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INTRODUCTION

THE RECENT reintroduction of trial by jury in Russia in 1993 and Spain in 1995 is interesting as a surprising reversal in a long-term trend towards elimination of the classic jury in favour 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. In both new systems, the old dispute has been rekindled as to whether juries should be restricted to finding the factual underpinnings of the prosecutor's accusations to be proved or not, or whether they should actually apply the law.

Most likely neither the primitive Norman-English juries, nor Germanic *scabini* or *rachimburgen*, nor the ancient Scandinavian lay courts worried about the separation of questions of fact and law. Self-informing juries were definitely masters over the "facts" and thus masters over the fate of the accused – whether he or she would remain a part of the community, be banished, be subject to a *wergild* or a fine. These primitive popular courts were probably concerned mainly with the social function of law, with resolving a dispute, restoring the peace of the community. Separation of fact and law was likely not important for them. Only with the intervention of the judge, with a division of labour among two classes of decision makers, did it become necessary to differentiate their functions. And with the intervention of the judge, came the politicisation of criminal law, its centralisation, and subjugation to the metropolitan power, indeed, its scientisation. The judges, representing the King in England, became the repositories of the law, in essence, enabling them to control and direct the decentralised decision makers, the jury.

On the European continent the old customary decision making bodies were displaced by judges, representing the dual central powers of the monarchy and the church. Unlike English common law judges, whose legal precedents continued customary law to a large extent, continental judges were more like priests,

indeed, often were priests in the ecclesiastical courts. Their duty to find the truth had religious undertones, whether they were ecclesiastical or royal judges. Law became the science of ascertaining the truth, something only specialist judges, not lay persons, could do. While there were tendencies in this direction in England which led to a struggle with the jury system in the seditious libel trials of the seventeenth and eighteenth centuries and the claim that juries had the right to nullify, they were never so pronounced as on the continent, where the judge-driven, secret, written inquisitorial system replaced the customary courts lock, stock and barrel.

This "politicisation" or "etatification" of criminal procedure paralleled the replacement of the adversary system by the system of official state prosecution, dominated by a public prosecutor. The criminal law was no longer limited to crimes which resulted in concrete harm (*erfolgsdelikte*), crimes which could be seen with the naked eye, and proved by the testimony of lay eyewitnesses, with concrete victims who would bring their private prosecutions. The dual powers of state and church invented crimes against the state or religion and used this pretext to invent the inquisitorial system, in which the state, as victim, prosecuted the case. Later the state claimed it was a victim even in those cases in which there was a concrete harm and pre-empted private prosecutions in those areas, pushing the victim completely out of the criminal trial. These new "crimes which could not be seen or testified to" required new kinds of judges – imbued in the science (or perhaps more accurately the witchcraft) of the law. The procedure had to be secret – these crimes could neither be seen nor heard by normal persons. These metaphysical roots of the inquisitorial system were revealed again during the reigns of terror in the Soviet Union in the 1920s and 1930s and in other so-called socialist countries. It seems as if so-called "victimless crimes" have also been a vehicle through which the state has wrested the administration of justice from community control. The Federal anti-drug campaign, the use of grand juries and the protection of undercover informers show the continuing vigour of this type of law enforcement in the United States.

At any rate, as law continued its pretensions to becoming a science, it collided with the archaic presence of the jury, especially in continental Europe, where this old customary institution was perceived as a bulwark of democracy and a tool in the revolutions against absolute monarchy. Once juries were introduced, first in France, and then, gradually, in most continental European countries, the division of labour between the entrenched professional (royal) judges and the new juries had to be articulated. Many preferred the pure English model, in which the jury decided guilt and the judge imposed sentence. But others did not want to abandon their fledgling *Rechtswissenschaft* and leave the imputation of guilt alone to unindoctrinated laypersons. This doctrinal dispute was a mask for a real political dispute. Would the centralised judicial institutions (and indirectly the monarchy) maintain their control over the administration of justice or would the upstart bourgeoisie (for all early jurors had to be property owners, educated, with the right to vote) assert its power as jurors? As early as 1620

Sir Edward Coke proclaimed, "Ad quaestionem facti non respondent judices; ad quaestionem juris non respondent juratores", and it is true that judges in seditious libel cases tried to limit juries to deciding mere naked, historical facts, such as whether an allegedly blasphemous or seditious tract was published, thus reserving for themselves the key question of whether the text was libellous. But juries in England by and large were recognised, not only as judges of the facts, but also as judges of guilt, by virtue of their ability to apply the law, delivered by the judge in instructions, to those facts.

"The jury is sovereign," remarked the judge in the second Madrid jury trial of the modern era, after the defendant was acquitted of the murder of his brother.[1] But the degree to which juries should be "sovereign" was the subject of controversy throughout the nineteenth century in the wake of continental Europe's importation of the Anglo-Saxon jury following the French Revolution. By and large, continental European countries, and among them Spain, rejected the division of labour between judge and jury favored in England and America. According to this division of labour, the jury returns a perfunctory verdict of "guilty" or "not guilty", following instructions by the court as to the law which must be applied in determining guilt with respect to each offence charged and as to the principles of criminal procedure which govern the weighing and evaluation of the evidence received. Instead continental Europeans adopted a type of "special verdict" composed of an often long and complicated list of questions relating to the acts allegedly committed by the defendant, the intent with which the acts were committed, any circumstances which justified, excused, mitigated or aggravated the commission of the acts, and finally, in most jurisdictions, relating to guilt.[2]

But that was not the end of it. Europeans did not feel lay people could or should "apply the law" to the facts they found to be true, but should leave that to the bench, legally trained (as many English and American judges were not) and imbued with the duty to seek the truth and ensure the equal application of the law according to the rules of legal "science". The French, following Montesquieu, believed that the jury should only determine the "facts" and the bench should be responsible for applying the law to the facts found true by the jury and thus decide guilt, not to speak of punishment. But the English tradition of the jury as the "conscience" of the community, deciding cases according to its "conscience" (in French, *intime conviction*) and "common sense" and informed by the moral values of the community made it ideologically difficult to restrict the jury to the mere determination of "naked facts." Thus, most laws allowed

[1] J. A. Hernández, "Declaramos no culpable a . . .", *El País*, 10 November 1996, 6.

[2] When the jury in Spain was restricted to press crimes, the law allowed a simple verdict of "guilty or not guilty." See § 78 Real Decreto de 2 de abril de 1852, "reformando las dispociones vigentes en materia de imprenta". The "question list" was first introduced with the Spanish Jury Law of 1872. See M. Marchena Gómez in A. Perez-Cruz Martin, I. Méndez López, G. López-Muñoz y Larraz, A. del Moral García, I. Serrano Butragueño, M. Marchena Gómez, J. A. Díaz Cabiale and L. M. Bujosa Vadell, *Comentarios sistemáticos a la Ley del Jurado y a la reforma de la prisión preventiva*. (1996, Granada), 239 (hereafter "A. Pérez-Cruz Martín, *Comentarios*").

the jury to decide the question of "guilt", yet still attempted to protect the bench's monopoly in applying the law.

The difficulty in separating "questions of fact" from "questions of law" and thus delimiting the provinces of jury and judge has long been recognized in continental European discussion:

> "It is at the same time both clear and plausible that the historical component of the factual question relating to guilt or innocence cannot be separated from the legal, without turning the jury into a joke, which is different from other jokes only because it is too serious a thing to be laughed at. For if the jury is only asked whether certain facts laid before them are historically true or not, then the judges, appointed by the overlord, are alone lords and masters over the guilt or innocence of the accused, for the qualification of the deed always depends on their judgment."[3]

The inability to separate questions of fact and law, and the European unwillingness to adopt the Anglo-American verdict form, which allows the jury to apply (and even nullify) the law in the secrecy of their deliberations, gradually led to the consolidation of jury and bench in the European "mixed courts". In these courts, however, the division of labour between lay and professional judges, and the precise manner of instruction as to the law and its application, are also cloaked in the absolute secrecy of their deliberations.[4]

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, gave rise to the common law rules of evidence and the principle of "free evaluation of the evidence" unfettered by formal rules of evidence.[5] Important developments in the substantive criminal law which affect the presentation and evaluation of evidence such as the separation of factual from legal questions and the breaking-down of criminal offences 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.[6]

[3] A. Feuerbach, *Betrachtungen über das Geschworenen-Gericht* (1813, Landshut), 170 (author's translation).

[4] See J. H. Langbein, "The English Criminal Trial Jury on the Eve of the French Revolution", in A. P. Schioppa (ed.), *The Trial Jury in England, France, Germany 1700–1900* (1987, Berlin: Duncker and Humblot), 34; for a summary of the nineteenth century German discussion, see P. Landau, "Schwurgerichte und Schöffengerichte in Deutschland im 19. Jahrhundert bis 1870", in *ibid.*, 279 and H. Meyer, *That- und Rechtsfrage im Geschworenengericht, insbesondere in der Fragestellung an die Geschworen* (1860, Berlin).

[5] Langbein also sees the seeds of "free evaluation of evidence" being planted in continental Europe before the introduction of trial by jury with the weakening of the institution of torture and the rise of "poena extraordinaria": J. H. Langbein, *Torture and the Law of Proof* (1977, Chicago: University of Chicago), 59. On the transformation of the "romantic notion" of *intime conviction* into the "less expansive" notion of *freie Beweiswürdigung*, which still required adherence to "extralegal canons of valid inference," see M. R. Damaska, *Evidence Law Adrift* (1997, New Haven: Yale), 22.

[6] See E. Amodio, "Giustizia popolare, garantismo e partecipazione" in E. Amodio (ed.), *I giudici senza toga. Esperienze e prospettive della partecipazione popolare ai giudizi penali* (1979, Milan),

Even in the nineteenth century, continental Europeans, while introducing progressive procedural safeguards for the criminal defendant, such as the presumption of innocence, oral, public and increasingly adversary trials, did not warm to the classic jury. They treated it as being alien to certain other principles of the inquisitorial criminal process such as the duty of the state (prosecutor, judge and investigating magistrate) to ascertain the truth, the necessity of reviewability of judgments, as reflected in the requirement of giving reasons for findings of guilt or innocence,[7] and the principle of mandatory prosecution (known as the "legality principle"), which is antipathetic to the unbridled "discretion" of juries to acquit out of sympathy or nullify the harshness of the sentence.[8] Instead they opted for a form of lay participation more conducive to the adherence to these principles: the "mixed court" of professional judges and lay assessors, collectively responsible for all questions of law, fact, guilt and sentence.

THE DIVISION OF LABOUR BETWEEN JUDGE AND JURY IN RENDERING JUDGMENT

Both the Russian and Spanish legislators have rejected the Anglo-American general verdict of "guilty" or "not-guilty," in favour of a list of questions or propositions presented to the jury, following the French model, which was later adopted by most continental European countries in the nineteenth century.

Before arguments and the last word of the defendant, the Spanish judge prepares a verdict form or *objeto del veredicto* in the form of a list of propositions, some designated as favourable to the defendant, some as unfavourable, 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 offence

13 (fn. 30). As will be discussed, *infra*, the Russian Supreme Court has made the quantum leap to treating the proof of *actus reus* as a factual question for the jury and *mens rea* as a legal question for the professional bench.

[7] According to Amodio, *ibid.*, 46–48, Art. III(1) of the Italian Constitution requiring reasons to be given for all judicial decisions, makes the reintroduction of the classic jury impossible.

[8] On jury nullification in the United States, see A. W. Alschuler and A. G. Deiss, "A Brief History of the Criminal Jury in the United States" (1994) 61 *University of Chicago Law Review* 867, 871–875.

(*recomendación del indulto*).[9] The judge's proposed verdict form must be discussed with the parties and the parties' objections may form the basis for an appeal of the judgment.[10]

The Russian system requires judges to pose three basic questions to the jury: first, whether the *corpus delicti* of the crime has been proved; secondly, whether the defendant authorship of the crime has been proved; and thirdly, whether he or she is guilty of having committed the crime.[11]

Both legislatures have resorted to the "question list" form of verdict to give the professional judge a factual foundation for the imposition of a reasoned judgment which is a statutory or constitutional requirement in both countries.[12] But both legislatures equivocated on whether they actually wished to limit the jury to deciding mere "naked historical facts" or to allow the jury to make a finding of "guilt" or lack thereof as to each charged offence. While the Russian legislation prohibits the judge from posing questions which require "strictly juridical evaluations", it also requires the judge to instruct the jury on the substantive law as it applies to the acts imputed to the defendant, thus seeming to indicate that the jury is to apply the law to the facts. But the Russian Supreme Court has interpreted the statutory language to reduce the jury to deciding only "naked historical facts", even depriving it of deciding "internal fact elements", or *mens rea*, by characterising it as a "question of law."[13]

Spanish courts have wrestled with similar problems. Most courts have tried to phrase questions of guilt in terms of the defendant "having caused the death"

[9] § 52 Ley Orgánica del Tribunal del Jurado (hereafter "LOTJ"), all cites from *Ley Orgánica del Tribunal del Jurado* (1996, Madrid: Biblioteca Nueva). Unlike the Spanish "recommendation", the Russian jury's finding of "leniency" or "special leniency" binds the judge in substantially lowering the sentencing parameters. §§ 449, 460 Ugolovno-protsessual'nyy kodeks RSFSR (Russian Code of Criminal Procedure, hereafter "UPK"), all cites from *Ugolovnyy kodeks Rossiyskoy Federatsii, Ugolovno-protsessual'nyy kodeks RSFSR, Ugolovno-ispolnitel'nyy kodeks Rossiyskoy Federatsii* (1997, Moscow: Ministry of Justice of the Russian Federation). See S. C. Thaman, "Das neue russische Geschworenengericht", in (1996) 108 *Zeitschrift für die gesamte Strafrechtswissenschaft* 191, 206.

[10] § 53 LOTJ.

[11] § 449 UPK. For a detailed discussion of the problems encountered by Russian judges in drafting the question list in the first trials, see S. C. Thaman, "The Resurrection of Trial by Jury in Russia" (1995) 31 *Stanford Journal of International Law* 61, 114–23.

[12] See art. 120.3 of the Spanish Constitution and §§ 314.1, 462 UPK.

[13] "Postanovlenie Plenuma Verkhovnogo Suda Rossiyskoy Federatzii: O nekotorykh voprosakh primeneniia sudami ugolovno-protsessual'nykh norm, reglamentiruiushchikh proizvodstvo v sude prisiazhnykh". No. 9 (20 December 1994) (hereafter "SCRF, Decision No. 9"), para. 18, in which the Russain Supreme Court held 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. I have criticised the jurisprudence of the Court, drawing on the pre-revolutionary practice and theory in S. C. Thaman, "Postanovka voprosov v sovremennom Rossiyskom sude prisiazhnykh" (1995) 10 *Rossiyskaia Yustitsiia*, 8–11; see also S. C. Thaman, *supra* note 9, 205–206. For similar criticism, see M. V. Nemytina, *Rossiyskiy sud prisiazhnykh* (1995, Moscow: Bek), 83. While *mens rea* is definitely a "question of fact" for the jury to decide in United States trials, the U.S. Supreme Court has recently decided that it does not violate due process to statutorily prevent the jury from hearing evidence relevant to the proof of mental state, to wit, evidence of intoxication: *Montana v. Egelhoff* 116 S.Ct. 2013 (1996).

of the victim and have eschewed using the *nomen juris* in their formulations. This has not been true of questions related to mitigating and aggravating circumstances, however, and the juries have been directly asked whether a murder was committed with treachery (*alevosía*) or excessive cruelty (*ensañamiento*), often including the definitions of legal terminology within the question itself. The Spanish courts have not shied away from asking juries directly about the defendant's mental state, for example whether an act was committed intentionally, recklessly, with gross or simple negligence, or accidentally.[14] According to some commentators, one of the main reasons for several of the more criticised verdicts is that juries are hesitant to find "intent" in the domestic and bar-room "crimes of passion" typical of many Spanish homicides. This has led judges to instruct juries as to the difference between intentional and reckless murder, as well as the difference between homicide with gross or simple negligence.[15]

The Russian separation of questions of guilt into three component parts permits implicit jury nullification by allowing an acquittal, even though the jury has determined that *corpus delicti* and the defendant's authorship of the criminal acts have been proved. A famous example of a jury availing itself of this option is to be found in the Vera Zasulich case in 1878 when the jury acquitted a young revolutionary sympathiser of shooting a Tsarist official, even though all of the elements of the crime were proved.[16] By contrast in Spanish law a contradiction between questions of *corpus delicti* and identity and guilt is treated as a defect in the verdict which the jury is instructed to correct.[17]

The Spanish system has also been much more explicit in limiting the jury's role in determining "guilt" by requiring findings on the commission of certain

[14] See S. C. Thaman. "Spain Returns to Trial by Jury" (1998) 21 *Hastings International and Comparative Law Review* for a detailed study of the Spanish question lists.

[15] This was the opinion of the President of Sevilla Provincial Court. See M. Carmona Ruano and J. M. De Paúl, "Informe sobre Las Causas Juzgadas por el Tribunal de Jurado" (1997, Sevilla) (unpublished manuscript on file with the author), 68–69.

[16] For discussions of pre-revolutionary Russian jury nullification in the context of the new statute, see S. C. Thaman, *supra* note 11, 114–115, *supra* note 13, 9. In a case from Ivanovo Region a jury affirmatively answered the *corpus delicti* and authorship questions, that the victim had been unlawfully stabbed to death, that his wife, the defendant, had perpetrated the killing, and that no legal excuses or justifications had been proved. Nevertheless, the jury found her "not guilty" of the murder and the Russian Supreme Court upheld the judgment. See S. C. Thaman "Geschworenengerichte in Ost und Recht" (1997) 41 *Recht in Ost und West* 73, 79. In commenting on the court's decision of 6 July 1995 affirming the case, the chief author of the jury law noted that one interpretation of "not guilty" under the Russian law is that "the act contains all the elements of the crime in its totality, but the jury, for reasons known to them, deprived the state of the right to achieve a conviction and apply the sanctions of the special part of the Penal Code". See S. A. Pashin, "Postanovka voprosov pered kollegiey prisiazhnykh zasedateley", in S. A. Pashin and L. M. Karnozova (eds.), *Sostiazatel'noe pravosudie* (1996, Moscow), Vol. 1, 90–91.

[17] § 63(1)(d) LOTJ. This happened in the second Málaga trial, a prosecution for trespass and threats, in which the jury found the principal fact questions to be proved, yet returned a verdict of "not guilty". The judge returned the verdict for "correction", explaining its supposed contradictoriness and the jury blithely found the principal fact questions (as to *corpus delicti* and authorship) to be "not proved" and revalidated its acquittal. See Carmona Ruano and De Paúl, *supra* note 15, 7.

"criminal acts" rather than findings of "crimes" in the juridical sense.[18] But the stricter "anti-nullification" approach of the Spanish legislature did not prevent the stunning acquittal of Mikel Otegi of the murder of two policemen in the Basque country in 1997. The jury was able to acquit the young man, despite clear evidence of an intentional double murder, because questions of *mens rea*, including questions of diminished capacity and insanity as a complete excuse for criminal conduct, are considered to be "questions of fact" for the jury to decide. Spain also permits a complete excuse on grounds of temporary insanity, even when caused by voluntary intoxication or other causes.[19] In Russia, the judge must discharge the jury and initiate psychiatric commitment procedures if evidence of mental illness eliminating criminal responsibility arises.[20] Up until the promulgation of a new penal code in 1996, the question of voluntary intoxication, a veritable national pastime in Russia, was only presented to the jury in the form of a circumstance which aggravates the level of guilt of the defendant. Despite this statutory aggravating factor, which also existed before the Russian Revolution, Russian jurors have tended to mitigate the responsibility of intoxicated defendants and recommend leniency.[21]

As in the first Russian trials, some Spanish judges have limited the propositions in the verdict form to those absolutely necessary to prove the elements of the offences and the mitigating or aggravating circumstances. For example, only nine and six propositions, respectively, were submitted to the juries in the first

[18] § 60 (1) LOTJ originally called for a finding of guilt or lack therof as to each "charged crime" (*delicto 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 finding of guilt in the strict meaning of the word and is actually superfluous in the technical sense. See J. Gómez Colomer, *El proceso penal especial ante el Tribunal del Jurado* (1996, Madrid), 122.

[19] In the Otegi Case the bulk of the defence's 64 questions related to the defendant's drinking the evening and morning before the killings and his prior encounters with the Basque police. The jury affirmed by majority vote the following questions: (Q69) Mr. Mikel Mirena Otegi Unanue has a personality with a propensity or predisposition to experience feelings of harrassment and persecution on the part of the *Ertzaintza*; (Q70) In Mr. Mikel Mirena Otegi Unanue there exists a pre-existing pathological condition or an ailment or an underlying psychic disturbance in connection with the aforementioned sense of harrassment and persecution by the *Ertzaintza*, which he experienced in extreme ways intolerable for his personality; (Q76) Mikel Mirena Otegi Unanue consumed an excessive quantity of alcoholic beverages between the afternoon and evening of 9 and 10 December 1995, until he achieved a state of inebriation; (Q77). The conjunction of all of the facts laid out in numbers 69 through 76 of Part C, or, in the alternative, of those which have been declared proved, had as a result that in the moment of firing the weapon Mr. Mikel Mirena Otegi Unanue was absolutely not in control of his actions. See Thaman, *supra* note 14 (citing Verdict Form from the Otegi cases (San Sebastián Provincial Court), Verdict 3 July 1997).

[20] See Thaman, *supra* note 11, 127.

[21] Eighty-nine defendants in 76 of the 109 first Russian trials to go to verdict were charged with the aggravating factor of having been drunk at the time of commission of the crime. Forty seven were recommended for leniency by the jury. Pre-revolutionary observers of jury trials in Russia also found that the "views of jurors about the condition of drunkenness at the moment of the commission of a crime are diametrically opposed to those provisions of the law dealing with this subject." See N. P. Timofeev, *Sud prisiazhnykh v. Rossii. Subebnye ocherki* (1881, Moscow), 381. Compare Bobrishchev-Pushkin, *Empiricheskie zakony deiatel'nosti Russkogo suda prisiazhnykh* (1896, Moscow), 355–356.

murder cases in Palencia and Granada. Other judges have had the jurors affirm or reject virtually every assertion contained in the prosecution and defence pleadings. For example, the 54 propositions submitted to the first Valladolid jury included several that had no relation to important elements of the offence and this elicited criticism among jurists and the press following the trial.[22] Interviews of jurors in the notorious Otegi case in San Sebastián revealed that they had great trouble understanding the 95 questions submitted to them.[23]

Following the preparation of the verdict form, the arguments of the parties and the last word of the defendant, the presiding judge in Spain instructs the jury "in a restrained manner and in a form the jury can understand" as to its functions, the content of the verdict form, the nature of the facts under discussion (those that determine the circumstances constitutive of the crime with which the defendants have been charged and those which refer to allegations of exclusion and modification of guilt), the rules of deliberation and voting, and the form of the final verdict. The judge must be careful not to direct the jury on the strength of the evidence and must instruct it not to consider any evidence declared to be inadmissible during the trial and to resolve all doubts in favour of the defendant.[24] Spanish judges have differing views on whether they should instruct juries on the legal elements of the charged crimes, inasmuch as the law expressly restricts the jury to deciding solely whether the charged acts were committed.[25] Even though the Supreme Court has in fact reduced Russian jurors to judges of "naked acts", and does not even let them decide questions of *mens rea*, the judge still gives a complete instruction on the substantive law during his or her summation. The judge is also required to summarise the evidence and the positions of the parties,[26] a practice that was adhered to in Spain from 1888 until 1931, when it was repealed because the summation was seen to be tantamount to an ultimate accusation by the supposedly neutral bench at the end of the trial when no response was afforded to the defence.[27] Several convictions have been reversed by the Russian Supreme Court because of the one-sidedness of the

[22] The judge admitted the difficulty he had with the verdict in a newspaper interview. J. C. León, "El jurado nos libera de una responsabilidad" (Interview with José Miñambres Flórez.), *El Norte de Castillo*, 16 June 1996, 10–11.

[23] C. Gurruchaga and J. C. Escudier, "La caótica actuación del jurado del 'caso Otegi'", *El Mundo*, 22 April 1997, 6–7.

[24] § 54 LOTJ.

[25] At the first Granada and Córdoba murder trials the author observed that trial judges scarcely mentioned the elements of the charged crimes (5–9 May 1997). Trial judges in Lugo, Sevilla and Girona agreed with this interpretation of the law. See Thaman, *supra* note 14, 354 (citing interviews with Edgar Armando Fernández Cloos, 10 June 1997, in Lugo Provincial Court, with Antonio Gil Merino, 16 June 1997, in Sevilla Provincial Court, and Fernando Lacaba Sánchez, 26 June 1997, in Girona Provincial Court). On the other hand, the judge in the first trial in Vitoria explained in the judgment how difficult it was to explain to the jury the difference between intentional murder, reckless murder, homicide with gross and simple negligence, and accident. See *ibid.*, 355 (citing judgment in the case of *Rey* (Vitoria Provincial Court), trial 5.5–5.9.97 (on file with author)).

[26] § 451 UPK. See Thaman, *supra* note 16, 207.

[27] F. Mares Roger and J. Mora Alarcón, *Comentarios a la Ley del Jurado* (1996, Valencia), 359.

presiding judge's summation, or because he or she neglected to mention some of the evidence.[28]

DELIBERATION, VERDICT AND JUDGMENT

Jury deliberations in both Russia and Spain are secret. The presiding judge is not allowed to participate and jurors may not reveal any information about their deliberations.[29] In Spain, seven votes out of nine are required to prove any propositions unfavourable to the defendant, whereas only five votes are needed to prove any proposition favourable 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.[30] Similarly, "guilty" verdicts require seven votes while "not guilty" verdicts and recommendations of suspension of sentence and clemency require only five.[31] The jury can request further instructions or clarification as to the verdict form, and if the jury has not voted after two days of deliberations, the judge can call the jurors into court to determine whether they have had any problems understanding the verdict form.[32]

While the detailed special verdicts used in Spanish and Russian cases certainly enable the sentencing and appellate judges to divine the reasoning process of the jury, Spain has gone one step further and required that the jury give a succinct rationale for its verdict, indicating the evidence upon which it was based and the reasons for finding a particular proposition proved or not proved.[33] Other than a non-binding statement by the jury provided for in the Austrian Code of Criminal Procedure,[34] this is the clearest attempt yet by a legislature to require that juries gives reasons for their verdicts.

[28] A. Shurygin, "Zashchita v sudoproizvodstve s uchastiem kollegii prisiazhnykh zasedateley" (1997) 9 *Rossiyskaia Yustitsiia* 5, 7. Counsel must object on the record to a lack of objectivity in the summation to preserve the issue on appeal. See § 451 UPK. This objection should be made in the presence of the jury, before they retire to deliberate, so as to give the judge a chance to correct any possible error. See *ibid.*

[29] §§ 55,56 LOTJ; 452 UPK.

[30] § 59 LOTJ.

[31] § 60 LOTJ. A guilty verdict in Russia requires a simple majority of seven of the 12 jurors' votes, whereas six votes are sufficient for an acquittal or a finding favourable to the defendant. See § 454 UPK.

[32] § 57 LOTJ. Russian jurors must strive for unanimity during the first three hours of deliberation, whereafter they may seek to reach a majority decision. See § 453 UPK. Juries seldom deliberate more than the three minimal hours.

[33] § 61.1 LOTJ. This innovation was deemed necessary to comport with art. 120.3 of the Spanish Constitution and with the presumption of innocence guaranteed by art. 24.2 of the Spanish Constitution and art. 6.2 of the European Convention on Human Rights. See V. Gimeno Sendra, *Ley Orgánica del Tribunal del Jurado. Comentarios práticos al nuevo proceso penal ante el Tribunal del Jurado* (1996, Madrid), 320.

[34] § 331(e) Austrian StPO. It is a contested point, however, whether the reasons stated in the "Niederschrift" may be used as a basis for attacking the factual findings of the jury. See E. Steininger,

While some juries have given fairly elaborate explanations of why they found a charge to be proven (for example, by explaining why they believed a witness, or did not believe the defendant, or by pointing to expert testimony), many juries have just provided stock phrases such as "testimony of witnesses and experts," or "evidence, experts, defendant's testimony".[35] The ultimate minimalist variant was that of the jury in the second Málaga case, which just wrote: "witnesses".[36]

Prior to the Otegi case, some commentators opined that requiring juries to give reasons for acquittals would violate the presumption of innocence and the principle of "free evaluation of the evidence", since an appellate court, when reviewing a jury's verdict, need only affirm that objective elements of proof exist which could have permitted the jury to reach a certain conclusion.[37] Indeed, many of the acquittal verdicts were phrased in terms of doubt as to the sufficiency of the proof.[38] On 27 June 1997, however, the Superior Court of Justice of the Basque Country reversed the Otegi acquittal on the ground that the jury had given insufficient reasons by basing these on little more than bald assertions of reasonable doubt. After lamenting that the jury had not given even a minimal explanation for its answers to the 91 factual questions, and provided only a "pseudo-motivation or substitute global motivation", the Court expounded:

> "The invocation of doubt and the references to that which the law requires – with which the jury pretends to support its answers, which they forgot to give reasons for before – reveal that the jury, camouflaging with perplexity a psychological state which has nothing to do with serious hesitation, invents the existence of a doubt which it gratuitously prejudges, in order to use the prop of Article 54(3) of the law. Armed with the protection of this precept, the jury proclaims that it is plagued by doubt, that it finds it impossible to dissipate it and that, because of it, it is resolving the issue in the sense most favourable to the defendant. It does not describe from where the doubt arose, nor the magnitude thereof, nor is any notion apparent of the force employed to overcome the doubt or clear up the difficulties to which it has given rise."[39]

Finally, the jury may request that the secretary of the court help them in drafting its verdict.[40] Some commentators have seen this as the first step towards, or a subliminal recognition of, the superiority of the mixed court with professional

"Die Anfechtung mangelhafter Tatsachenfeststellungen im Geschworenenverfahren" (1992) 47 *Österreichische Juristenzeitung* 687, 688–691.

[35] Carmona Ruano and DePaúl, *supra* note 15, 54 list a number of such "reasons," categorising them as "minimal."

[36] *Ibid.*, 26–27.

[37] See J. A. Díaz Cabiale, "Prueba, Veredicto, Deliberación y Sentencia", in A. Pérez-Cruz Martín, *Comentarios*, *supra* note 2, 290 and Mares Roger and Mora Alarcon, *supra* note 27, 398.

[38] An example would be the acquittal of the defendant in the first Ávila trial for failing to render aid after a traffic accident: "After we heard all the testimony of witnesses and experts, the evidence was not sufficient to declare the defendant guilty." See Thaman, *supra* note 14 (citing Verdict Form from the case of Barrero (Ávila Provincial Court), 10 July 1996).

[39] Decision of the Tribunal Superior de Justicia del País Vasco (6.27.97), quoted in A. Intxausti, "Otegi volverá a ser juzgado por matar a dos 'ertzainas'", *El País*, 28 June 1997, 13.

[40] § 61.2 LOTJ.

judges and lay assessors.[41] Indeed, in a few of the first trials the legally trained secretary answered substantive legal questions posed by the jury.[42]

After receiving the verdict from the jury, the judge must review the verdict for defects and ask the jury to make any necessary corrections. In the Spanish system, a judge may dissolve the jury and set the case for trial before a new jury if the jury fails to correct inaccuracies after being recalled three times. If the new 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.[43]

Following a guilty verdict in both countries, the judge must make a judgment which is based on the facts found to be true by the jury. This judgment juridically endorses the verdict before the imposition of sentence.[44] Spanish judges have expressed frustration at having to justify in their judgments jury verdicts with which they do not agree, a situation which could be faced by judges in mixed courts, in the unlikely event that they were outvoted by the lay assessors. In a 26-page judgment the judge in the thirteenth Barcelona trial expressed his disagreement with a jury's finding that the defendant did not intend to kill when he stabbed his female companion seven times in areas of her body containing vital organs. As the judge put it, "In the mind of the jurist a certain pain emerges, from the point of view of judicial technique", when one must justify a judgment when the facts "collide with the interpretative criteria which jurisprudence utilises to determine the intentionality of an agent".[45] The judge in the second Córdoba trial criticised a jury's verdict which compelled him to sentence a man to 30 years in prison as "the sentiments of the common people, struggling in the nadir of a long process of decadence", and added:

> "There are times when the soul is buffeted about by anxiety when the knowledge of ancestral criteria of the technical application of the law is brought down in an instant by simple inclinations of personal sensibility, replete with honesty, but nevertheless deprived of even the simplest sense of legal culture."[46]

[41] Gomez Colomer, *Proceso*, *supra* note 18, 124.

[42] The secretary in the second Oviedo trial told the author that she not only explained to the jury the effect of recommendations of clemency or a suspended sentence, but also the difference between a complete and partial excuse from criminal responsibility due to psychic disturbance. See Thaman, *supra* note 14 (citing interview with Evelia Alonso Crespo, in Oviedo Provincial Court, 9 June 1997).

[43] § 65 LOTJ. The Russian judge may also return the jury to the jury room to correct contradictions in their verdict. See § 456 UPK.

[44] § 70 LOTJ; § 459 UPK. Judgments of guilt and acquittal may be appealed in both Russia and Spain. Spain provides for a first appeal, in which new evidence may be adduced, and an appeal in cassation from which there is a further appeal to the Supreme Court of Spain. See §§ 846 (a)–(c) of the Ley de Enjuiciamiento Criminal. Russia provides for one level of appeal in cassation directly to the Russian Supreme Court. See §§ 463–464 UPK.

[45] Judgment, Ortega Case (Barcelona Provincial Court), tried 5.20–5.23.97, cited in F. Peirón, "Un juez critica el veredicto de un jurado que sólo consideró imprudencia matar a una mujer a puñaladas", *El País*, 31 May 1997.

[46] "Juez firma sentencia de un jurado por imperativo legal", *Ideal*, 8 June 1997, 1.