1998

The Jury Returns to Continental Europe: Russia and Spain Return to the Classic Jury as a Catalyst in a Move to a More Adversary Form of Criminal Trial

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THE JURY RETURNS TO CONTINENTAL EUROPE: RUSSIA AND SPAIN RETURN TO THE CLASSIC JURY AS A CATALYST IN A MOVE TO A MORE ADVERSARY FORM OF CRIMINAL TRIAL

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I. Introduction

The recent reintroduction of trial by jury in Russia (1993) and Spain (1995) is not only interesting as a surprising reversal in a long-term trend towards elimination of the classic jury in favor of courts composed either exclusively of professional judges, or of so-called "mixed courts," in which professional judges and lay assessors collegially decide all questions of fact, law and sentence. It also raises the question of whether the jury can again be, as it was in the 19th Century in the wake of the French Revolution, a catalyst in the reform of Continental European criminal procedure.

The modern notions of due process, and "Rechtsstaatlichkeit" in criminal procedure, that have gained general international recognition in national constitutions and international human rights conventions, have their origins for the most part in Anglo-American concepts which developed in the context of an adversarial trial by jury: (1) the presumption of innocence; (2) the privilege against self-incrimination; (3) equality of arms; (4) the right to a public and oral trial; (5) the accusatory principle; (6) independence of the judge from the executive (investigative agency). The classic separation of powers within the adversarial criminal process between a neutral judge, responsible for deciding questions of law and punishment, and a panel of non-legally-trained lay persons responsible for questions of fact and guilt, also gave rise to common law rules of evidence relating to hearsay and relevance and exclusionary rules relating to excessively prejudicial and illegally-gathered evidence[1] and to

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1. The research of John H. Langbein has seriously called into question, however, whether the Anglo-American rules of evidence were attributable to the division of labor

the principle of *intime conviction* or "free evaluation of the evidence."[2] Important developments in the substantive criminal law which affect the presentation and evaluation of evidence such as the separation of factual from legal questions[3] and the breaking-down of criminal offenses into their various constitutive elements, both objective and subjective, arguably have their roots in the need for the judge to instruct the jury on how to apply the law to the facts of the case.[4]

Though most of these principles have been accepted into the formerly inquisitorial criminal procedures of civil law countries, the structural framework in which they originated - the adversarial trial by jury - has largely been rejected by the same countries as being alien to certain other principles of the inquisitorial criminal process: (1) the duty of the State (prosecutor, judge, investigating judge) to ascertain the truth; (2) the necessity of review of judgments, as reflected in the requirement of giving reasons for findings of guilt or innocence;[5] and (3) the legality principle, which not only is antipathetic to the unbridled "discretion" of juries to acquit out of sympathy or nullify the harshness of the sentence,

between jury and judge or rather to the "lawyerization" of criminal trials in the late 18th and early 19th centuries. Langbein, John H, *The Criminal Trial before the Lawyers*, 45 UNIV. OF CHICAGO L. REV. 263, 306 (1978) (hereafter Langbein, *Criminal Trial*).

2. Langbein also sees the seeds of "free evaluation of evidence" being planted in Continental Europe before the introduction of trial by jury with the French Revolution, with the weakening of the institution of torture and the rise of "poena extraordinaria." Langbein, John H, TORTURE AND THE LAW OF PROOF, at 59 (1977). (hereafter Langbein, TORTURE).

3. Though Sir Edward Coke as early as 1620 proclaimed "*Ad quaestionem facti non respondent judices; ad quaestionem juris non respondent juratores*," and early French and German jury legislation tried to reduce juries to merely the judges of "historic facts," leaving the application of the law to the facts to the professional judge. German, and later Russian jurist scholars, quickly understood that the jury's verdict of "guilty" or "not-guilty" was a mixed issue of law and fact, which led the Germans to replace the classic jury with the mixed court or *Schöffengericht* in which professional judges and lay assessors decide all issues of law, fact, guilt and sentence in joint session. *See*, John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, in Antonio Padoa Schioppa, (ed.) THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700-1900, at 34, (Berlin, 1987). (hereafter *English Criminal Trial*); for a summary of the 19th Century German discussion, see Peter Landau, *Schwurgerichte und Schöffengerichte in Deutschland im 19. Jahrundert bis 1987*, at 279, (*supra*, this note), and Hugo Meyer, THAT- UND RECHSFRAGE IM GESCHWORENENGERICHT, INSBESONDERE IN DER FRAGESTELLUNG AN DIE GESCHWOREN, (Berlin, 1860).

4. See Ennio Amodio, *Giustizia popolare, grantismo e partecipazione*, I GIUDICI SENZA TOGA: ESPERIENZE E PROSPETTIVE DELLA PARTECIPAZIONE POPOLARE AI GIUDIZI PENALI, at 13, f.n. 30, Ennio Amodio, ed. (Milan, 1979).

5. According to Amodio, Art, 111 (1) of the Italian Constitution requiring reasons to be given for all judicial decisions, makes the reintroduction of the classic jury impossible. Amodio, *supra* note 4, at 46-48.

but also to the apotheosis of party-control of the criminal trial: plea-bargaining, which grew from the same soil as trial by jury in England and the United States.[6] Juries have largely been abolished or converted into a form of lay participation more conducive to the adherence to the aforementioned principles: the "mixed court" of professional judges and lay assessors, collectively responsible for all questions of law, fact, guilt and sentence.

To what extent, however, are the universally-accepted principles derived from common law criminal procedure dependent on the classic separation of powers in the adversary jury trial?[7] Can you have a presumption of innocence and an independent fact/guilt finder in a professional judge who has studied the investigative file and determined, before the trial, that it includes sufficient evidence for a finding of guilt?[8] Is the classic jury a useful catalyst in cementing the independence of the judge from the executive (investigative) branch, so as to provide a foundation for an objective "ascertainment of the truth?"[9] If judge and

6. On jury nullification in the U.S., see Albert W. Alschuler and Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 UNIV. OF CHICAGO L. REV. 867, S. 871-875 (1994).

7. For the proposition that French and German reformers, enamored with the Anglo-American jury system, lost sight of the "interdependencies" between that system and the procedural and evidentiary maxims of the adversary system, which were otherwise rejected, see Karl H. Kunert, *Some Observations on the Origin and Structure of Evidence Rules under the Common Law System and the Civil Law System of 'Free Proof' in the German Code of Criminal Procedure*, 16 BUFFALO L. REV. 122, 147 (1967); cf. Amodio, *supra* note 4, at 13 (fn. 30).

8. Views in Germany as to this fact range from the ultra-pessimistic contention that German criminal procedure is a Potemkin facade and the trial an orchestrated blessing of the results of the preliminary investigation, *See*, Bernd Schünemann, *Reflexionen über die Zukunft des deutschen Strafverfahrens* FESTSCHRIFT FÜR GERD PFEIFFER, (1988), to cautious assertions that the preliminary studying of the file, while strongly influencing the presiding judge, does not make him/her incapable of objectively weighing the trial evidence. *See*, Christoph Rennig, DIE ENTSCHEIDUNSFINDUNG DURCH SCHÖFFEN UND BERUFSRICHTER IN RECHTLICHER UND PSYCHOLOGISCHER SICHT, (1993) at 177 (Tab. 10), 223, 237. *Cf.* Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure*, 121 UNIV. OF PENN. L. REV., 506, 544 (1973) (hereafter Damaska, *Evidentiary Barriers*).

9. The "pre-prepared version of the truth" presented to the trial judge in the form of the investigative dossier, Nico Jörg, Stewart Field, Chrisje Brants, "*Are Inquisitorial and Adversarial Systems Converging?*" CRIMINAL JUSTICE IN EUROPE: A COMPARATIVE STUDY (Christopher Harding, Phil Fennell, Nico Jörg, Bert Swart, eds., 1995) at 46-47. The *Schulterschluß* between the trial judge and the prosecutor, and the "systematic distortion of the processing of the information, caused by the judicial reconstruction of an historical situation" all constitute, according to its critics, "weaknesses of truth-finding hindered by inquisitorial procedure with an accusatory facade." Schünemann, *supra* note 8, at 475-6, 479.

investigator have a duty to find the truth and the defendant invokes his/her right to remain silent, how effective is this right when the judge is also the finder of guilt?[10] What is the meaning of *intime conviction* in a "mixed court," where the presiding judge has unique access to the dossier, and is responsible for drafting the judgment (even in the unlikely event he/she has been overruled by the lay assessors) so it will withstand the formal requirements of appellate scrutiny?[11]

This paper will briefly compare the provisions of the Russian Jury Law of 1993[12] and the Spanish Jury Law of 1995[13] and their application in the first trials with special attention to the effect the re-injection of a classic jury has had in relation to the aforementioned problems. With regard to Russia, I will be brief, relying on citations to an exhaustive study I made of the legislative history of the new Russian Jury Law, its provisions, and its application in the first 114 trials in the years 1993-1994.[14] In discussing the Spanish legislation and practice I will refer to

10. The fact that continental defendants virtually never remain silent, either during the preliminary investigation or the trial itself answers this question. *See* Mirjan Damaska, THE FACES OF JUSTICE AND STATE AUTHORITY, (1986) at 128, (hereafter Damaska, FACES OF JUSTICE); and Damaska, *Evidentiary Barriers, supra* note 8, at 527.

11. As to the problems inherent in the presiding judge logically explaining the reasoning of the lay assessors, especially if he/she has been outvoted by them. *See* Damaska, *Evidentiary Barriers, supra* note 8, at 540, 543; as to how the "freie Beweiswürdigung" of the judge, through the necessity of its having to be based in "rules of logic, experience and/or laws of nature or probability," has led to the re-emergence of new "formal rules of evidence" which it was supposed to have replaced. *See* Damaska, *Evidentiary Barriers, supra* note 8, at 540, and FACES OF AUTHORITY, *supra* note 10, at 20, 55; Kunert, *supra* note 7, at 124.

12. Zakon Rossiyskoy Federatsii. O vnesenii izmeneniy i dopolneniy v Zakon RSFSR O sudoustroystve RSFSR, Ugolovno-RSFSR ob administrativnykh pravonarusheniiakh. VEDOMOSTI S' 'EZDA NARODNYKH DEPUTATOV ROSSIYSKOY FEDERATSII I VERKHOVNOGO SOVETA ROSSIYSKOY FEDERATSII. No. 33, 1313, 2238-2264 (19 Aug. 1993). The Jury Law amends several Russian codes, most notably for the purposes of this article, the Code of Criminal Procedure (UPK), and the Law on Court Organization (LOC). All citations from UPK from UGOLOVNO-PROTSESSUAL'NOE ZAKONODATEL'STVO. (Moscow, 1994). The right to jury trial was introduced in only nine of Russia's some 84 political units: Ivanovo, Moscow, Riazan, Rostov-on-the-Don, Saratov and Ul'ianovsk Regions, and Altay, Krasnodar, and Stavropol Territories.

13. See Ley Orgánica 5/1995, del Tribunal del Jurado. BOE núm. 122. May 23, 1995, pp. 15001-15021. Amended by Ley Orgánica 8/1995. BOE, Nov. 21, 1995. All citations from LEY DEL JURADO. Ed. Victor Moreno Catena, 2d. Edition. (Madrid, 1995) (hereafter LOTJ).

14. Thaman, Stephen C., *The Resurrection of Trial by Jury in Russia*, 31 STANFORD JOURNAL OF INT'L. LAW 61-274 (1995) (hereafter, Thaman, *Resurrection*; for a concise but more current treatment of the provisions of the new law and its implementation, see Stephen C. Thaman, *Das neue russische Geschworenengericht*, ZEITSCHRIFT DER GESAMTEN

information I have gathered about the first trials held in Spain since the law went into effect.[15] The most notorious case so far, has been that of Mikel Otegi, a young Basque nationalist, who was acquitted of murdering two Basque policeman on March 7, 1997. The acquittal shocked the Spanish public and has given rise to calls to amend the new law, or to suspend it in the Basque Country.

II. Brief Historical Background

The liberal Spanish Constitutions of 1812, 1837, 1869 all provided for some kind of trial by jury, but the institution only found legislative form in the Code of Criminal Procedure of 1872 and finally in the Law on the Jury of 1888. Only the latter law was implemented for any length of time, functioning between 1888 and 1923, when it was suspended by the Primo de Rivera dictatorship, and then again from 1931 until 1936.[16]

Trial by jury was introduced in Russia in the judicial reforms of 1864 by Alexander II and survived, despite subsequent legislation removing political and press crimes from its jurisdiction, until abolished by the Bolsheviks in 1917.[17]

The post-Franco Constitution of 1978 provided in Art. 125 for the participation of the people in the administration of justice through the institution of trial by jury.[18] This was seen as a key in the democratic

STRAFRECHTSWISSENSCHAFT, Vol. 108, No.2 (1996) (hereafter Thaman, *Geschworenengericht*).

15. The three first trials began simultaneously on May 27, 1996, in Palma de Mallorca, Valencia and Palencia. Trials in Barcelona (May 29) and Valladolid (June 3) commenced soon thereafter. Trials also took place early in July in Las Palmas in the Canary Islands (July 3), Granada (July 8) and Córdoba (July 8, 1996). I saw the first trials in Palma de Mallorca, Valladolid, Granada and Córdoba, and have studied the pertinent trial documents of many of the first cases, as well as newspaper accounts of many others. I conducted interviews with many of the trial judges, prosecutors and defense lawyers in the first cases as well. This was during a research sojourn in Spain from May 5 through July 16, 1996. My in-depth analysis of the new Spanish jury law and its application in the first year of trials will appear in 21 HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW Jan-Feb 1998 and is an updated version of the article *Geschworenengerichte in Ost und West* in 41 RECHT IN OST UND WEST 73-81 (1997).

16. For a history of jury trial legislation in 19th Century Spain, *see* Juan Antonio Alejandre, LA JUSTICIA POPULAR EN ESPAÑA (Madrid, 1981), at 79ff. The legislature hearkened to this liberal tradition in § I, Exposición de Motivos, LEY DEL JURADO *supra* note 13, at 19-20.

17. *See* Thaman, *Resurrection*, *supra* note 14, at 64-5.

18. Art. 125, Constitución Española. All citations from CONSTITUCION ESPAÑOLA Y TRIBUNAL CONSTITUCIONAL, (Barcelona, 1996).

reform of criminal justice following the Franco dictatorship.[19] In the years 1978-1995, however, the appropriateness of the classic jury in serving as a catalyst for criminal justice reform was called into question by a majority of Spanish jurists. They stressed the perceived inadequacies of the Spanish jury experience after 1888 and maintained, either that Art. 125 only made lay participation an option,[20] or that, if it were a constitutional mandate, that the "mixed jury" or *Schöffengericht* would be constitutionally adequate, this being the modern form of popular participation followed by countries with a similar Continental European tradition in Germany, France, Italy and Portugal.[21]

The movement towards recognizing adversary procedure and trial by jury as constitutional foundations of the Russian administration of justice,[22] which began during Gorbachev's *perestroika*, and culminated in the Russian Jury Law, was precisely aimed at replacing the traditional Soviet court with lay assessors, which had been completely ineffective as a popular corrective against judicial arbitrariness and party control of judicial decision-making.[23]

19. The legislature noted that the suspension, abolition or limitation of the jury trial in the period 1820-1939 always coincided with limitations of civil rights in periods of monarchic reaction or dictatorship. § I, Exposición de Motivos, LEY DEL JURADO, *supra* note 13, at 19-20. Indeed, in nearly all Continental European countries, the introduction of trial by jury coincided with liberal reforms, and its abolition with the installation of dictatorial or totalitarian regimes, i.e., Bolshevism in Russia (1917), Fascism in Italy (1931), the Vichy Regime in France (1941). The only exception was Germany, in which the democratic Weimar Government abolished the classic jury, albeit in an undemocratic manner, by the Emminger decree of 1924. Kahn, Ellison, *Restore the Jury?* 108 SOUTH AFRICAN LAW JOURNAL 672, 678 (1993).

20. A dubious precedent for the "optional" nature of constitutional commands can be found in the Argentine Constitution of 1815, which called for trial by jury, but which has never been implemented by legislation. Ricardo J. Cavallero / Edmundo S. Hendler, JUSTICIA Y PARTICIPACION. EL JUICIO POR JURADOS EN MATERIA PENAL (Buenos Aires, 1988) S. 43 ff.

21. For summaries of these discussions, and advocation of the propriety of introducing a court with lay assessors, see Ernesto Pedraz Penalva, *Sobre el significado y vigencia del Jurado* in CONSTITUCION, JURISDICCION Y PROCESO (Madrid, 1990), at 60-62; Pérez-Cruz Martin, Agustine-J. LA PARTICIPACION POPULAR EN LA ADMINISTRACION DE JUSTICEA: EL TRIBUNAL DEL JURADO (Madrid, 1991), at 322 ff.

22. Art. 123 of the Russian Constitution of 1993 guarantees adversary procedure and trial by jury. *See* KONSTITUTSIIA ROSSIYSKOY FEDERATSII (Moscow, 1993) (hereafter Const. RF).

23. Thaman, *Resurrection*, *supra* note 14, at 66-68.

III. Composition of the Jury Court and its Competence

Whereas the jurisdiction of the Russian jury court is identical to that of the second-level courts of original jurisdiction which have exclusive competence to try jury cases,[24] the Spanish legislator chose to reject jurisdiction based on the magnitude of threatened punishment[25] and has limited jury trial jurisdiction to particular types of crimes subject to the jurisdiction of the second-level courts of original jurisdiction (*audiencia provincial*): crimes against persons, crimes committed by public official in the exercise of their duties, crimes against honor, crimes against liberty and security, arson.[26]

In Russia and the U.S., the right of trial by jury is a procedural right of the defendant, which can be waived. Thus, in the U.S upwards of 93% of all criminal cases subject to jury trial are resolved through plea-bargaining without a jury or any trial taking place. In Russia, a large portion of defendants also waive their right to jury trial, in favor of being tried by the traditional court with lay assessors or by a three-judge panel, a reform introduced with the jury trial legislation.[27]

24. §§ 421, 35 UPK. These are mainly capital crimes of aggravated murder and rape, but also include some crimes of counterfeiting, bribery and a few other offenses. The pertinent courts are called "regional courts" or "territorial courts" depending on the type of federal political entity involved. I will hereafter refer to them as "regional courts" for simplicity's sake.

25. The Law on the Judiciary (Ley del Poder Judicial) originally provided that the competence of the jury court would be determined in relation to the type of crime **"and the quantity of the punishment designated therefore."** § 83 (2) (d) LOPJ, before its amendment by the LOTJ. ENJUICIAMIENTO CRIMINAL (Civitas). 16th Edition (Madrid, 1995), fn. 108bis, at 91. In the U.S. the right to jury trial inures when the crime with which the defendant is charged is punishable by more than six months deprivation of liberty. Baldwin v. New York, 399 U.S. 66 (1970).

26. § 1, LOTJ. The law has been criticized for including comparatively trivial crimes such as bribery of public officials, and minor threats and burglaries within the jury court's jurisdiction, and excluding serious crimes against the person such as rape. Vicente Gimeno Sendra, *La segunda reforma urgente de la Ley del Jurado* in EL TRIBUNAL DEL JURADO (Las Palmas, 1996) at 27-28 (hereafter *Segunda*); Juan-Luis Gómez Colomer, EL PROCESO PENAL ESPECIAL ANTE EL TRIBUNAL DEL JURADO (Madrid, 1996), at 33-34; Indeed, 3 of the first 4 trials in Spain were for relatively minor crimes. The German businessman who was acquitted in the Palma de Mallorca case was only subject to a fine for attempting to bribe local police officials and the cases in Valencia and Barcelona involved burglaries by boyfriends of their estranged companions.

27. I have questioned whether these "waivers" have been voluntary and many believe that they are the result of coercion or undue influence exerted by investigators, defense lawyers, or judges at the preliminary hearings., Thaman, *Resurrection*, *supra* note 14, at 87-88; and *Geschworenengericht*, *supra* note 14, at 195.

In Spain, on the other hand, the jurisdiction of the jury courts is mandatory, inasmuch as the right to jury trial is considered to be exclusively a right of the citizenry to participate in the administration of justice as jurors.

The jury court is composed of nine jurors and two alternates in Spain and 12 jurors and two alternates in Russia. Both courts are presided by one professional judge.[28]

In both Spain and Russia, voter registration lists serve as the sources for the lists of prospective jurors. Although the right to vote inures at age 18 in both countries, Russia has restricted jury eligibility to registered voters who have attained the age of 25. Both countries exempt certain public officials as well as officials in the legal profession and in law enforcement and allow discretionary excuses due to age, hardship or illness.[29]

In both countries, the jury which will try a particular case is selected from at least 20 prospective jurors who have been preliminarily screened and summoned to the court on the day of trial.[30] After normally brief questioning as to the jurors ability to be a fair and impartial juror in the case before the court,[31] prosecution and defense may exercise challenges for cause, or peremptorily challenge a limited number of prospective jurors (2 each in Russia, 4 each in Spain).[32]

IV. Preliminary Investigation and Preliminary Hearing in Jury Cases

Whereas the Russian legislator left the preliminary investigation largely unchanged,[33] the Spanish Jury Law has provided for active participation of both the defense and prosecution as soon as it becomes apparent to the investigative judge that a crime subject to the jury court's jurisdiction will be charged. Following notification of the parties, the law then provides for adversary proceedings in which the parties may

28. § 2 LOTJ; 440 UPK.

29. §§ 8-12 LOTJ; § 80 GVG.

30. § 39 LOTJ; § 434 UPK.

31. The judge conducts this questioning in Russia, § 438 UPK. In Spain, as in many U.S. jurisdictions, the judge turns over questioning to the parties. § 40 LOTJ.

32. § 40 LOTJ, § 439 UPK.

33. Only at the conclusion of the preliminary investigation does the investigator, a legally-trained official in the Ministry of the Interior or the Procuracy, advise the defendant of his right to jury trial in a proceeding in which counsel must be present. § 423 UPK. Many defendants waive their right to jury trial at this stage. *See* Thaman, *Geschworenengericht*, *supra* note 14, at 194-95.

concretize their accusatory and defense pleadings and request further investigative measures.[34]

The preliminary hearing in Spain is conducted by the investigative judge and is thus akin to an extension of the preliminary investigation itself, which takes place after the performance of indispensable investigative acts and the submission by the defense of its provisional response to the accusatory pleadings. At the hearing the parties may request the investigative judge to perform further investigative acts, move to dismiss charges or the entire accusation or amend the charges to charge another crime related to the "justiciable facts." If the evidence is sufficient to charge the defendant with a crime subject to the jury court, the judge issues an order holding the defendant for trial.[35]

In Russia, as in Germany, the preliminary hearing is conducted by the trial judge, who must review the entire dossier of the preliminary investigation in making the decision as to whether to set the case for trial and what evidence will be admissible at trial. Though the hearing is adversary, no new evidence is adduced, and rulings suppressing evidence must be based on the contents of the investigative dossier. If the judge at the preliminary hearings determines that there is insufficient evidence to proceed to trial, he or she may dismiss the case, but the usual remedy is to return the case to the investigator for supplementary investigation.[36] The Russian preliminary hearing in jury trials has seen a remarkable implementation of the constitutional prohibition of the use of evidence which has been seized in violation of the Russian Constitution or the code of criminal procedure.[37]

Whereas the Russian legislation has strengthened the procedure for excluding illegally gathered evidence but left the central role of the investigative dossier intact, the Spanish legislator has modeled its

34. §§ 25-29 LOTJ. This augmentation of the rights of both defense and prosecution during the preliminary investigation, and the corresponding limitation of the powers of the investigative judge, has been criticized on grounds of equal protection, and as being beyond the scope of a law to introduce trial by jury. Vicente Gimeno Sendra, LEY ORGANICA DEL TRIBUNAL DEL JURADO. COMENTARIOS PRATICOS AL NUEVO PROCESO PENAL ANTE EL TRIBUNAL DEL JURADO. (Madrid, 1996), at 165-6 (hereafter COMENTARIOS; Víctor Fairén Guillén, *Comentarios al 'Anteproyecto de Ley del Jurado'* in REVISTA DE DERECHO PROCESAL, No. 2, 1994, at 462.

35. §§ 30-32 LOTJ.

36. This was done in 18% of all cases in the period of November 1993 to January 1, 1995. Thaman, *Geschworenengericht*, *supra* note 14, at 195.

37. Art. 50, Const. RF. For a discussion of this interesting emerging body of law, see Thaman, *Geschworenengericht*, *supra* note 14, ebenda, at 196-7, and Thaman, *Resurrection*, *supra* note 14 at 90-94.

preliminary hearing on that of the Italian Code of Criminal Procedure of 1988[38] in attempting to eliminate the investigative dossier completely from the trial, so as to reinforce the principal of immediacy and the oral nature of the trial in the jury court.[39] Besides the pleadings, the "trial file" is limited to that evidence which cannot be repeated at trial or which needs to be ratified at trial, and other evidence the parties have expressed an intention of using at trial.[40]

V. The Trial

A. The Changing Roles of the Participants

One of the key aims of the Russian legislator was to strip the trial judge of the inquisitorial duty of seeking the truth and of all accusatorial roles the Soviet-Russian procedure had imposed on the court: in the new jury trials, the judge no longer reads the accusatory pleading nor dominates the questioning of the defendant and the witnesses. The judge may no longer prevent the prosecutor's dismissal of the case, act as prosecutor of necessity when the prosecutor does not appear for trial or return the case to the investigator on his or her own motion.[41]

The Spanish criminal trial was perhaps the most adversary in nature of any on the European continent even before the passage of the jury law.[42] Though the Spanish jury law kept the trial procedure basically unchanged, the trial judges ability to control the taking of the evidence

38. In Italy, however, the preliminary hearing judge has no connection with the preliminary investigation and is different from the trial judge, thus ensuring a greater amount of structural independence. For analysis of the "double file" innovation in the new Italian CCP, *see* Hans-Heinrich Jescheck, *Grundgedanken der neuen italienischen Strafprozeßordnung in rechtsvergleichender Sicht*, in FESTSCHRIFT FÜR ARTHUR KAUFMANN ZUM 70. GEBURTSTAG 659, at 662ff. (1993); Alessandro Honert, *Der italienische Strafprorzeß: die Fortentwicklung einer Reform*, 106 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 427, at 436 (1994).

39. See LOTJ, § III(1) Exposición de Motivos, *supra* note 13 at 25-26.

40. § 34 LOTJ.

41. See Thaman, *Geschworenengericht*, *supra* note 14, at 199-201. I have criticized the judge's continuing power to return a case for further investigation after the jury has been sworn and heard evidence, as violating not only the presumption of innocence, but also the right to one's lawful judge, guaranteed by Art. 47 of the Const. RF. See Thaman, *Sud prisiazhnykh v sovremennoy Rossii glazami amerikanskogo yurista*, GOSUDARSTVO Y PRAVO, Vol. 2, 1995, pp. 70-71.

42. The duty of the judge to ascertain the truth was phrased in terms of "conducting the trial taking care to prevent discussions which are impertinent or do not aim at establishing the truth, without restricting the liberty necessary for the defense." § 683 LECr. Very similar language has been adopted by the new Russian jury law. § 429 UPK.

has been drastically impeded by lack of access to the investigative dossier. The trial is begun not only with the reading of the accusatory pleadings of the prosecution, but also those of the private prosecutor (usually the alleged victim, the victim's family, or their representatives)[43] and the defendant.

The adversary empowerment of the victim or aggrieved party in both the Russian and the Spanish jury trial has been one of the most distinctive aspects of the new jury procedures.[44] In both the Russian and the Spanish trials a prosecutorial motion to dismiss may only be granted if the aggrieved (the private prosecutor) agrees.[45] The aggrieved in the Russian trial, usually unrepresented by counsel, uneducated, and often without any knowledge of the investigation of the case, has had a disturbing effect in many trials by unpredictable outbursts of emotion, blurting out inadmissible or suppressed evidence, and necessitating laborious explanations by the judge of every aspect of the proceeding.[46] On the other hand, the aggrieved party is invariably represented by counsel in the Spanish trial and has had a strong impact on the jury in several of the first cases. In my opinion, this has neutralized the supposed advantages the defendant has in being the only "common citizen" arguing to a jury of his peers against the prosecutor, the representative of the state. This can create either a "good cop-bad cop" situation, where the public prosecutor pursues justice and the "just resolution" and the private prosecutor screams for blood.[47] This can also be used to push a certain theory of the case aimed primarily in pursuit of a greater monetary award.[48]

43. See §§ 649 ff. LECr. The aggrieved has a right to court-appointed counsel in case of indigence as well. § 119 LECr.

44. In the U.S. the aggrieved is not a party in criminal proceedings, has no right to question witnesses, make a statement, or argue to the jury. Their only input would be as a witness. For criticism of this state of affairs *See* George P. Fletcher, *With Justice for Some: Protecting Victims' Rights in Criminal Trials*, ADISON-WESLEY (1996), at 248-250.

45. § 430 UPK, § LOTJ.

46. On the role of the victim, see Thaman, *Resurrection*, *supra* note 14 at 107-108.

47. In the first case in Granada, the prosecutor and the defense asked the jury to acquit a 71 year-old woman on insanity grounds after all three psychiatric experts agreed she was completely irresponsible when she stabbed her 86 year-old neighbor to death. The private prosecutor asked for a guilty verdict based on partial lack of responsibility and the jury returned a guilty verdict. Ines Gallastegui, *El primer jurado andaluz dicta un veredicto de condena contra una mujer que mató a su vecina*, IDEAL, (Granada July 5, 1996) at 5.

48. In the second Barcelona trial, the private prosecutor was represented by a former television personality who was successful in convincing the jury that defendant was guilty of only attempted murder of a taxi driver, in order to support his civil suit for $50 million pesatas against the city government and the taxi company for causing the death by being dilatory in getting an ambulance to the scene. Camen Muñoz, *La fiscal pide una pena menor*

B. Proceedings Preliminary to the Taking of Evidence

The evidentiary portion of the trial in both Spain and Russia follows the Continental European model, beginning with the reading of the accusatory pleading, the plea and interrogation of the defendant, the testimony of witnesses and experts, and finally the summations and last word of the defendant.[49] The provisions of the extant provisions of the Codes of Criminal Procedure remain in force, to the extent they are not in contradiction with the provisions of the new jury laws.[50]

In Spain, allegations alleging constitutional violations during the preliminary hearing or examination are heard in the trial court before jury selection begins, as are all motions to suppress evidence on other grounds, or to admit new evidence. Following the reading of the pleadings, the parties in Spain (including the aggrieved) are allowed to make an opening statement, a provision absent from the new Russian legislation, in order to explain their pleadings, the facts they believe will be proved, and the verdict and sentence they believe will be just. They may even propose the hearing of new evidence.[51]

C. Pleas of Guilty

In both countries, the defendant or defendants are first asked if they admit the charges brought against them.[52] Pleas of guilty in conformity with the pleadings and requested sentence of the prosecutor (or the private prosecutor, whichever is higher), are permitted in Spain (both with and without juries) if the sentence does not exceed six years deprivation of liberty, and there is no question as to the presence of a *corpus delicti* for the crime or any objection of the defense counsel. Upon such a reaching of *conformidad* the trial is terminated and sentence is imposed.[53] The

por la muerte del taxista, EL PERIOICO, Sept. 20 (1996) at 26; Blanca Cia, *El jurado dice que el acusado no quiso matar al taxista*, EL PAIS (Catalan Edition) Sept. 21 (1996) at 1,7.

49. For a summary of the Russian procedure, *See* Thaman, *Geschworenengericht*, *supra* note 15, at 202-204; and for Spain, §§ 688 f. LECr.

50. § 420 UPK, §§ 24, 42 LOTJ.

51. § 45 LOTJ. Opening statements are also a part of the U.S. criminal trial.

52. § 278 UPK, §§ 688-693 LECr.

53. §§ 50 LOTJ, 694-696 LECr. A *conformidad* may be reached at any time before the case is submitted to the jury. Thus, in the first Madrid trial, the prosecutor waited until psychiatric experts declared the defendant unanimously not to have been criminally responsible when he killed his wife, changing his pleading to an acquittal by reason of insanity with a condition of 15 years confinement in a psychiatric facility. José Hernández, *El juez disolvió el primer jurado de Madrid al aceptar el parricida ingresar 15 años en un psiquiátrico*, EL PAIS, (Oct. 9, 1996) at 1, 5. Similar resolutions occurred in the second *Castellón* and *Vizcaya* (Bilbao) cases.

Spanish practice of *conformidad*, in some ways similar to American plea bargaining, is not permitted in the Russian legislation, which requires the jury to decide the question of guilt, even where the defendant admits all elements of the charged crime.[54]

D. The Taking of the Evidence

The trial in both countries begins with the defendant's admonition of his right not to give testimony and his privilege against self-incrimination. If he waives these rights, the prosecutor then begins examination of the defendant.[55] In nearly all of the first Spanish trials the defendant has given a statement. This was true in all but one of the first 114 Russian trials, though some judges allowed the defendant to wait and hear the prosecution's case, before deciding whether to testify or not, as is the practice in the U.S. For criminal justice systems that place great emphasis on the presumption of innocence, the burden on the prosecution to prove the case, and the right of the defendant to remain silent, the interrogation of the defendant before any incriminatory evidence has been presented to the fact finder is a lingering inquisitorial vestige in these two systems.

In both Russian and Spanish jury trials, questioning of the witnesses is initially left to the parties, with the opponents having a right to cross-examine. The judge only intervenes at the end.[56] Russian judges have persisted in the dominant role of an inquisitorial judge much more than their Spanish counterparts.[57] The Spanish Jury Law, like the Russian Law, allows the jurors to submit written questions which are then asked by the presiding judge if they are not objectionable.[58]

The Russian jury law did not make any attempt to limit the jury court's access to the preliminary investigation file, nor to regulate the use

54. § 446 UPK. For the story of a Russian man who was acquitted by a jury of capital murder and rape after pleading guilty, *see* Thaman, *Resurrection*, *supra* note 14, at 104-5, 159-160. In the U.S. in approximately 93% of all criminal cases, the defendant elects to waive his right to trial by jury and plead guilty in exchange for a guaranteed or expected sentence, which would be less than if he went to trial and was not successful.

55. §§ 688-700 LECr., §§ 278, 446 UPK.

56. § 446 UPK., § 708 LECr.

57. In the four Spanish trials I saw the trial judges asked few if any questions, leaving the conduct of the evidentiary portion of the trial entirely in the hands of the prosecutor and lawyers. Some Russian judges did, however, adopt a completely passive role as would befit a U.S. judge. *See* Thaman *Resurrection*, *supra* note 14, at 102-109 and *Geschworenengericht*, *supra* note 14 at 202-203.

58. § 446 UPK., § 46.1 LOTJ.

of prior statements of witnesses or defendants included therein.[59] In Spain, however, since the trial judge does not conduct the preliminary hearing and the file itself is not physically present at the trial, the trial judge's knowledge of the evidence is identical to that of the jurors, restricted to evidence introduced at trial. This effectively prevents the assumption of an inquisitorial role as is still common in the Russian trials.

Although the jury law allows the parties to question witnesses about prior statements that contradict their testimony at trial, these statements may not be read into evidence, nor are they admissible for the truth of the matter stated.[60] The new procedure has presented problems, however, for the lawyers. In the three murder trials I observed (Valladolid, Granada and Córdoba) the defendants, in testifying, denied that they remembered what happened on the day of the homicide. Without being able to use the statements from the preliminary investigation, the prosecutors found it very difficult to impeach the alleged lack of memory of the defendants, which led to an interrogation which was confusing for jurors and audience alike.

E. Division of Labor between Judge and Jury in Rendering judgment

The verdict form in the Anglo-American criminal trial, is simply one of "guilty" or "not-guilty" of the crimes charged in the accusatory pleading. Since acquittals are final and not subject to review, and guilty verdicts are only subject to review in a proceeding similar to *cassation*, the trial judge must control the discretion of the jury in his or her instructions as to how to apply the law to the facts they find to be true. The jury is thus explained the elements of the charged offenses, the rules of circumstantial evidence and evaluation of evidence, and is told that *it must follow the law as explained by the judge*. As a general rule, except in death penalty cases the jury is not told of the sentence which could await the defendant upon conviction. Both the Russian and Spanish legislators have rejected the Anglo-American verdict form, in favor of a list of questions or propositions, following the French model, adopted by most Continental European countries in the 19th Century.

59. Extensive reading from the dossier to impeach the defendant or witnesses, in cases where witnesses failed to appear was common in the first Russian trials. Thaman, *Resurrection*, *supra* note 14, at 107.

60. § 46.5 LOTJ. The same evidentiary procedure was introduced in the Italian Code of Criminal Procedure of 1988, only to be annulled by the Constitutional Court and by subsequent legislation. *See* Honert, *supra* note 38, at 436. In Spanish trials before professional judges prior statements may be read in court to impeach in-court statements, § 714 LECr.

Before arguments and the last word of the defendant, the Spanish judge prepares a verdict form, *objeto del veredicto*, in the form of a list of propositions, some designated as favorable to the defendant, some as unfavorable, and the jury must decide whether they were proved or not proved during the trial. These propositions are restricted to the facts presented by the various parties which serve as the basis for their pleadings regarding the criminal liability (or lack thereof) of the defendant. The propositions relate to the elements of the crimes charged, conditions which modify or exclude guilt and statutory factors in aggravation or mitigation of the defendant's criminal responsibility. Finally, the jury is asked to affirm or deny the proof of the defendant's guilt as to the criminal acts, *hechos delictivos*, contained in the parties' pleadings. If the jury considers that guilt has been proved as to one or more of the allegations, the jury may recommend a suspension of sentence, *remisión condicional de la pena*, or that the government grant complete or partial amnesty for the offense *recomendación del indulto*.[61] The judge's proposed verdict form must be discussed with the parties and the parties' objections may form the basis far an appeal of the judgment.[62] The Russian "question list" requires the posing of three basic questions: (1) whether the *corpus delicti* of the crime has been proved; (2) whether the defendant has been proved to be the perpetrator of the crime; and (3) whether he or she is guilty of having committed the crime.[63]

Both legislators resorted to the "question list" form of verdict, so as to give the professional judge a factual foundation for the imposition of a reasoned judgment, a statutory and/or constitutional requirement in both countries.[64] But both legislatures equivocated as to whether they actually wished to limit the jury to deciding mere "naked historical facts" by allowing the jury to make a finding of "guilt" or lack thereof as to each charged offense.[65]

61. § 52 LOTJ. Unlike the Spanish "recommendation," the Russian jury's finding of "lenience" or "special lenience" binds the judge in substantially lowering the sentencing parameters. §§ 449, 460 UPK. *See* Thaman, *Geschworenengericht*, *supra* note 14, at 206.

62. § 53 LOTJ.

63. § 449 UPK. For a detailed discussion of the problems encountered by Russian judges in drafting the question list in the first trails, *See* Thaman, *Resurrection*, *supra* note 14, at 114-23 and *Geschworenengericht*, *supra* note 14, at 204-206.

64. *See* Art. 120.3 CE, §§ 314.1, 462 UPK.

65. Though the supreme Court of the Russian Federation (SCRF) has opined that the jury lacked competence to decide "juridical questions" as to whether a murder was intentional or negligent, or committed in the heat of passion, for financial gain, due to "hooliganistic" motivation, with extreme cruelty, using excessive force in self-defense, or whether an act amounted to robbery or rape, it doesn't explain why the jury is then

The Russian separation of the guilt question into three components, has allowed implicit jury nullification, by allowing an acquittal, even though the jury has determined *corpus delicti* and the defendant's authorship of the acts have been proved.[66] The Spanish law prevents this by requiring the judge to return a verdict to the jury when there is a contradiction between the propositions as to authorship and *corpus delicti* and the finding of guilt.[67]

The Spanish law has also been much more explicit in reducing the "guilt" finding to one relative only to the commission of certain criminal acts, rather than crimes in the juridical sense.[68]

As in the first Russian trials, some judges have limited the propositions in the verdict form to those absolutely necessary to prove the elements of the offenses and the mitigating or aggravating circumstances (e.g. 9 propositions in Palencia and 6 in Granada in murder cases), whereas others have had the jurors affirm or reject virtually every assertion contained in the accusatory document of the prosecutor and the defense qualifications. The 54 propositions submitted, for instance, to the first Valladolid jury included several that had no relation to important elements of the proof, which elicited criticism among jurists and the press following the trial.[69] Interviews of the jury in the notorious *Otegi* case in San Sebastián revealed that they had great trouble understanding the 95

instructed as to the elements of the offenses if they are not to apply the law in reaching their verdict. I have criticized the jurisprudence of the SCRF, drawing on the pre-revolution practice and theory in Stephen Thaman, *Postanovka voprosov v sovremennom Rossiyskom sude prisiazhnykh*, ROSSIYSKAIA YUSTITSIIA, No. 10 (1995) at 8-11; *see also* Thaman, *Geschworenengericht*, *supra* note 15, at 205-206.

66. For discussions of pre-revolution Russian jury nullification in the context of the new statute, *see* Thaman, *Resurrection*, *supra* note 14, at 114-115; POSTANOVKA, *supra* note 65, at 9. In a recent case, an Ivanovo jury acquitted a woman for murder of her husband, after they had affirmatively answered the questions as to *corpus delicti* and authorship and the SCRF upheld the judgment. Case of *Kraskina* (Ivanovo Regional Court), reported in LETOPIS' SUDA PRISIAZHNYKH, Vol. 5, at 20-21. Moscow State Legal Department (1995); and in Mikhail Ovcharov, *Sud prisiazhnykh reshil: Khoroshego muzha zhena ubivat' ne stanet*, in which the jury decided: A wife doesn't murder a good man.

67. § 63 (1) (d) LOTJ.

68. § 60 (1) LOTJ originally called for a finding of guilt or lack thereof as to each charged crime (*delito imputado*. In November 1995 the language was changed to "charged criminal act" (*hecho delictivo imputado*) so as to effect a clean separation of questions of law from questions of fact. Thus, as one critic noted, it is no longer a guilt-finding in the strict meaning of the word and is actually superfluous in the technical sense. Colomer Gómer, PROCESO, at 122.

69. The judge admitted the difficulty he had with the verdict in a newspaper interview. Juan Carlos León, *El jurado nos libera de una responsabilidad*, Interview with José Miñambres Flórez. EL NORTE DE CASTILLO, June 16 (1996), at 10-11.

questions submitted to them, many of which bore no relation to proof of the crucial elements of the charged murder of two Basque policemen.[70]

Following the preparation of the verdict and the arguments of the parties and last word of the defendant, the presiding judge instructs the jury "in a restrained manner, in a form the jury can understand" as to their functions, the content of the object of the verdict, the rules of deliberation and voting, and the form of their final verdict. He must be sure not to make any allusions about proofs and must instruct the jurors not to consider any evidence declared to be inadmissible during the trial and to resolve all doubts in favor of the defendant.[71] Unlike the Russian legislation, where the judge does not summarize or comment on the evidence.[72]

F. Deliberation, Verdict and Judgment

Jury deliberations in both Russia and Spain are secret, without participation of anyone including the presiding judge, and the jurors may not reveal any information about the deliberations.[73] In Spain, seven of nine votes are required to prove any propositions unfavorable to the defendant, whereas five votes are needed to prove any proposition favorable to the accused. Jurors are also allowed to alter the propositions submitted to them as long as they do not substantially alter the subject of their deliberations and the alterations do not result in an aggravation of the possible criminal responsibility of the defendant.[74] Similarly, the vote as to guilt requires seven votes and that of not-guilty, and recommendations of suspension of sentence and clemency only five.[75] The jury can request re-instructions or clarifications as to the verdict form, and if the jury has not voted after two days of deliberations, the judge can call them into court to determine whether they have had any problems understanding the verdict form.[76]

70. Carmen Gurruchaga / Juan Carlos Escudier, *La caótica actuación del jurado del "caso Otegi,"* EL MUNDO, April 22 (1997), at 6-7.

71. § 54 LOTJ,

72. § 451 UPK. *See* Thaman, *Geschworenengericht*, *supra* note 14, at 207.

73. §§ 55,56 LOTJ; 452 UPK.

74. § 59 LOTJ.

75. § 60 LOTJ. A verdict of guilty in Russia requires a simple majority of seven of the twelve jurors' votes, whereas six votes are sufficient for an acquittal or a finding favorable to the defendant. § 454 UPK.

76. § 57 LOTJ. Russian jurors must strive for unanimity during the first 3 hours of deliberation, thereafter they may seek to reach a majority decision. § 453 UPK. Juries seldom deliberate more than the three minimal hours.

The most remarkable innovation in the Spanish law is the requirement that the jury give a succinct motivation of their verdict, indicating the evidence upon which they based their verdict and the reasons for finding a particular proposition proved or not proved.[77] Other than a non-binding statement by the jury provided for in the Austrian Code of Criminal Procedure,[78] this is the clearest attempt yet by a legislature to demand motivation of a verdict by a classic jury. The jury may request that the secretary of the court help them in drafting their verdict.[79]

If the judge returns the jury three times to correct inaccuracies in the verdict and they fail to do so, he or she may dissolve the jury and set the case for trial before a new jury. If this jury also fails to reach a verdict due to similar problems, the judge must on his or her own motion enter a verdict of acquittal.[80]

The judge's judgment following a guilty verdict in both countries must be based on the facts found to be true by the jury, which the judge then qualifies before imposing sentence.[81]

VII. Conclusion

It is difficult to predict the future of trial by jury in either Russia or Spain. Despite being constitutionally anchored in both countries, there is a decided lack of enthusiasm on the part of professors, judges and lawyers as to whether it is an institution capable of helping to solve the problems plaguing the administration of justice. It also remains to be seen whether it will serve as a genuine catalyst in transforming the criminal trial in both

77. § 61.1 LOTJ. This innovation was deemed necessary to comport with Art. 120.3 of the CE, the presumption of innocence, guaranteed by Art. 24.2 CE, and § 6.2 ECHR. Gimeno Sendra, *Comentarios*, at 320.

78. § 331 (e) Austrian StPO. It is a contested point, however, whether the reasons stated in the *Niederschrift* may be used for a basis of attacking the factual findings of the jury. *See* Einhard Steininger, *Die Anfechtung mangelhafter Tatsachenfestellungen im Geschworenenverfahren*, 47 ÖSTERREICHISCHE JURISTENZEITUNG 687, 688-591 (1992).

79. § 61.2 LOTJ. Some commentators have seen this provision as a first step towards, or a subliminal recognition of, the superiority of the court with lay assessors. Gimeno Sendra, *Segunda*, *supra* note 26, at 34-5; Gómez Colomer, PROCESO, *supra* note 26, at 124.

80. § 65 LOTJ. The Russian judge may also return the jury to the jury room to correct contradictions i their verdict. § 456 UPK.

81. § 70 LOTJ; § 459 UPK. Both judgments of guilt and acquittals may be appealed in Russia and Spain. Spain provides for a first appeal, in which new evidence may be adduced, and an appeal in cassation following that to the supreme Court of Spain. §§ 846bis (a), 846bis (c) LECr. Russia provides for one level of appeal in cassation directly to the Russian Supreme Court. §§ 463-464 UPK.

countries into an adversary proceeding, with increased oral argument and immediacy and less reliance on the investigative dossier.

Russia's new law has been in effect for three years as of November 1, 1996, yet the institution has not spread beyond the nine original regions.[82] From December 15, 1993 until January 1, 1995, 173 jury trials were held in which 33 (18%) ended in outright acquittals of all defendants, in comparison with a 1% acquittal rate in trials before single judges of courts with lay assessors. Many trials ended in convictions for lesser offenses or in verdicts of lenience or special lenience.[83] The relative lenience of Russian juries can perhaps be explained as a reaction to an excessively severe soviet criminal justice system, coupled with profound mistrust among the population of criminal investigators and police, who are known to engage in brutal coercive tactics in interrogation and are otherwise distrusted in their testimony.[84] The parties have become much more active in the presentation of evidence and examination of witnesses which may also have led to a higher acquittal rate.

Yet the Supreme Court of the RF has interpreted the ambiguous sections of the jury law so as to virtually exclude the jury from deciding the issues in these mostly capital cases which trigger possible imposition of the death penalty: the statutory aggravating circumstances, intentionality, affirmative defenses such as necessary defense or heat of passion.[85] Of the 19 judgments reversed by the Supreme Court Cassational Panel as of January 1, 1995, nine have been acquittals.[86]

Spanish juries have been unpredictable to say the least. Whereas it appeared that they would return harsher verdicts than the three-judge panels - which otherwise try serious criminal cases - after the first nine

82. Plans to expand to 12 new regions, including the cities of St. Petersburg and Moscow have been ignored by the government and the State Duma. Conversation with Sergey A. Pashin, Judge of the Moscow City Court, author of the law, and its main proponent in Russia, July 22, 1996, Moscow City Court.

83. Thaman, *Geschworenengericht*, *supra* note 14, at 212.

84. Thaman, *Resurrection*, *supra* note 14, at 66-67, 91-94, 130.

85. I have argued that this could violate Art. 20 of the Const. RF which guarantees jury trial in capital cases. Thaman, *Geschworenengericht*, *supra* note 14 at 205; *Postanovka*, *supra* note 65, at 10.

86. Only one of the 10 acquittals that were appealed was not nullified on appeal. Thaman, *Geschworenengericht*, *supra* note 14, at 211. The apparent arbitrariness of the Cassational Panel's practice is highlighted by the fact that it has reversed three consecutive acquittals by three different juries in one attempted murder case from Altay Territory, all due to technicalities. Case of *Denisov*. For the first trial, see Thaman, *Ressurection*, *supra* note 14, at 147-148.

cases,[87] subsequent cases show that juries are willing to convict of lesser-included offenses or even acquit in murder prosecutions.[88]

The acquittal of Mikel Otegi riveted the Spanish public's attention to the new jury courts, after the institution had been neglected following the first trials in May of 1996. Spearheaded by he ruling Popular Party, the *Otegi* verdict spawned calls to suspend jury trials in the Basque Country, because it was the consensus of opinion that the verdict was not based on the evidence, but was due to the either juror sympathy with the Basque Nationalists, or fear of retribution if they convicted the young nationalist sympathizer.

Other reform proposals focused on providing for changes of venue in such cases; for eliminating assaults on police officers and other government officials from the list of crimes subject to the jury court's jurisdiction; restricting the jury's role to deciding only naked factual questions, and leaving the guilt finding and the findings of mitigating circumstances relating to mental disease or intoxication to the professional judge; reform of appellate procedures to allow for broader appeal of judgments of acquittal; and the transformation of the classic jury into a "mixed court."[89]

The extreme lenience of Spanish law in allowing a defense of not guilty by reason of complete or temporary insanity, whether due to mental disease or defect, alcohol or drug intoxication, or even "any other

87. In the first nine verdicts of which I am aware, the jury followed the pleadings of the public prosecutor in five cases (Valencia, Palencia, the first Barcelona cases, Córdoba and Las Palmas, *see* note 15); or as in the Granada case, the more punitive pleadings of the private prosecutor. There was only one acquittal, in the bribery case in Palma de Mallorca. Defendant was convicted of murder without aggravating circumstances in the first Valladolid case and of negligent homicide in the first Murcia case. The prosecutors in the Valencia and Granada cases admitted that professional judges would have rendered milder verdicts than the jury in both cases. Interview with Antonio Navajas, Prosecutor in Granada. *See also,* Sara Velert, *El jurado de Valencia condena al acusado de allanamiento de morada*, EL PAIS, May 29, 1996, at 30.

88. Of the 18 homicide verdicts rendered by juries as of May 28, 1997 of which i am aware, nine have been charged by the public prosecutor, one has been for murder without aggravating circumstances, six for substantially lesser homicide offenses (such as negligent homicide) and there have been two outright acquittals.

89. Javier Nuñoz, *El Gobierno y el PNV abogan por reformar el jurado para que no se repitan veredictos "absurdos"*, EL CORREO, Internet 3.8.97 (1997); C. Valdecantos, *El PP quiere limitar las competencias del jurado*, EL PAIS Internet, 3.8.97 (1997); Raimundo Castro, *El Gobierno cambiará la Ley del Jurado por el "caso Ortegi*, EL PERIODICO, Internet 3.8.97 (1997); Ferran Gerhard, *Mariscal trabaja ya en la nueva Ley del Jurado*, EL PERIODICO, Internet, 3.9.97 (1997); Salome García, *El Gobierno baraja sustraer al jurado el ataque a policías*, EL PERIODICO, Internet 3.11.97 1997).

circumstance of analogous significance,"[90] has led to the mounting of such defenses in nearly all cases. While such defenses have been rejected by most juries, the *Otegi* case, in which the jury found that defendant was temporarily insane due to alcoholic intoxication coupled with a feeling of being harassed by the Basque police, could well be the impulse for the impulse for the Spanish legislature to amend its law concerning mental defenses as was done in California following the Dan White verdict and in the federal system following the John Hinckley verdict. This would be a clear example of how the presence of a jury of lay fact finders exercises influence on the definition of crimes and their defenses in the substantive criminal law.

Unlike Spanish law, however, Russian law makes alcoholic intoxication an aggravating factor (leading extraordinarily drink Russian defendants to deny their inebriated state) and makes a finding of insanity one for the professional bench and not the jury.[91]

Despite the fact that trial by jury is now required in murder and certain other cases throughout Spain, there have as of yet been remarkably few jury trials, with several provinces still awaiting their first as of May 27, 1997, the first anniversary of the first trials.[92] Prosecutors have been either charging lesser crimes to avoid the jurisdiction of the trial court[93] or are reaching agreements with defendants, *conformidad*, in the minor cases of threats, burglary and bribery so as to avoid trials in the jury court.[94]

The reappearance of juries on the inquisitorial soil of Continental Europe is an important phenomenon, regardless of its reception among law professors, lawyers, judges and politicians. It breathes life into the overly written, overly bureaucratic structure of European criminal jurisprudence and makes European jurists rethink the procedural and substantive tenets upon which their criminal justice systems are based.

90. §§ 20,21 Penal Code of 1995. *See* CODIGO PENAL Y LEGISLACION COMPLEMENTARIA (Civitas) (1996). Most of the first trials were tried under similar provisions of the Penal Code of 1973, for the 1995 Code went into effect only three days before the first trials began on may 24, 1996.

91. In 61 of the first 97 capital murder trails before Russian juries it was alleged that the defendant was drunk. *See* Thaman, *Resurrection, supra*, note 14, at 117 and fn. 346,127.

92. I am aware of at least seven of Spain's 50 provinces which have not yet celebrated their first jury trials: Segovia, Jean, Cuenca, Cantabria, La Rioja, Soria and Tarragona. The number is likely larger.

93. Conversation with Carmen Vicente, Secretary of the Investigative court (Juzgado de Instrucción) No. 3 in Salamanca, May 20, 1996.

94. Conversation with Chief prosecutor (Teniente Fiscal) of the Madrid provincial Court, Joaquín Sánchez Covía, on September 20, 1996 in Madrid.

The jury is also a quintessentially political intervention in the administration of criminal justice with profound effects on the division of labor between the legislative, executive and judicial branches in the administration of criminal justice. Whether the introduction of juries seeks to liberate a weak judiciary from its ties to the executive branch (Russia) or to undermine a judicial branch which is perceived as exercising too much power (Spain), it cannot help but realign the balance of power between the three arms of government and open up space for an empowerment of the defense and the victim. It also may serve as the foundation for a "reprivatization of the criminal law"[95] by inducing consensual resolutions of criminal cases such as is possible with the Spanish *conformidad.*

95. *See* Albin Eser, *Funktionswandel strafrechtlicher Prozeßmaximen: Auf dem Weg zur 'Reprivatisierung' des Strafverfahrens*, 104 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 361 (1992).