



## THE RETURN OF THE JURY IN SPAIN

by Dr. Gustavo López Muñoz y Larraz

Doctor and Licenciado of Law by the University of Madrid

Founder of the Spanish "Association For Trial by Jury" (Asociación pro-Jurado) & Pres. 1982-1996

International Fellow IATL, 1977.

[www.lawyerspain.net](http://www.lawyerspain.net)

**ABSTRACT:** The new Spanish Jury Law (**Ley del Tribunal del Jurado**) foreseeing by article 125 of the democratic Constitution of 6 December 1978 was finally **enacted by Organic Law 5/1995 of 22 May** (partially amended by Organic Law 8/1995 of 16 November), after being constantly urged by the Spanish "*Association For Trial by Jury*" (**Asociación pro-Jurado**), with the backing of the *Basque Parliamentary Group* in the Spanish Congress.

The history of the Spanish Jury starts with the **liberal Constitution of Cadiz in 1812** under the influence of the French Constitution of Bayona of 1808, being present during the alternative periods of liberty while completely eliminated or its role extremely restricted in the many periods of regression, as it happened during **General Franco's dictatorship**, when the Jury was "*suspended*" by military Decree from 1939 to its rebirth in 1995 under the Socialist Government of Felipe González.

### COMPARATIVE SUMMARY BETWEEN USA AND SPANISH JURY

- In SPAIN the Jury only affects CRIMINAL matters and only those very limited crimes provided by the Spanish Criminal Code, such as: (1) *murders, excluding intended murders or due to imprudence*; (2) *crimes committed by public officers in the course of their duties*; (3) *felonies against environment and arson*; (4) *embezzlement of public funds*; (5) *omission of the duty to render aid*; (6) *crimes against liberty and security*.

- In SPAIN, defendant cannot ELECT between Judge and Jury. If the case is a crime that belongs to the jurisdiction of the Jury, will be remanded and judged by Jury trial only, with no other alternative. Defendant cannot wave trial by Jury.
- The main discussion during the enactment of the Jury Law was whether it was better to follow the *Anglo-American* or the *European-Germanic* system, understanding that the first one was based in the separation from Judge and Jury (*Facts and Law*), having a separated *verdict and sentence*; while the Germanic was *mixed*, with only one body of deliberation integrated both by Judges and laypeople (generally in the proportion of 3 Judges and 9 laypeople), discussing all together law and facts, ruling the sentence with no separated verdict.

The *Anglo-American system*, strongly defended by the "*Asociación of Trial by Jury*" (*Asociación pro-Jurado*), with the backing of the Press (*El Pais, Diario 16, TV, radio, etc.*), was victorious against the constant pressure of Judges, Prosecutors and Professors of Law, mostly favorable to the *mixed system*, backed by two main allegations: (1) It was the *historic Spanish Jury system* since 1812 and (2) Judges would have an undermining superiority over laypeople, as experienced in Germany and many other European countries under the *mixed Jury system*. There was also an additional "*marketing*" argument that proved very successful: the *Anglo-American system* was the "*pure system*" while the *Germanic* was the "*impure*"... due to the unnatural mixture of Judges and laypeople...

- The Spanish Jury is composed by 9 Jurors and 2 alternates, presided by a single professional Judge.
- The Spanish Jury voting rule is not by *unanimity* and above all has been strongly criticized for being set as 7 votes to guilt and only 5 votes to acquit, even though the "*presumption of innocence*" plus the "*burden of proof*" are by themselves sufficient assistance to acquit...without the need of said 7 to 5 voting margin...that sometimes brings about *surprising* verdicts...allowing heavy criticism by many adversaries to the Jury.
- To be a Juror in Spain you have to be a Spanish citizen over 18 years of age, who can read and write and resides in the jurisdiction of the Court and in full exercise of all rights, not suffering any disability that prevents the duty. Convicted criminals cannot serve as Jurors. Member of the judiciary, prosecutors and practicing lawyers and a large number of public officers cannot serve as Jurors either. The prospective jurors names come from the voting list of General Elections.

- The “*voir dire*” in the Spanish Jury is much more limited than in the USA. At least there should be present in Court on trial date 20 prospective jurors from the original list of 36. The *voire dire* is conducted in close session. Defense lawyers and Prosecutors have 4 *peremptory challenges* to be allotted among each group. All parties can freely and directly ask relevant questions to the prospective jurors before challenge.
- The Spanish verdict is much more complex and articulated than the USA due to the lack of trust by the drafter of the Law on the capacity of the Jurors, plus the explicit requirement of the Spanish Constitution (article 120,3º) regarding the high degree of reasoning (“*motivación*”) required to rule judgments. In fact, the level of reasoning by Jurors is somehow similar to the one required to professional Judges, so much so that many or verdicts reversals are due to lack of the required reasoning...to the point that the Supreme Court has been obliged to clarify the standard of reasoning expected from Jurors, regardless of the fact that the presiding professional Judge, in his sentence, can further explain the reasoning according to Law within the scope of the verdict.
- The level of “*Instructions*” that the Presiding Judge gives to Jurors in Spain is extremely constraint and insufficient to the complexity of the task required. Nevertheless, in the course of deliberation, the Jury can consult doubts to the Trial Judge with the participation of all parties. Judges in Spain have had very limited experience conducting trials by Jury and moreover have not been specifically instructed to that effect and even, some of them, dislike to preside Jurys, having being oppose to the rebirth of the institution.
- The Spanish Jurors, in close chambers, and without any outside contact, must answer in a clear and univocal form all and every question raised in writing by the trial Judge in a *List*, with separated and numbered paragraphs (*Objeto del Veredicto*) in accordance to questions previously formulated by the parties and those other considered pertinent and required by the presiding Judge. It is not enough to the Spanish Jury to answer *guilty/not guilty*. Firstly the Jury has to answer questions raised by the Judge regarding the facts as *proved or not proved* and vote each and every question, even underlining whether they are against or favorable to the defendant and, moreover to increase this complexity, one of the facts should be named by the Judge as “*Principal Fact*” (*hecho principal*). Finally, should the defendant is considered *guilty* the Jury is allowed to recommend to the Judge to suspend sentence or even request clemency (“*indulto*”) from the Government.

- Finally, the role of the Trial Judge in the Spanish Jury is similar to its role in the *Anglo-American system*: The application of the Law and Jurisprudence to the verdict rendered.
- For further knowledge of the Spanish Jury, I strongly recommend to refer to the extremely sound article written by Prof. Stephen C. THAMAN, at *Hastings International and Comparative Law Review*, Volume 21, number 2, University of California. (Prof Thaman email: [thamansc@slu.edu](mailto:thamansc@slu.edu))

IATL Madrid Conference, 26<sup>th</sup> October 2016

