET AL., *supra* note 6, at 207, 207–85, and JUAN MONTERO AROCA, *LOS RECURSOS EN EL PROCESO ANTE EL TRIBUNAL DEL JURADO* (1996).

according to general rules.⁸⁷ Spanish jurisprudence on the application of the L.O.T.J. has noted problems over compliance with this legal requirement on several occasions: it was once pointed out that, more than approximately fifty percent of total verdicts were either poorly reasoned or unreasoned.⁸⁸

B. *Restricted Competence of Jury Courts*

The competence of jury courts has itself caused much discussion and several opinions are proffered in the literature,⁸⁹ as well as in public institutions,⁹⁰ in support of several amendments. Such opinions agree in most cases on the absence of coherence and proper relationships between the list of crimes contained in Article 1(2), which, as jury provisions, have a historical parallel in Spain.⁹¹ Different proposals have been cited, such as the inclusion of offenses against sexual freedom and the elimination of the so-called “bagatelle offenses,” which cover failure to render aid, trespass in a dwelling place, and especially associated threats with menaces. The latter has led to several pieces of jurisprudence in application of the aforementioned “avoidance of jury trial.”⁹² A general criterion has also been added, which excludes the sorts of offenses that require complex evidence.⁹³

87. See L.E. CRIM. arts. 847–909. An example is presented by Juan Montero Aroca in *Ambito del recurso de casación en el proceso especial ante el tribunal del jurado (con ocasión de la STS, sala 2a, de 24 de febrero de 1998)*, 8–9 TRIBUNALES DE JUSTICIA 831 (1998).

88. See Manuel Serra Domínguez, *El Jurado: éxito o fracaso*, in PROBLEMAS ACTUALES DE LA JUSTICIA PENAL 59, 62 (Joan Picó i Junoy ed., 2001).

89. See, e.g., Estrampes, *supra* note 18, at 433–34; Gimeno Sendra, *supra* note 29, at 420. For further evaluation, see also Jesús María González García, *Constitución de 1978 y justicia popular: siete años de tribunal de jurado*, in MANUEL BALADO RUIZ-GALLEGOS & JOSÉ ANTONIO GARCÍA REGUEIRO, LA CONSTITUCIÓN ESPAÑOLA DE 1978 EN SU XXV ANIVERSARIO 933 (J. M. Bosch ed., 2003).

90. See, e.g., FISCAL GENERAL DEL ESTADO, *Memorias de la Fiscalía General del Estado*, 1057, available at http://www.fiscal.es/ficheros/memorias/484/1022/MEMFIS10_completo_con_botones.pdf (last visited Mar. 4, 2011) (stating that some Provincial Prosecution Offices, including Salamanca, Toledo, and A Coruña, have proposed amendments to the L.O.T.J. in order to exclude some offenses from the jury court’s competence, such as those listed here).

91. Specifically, the 1820 Press Law as the first legal regulatory legislation of “judges of fact” and, especially, the 1888 “Pacheco Law,” which involved jury trials for all kinds of crimes, terrorism, and economic fraud. See generally Jimeno-Bulnes, *supra* note 2, at 165–69.

92. The offense of threats with menaces may be qualified as either a crime or a misdemeanor according to Articles 169–171 and 620 of the C.P., respectively. In this latter case, competence is attributed not to the jury court but to the Investigative Judge according to Article 87(1)(c) of the L.O.P.J. The exclusion of the offense of menaces from the jury’s competence had been already suggested by the C.G.P.D. 1998 REPORT, *supra* note 56, at 74.

93. This is the case of certain offenses against the public administration, for example, embezzlement of public funds, fraud or illegal levies, or illegal negotiations by public officials; also, the offense of arson in forestlands entails difficulties with regard to evidence, as very often no more than circumstantial evidence is available.

The Preamble to the L.O.T.J. provides for the extension of the jury court's competence to crimes other than those listed in Article 1 on the basis of past experience and the consolidation of the jury institution.⁹⁴ At present, the competence of the jury court is regulated in Articles 1 and 5; the latter includes interesting rules that extend the competence of the jury courts to "related crimes,"⁹⁵ with special provisions that differ from those contemplated in the general rules (Article 17 of L.E. CRIM.). In sum, the special rule contained in the L.O.T.J. applies *vis expansiva* to jury courts, which attribute them with competence to try those related crimes when the relationship is due to (a) simultaneity in the committal of the crimes by two or more persons jointly, (b) agreement between several persons to commit the same crimes in different places, and (c) committal of certain crimes (secondary offenses) in order to incite the committal of other ones (principal crimes) which are also executed. But further interpretations of this notional relationship have restricted the possession of such *vis attrativa* by jury courts, especially in cases known as "subjective related crimes."⁹⁶

One of these restrictive interpretations has been presented in jurisprudence pronounced by the Supreme Court, which in Spain acquires the role of legal doctrine. After some contradictory decisions in favor of extending the competence of the jury court to such "subjective related crimes,"⁹⁷ and one against such an extension,⁹⁸ an even more recent Agreement by the

94. L.O.T.J. pmbi. II, para. 4 ("El ámbito competencial correspondiente al Tribunal del Jurado se fija en el artículo 1. Sin embargo, el legislador en el futuro valorará sin duda, a la vista de la experiencia y de la consolidación social de la institución, la ampliación progresiva de los delitos que han de ser objeto de enjuiciamiento." ["The competence scope of the Jury Court is defined in article 1. Nevertheless, in view of the experience and the social consolidation of the institution, the legislator will, in the future, undoubtedly support the progressive increase of the list of offenses that have to be tried."]).

95. See Eduardo de Urbano Castrillo, *EL JURADO Y EL DELITO CONEXO*, 1 LA LEY 2030 (1997); Juan F. Herrero Perezagua, *La conexión en el proceso ante el Jurado*, 1 ACTUALIDAD PENAL 49 (1999). Also, more recently, Miguel Colmenero Menéndez de Lurca, *LA CONEXIDAD EN LA COMPETENCIA DEL TRIBUNAL DEL JURADO*, in JUICIO POR JURADO: EXPERIENCIA Y REVISIÓN, *supra* note 8, at 47, with reference to the jurisprudence pronounced by the Supreme Court, Criminal Chamber number two; the criminal division in which the author acts as a magistrate.

96. See, e.g., El FISCAL GENERAL DEL ESTADO, *CIRCULAR NUMERO 3/1995, de 27 de diciembre, SOBRE EL PROCESO ANTE EL TRIBUNAL DEL JURADO: SU ÁMBITO DE APLICACION*, 1099-1100 http://www.fiscal.es/cs/Satellite?buscador=0&c=Page&cid=1240559967917&codigo=FGE_&language=es&newPagina=31&pagename=PFiscal%2FFPage%2FFGE_buscadorArchivoDocument (last visited Mar. 4, 2011) (discussing the jury proceedings and their objective application, delivered by the Attorney General).

97. E.g., S.T.S., Nov. 29, 2000 (R.G.D., No. 8726). In this case, the magistrate reporter was Jose Antonio Martín Pallín, who is well known in Spanish literature on the judiciary as one of the supporters of the jury institution. In this concrete case, the *vis attrativa* of the jury court was defended in relation to cases that even differed from those explained in Article 5 of the L.O.T.J., inasmuch as more serious crimes committed by the same person is attributed to jury court.

98. E.g., S.T.S., Oct. 5, 2000 (R.G.D., No. 7099). The Provincial Court at Burgos has upheld identical criteria. For example, judgment number 56, of December 5, 2005, S.A.P., Dec. 5, 2005 (R.J.,

Plenary of the Criminal Chamber on February 23, 2010,⁹⁹ declared a common doctrine in order to restrict the competence of jury courts to related crimes. The agreement encourages separate trials for such offenses whenever possible and establishes different rules to be followed in the interpretation of an objective and subjective relationship between different crimes. In recent judgments, the Supreme Court has already applied the agreement; nevertheless, some magistrates have expressed dissenting opinions that have defended the competence of the jury court for the crime in question.¹⁰⁰ This last judicial practice shows how far removed this question is from a peaceful resolution.

Finally, the enormous importance of the question should not be overlooked, as the Jury Court is a recognized court of law equal to any other professional judge or court, according to constitutional provisions contained in Article 24(2) of the Spanish Constitution.¹⁰¹ The proclamation of this fundamental right was envisaged in the Jurisprudential Decision of the Constitutional Court number 147/1983, April 13, 1983¹⁰²—although the enactment of the L.O.T.J. in 1995 had yet to take place—and for this reason, the defense appeal for trial by jury was dismissed. The Constitutional Court declared at that time the obligation of the Spanish legislature to provide for the jury procedure on the basis of Article 125 of the Spanish Constitution¹⁰³ and, having done so, to establish the fundamental right to be

No. 788), attributed competence to the jury court to judge the embezzlement of public funds, and competence to the Provincial Court to judge the forgery of public documents that would disrupt the "cause's continence" and lead to contradictory judgments.

99. T.S., Feb. 23, 2010 (J.T.S., No. 142593). In contrast, it is not found on the official website of the Supreme Court. In fact, the Plenary of the Criminal Chamber on February 5, 1999, reached an agreement on the same topic, which has been quoted several times in various pieces of jurisprudence.

100. *E.g.*, S.T.S., July 23, 2010 (R.G.D., No. 4955). Here, the dissenting opinion presented by Jose Antonio Martín Pallín criticizes some of the rules in the previous agreement by the Plenary of the Supreme Court, Criminal Chamber, which he considers fortuitous and uncertain.

101. C.E., B.O.E. n. 311, Dec. 29, 1978 ("all have the right to the ordinary judge predetermined by law; to defense and assistance by a lawyer; to be informed of the charges brought against them; to a public trial without undue delays and with full guarantees; to the use of evidence appropriate to their defense; not to make self-incriminating statements; not to plead themselves guilty; and to be presumed innocent"). The right to the lawful judge forms part of the content to the due process of law contemplated in this whole provision and, as a kind of a fundamental right, allows the defense to raise an appeal before the Constitutional Court, as previously explained. For extensive treatment of the topic, see MARÍA LUISA ESCALADA LÓPEZ, *SOBRE EL JUEZ ORDINARIO PREDETERMINADO POR LA LEY* (2007). In relation with the jury court, see Jose Augusto de Vega Ruiz, *EL JURADO Y EL JUEZ ORDINARIO Y PREDETERMINADO POR LA LEY*, 3 LA LEY 899 (1989).

102. T.C., Apr. 13, 1983 (B.J.C., No. 147), available at http://www.boe.es/aeboe/consultas/bases_datos/doc.php?coleccion=tc&id=AUTO-1983-0147.

103. At that time, there was also great controversy surrounding the thesis of an "obligatory mandate" in reference to the interpretation of Article 125 of the Spanish Constitution. See Jimeno-Bulnes, *supra* note 2, at 169–70.

judged by a jury court as provided for by law.¹⁰⁴ For this reason, further jurisprudence was pronounced by the Supreme Court as well as by the Constitutional Court to clarify the issue that relates to the infringement of such fundamental rights to trial by jury and the competence of the jury court to extend to related crimes according to the rules in Article 5 of the L.O.T.J.¹⁰⁵ However, most of this jurisprudence rejects the complaints of the defense and declares the non-violation of this fundamental right despite the legal certitude over the attribution of the jury court's competence because they involve well-known, televised cases, such as the Fago crime,¹⁰⁶ or the case of Marta del Castillo,¹⁰⁷ which is still in progress.

104. T.C., Apr. 13, 1983 (B.J.C., No. 147), available at http://www.boe.es/aeboe/consultas/bases_datos/doc.php?coleccion=tc&id=AUTO-1983-0147 ("En conclusión, de acuerdo con el art. 125 de la Constitución, existe una obligación para el legislador de crear el jurados. Una vez creado, y dado que el art. 24.2 de la Constitución reconoce el derecho al Juez ordinario predeterminado por la Ley, el mencionado derecho fundamental comprenderá el derecho a ser enjuiciado por un jurado en la medida en que la Ley a que remite así lo prevea cuando se promulgue, y con el alcance que corresponda a la intervención del jurados." ["In conclusion, in accordance with art. 125 of the Constitution, the legislator has an obligation to establish the juries. Once established, and given that art. 24.2 of the Constitution acknowledges the right of the ordinary Judge predetermined by Law, the aforementioned fundamental right will include the right to be tried by a jury insofar as the law to which it refers envisages this when it is enacted and within the limits that correspond to the tasks of the jury."]).

105. Arguments between both courts are sometimes contradictory on this topic and even in the same Supreme Court; hence, the pronouncement of the aforementioned Agreement on February 23, 2010. See, e.g., S.T.S., Sept. 29, 2010 (R.G.D., No. 5290); S.T.S., June 26, 2009 (R.G.D., No. 3938); S.T.C., Feb. 27, 2007 (S.T.C., No. 156), available at <http://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Auto.aspx?cod=8748>; A.T.S., Jan. 20, 2004 (R.G.D., No. 70).

106. See S.T.S., Sept. 29, 2010 (R.G.D., No. 5290). Fago's crime took place in a small village located in the Pyrénées, where the major was assassinated by a neighbor, according to the conviction declared by the Provincial Court of Huesca instead of the correspondent jury court. For this reason, there was an allegation of the infringement of lawful judge before the Supreme Court. But the Supreme Court decision declared that there was no violation of the competence rules as far as the "related crimes" competence rules according to Article 5 of the L.O.T.J. were applied. Precisely, in provision of such decision for present case, the pronouncement of the Agreement by the Plenary of the Criminal Chamber took place on February 23, 2010. Another important reason for such jurisprudence in this case was the enormous influence of the mass media and the possible danger for jury bias, although the bias of the professional judge was also alleged before the Supreme Court. In fact, there was a well-known television series promoted by the public television channel in Spain (TVE) relating the real facts with fiction personages.

107. See *Caso «Marta del Castillo»: Auto que declara la competencia de la Audiencia Provincial en detrimento del Tribunal del Jurado para el enjuiciamiento de la causa*, DIARIO LA LEY, Dec. 27, 2010 (n. 7535). An order by Provincial Court at Seville on August 13, 2010, applying a previous Supreme Court Agreement of February 23, 2010, declared the competence of the Provincial Court instead of the respective jury court in spite of the case, which involved the murder of Marta del Castillo. The argument employed was that the murder was committed to cover up a rape, which figured among the offenses excluded from the competence of the jury court according to the Supreme Court's interpretation of Article 5 of the L.O.T.J. contained in the aforementioned Agreement. As many people in the city demonstrated solidarity towards Marta and lent public support to her family, this case also had a big impact in the mass media.

C. Settlement of Particular Agreements Between the Accused and the Prosecution

Another illustrative example of the phenomenon known as "avoidance of the jury trial," according to reports of the General Council of Judiciary Branch,¹⁰⁸ takes place when particular agreements are made between the accused and the prosecutor or prosecutors. In fact, this mechanism represents a sort of plea bargaining and the pronouncement of a "conformity sentence." According to Article 50(1) of the L.O.T.J., this agreement or *conformidad* in jury proceedings is only legally provided once the jury trial has begun, as explained above, with a general rule¹⁰⁹ limiting it to offenses punishable by no more than a six-year prison term. However, on some occasions the consensus reached between the prosecution (public, private, or popular) and the accused with regard to the plea or "conformity" is reached before the beginning of the jury trial. It can even happen before the selection of the jury in the pretrial procedure or "intermediate phase." In short, an agreement with the offer from the prosecution is presented in the defense writ (*escrito de defensa*) by the defense lawyer and is then ratified by the accused before the magistrate-president.¹¹⁰

The arguments employed for such judicial practice vary; some are laudable even though they do not always comply with written law, which should be amended in this context.¹¹¹ In sum, the legal arguments refer to the analogical application of Article 50 of the L.O.T.J. and to the subsidiary of the general rule provided in Article 655 of L.E. CRIM.,¹¹² which is applicable in ordinary criminal proceedings.¹¹³ The latter contemplates the conformity institution before the beginning of an oral hearing. Economic

108. C.G.P.D. 1999 REPORT, *supra* note 56; C.G.P.D. 1998 REPORT, *supra* note 56.

109. Article 655 and, more specifically, Article 787(1) of the L.E. CRIM. provide for abbreviated proceedings. The rules in the latter article only allow for the conformity institution as a variation of the ordinary proceeding. The reason is due to the legally stipulated competence limits for each one. According to Article 757 of the L.E. CRIM., abbreviated rules are indicated with regard to crimes for which the punishment is not in excess of nine years imprisonment or of a different nature. Otherwise, the rules of ordinary proceeding will be applied for serious crimes.

110. See L.O.T.J. art. 29(2). The preliminary hearing may be waived pursuant to Article 30(2) of the L.O.T.J. See Estrampes, *supra* note 18, at 452–53.

111. Manuel Miranda Estrampes, a public prosecutor, has argued that legal conformity should be substituted by this judicial practice in order to allow conformity before the jury trial and then the constitution of the jury panel. Estrampes, *supra* note 18, at 452–54.

112. See L.O.T.J. arts. 24(2), 29. Note that Article 29 of the L.O.T.J. refers to only Articles 650, 652, and 653, but not Article 655, of the L.E. CRIM. They usually refer to the last article inasmuch as Article 652 of the L.E. CRIM. makes reference to the possibility that the accused person or persons may show their "agreement" (*están conformes*) with pleas contained in prosecution writs. Ordinary significance of the Spanish term *conforme* is applied in this case to the conformity institution.

113. The only proceedings where the conformity institution can take place according to the legal competence limits. See L.E. CRIM. art. 787(1); *supra* note 109.

arguments are also presented. In this context, it is considered “ridiculous” and “costly” to open a jury selection process and hold a jury trial when there is no need for the jury court to pronounce a verdict, and the judgment has already been ratified in the agreement between the prosecution and the accused.

One of the Provincial Courts to pioneer this judicial practice is the Provincial Court of Asturias. Some of its decisions in 1996, 1997, and 1998 had already defined this position under the name of “conformity” (*conformidad*). One example is judgment number 68/1998, February 6, 1998,¹¹⁴ which was in relation to the offense of trespass in a dwelling place. The two accused and their defense counsel expressed agreement with this charge and the penalty offered by the prosecutor; an agreement or “conformity” was submitted to the Investigative Judge and to the magistrate-president of the Jury Court, who pronounced the conformity sentence. Thus there was no need for either a jury trial or the selection of the jury panel.

The Provincial Court in Barcelona pronounced similar jurisprudence around the same time, in 1996, and later on. Its opinions were upheld by the Regional Supreme Court in Catalonia, in resolution of some appeals on this cause. Specifically, judgment number 11/1998, September 10, 1998, pronounced by the Regional Supreme Court of Catalonia (Civil and Criminal Chamber),¹¹⁵ employs the above-mentioned arguments, in order to declare that the conformity institution may be applied to the jury trial and the selection of the jury process. The decision implicitly considers the existence of a legal loophole not covered by law and argues that the L.O.T.J. only provides for the so-called “outcome conformity” (*conformidad de desenlace*), hence the need for an analogical interpretation of the above-mentioned legal rules. An interesting case concerned a successful appeal of an the acquittal handed down by the Provincial Court of Barcelona; instead of the conviction which had been agreed upon, the Catalan Supreme Court declared the decision contradictory and referred to the binding nature of the conformity institution.¹¹⁶

Finally, this jurisprudence is increasingly used by current Provincial Courts in Spain, especially over recent years. Judgments arising from agreements that are based on this doctrine have been pronounced by the

114. S.A.P., Feb. 6, 1998 (R.J., No. 841). References to previous jurisprudence by the same court, such as the judgments of December 19, 1996, Section Two, and of April 24, 1997, Section Three, are indicated here.

115. S.T.S., Sept. 10, 1998 (R.J., No. 3942). The reference to the Provincial Court of Barcelona's previous jurisprudence is pointed out, such as the judgments of May 20 and June 11, 1996, as well as of February 24, April 11, May 20, June 18, and July 16, 1997.

116. S.T.S., Sept. 20, 1998 (R.J., No. 3942).

Provincial Courts of Guipúzcoa,¹¹⁷ Lugo,¹¹⁸ Madrid,¹¹⁹ Cantabria,¹²⁰ Tarragona,¹²¹ Valladolid,¹²² Ciudad Real,¹²³ and Pontevedra.¹²⁴ The Provincial Court of Burgos has also developed these arguments in several decisions, such as judgment number 6/2006, February 22, 2006,¹²⁵ and, more recently, decision numbers 12/2009, March 6, 2009,¹²⁶ and 53/2010, September 24, 2010.¹²⁷ The same approach was followed in a well-known case in Burgos due to media attention under the title of “Tania’s crime,” in which Tania’s friend, an immigrant worker like the victim, mounted a popular accusation, along with the public prosecution; both prosecutors and accused agreed on fourteen years imprisonment, which appeared in the judgment pronounced by the magistrate-president on November 24,

117. S.A.P., Mar. 29, 2000 (R.J., No. 117). In this case, the accused agreed with the plea from the public prosecution, who requested six months imprisonment as well as suspension of passive suffrage rights and medical treatment throughout the conviction because of conditional threats offense, according to Articles 169(1) of the C.P., as well as Articles 20(1) and 21(1) of the C.P.

118. S.A.P., Feb. 9, 2001 (R.J., No. 244). Here, the agreement between the accused and the public prosecutor took place in order to accept a conviction in exchange for three years and nine months’ imprisonment in a psychiatric hospital because of the murder, according to Article 138 of the C.P., and the mental illness of the accused operating as an incomplete exemption, as in Articles 20(1) and 21(1) of the C.P.

119. S.A.P., Nov. 29, 2002 (J.T.S., No. 92159); S.A.P., May 3, 2004 (J.T.S., No. 228205). In both cases, the accused was convicted of trespass in a dwelling place under Article 202(1) of the C.P. and a punishment of three months imprisonment was agreed upon.

120. S.T.S., Oct. 8, 2009 (J.T.S., No. 469157); S.A.P., Jan. 23, 2006 (J.T.S., No. 135298); S.A.P., Dec. 12, 2002 (J.T.S., No. 66957). In the first and third cases, the offense consisted of arson in forestlands under Articles 352 and 353 of the C.P. punished with a year of imprisonment and the imposition of a fine throughout twelve months and the suspension of passive voting right. The offense in the second case was qualified as menaces under Article 169(1) of the C.P. and punishable by a prison term of six months with the suspension of voting rights.

121. S.A.P., Feb. 4, 2004 (J.T.S., No. 91603). The accused was fined six months with a daily €2.40 quota for embezzlement of public funds, an offense defined in Article 433 of the C.P.

122. S.A.P., Dec. 11, 2003 (J.T.S., No. 78047). The offense here was also against the public administration, this time consisting of bribery defined in Articles 421 and 423(1) of the C.P.; the accused received a €200 fine.

123. S.A.P., May 3, 2007 (J.T.S., No. 283150). Both accused were convicted of trespass in a dwelling place, as defined in Article 202(1) of the C.P., and punished six months imprisonment and the suspension of voting rights for a similar period.

124. S.A.P., Jan. 14, 2009 (J.T.S., No. 263555). The accused was convicted of failing to render aid to a person run over by his vehicle under Article 195(1), (3) of the C.P. and was condemned to six months imprisonment.

125. S.A.P., Feb. 22, 2006 (J.T.S., No. 111296). Here the defendant who was accused of murder under Article 138(1) of the C.P. was finally released because of the application of the exemption clause contained in Article 20(1) of the C.P. under the title of “psychic abnormality,” hence the application of the security measure consisting of confinement in a psychiatric hospital for fifteen years.

126. S.A.P., Mar. 6, 2009 (J.T.S., No. 261540). The offense consisted of continuous threats with menaces under Article 169(1) of the C.P., punishment for which was established at two years imprisonment under Article 74 of the C.P. and the suspension of voting rights for a similar period.

127. S.A.P., Sept. 24, 2010 (J.T.S., No. 348617). The accused was convicted of homicide under Article 138 of the C.P. and assassination under Article 139 of the C.P., for which she was condemned to thirteen years and to eighteen years imprisonment, respectively, with total disability in both cases for the murder of her mother and three-year-old child.

2010.¹²⁸ These events occurred two days after the day fixed for the selection of the jury panel and the start of the jury trial, neither of which took place. The magistrate-president presented his excuses, justification, and gratitude to the twenty-nine prospective jurors for their attendance.¹²⁹

CONCLUSION

Having read through this description of the key institutional and procedural features of Spain's jury system and, especially, those points that relate to the jury selection process and jury proceedings, it is clear that the theoretical rules do not always mirror judicial practice. Two examples have been presented in relation to the judicial practice that the Supreme Court dubbed the "avoidance of jury trial," according to reports drafted by the General Council of Judiciary Branch:¹³⁰ the restriction of the competence of jury courts to related crimes when their judgment can take place separately, and the introduction of the "conformity institution" or "plea bargaining" before the selection of the jury and the start of the trial, as abbreviated proceedings are always possible.¹³¹

Indeed, for these reasons, the impact of jury proceedings in Spain is still more limited and symbolic than it should be according to legal rules and the competence of jury courts is also restricted to certain offenses. One needs to do no more than compare the number of criminal cases tried in Jury Courts in application of the L.O.T.J. with the total number of cases tried in the Criminal or Provincial Courts according to the ordinary or abbreviated procedural rules:¹³² there were 269 jury trials in 2008, compared to 138,948 abbreviated proceedings and 3,342 ordinary proceedings, in addition to the 141,519 urgent diligences or fast-track procedures conducted by the Investigative Judges on custody (*Juzgados de guardia*).¹³³

128. Judgment n. 65/2010, not yet reported and delivered in Jury Proceeding n. 2/2009, whose Jury selection file n. 303/2010 was commented on above.

129. November 22, 2010, at 9:30 am. My gratitude again to José Luis Gallo Hidalgo, Clerk of the Provincial Court at Burgos, for facilitating my presence at the sessions to select the jury panel, a procedure that takes place with the exclusive assistance of the Clerk of the Court and parties under Article 38 of the L.O.T.J.

130. C.G.P.D. 1999 REPORT, *supra* note 56; C.G.P.D. 1998 REPORT, *supra* note 56.

131. *See supra* notes 109 and 113.

132. There is no coincidence between the competence of the Criminal or Provincial Courts and the employment of abbreviated or ordinary proceeding rules. The former are competent to judge offenses punishable by up to five years imprisonment and the latter judge crimes over this limit according to general rules provided for in Article 14 of the L.E. CRIM. In contrast, Article 757 of the L.E. CRIM. provides for the application of rules on fast-track or ordinary proceedings for offenses punishable by up to nine years imprisonment. *See supra* note 109.

133. *See* L.E. CRIM. arts. 797–99. They take place in a different kind of ordinary proceedings called "fast-track proceedings for certain offenses" (*procedimiento para el enjuiciamiento rápido de determi-*

An imparity that increased in 2009, when 250 jury proceedings took place compared to 145,710 abbreviated proceedings, 3,291 ordinary proceedings, and 159,721 fast-track procedures, according to statistics provided by the Office of the Attorney General.¹³⁴

Many arguments both for and against retaining the jury institution in Spain have been presented by its supporters and detractors. Another relevant factor is the reluctance of the public to act as jurors for several reasons (economic,¹³⁵ apprehension, and even fear¹³⁶), which should be borne in mind along with more prosaic considerations. The Supreme Court has argued that juries waste time and resources in several of its decisions. After fifteen years of functioning, it is perhaps time to propose some of the amendments to the L.O.T.J. that have been discussed in this Article, in order to strengthen legal support for this judicial practice. Otherwise, Spanish judges and courts may indeed surpass their constitutional role contemplated in Article 117(3) of the Spanish Constitution,¹³⁷ inasmuch as the continental civil law system solely applies the law,¹³⁸ but is not meant to

nados delitos) with their own legal provisions, for offenses of minor importance and light sanctions, such as traffic offenses, security, larceny and petty theft, etc.; certain other legal prescriptions are also required. These proceedings are regulated in Articles 795–803 of the L.E. CRIM. and can take place before the Investigative Judges under legal rules when the conformity institution is operative; otherwise, an oral hearing will take place in a Criminal Court under the abbreviated proceedings rule.

134. This according to statistics provided by the Office of the Attorney General. See EL FISCAL GENERAL DEL ESTADO, *Memorias 2009: Datos Compendiados a Escala Nacional*, 1310–11, http://www.fiscal.es/ficheros/memorias/202/572/08_v2c2compendiados.pdf (last visited Mar. 4, 2011); EL FISCAL GENERAL DEL ESTADO, *Memorias 2010: Evolucion en el Orden Cuantitativo de los Procedimientos* *Iniciados*, 219–20, http://www.fiscal.es/cs/Satellite?cid=1247140094968&language=es&pagename=PFiscal%2FPagina%2F FGE_contenidoFinal (last visited Mar. 4, 2011). Also, the General Council of the Judiciary Branch publishes its own statistics in English. See GENERAL COUNCIL OF THE JUDICIARY, THE SPANISH JUSTICE SYSTEM: ALL THE FACTS 2009, available at <http://www.poderjudicial.es/eversuite/GetDoc?DBName=dPortal&UniqueKeyValue=153965&Download=false&ShowPath=false>.

135. See José Juan Toharia, *Los españoles ante el juicio con Jurado*, 45–46 DOCUMENTACIÓN JURÍDICA 285, 285 (1985); JOSÉ JUAN TOHARIA, *ACTITUDES DE LOS ESPAÑOLES ANTE LA ADMINISTRACIÓN DE JUSTICIA* 29 (1994).

136. Specifically, Carlos Fidalgo Gallardo, *LA INTIMIDACIÓN DE LOS JURADOS*, 1–2 JUSTICIA 171 (1998).

137. Textually, “The exercise of judicial authority in any kind of action, both in ruling and having judgments executed, is vested exclusively in the courts and tribunals laid down by the law, in accordance with the rules of jurisdiction and procedure which may be established therein.” C.E., B.O.E. n. 311, Dec. 29, 1978).

138. Recalling the words of Montesquieu, “la bouche qui prononce les paroles de la loi; des êtres inanimés qui n’en peuvent modérer ni la force ni la rigueur” as the latter is the task of the legislature. Charles de Secondat, *De l’esprit des lois* (1748), translated in THOMAS NUGENT, *THE SPIRIT OF LAWS* 180 (2001), available at <http://www.efm.bris.ac.uk/het/montesquieu/spiritoflaws.pdf> (last visited Mar. 4, 2011) (translated as “the national judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour”). In Spain, see comments by ERNESTO PEDRAZ PENALVA, *La jurisdicción en la teoría de la división de poderes de Montesquieu*, in CONSTITUCIÓN, JURISDICCIÓN Y PROCESO, *supra* note 7, at 30.

create new precedent-based law, as is the case in countries with a common law tradition.

