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Jury selection and jury trial in Spain: between theory and practice

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Abstract

The Jury Court in Spain is composed of nine citizens and is headed by a magistrate belonging to the Provincial Court, Chamber of Criminal. These citizens participate as lay assessors in a very particular way. The Spanish Jury Law 5/1995 contemplates its intervention in criminal proceedings as a sort of 'duty-right'; one hand, inasmuch as it is a right, the law guarantees a remuneration; on the other, inasmuch as it is a duty, the Jury Law does not provide any sort of sanction because of inassistance. Also legal status of the Spanish jurors is established by a complicated system of qualification and disqualifications causes. There are four categories for disqualification: incapacities, incompatibilities, prohibitions and excuses, which contemplate various personal and professional circumstances. In contrast, certain omissions in the regulation may be appreciated such as the conscientious objection for example, which becomes the most controversial question with regard to the duty to act as a juror.

The purpose of present paper is to discuss the abover points and examines how jury selection and service actually proceeds in Spanish Jury Courts. An initial reference is made to the composition of the lists of prospective jurors, which includes an explanation of the way in which prospective jurors are designated by random from the electoral census and how the definitive lists are drawn up in each province at two-yearly intervals and delivered to the Provincial Courts. Subsequently, the trial jury selection system is presented along with other measures that relate to jury participation in criminal proceedings, such as the completion of a questionnaire on lawful grounds for disqualification and the distribution of a copy of the 'jury handbook' to each selected juror. References are also made to the possibility of challenges for cause and without cause (peremptory challenges) both by the parties to the trial, defence and prosecution, as well as to the requirement to take oath to all jurors. In all this exposition the example of Provincial Court of Burgos shall be used with consideration of practical experiences and even if possible, statistics, to its conducting of jury trials in criminal proceedings.

Having discussed the above points, the paper draws to a close with a number of succinct concluding remarks.

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Key words

Lay participation in the legal system: lay assessors; legal status; legal consciousness; jury selection

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Even though Spain has traditionally followed a civil law system, it is at present the only European country to have introduced the common law model of jury trials into its criminal proceedings through the Spanish Jury Law of 1995 (*Ley Orgánica 5/1995, de 22 de mayo, del Tribunal del Jurado*). Despite counter proposals for mixed courts composed of professional judges consulting with lay assessors (*escabinado*), the Spanish jury system is now fully functional following the enactment of the law and diligently applies its at times extremely complex content. The rules on jury selection mean that the selection process is long and somewhat tedious in both theory and practice. However, theory and practice can differ in jury trials, as a jury may be dismissed in certain trials following 'plea bargaining' agreements between the accused and the prosecution, when dealing with a cut and dry case. Although this particular mechanism is not expressly contemplated in law, such practices grounded in the jurisprudence of the Provincial Court have been applied at the Jury Court of Burgos (Spain). Other more general jurisprudence from the Supreme Court serves to limit the competence of jury courts. This Chapter discusses the role of the Spanish Jury Court, both in theory and in practice, from an institutional and a procedural perspective, and examines the reality of the jury selection process and jury service in Spanish Jury Courts as well as the development of jury trials in court. Throughout this paper, all the examples are drawn from criminal proceedings in the course of jury trials, with special emphasis on the Provincial Court of Burgos. Having compared theoretical reality and current practice in all areas of these proceedings, the paper draws to a close with a number of succinct concluding remarks.

1. Introduction

Spain has adopted the classic system of trial by jury, as opposed to the European and 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 (SC) in the *Ley Orgánica del Tribunal del Jurado 5/1995* (henceforth, LOTJ), 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 its peculiarities concern the verdict phase insofar as under Spanish legislation, the verdict must be decided by the majority rule and, perhaps more unusually, it must also be "reasoned" in a similar way to the judicial decision itself, albeit expressed in the language of the layperson.³

In relation to the Spanish jury, there is significant literature in English discussing special features in the Spanish legislation and also relating to the great controversy over the selection procedures under LOTJ in application of constitutional

¹ For an essential approach, see classical bibliography such as F. Gorphe (1936, pp.155-168). In contrast, for a general view of the jury in countries with a common-law tradition see special issue edited by N. Vidmar (1999, 2000); also for a general global approach see *Revue internationale de droit pénal* (2001). Finally, in relation with the jury in USA see N.S. Marder (2003, 2005).

² Official State Gazette (*Boletín Oficial del Estado*, henceforth BOE) May 23rd, 1995, n.122, pp.15001-15021, available at <http://www.boe.es> (menu Consultas, Base de datos). The *Ley Orgánica del Tribunal del Jurado 5/1995* or Organic Law on Jury Court has been in force since November 24th, 1995 and amended twice by Organic Laws 8/1995 (November 16th) and 10/1995 (November 23th) 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 in contrast to the supporters of the mixed-court model; see, e.g., such prestigious professors as V. Fairén Guillén, V. Gimeno Sendra, J. Martín Ostos, E. Pedraz Penalva (on whether the jury court is necessary at all!), A. Pérez-Cruz; several bibliographic sources, all quoted in M. Jimeno-Bulnes (2004, pp.181-185). Also S.C. Thaman (1998, p.253), considered the mixed court as the best solution for Spain.

³ Arts. 59 (1) and 61 (1) (d) LOTJ, the latter in provision of "a succinct explanation of the reasons why the members of the jury have declared, or refused to declare, certain facts as having been proved" as one of the items on the verdict form. See M. Jimeno-Bulnes (2007) and especially in Spain for a comparative view with US legislation, E. Vélez Rodríguez, (2006).

provisions.⁴ The debate over the appropriateness of the classical jury pattern in a Civil Law system did nothing to stop the enactment of the LOTJ in Spain, nor was it derailed by the existing lay participation in the administration of justice.⁵ The literal wording of Article 125 of the SC contemplates the right to become a juror, rather than framing it 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".⁶ 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 LOTJ in 1995, but the purpose of this paper 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 practice⁷, in order to verify adherence with the law in both senses from an institutional and procedural perspective. Firstly, in relation to the institutional perspective, we will review the fulfillment of the "duty/right"⁸ of Spanish citizens, insofar as the task to participate in the administration of justice is remunerated, but it is also 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 courts⁹ and assignment of cases to professional judges as well as plea bargaining between the accused and prosecution when in the best judgment of the magistrate-president of the Jury Court the case is cut and dry, which 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.

2. 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 throughout the trial: they reach a verdict in the light of which the magistrate-president pronounces judgment

⁴ See M. Jimeno-Bulnes (2004b, p.170 and bibliographic quote); longer Spanish version (2004a). Also on the history of the Spanish jury, C. Gleadow (2000) as well as relevant literature such as S.C. Thaman (1998, p.250). For a selection of Spanish as well as Latin-American bibliographies providing comparative views of jury proceedings in different Spanish speaking countries see the general work *Juicio por Jurados en el proceso penal* (Maier et al., 2000) with contributions by E. Pedraz Penalva at pp.239-333 and A. Pérez-Cruz at pp.335-388.

⁵ In this context, P. Andrés Ibáñez (2004, p. 17).

⁶ Official translation available on ULR <http://www.6diciembre.es> (accessed on December 28th, 2010). Hence, "nobody can think that a jury is obligatory" according to E. Pedraz Penalva (1990, p. 65); as stated, the author is very critical of the jury institution and its social legitimacy, i.e., E. Pedraz Penalva (1994, p. 2; 1996). In contrast, other authors at the time argued that Article 125 established "a constitutional mandate of obligatory nature"; e.g., V. Gimeno Sendra (1981, p. 345) and R. Soriano (1985, p. 1031; 1985, p. 129); also, the Minister of Justice, who promoted the introduction of the jury system in Spain, J.A. Belloch (2000, p. 323).

⁷ In this context see, for Spain, E. Bacigalupo Zapater and M. Carmona Ruano (2007) as well as J. Cano Barrero (2007). Also, for an interesting and systematic approach, M. González Jiménez (2006).

⁸ The title of Art. 6 LOTJ which states that the *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] (unofficial translation).

⁹ The jury court is the lawful court according to Art.24 (2) SC for certain offenses that are legally prescribed in Art. 1 (2) LOTJ. 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 to the U.S. Constitution or, in particular, the Jury Waiver in rule 23 (a) Federal Criminal Procedure Rules; for a comparative view between both systems in Spain and U.S.A. see B. Sanjurjo Rebollo (2004, pp.173-174, 318-319).

and where necessary imposes the sentence.¹⁰ However, one of the most controversial questions centers on the precise way in which the right to trial by jury is regulated in the LOTJ, which establishes lay participation in a jury in terms of a "duty-right" in a very particular way, as explained in Article 6.¹¹ Insofar as it is a right, the law offers remuneration;¹² in as much 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.¹³

Moreover, the most controversial question with regard to this duty to act as juror is the absence of any regulation that refers to conscientious objection.¹⁴ Initially, the Constitutional Court appeared to look favorably on conscientious objection, allowing the complainant the possibility of lodging an appeal of last resort or a 'defence appeal' (*recurso de amparo*) on the grounds of a breach of fundamental rights. In the only decision on this issue,¹⁵ the Constitutional Court declared that it was "too soon" to appreciate a possible breach of the fundamental right to conscientious objection, because the moment to allege the legal causes of qualification had yet to arrive. 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, but the argument is that it operates, in any case, as one sort of excuse in judicial practice, as will be shown. Firstly, however, some references to legal rules should be mentioned in relation to the juridical status of Spanish jurors and the jury selection process.

2.1. Legal status of jurors in the LOTJ (Spanish Jury Law): causes for qualification and disqualification

With regard to the legal status of Spanish jurors, the LOTJ establishes a complicated system of causes for their qualification and disqualification,¹⁶ 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 of the LOTJ lists five points: jurors must be over 18 years of age,¹⁷ possess the right to vote, be able to read

¹⁰ See Arts. 2-4 LOTJ. Among the works in Spanish, see basic remarks by J.L. Gómez Colomer (2001; 1996). Specifically, regarding the composition of the Jury Court, see A.J. Pérez-Cruz (1995), as well as J. Sánchez Melgar (1996).

¹¹ See *supra* note 8. Also, J.L. Gómez Colomer (1995) and, specifically, A. Gisbert Gisbert (1985) as well as G. Rollnert Liern (1996). In general, more recently, A.M. Lorca Navarrete (2009).

¹² The Resolution of July 21st, 2006, by Subsecretary of Spanish Presidency (Spanish Official Journal of July 26th, 2006, n.177, p.2819) determines a daily payment of 67 Euros for each juror and 33.50 Euros for prospective jurors as well as a travel allowance (0.19 Euro/km by car), lodging (65.97 Euros, breakfast included) and a food stipend of 18.70 Euros (lunch and evening meal).

¹³ According to Art. 39 (2) LOTJ, fines amount to 150 Euros if a person summoned to do jury service fails to appear in court without any justification after the first summons and fines of between 600 to 1,500 Euros are payable 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 Art. 41 (4) LOTJ; in this case, the penalty rises to 300 Euros. The highest penalties are imposed on jurors who fail to take part in the verdict-voting and register an abstention; according to Art. 58 (2) LOTJ, a penalty of 450 Euros 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 A.M. Lorca Navarrete (2009, pp.186-197); also extensively on criminal liability, A. Llabrés Fuster and C. Tomás-Valiente Lanuza, (1998).

¹⁴ See, especially, J.M. Bermúdez Requena (1998) and J. Martínez Torrón (1996).

¹⁵ STC 216/1999, November 29th, available at the website of the Constitutional Court <http://www.tribunalconstitucional.es> 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" in as much 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 up the oath as a juror in a specific criminal trial.

¹⁶ See specifically J.L. Gómez Colomer (1995). Also, more extensively in A.M. Lorca Navarrete (2009, pp.29 *et seq.*).

¹⁷ See discussion on this minimum age in A. M. Lorca Navarrete (2009, pp.34-37); the author himself defends proposals to raise the minimum age to 30 years old, as in a previous Spanish Jury Law, promulgated by Minister of Justice Alonso Martínez on April 20th, 1988, known as the "Pacheco Law". Another proposal fixes this minimum age at 24 years old, see M. Miranda Estrampes (2006, p.426).

and write, reside in any part of the province in which the offense was committed, and have no 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:

- a) *Incapacities*: these circumstances described in Article 9 LOTJ 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.
- b) *Incompatibilities*: listed in Article 10 LOTJ, these refer to people unable to do jury service owing to their public position,¹⁸ such as the King, the Royal Family and other family members,¹⁹ national and regional Prime Ministers, Members of Parliament and Senators,²⁰ magistrates of the Constitutional Court,²¹ the ombudsman, judges and prosecutors²² as well as civil servants working in the justice administration, penitentiary institutions, delegates of the Governor's office, lawyers in general as well as lecturers at law schools,²³ members of the armed forces and the security services and diplomats in general.
- c) *Prohibitions*: listed under Article 11 LOTJ and common to all judicial proceedings, these prohibitions prohibit the participation of certain people because of their condition or position in the process,²⁴ in this case, being a party to the same criminal proceedings, participating in them 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.
- d) *Excuses*: contemplated in Article 12 LOTJ, these concern people over 65 years of age, those who have acted as jurors in the past four years, or who 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 LOTJ under the heading "Designation of the jurors" although both terms are used;²⁵ and the 'organization of the Jury Office' is even employed by some authors.²⁶ Jury selection procedures are extremely complicated and critics have proposed their simplification,²⁷ though to no effect for the moment. Starting with these selection procedures, the Provincial Electoral Offices makes an initial random

¹⁸ See especially C. Ríos Molina,(1998).

¹⁹ As listed in Royal Decree 2917/1981, November 27th (BOE of December 12th, 1981, n.297, pp.29061-29062) as well as their spouses.

²⁰ In central, regional and local Assemblies as well as in the European Parliament. This applies to entire executive and legislative groups at all administrative levels (i.e. mayors).

²¹ Or linked to them, also 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*).

²² Also those belonging to martial courts, as Spain has a separate jurisdiction for military forces regulated by Organic Law 4/1987, July 15th (BOE of July 18th, 1987, n.171, pp.22065-22079).

²³ 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.

²⁴ General reasons in this sense for judges and magistrates are provided in Article 219 Organic Law on the Judiciary (*Ley Orgánica del Poder Judicial* or LOPJ), Organic Law 6/1985, July 1st, 1985 (BOE of July 2nd, 1985, n.157, pp.20632-20678).

²⁵ Section 3 LOTJ, Arts. 13-23 LOTJ. See in this context A. Gisbert Gisbert (1996). Also, use of the term 'selection' in, J. Martín Ostos (1997) and J.L. Vázquez Sotelo (1997); P. Casanovas Romeu (1999) uses both terms.

²⁶ In particular, C. Galipienso Calatayud (2005).

²⁷ See for example F. J. de Frutos Virseda (2001).

selection of jurors from the local electoral census,²⁸ which is publicly available at every town hall and appears in the official Journal of each Province.²⁹ This availability allows prospective jurors to request disqualification, if they consider themselves unsuitable for 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.³⁰ 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 a two-year period starting from January 1st of the following year.³¹

The jury selection process takes place when a criminal cause for judgment under the rules of LOTJ is referred to the Provincial Court from the Office of the Investigative Judge.³² At that point, the selection of the panel for a particular case takes place in which the clerk of court plays an essential role.³³ A new random selection process using a computer program chooses the 36 prospective jurors from the definitive list for every criminal cause. Once selected, the clerk posts a questionnaire along with a jury-handbook³⁴ to the 36 prospective jurors³⁵ in order to ensure 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,³⁶ and any supporting documentation if necessary and return it to the Provincial Court.

Art. 21 LOTJ states that a copy of the questionnaires completed by the prospective jurors will be delivered to the parties in the jury trial: the prosecutor, parties to the prosecution, or private prosecution where applicable³⁷ and defense counsel. They

²⁸ See criticism on this point by V. Gimeno Sendra (1995, p.421); his argument is to attribute these competences to the municipalities as that is where the public may consult the lists of prospective jurors.

²⁹ There is a special rule on the selection process of prospective jurors in Royal Decree 1398/1995, August 4th (BOE August 5th, 1998, n.186, pp.24254-24256).

³⁰ Arts. 14 and 15 LOTJ; according to this rule any citizen can 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 Art. 13 (3) LOTJ. Also, the rule in Art. 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.

³¹ Art. 16 (2) LOTJ. 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.

³² Art. 87 (1) (a) LOPJ invests the Investigative Judges with competence to conduct the preliminary criminal proceeding or investigative phase. The same provisions are also included in Arts. 24-28 LOTJ.

³³ See especially R.C. Cancio Fernández (2001).

³⁴ This handbook contains useful information on the institution of the jury and the role of the juror, written in easily understandable, non-judicial language. The current edition is printed in the Official State Gazette (BOE), ed. 1996.

³⁵ Art. 19 LOTJ. 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 LOTJ and others (e.g., those related to family or to other kinds of relationships), as well as the above-mentioned jury hand-book and a stamped address envelope to return the completed questionnaire to the Provincial Court.

³⁶ Art. 20 LOTJ. 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 name, identity card number, date of birth, sex, address, telephone number, professional degree, civil status, occupation, educational level, secondary address or telephone numbers and includes a space in which to list any attachments or copies of any documents.

³⁷ Note that the SC in Article 125 allows private individuals "to initiate the prosecution of an offense whether or not they are the victims of an offence"; see extensively in English language J. Pérez Gil, (2003, p.155). On the same page, the author defines this popular accusation in Spain as "an accusation exercised by a person who has no direct relation to the legal rights that are endangered or damaged".

all now present any allegations and challenges which are decided by the magistrate-president of the Provincial Court,³⁸ by judicial order after a preliminary hearing behind closed doors in the presence of the parties, the clerk of the court and the magistrate-president.³⁹ 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 concrete excuses are foreseen as grounds of challenge.⁴⁰ It should be noted that, at present –for the selection of jurors– Spanish legislation only provides challenge for cause and never 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.⁴¹

The jury selection process ends with a list of 20 prospective jurors in order to constitute the panel; if less than twenty remain, a new random selection is carried out according to the instructions in Article 23 LOTJ. 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.

2.2. *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 LOTJ. 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 36 prospective jurors.⁴²

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) LOTJ, 'subject to indictment' and as such unable to become a juror;⁴³ as he presented a copy of the

However, Spanish law imposes strict requirements on those wishing to exercise this right, which is reserved for Spanish citizens acting in a private capacity; according to Arts. 101 and 270 Spanish Criminal Procedural Act (*Ley de Enjuiciamiento Criminal*, henceforth LECrim) foreigners are excluded. Contrary opinions are expressed on the rights of European citizens in this respect; see V. Gimeno Sendra (1993, p.90; also published in French, 1994).

³⁸ Specifically, A. Ríos Cabrera (1998).

³⁹ 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, e.g., STS 4911/2009, July 22th, available also at official Supreme Court website (URL <http://www.poderjudicial.es>; last accessed on January 3rd, 2011).

⁴⁰ In practice, most of the reasons given by prospective jurors are in the specific list of excuses in Art. 12 LOTJ as will be set out. Other arguments fall under the title of Art. 22 LOTJ "resolution of excuses", a hearing that is usually known as '*vista de excusas*' or "excuses hearing".

⁴¹ Art. 40 LOTJ 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.

⁴² 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; 13 prospective jurors presented reasons and excuses in Jury Proceeding n.2/2009, Jury selection file n.303/2010.

⁴³ Arts. 153 and 172 Spanish Criminal Code enacted by Organic Law 10/1995, November 23rd (BOE November 24th, 1995, n.281, pp.33987-34058, henceforth CP) according to the wording in Organic Law 1/2004, November 28th, Measures of Integral Protection against Gender Violence (*Medidas de Protección Integral contra la Violencia de Género*, BOE December 29th, 2004, n.313, pp.42166-42197). 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

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) LOTJ, justified by supporting documentation, which is automatically approved without further consideration by the parties or the magistrate-president.

Even more surprising still is incompliance with the conditions for qualification required by Article 8 LOTJ; this might suggest that the electoral census is erroneous to some extent in Spain, especially the data on residence, age⁴⁴ and 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, they are illiterate or even that the person summoned to do jury service is dead, supported by a death certificate presented by a relative.⁴⁵ All these and similar cases are upheld by the magistrate-president in a judicial order whenever documentary evidence is sufficient.⁴⁶ 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) LOTJ. Medical certificates are not always accepted by the different parties and the judge on whose discretionary criteria a great deal depends.⁴⁷

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 65, the performance of family tasks, work of general interest or that may not be delegated. The first reason 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 are still alleged in Spain as excuses, mostly in cases of prospective female jurors, who wish to refuse jury service on the grounds of a need to care for elder relatives or young children,⁴⁸ 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, for example, self-employed truck drivers who own their own vehicle or 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 LOTJ as reasons for undertaking jury service.

Finally, the last excuse is used in most of the applications that allege causes other than those specifically listed. Some are based on Article 12 (7) LOTJ,⁴⁹ but this

relationship; i.e. Judges of Violence against the Women - a sort of Investigative Judges with competence for certain civil matters related to civil status. See more extensively M. Jimeno Bulnes (2009a; 2009b).

⁴⁴ Although the most frequent age-related reason of being over 65 years old is presented as an excuse, as described in Article 12 (1) LOTJ and is not a qualification condition.

⁴⁵ Arts. 8 (4) and (3) respectively.

⁴⁶ 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 probatio*'.

⁴⁷ For example, medical reports were accepted that referred to anxiety and depression, which was the cause of his 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.

⁴⁸ Information held on file refers to home care for a 96 year-old relative, babies and children of 6 and 8 years old.

⁴⁹ Among the files examined, 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. Also, in another case, a copy of a public

provision, as already mentioned, is in fact commonly used in practice as a conscientious objection 'escape' clause;⁵⁰ specifically, the sentence "I do not feel capable of acting as a juror" and "I am not a suitable person" are very often given as reasons⁵¹ by prospective jurors, in order to avoid jury service. In practice, the criterion applied by the Provincial Court of Burgos also rejects this reason, as there is no evidence of any impediment which might prevent or hamper the fulfillment of jury service from a literal reading of Article 12 (7) LOTJ. However, the same cause put forward by a prospective juror sometimes prompts a peremptory challenge under Article 40 LOTJ,⁵² when selecting the jury before the trial starts from the 20 prospective jurors (the minimum required under Article 23 LOTJ, as mentioned). Both the parties and the magistrate-president wish to avoid reluctant jurors whose presence in the jury is considered by experience to be "disturbing".⁵³

3. Jury trial: general remarks on theory and practice

Let us now turn to the development of the jury proceedings. A summary description of the rules on jury trial rules in LOTJ 5/1995 will help to understand the theoretical development of jury trials in Spain. Even though not all judicial practice keeps fully to these legal rules -practices described by General Council of the Judiciary Branch as the 'avoidance of jury trial'-⁵⁴ 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 questions: the restriction of the competence of jury courts and 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 LOTJ.

3.1. Jury trial rules

The first point relates to the kind of proceedings envisaged in the LOTJ, which considers jury proceedings as "special proceedings", despite authoritative opinions to the contrary that defend its ordinary nature.⁵⁵ The defense of its special nature is precisely its exclusive competence to pass judgment on criminal matters, specific offences and crimes according to the rules described in Article 1 (2) LOTJ: cases of murder and homicide, threats with menaces, failure to render aid, trespass in a dwelling, arson in forestland and, finally, several kind 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.⁵⁶

Initially, the general characteristics of the Spanish jury trial are those common to all kinds of criminal procedures in this country. Perhaps the most expressive feature

transport timetable was attached to the excuse to demonstrate the impossibility of attending court for geographical reasons, which was also dismissed by the magistrate-president.

⁵⁰ Also, in defense of such "hidden" conscientious objection, A.M. Lorca Navarrete (2009, p.73).

⁵¹ At least once or twice in every case reported and sometimes even more.

⁵² 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; if 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 Art. 40 (3) LOTJ.

⁵³ M. Miranda Estrampes (2006, p. 428) expresses the same opinion.

⁵⁴ Reports approved in plenary sessions of 14th January, 1998, and 5th May 1999 on the practical application of the LOTJ in Spain obtained from the Center of Judicial Documentation of this institution (General Council of Judiciary Branch (*Consejo General del Poder Judicial* or CGPJ), San Sebastián.

⁵⁵ Among the the selected handbooks on Criminal Procedural Law see V. Gimeno Sendra (2010, p.460). Alternatively, as previously mentioned, J.L. Gómez Colomer (2001).

⁵⁶ See comments by A.J. Pérez-Cruz Martín (1998).

is the enforcement of the adversarial system⁵⁷ because now, more than ever, every piece of evidence must be presented at the oral hearing (*juicio oral*). The Preliminary Recitals of the LOTJ 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 all the evidence before the jury".⁵⁸ This is certainly not new for trial procedure but it is for the preliminary investigation;⁵⁹ for this same 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.⁶⁰

Likewise, instead of regulating only the trial procedure –usually called "plenary" or "oral trial"– before the Jury Court, the LOTJ contemplates the development of pre-trial procedures before the Investigative Judge (*Juez de Instrucción*)⁶¹ as well as the so-called "intermediate phase". This 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, having evaluated the criminal investigation. In the LOTJ, this phase is called the preliminary hearing because it is developed orally in a session with the parties to the case.⁶²

In this brief analysis of the LOTJ, attention will focus on the trial procedure, side-stepping the pre-trial procedure.⁶³ It is not the intention here to comment on the whole trial by jury, but just on some of its peculiarities that arise in Spanish law. 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 LOTJ–, 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*). 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 description together with a decision on the evidence proposed by the parties.⁶⁴

Of course, the trial itself must begin with the constitution of the jury panel once the jury selection has taken place, as commented 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 laws⁶⁵ except for some evidential peculiarities, all of which are prescribed in Article 46 LOTJ; 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.⁶⁶

⁵⁷ In Spain, the presentation on the issue by T. Armenta Deu (1995). In relation with the jury proceeding, J. Suau Morey (1999).

⁵⁸ Preamble of LOTJ, para.III.5 translated by S.C. Thaman (1998, p.272).

⁵⁹ With regard to this pre-trial 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. On this general context see M. Delmas-Marty and J.R. Spencer (2002) as well as R. Vogler and B. Huber (2008).

⁶⁰ This opinion is supported by A.M. Lorca Navarrete (2009).

⁶¹ See J. Vegas Torres, (2004).

⁶² Articles 30 *et seq* LOTJ. See specifically A. del Moral García (1996).

⁶³ For a complete treatment of pre-trial procedure, among others, see J.A. Díaz Cabiale (1996); J.A. Martín Martín (1996); M. Ortells Ramos (1998) and A.J. Pérez-Cruz Martín (1995). Also, extensively, E. González Pillado (2000) and, more recently, L. Varela Castro (2007).

⁶⁴ Full description of its content is provided under Art. 37 LOTJ.

⁶⁵ According to Art. 42 (1) LOTJ. Also general reference is made in Art. 24 (2) LOTJ to the rules of Criminal Procedural Law, without specifying which kind of procedure, ordinary or fast-track; but the clear mention of some prescriptions regulating the ordinary procedure such as Arts. 25 (2), and 26, and the general character of the former justifies the application of its regulations as a subsidiary regulation.

⁶⁶ See J.M. Planchat Teruel (1996); more recently, A. J. Barreiro, (2004, pp.19-85) as well as R. López Jiménez (2007). Also extensively R. López Jiménez (2002)

The appointment of the jury panel for the trial usually takes place in the presence of the parties to the trial and the respective clerk of the court, according to procedure contained in Article 38 LOTJ.⁶⁷ The law requires that there be twenty prospective jurors to constitute the panel from which the trial jury is composed. After that, the magistrate-president will submit them to a new round of oral questioning that relates to the previously examined causes for qualification and disqualification. Also, the parties have once again the opportunity, firstly to challenge with cause and then, in a peremptory challenge without cause, once the nine trial jurors who will form the jury and the two substitutes have been balloted according to Article 40 (3) LOTJ. Every party can challenge a maximum of four jurors without cause; 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. Finally, when the jury has been selected, all the jurors must take the oath or promise;⁶⁸ otherwise, they face a fine of 300 Euros that is imposed by the magistrate-president.

The jury court may be dismissed in advance, when, either the counsel or the magistrate-president considers there is insufficient evidence⁶⁹ following a motion from the defense counsel, as provided for in Article 49 LOTJ. Alternatively, it may be dismissed when a consensus with the defense is reached on the charges to which the accused will plead guilty (*conformidad*, in a similar way to the *plea bargaining* in the U. S. A)⁷⁰ and the penalty does not exceed six years imprisonment, as described in Article 50 LOTJ. Unless these circumstances arise, the jury trial will end with the description of the "verdict subject matter". Its form is determined by law⁷¹ and it will be given to the jurors with the usual "instructions" or *summing up*,⁷² bringing the jury trial to an end and starting the deliberation procedure to pronounce the verdict. In this respect, it must be pointed out that the LOTJ 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) LOTJ specifies the legal requirement of five votes to prove a fact that is in the accused favor, but seven votes if it is not favorable to the accused, which reflects a logical consideration that the latter is of greater seriousness.⁷³ 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) LOTJ sets out the requirement that "a brief explanation of the reasons which justify the declaration of certain facts as proven or unproven" appear in the draft verdict. The problem arises because of the need to determine whether the verdict forms fulfill this requirement or not and how the expression "brief explanation of

⁶⁷ Specifically on this topic, M. Gutiérrez Carbonell (2007).

⁶⁸ The legal prescription reproduced in Art. 41 (1) LOTJ 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 J.L. Moreno Retamino (2000).

⁶⁹ For example, this was the case of a judgment in the Provincial Court at Burgos (henceforth, SAP Burgos) pronounced on June 8th, 2001 (JUR 2001/227937, available by subscription from the Aranzadi <http://www.westlaw.es> database). Of course, the LOTJ also contemplates subsequent dismissal of the jury when the verdict does not reach the legally required number of votes and a new trial with another jury has to be held (Art. 65 LOTJ).

⁷⁰ See, in Spain, N. Cabezudo Rodríguez (1996); also N. Rodríguez García (1997); also B. Sanjurjo Rebollo (2004, pp.213-259). On jury proceedings, A. de Diego Díez (1996).

⁷¹ Art. 52 LOTJ. See comments by J. Garberí Llobregat (1996); also D. de Alfonso Laso (2005) and, more extensively, J.M. Bermúdez Requena (2004). More recently, A.L. Hurtado Adrián,(2004) as well as L. del Río Fernández (2007).

⁷² See Art. 54 LOTJ. On this issue, J.M. de Paul Velasco (1999), with some suggestions and examples in this respect. A particular reference to summing up in Common Law is included in M. Jimeno Bulnes (2001, pp.373 *et seq*); also, extensively, M.A. Pérez Cebadera (2003). For a more recent and general view on recent proposals see N.S. Marder (2006).

⁷³ See especially J. López Sánchez (1999).

the reasons" can be interpreted.⁷⁴ There are arguments for⁷⁵ and against this provision,⁷⁶ it being one of the most debatable points of the LOTJ among Spanish scholars. Also, 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.⁷⁷

Moreover, this question has also 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) LOTJ or to the Regional Supreme Court for appeal,⁷⁸ which will proceed to nullify the whole sentence as a real cassation.⁷⁹ After this appeal, only an ordinary cassation before the Supreme Court in Madrid is possible against the judgment pronounced by the Regional Supreme Courts, according to general rules.⁸⁰ Also Spanish jurisprudence on the application of the LOTJ has noted problems over compliance with this legal requirement on several occasions: it was once pointed that, approximately, over 50% of total verdicts were either poorly reasoned or unreasoned.⁸¹

3.2. *Restricted competence of jury courts*

The competence of jury courts has itself caused much discussion and several opinions are proffered in the literature⁸² as well as in public institutions,⁸³ 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) LOTJ, which as jury provisions have a historical parallel in Spain.⁸⁴ 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".⁸⁵ A general criterion has also been added, which excludes the sorts of offense that require complex evidence.⁸⁶

⁷⁴ Especially Y. Doig Doig (2005) and A.M. Lorca Navarrete (2003). See also criticism by I. Esparza Leibar (2000).

⁷⁵ For example, A.M. Lorca Navarrete (2003, p. 2).

⁷⁶ In particular, I. Esparza Leibar (2000, p. 457).

⁷⁷ These positions vary from the strictest interpretation (the "maximalist thesis") that 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 not greater 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 Supreme Court in M. Jimeno-Bulnes (2007, pp.769 *et seq*); see also for Spain J. Vegas Torres(2006).

⁷⁸ In this case provision is contained in ordinary procedural rules, such as Art. 846 bis (c) (a) LECrim. On the topic, C. Arangüena Fanego (1997) and, extensively, M. Villagómez Cebrián,(1998).

⁷⁹ See especially M.L. GarcíaTorres (2003) n.3. On judicial review, see J.M. Maza Martín (2004); also, extensively, J. Montero Aroca (1996).

⁸⁰ Arts. 847 *et seq* LECrim. An example is presented by J. Montero Aroca (1998).

⁸¹ See M. Serra Domínguez (2001, p.62).

⁸² See, in general, V. Gimeno Sendra (1995, p.420) and M. Miranda Estrampes (2006, pp.433-434). Also, further evaluation by J.M. González García (2003).

⁸³ Especially the annual reports presented by the General Attorney Government Office available at <http://www.fiscal.es> (menu *Documentos*). See for example Annual Report 2009 at p.1057, which states how some Provincial Prosecution Offices –Salamanca, Toledo and A Coruña– have proposed amendments to the LOTJ in order to exclude some offenses from the jury court's competence such as those listed here.

⁸⁴ 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 more extensively M. Jimeno-Bulnes,(2004a, pp.165-169).

⁸⁵ Insofar as the offense of threats with menaces may be qualified as either a crime or a misdemeanour according to Arts.169 *et seq* and 620 CP, respectively; in this latter case competence is attributed not to the jury court but to the Judge of the Investigative according to Art. 87 (1) (c) LOPJ. The exclusion of

The Preamble to the LOTJ⁸⁷ 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. At present, the competence of the jury court is regulated in Article 1, as well as in Article 5 LOTJ; the latter also includes interesting rules that extend the competence of the jury's court to "related crimes"⁸⁸, with special provisions that differ from those contemplated in the general rules (Article 17 LECrim). In concrete, the special rule contained in the LOTJ 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 interpretations⁸⁹ of this notional relationship have restricted the possession of such *vis attrativa* by jury courts, especially in cases known as "subjective related crimes".

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 favor⁹⁰ of extending the competence of the jury court to such 'subjective related crimes' and yet another one against,⁹¹ an even more recent Agreement by the Plenary of the Criminal Chamber on February 23rd, 2010⁹² has declared a common doctrine in order to restrict this competence of jury courts to related crimes. The agreement encourages separate trials for such offences 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

the offense of menaces from the jury's competence had been already suggested by the General Council of the Judiciary Branch's Report (1998), *supra*, note 54, p.74.

⁸⁶ 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.

⁸⁷ Para.II.4, textually, "The competential scope of the Jury Court is defined in article 1. Nevertheless, in view of experience and the social consolidation of the institution, the legislator will, in future, undoubtedly support the progressive increase of the list of offenses that have to be tried" [*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*].

⁸⁸ See specifically E. de Urbano Castrillo (1997) and J.F. Herrero Perezagua (1999). Also more recently, M. Colmenero Menéndez de Luarca (2007) with reference to the jurisprudence pronounced by the Supreme Court, Criminal Chamber number two; the criminal division in which the autor acts as a magistrate.

⁸⁹ For example, Circular number 3/1995, December 27th, on the jury proceedings and their objective application delivered by the General Attorney and available from the official website <http://www.fiscal.es> (menu *Circulares, Consultas e Instrucciones*); see pp.1099-1100.

⁹⁰ For example, STS 8726/2000, November 29th, available at the official website of the Supreme Court (URL <http://www.poderjudicial.es/search/index.jsp>; last accessed January 3rd, 2011). The magistrate reporter was in this case J.A. Martín Pallín, well known in Spanish literature on the judiciary as one of the supporters of jury institution; in this concrete case, the *vis attractiva* of the jury court was defended in relation to cases that even differed from those explained in Art. 5 LOTJ, in as much as more serious crimes committed by the same person is attributed to jury court.

⁹¹ E.g., STS 7099/2000, October 5th, also available from the same official website. Identical criteria have been upheld by the Provincial Court at Burgos, for example, in judgment n.56/2005, December 5th (ARP 2005/788 available by subscription from the Aranzadi <http://www.westlaw.es> database) which considers that the attribution in this case of competence to the jury court to judge the embezzlement of public funds, and, to the Provincial Court, to judge the forgery of public documents would disrupt the "cause's continence" and lead to contradictory judgments.

⁹² JUR 2010/142593 also available by subscription from the Aranzadi <http://www.westlaw.es> database; in contrast, it is not found on the official website of the Supreme Court. In fact, the Plenary of the Criminal Chamber on February 5th, 1999, reached an agreement on the same topic, which has been quoted several times in various pieces of jurisprudence.

that have defended the competence of the jury court for the crime in question.⁹³ 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.⁹⁴ The proclamation of this fundamental right was envisaged in the Jurisprudential Decision of the Constitutional Court number 147/1983, April 13th,⁹⁵ although the enactment of the LOTJ (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 legislator to provide for the jury procedure on the basis of Article 125 CE⁹⁶ and, having done so, to establish the fundamental right to be judged by a jury court as provided for by law.⁹⁷ For this reason, further jurisprudence was pronounced by the Supreme Court as well as by the Constitutional Court to clarify the question that relates to the infringement of such fundamental rights to trial by jury, and the competence of the jury court extends to related crimes according to the rules in Article 5 LOTJ.⁹⁸ It should be acknowledged that 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 press and TV cases (media cases) such as the Fago crime,⁹⁹ or the case of Marta del Castillo which is still in progress.¹⁰⁰

⁹³ In particular, STS 4955/2010, July 23rd available at official website of the Supreme Court ((URL <http://www.poderjudicial.es/search/index.jsp>; last accessed January 3rd, 2011). Here, the dissenting opinion presented by J.A. 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.

⁹⁴ Textually, "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 on the topic, see M.L. Escalada López (2007); in relation with the jury court, J.A. de Vega Ruiz (1989).

⁹⁵ Available at URL http://www.boe.es/boe/consultas/bases_datos/doc.php?coleccion=tc&id=AUTO-1983-0147

⁹⁶ At that time, there was also great controversy surrounding the thesis of an "obligatory mandate" in reference to the interpretation of Article 125 CE; see M. Jimeno-Bulnes (2004a, pp.169-170).

⁹⁷ Textually: "*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 conclusión, 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".

⁹⁸ Arguments between both courts are sometimes contradictory on this topic and even in same Supreme Court; hence, the pronouncement of the afore-mentioned Agreement on February 23rd, 2010. See for example STS 70/2004, January 20th, STS 3938/2009, June 26th, 5290/2010, September 29th ... all of them pronounced by the Supreme Court and available at ULR <http://www.poderjudicial.es/search/index.jsp> as well as the STC 156/2007, July 2nd available at ULR <http://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Auto.aspx?cod=8748>

⁹⁹ See previous STS 5290/2010, *supra*, note 98. Fago crime took place in a small village located in the Pyrinée, where the major was assassinated by a neighbour according to the conviction declared by the Provincial Court of Huesca instead of the correspondent jury court; for this reason, the allegation of the infringement of lawful judge before the Supreme Court. But the Supreme Court decision declared there was no violation of the competence rules as much as the 'related crimes' competence rules according to Art. 5 LOTJ were applied. Precisely, in provision of such decision for present case, it took place the pronouncement of the Agreement by the Plenary of the Criminal Chamber February 23rd, 2010, above mentioned. Another important reason for such jurisprudence in this case was the enormous influence of mass media and the possible danger for bias of the jury although here also the bias of the professional

3.3. Settlement of particular agreements between the accused and prosecution

Another illustrative example of the phenomenon known as "avoidance of the jury trial" according to the reports of the General Council of Judiciary Branch¹⁰¹ takes place when particular agreements are made between the accused and prosecutor or prosecutors. In fact, this mechanism represents a sort of plea bargaining and the pronouncement of a "conformity sentence"; but, according to Article 50 (1) LOTJ, this agreement or *conformidad* in jury proceedings is only legally provided once the jury trial has begun, as explained above, with a general rule¹⁰² on its limitation to offenses punishable by no more than a six-year prison term. However, on some occasions the consensus reached between prosecution (public and private and/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, 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.¹⁰³

The arguments employed for such judicial practice vary; some are laudable although they do not always comply with written law, which should be amended in this context.¹⁰⁴ In concrete, the legal arguments refer to the analogical application of Article 50 LOTJ and to the subsidiarity of the general rule provided in Article 655 LECrim¹⁰⁵ that is applicable in ordinary criminal proceedings (in concrete, the abbreviated proceedings)¹⁰⁶. The latter contemplates the conformity institution before the beginning of an oral hearing. Secondly, the economic 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*). For example, judgment

judge was allegated before the Supreme Court; in fact, there was even a well known TV serial promoted by public TV channel in Spain (TVE) relating the real facts with fiction personages.

¹⁰⁰ See Order by Provincial Court at Seville August 13th, 2010 (*Diario La Ley*, December 27th, 2010, n.7535, available at <http://diariolaley.laley.es> by subscription) in application of a previous Supreme Court Agreement February 23rd, 2010, and declaring 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 interpretation of Art. 5 LOTJ 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.

¹⁰¹ Reports 1998 and 1999, *supra*, note 54.

¹⁰² Art. 655 LECrim and, more specifically, Art. 787 (1) LECrim 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 Art. 757 LECrim abbreviated rules are indicated with regard to crimes for which the punishment is not in excess of 9 years imprisonment or of a different nature. Otherwise, the rules of ordinary proceeding will be applied for serious crimes.

¹⁰³ According to Art.29 (2) LOTJ and without holding the preliminary hearing provided in Art. 30 (2) LOTJ. See M. Miranda Estrampes (2006, pp.452-453).

¹⁰⁴ It has been 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; this is once again the opinion of M. Miranda Estrampes (2006, pp.452-454), himself a public prosecutor.

¹⁰⁵ According to general provisions contained in Art. 24 (2) LOTJ and special rules listed in Art. 29 LOTJ; note that in this last case only Arts. 650, 652 and 653 LECrim appear and not Art. 655 LECrim. They usually refer to the last article in as much as Art. 652 LECrim 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 of "conforme" is applied in this case to the conformity institution.

¹⁰⁶ The only proceedings where the conformity institution can take place according to the legal competence limits. See Art. 787 (1) LECrim and *supra* note 102.

number 68/1998, February 6th,¹⁰⁷ in relation to the offense of trespass in a dwelling place. The two accused and their defense counsel expressed agreement with this charge and 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, there being no need for either a jury trial or the selection of the jury panel.

Also, the Provincial Court in Barcelona has pronounced similar jurisprudence at 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. In concrete, judgment number 11/1998, September 10th, pronounced by the Regional Supreme Court of Catalonia (Civil and Criminal Chamber),¹⁰⁸ 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 LOTJ 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 against 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.¹⁰⁹

Finally, this jurisprudence is increasingly used by Provincial Courts in Spain nowadays, especially over recent years. Judgments arising from agreements that are based on this doctrine have been pronounced by the Provincial Court of Guipúzcoa,¹¹⁰ Lugo,¹¹¹ Madrid,¹¹² Cantabria,¹¹³ Tarragona,¹¹⁴ Valladolid,¹¹⁵ Ciudad Real,¹¹⁶ and Pontevedra¹¹⁷. The Provincial Court of Burgos has also developed these

¹⁰⁷ ARP 1998/841 available from the Aranzadi <http://www.westlaw.es> database by subscription. References to previous jurisprudence by same court such as the judgment of December 19th, 1996, Section Two and April 24th, 1997, Section Three, are indicated here.

¹⁰⁸ ARP 1998/3942 available by subscription from the Aranzadi <http://www.westlaw.es> database. The reference to previous jurisprudence by the Provincial Court of Barcelona is pointed out, such as judgments on references to previous jurisprudence by same court i.e. judgment of May 20th and June 11th, 1996 as well as February 24th, April 11th, May 20th, June 18th and July 16th, 1997.

¹⁰⁹ STSJC núm 11/1998, *supra*, note 108.

¹¹⁰ SAP 78/2000, March 29th, ARP 2000/117 available by subscription from the Aranzadi <http://www.westlaw.es> database. In this case, the accused agreed with the plea from the public prosecution, who requested 6 months imprisonment as well as suspension of passive suffrage rights and medical treatment throughout the conviction because of conditional threats offense according to Arts. 169 (1) CP as well as 20 (1) and 21 (1) CP.

¹¹¹ SAP 28/2001, February 9th, ARP 2001/244 available by subscription from the Aranzadi <http://www.westlaw.es>. Here the agreement between the accused and public prosecutor took place in order to accept a conviction of 3 years and 9 months imprisonment in a psychiatric hospital because of the murder according to Art. 138 CP and the mental illness of the accused operating as an incomplete exemption, as in Arts. 20 (1) and 21 (1) CP.

¹¹² SSAP 4/2002, November 29th, JUR 2003/92159 and 203/2004, May 3rd, JUR 2004/228205, both available by subscription from the Aranzadi <http://www.westlaw.es> database. In both cases, the accused was convicted of trespass in a dwelling place according to Art. 202 (1) CP and a punishment of 3 months imprisonment was agreed.

¹¹³ SSAP 24/2002, December 12th, JUR 2003/66957, 3/2006, January 23rd, JUR 2006/135298 and 3044/2009, October 8th, JUR 2009/469157, all available by subscription from the Aranzadi <http://www.westlaw.es> database. In first and third cases the offense consisted of arson in forestlands according to Arts. 352 and 353 CP punished with a year of imprisonment and the imposition of a fine throughout 12 months and the suspension of passive voting right; the offense in the second case was qualified as menaces according to Art. 169 (1) CP and punishable by a prison term of 6 months with the suspension of voting rights.

¹¹⁴ SSAP February 4th, 2004, JUR 2004/91603 available by subscription from the Aranzadi <http://www.westlaw.es> database. The accused was fined 6 months with a daily 2.40 Euros quota for embezzlement of public funds, an offense defined in Art. 433 CP.

¹¹⁵ SAP 442/2003, December 11th, JUR 2004/78047 available by subscription from the Aranzadi <http://www.westlaw.es> database. The offense here was also against the public administration, this time consisting in bribery defined in Arts. 421 and 423 (1) CP; the accused received a 200 Euro fine.

¹¹⁶ SAP 15/2007, May 3rd, JUR 2007/283150 available by subscription from the Aranzadi <http://www.westlaw.es> database. Both accused were convicted of trespass in a dwelling place defined in

arguments in several decisions such as judgment number 6/2006, February 22th,¹¹⁸ and, more recently, decisions number 12/2009, March 6th,¹¹⁹ and 53/2010, September 24th.¹²⁰ 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 her friend, an immigrant worker like the victim, mounted a popular accusation, along with the public prosecution; both prosecutors and accused agreed on 14 years imprisonment, which appeared in the judgment pronounced by the magistrate-president on November 24th, 2010.¹²¹ 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 29 prospective jurors for their attendance, who were to have begun their jury service on that same day.¹²²

4. Concluding Remarks

Having read through this description of the key institutional and procedural features of the jury system in Spain and, especially, those points that relate to the jury selection process and jury proceedings, it may be appreciated that the theoretical rules do not always mirror judicial practical. 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:¹²³ 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.¹²⁴

Indeed, for all these reasons, the impact of jury proceedings in Spain is still more limited and symbolic that it should be according to legal rules and the competence of jury courts is also restricted to certain offenses. One needs do no more than compare the number of criminal cases tried in Jury Courts in application of the LOTJ with the total number of cases tried in the Criminal or Provincial Courts according to the ordinary or abbreviated procedural rules:¹²⁵ there were 269 jury trials in 2008,

Art. 202 (1 CP) and punishable by 6 months of imprisonment and the suspension of voting rights for a similar period.

¹¹⁷ SAP 1/2009, January 14th, JUR 2009/263555 available by subscription from the Aranzadi <http://www.westlaw.es> database. The accused was convicted of failing to render aid to a person run over by his vehicle; according to Arts. 195 (1) and (3) CP and was condemned to 6 months imprisonment.

¹¹⁸ JUR 2006/111296 available by subscription from the Aranzadi <http://www.westlaw.es> database. Here the defendant who was accused of murder under Art. 138 (1) CP was finally released because the application of exemption clause contained in Art. 20 (1) CP under title of "psychic abnormality", hence the application of the security measure consisting of confinement in a psychiatric hospital for 15 years.

¹¹⁹ JUR 2009/261540 available by subscription from the Aranzadi <http://www.westlaw.es> database. The offence consisted of continuous threats with menaces under Art. 169 (1) CP, punishment for which was established at 2 years imprisonment according to Art. 74 CP and the suspension of voting rights for a similar period.

¹²⁰ JUR 2010/111296 available by subscription from the Aranzadi <http://www.westlaw.es> database. The accused was convicted of homicide under Art.138 CP and of assassination unde rArt.139 CP; for which she was condemned to 13 years and to 18 years imprisonment, respectively, with total disability in both cases for the murder of her mother and child of 3 years old.

¹²¹ Judgment number 65/2010, not yet reported and delivered in Jury Proceeding n.2/2009, whose Jury selection file n.303/2010 was commented on above (vid. *supra* chapter II.2.)

¹²² November 22nd, 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 Art. 38 LOTJ.

¹²³ Reports 1998 and 1999, *supra*, note 54.

¹²⁴ See *supra* notes 102 and 106.

¹²⁵ 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 Art. 14 LECrim. In contrast, Art. 757 LECrim provides for the application of

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*)¹²⁶. An parity 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.¹²⁷

Many arguments both for and against retaining the jury institution have been presented in Spain by its supporters and detractors. Also, another relevant factor is the reluctance of the public to act as jurors for several reasons (economic,¹²⁸ apprehension and even fear),¹²⁹ which should be borne in mind along with more prosaic considerations. The Supreme Court has argued the investment of wasted time and resources in several of its decisions. After 15 years of functioning, it is perhaps time to propose some of the amendments to the LOTJ that have been discussed in this paper, in order to strengthen legal support for this judicial practice. Otherwise, Spanish judges and courts may indeed surpass their constitutional role, contemplated in Art. 117 (3) SC,¹³⁰ in as much as the continental civil law system solely applies the law,¹³¹ but is not meant not to create new precedent-based law, as happens in countries with a tradition of Common Law.

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rules on fast-track or ordinary proceedings for offenses punishable by up to nine years imprisonment; see *supra* note 102.

¹²⁶ See Arts. 797 *et seq* LECrim. They take place in a different kind of ordinary proceedings called "fast-track proceedings for certain offenses" (*procedimiento para el enjuiciamiento rápido de determinados delitos*) with their own legal provisions, for offenses of minor importance and light sanctions such as traffic offenses, security, larceny and petty theft, ..; certain other legal prescriptions are also required. These proceedings are regulated in Arts. 795-803 LECrim 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.

¹²⁷ Annual reports for 2009 and 2010 at pp.1310-1311 and 219-220, respectively, both available at <http://www.fiscal.es> (menu *Documentos*). Also, the General Council of Judiciary Branch publishes its own statistics in English; see 'The Spanish Justice system: all the facts' available at official website <http://www.poderjudicial.es> (menú *CGPJ; estadísticas, la justicia dato a dato, año 2009*)

¹²⁸ See especially J.J. Toharia (1985, p. 285; 1994, p. 29)

¹²⁹ Specifically, C. Fidalgo Gallardo (1998).

¹³⁰ 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" in the translation taken from the website <http://www.6diciembre.es> already indicated.

¹³¹ 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. See Ch.L. de Secondat, baron de la Brède et de Montesquieu (1748), English edition at Book VI, p.180 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 E. Pedraz Penalva (1990, p. 30).

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