

TOWARDS A MUTATION OF THE LANGUAGE OF CRIMINAL LAW IN
FRENCH AND BRITISH COURTS? THE INFLUENCE OF THE PART PLAYED
BY JURIES ON JUDGES' DISCOURSE

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Until recently juries played an essential part in most British criminal trials save for those of non-indictable offences. Conversely in France criminal trials have until now been run by judges only except for the most important offences called "crimes". This is due to evolve in the near future. Since 2007 the Crown Court has been able to hold a criminal trial without a jury. The first Crown Court trial without a jury took place in 2009. On the contrary French Parliament prompted by former President Sarkozy passed a law in August 2011 (which came into force in January 2012) introducing juries in most criminal trials. These countries have opposite legal systems (a common law one for Britain and a civil law one for France) and different procedural rules but they share the same constitutional values (at national and European levels) such as everyone's right to a fair trial. Today both countries are advocating major changes to the role played by citizens (as judges of fact) in criminal trials. British citizens who were likely to be called as jurors now have a lesser say than their French counterparts who will be more involved in criminal litigation. Behind the political, sociological, human and financial reasons which may underpin these major changes, we will consider to what extent and how the language of criminal law has been, and will continue being affected by the evolving role given to the People. Through the consideration of a number of statutory or judicial documents, we will try to determine the message which the British and French governments are trying to convey to their citizens whether they are potential jurors or alleged offenders and more generally how these changes may affect people's perception of Justice.

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I. INTRODUCTION

The role played by jurors in criminal trials is the exercise of a democratic right allowing the People to take part in the judicial process at least for the most serious offenses. If civil jury trials disappeared in England and Wales with the implementation of the Juries Act 1974 and if jurors' role there as well as in France has decreased over the years mostly through financial constraints, the right of

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citizens to “have a say” in the way justice is rendered is still taken for granted. This does not mean that the perception of jury trials is always positive. For late 20th century British barrister turned judge Lord Devlin the jury system is “the lamp that shows that freedom lives”.¹

Conversely American Mark Twain regarded criminal jury trials as a “sorrowful farce”:

Alfred the Great when he invented trial by jury and knew that he had admirably framed it to secure justice in his age of the world, was not aware that in the nineteenth century the condition of things would be so entirely changed that [...] it would prove the most ingenious and infallible agency for defeating justice that human wisdom could contrive.²

Many authors have written about justice and juries including 19th century writers English Charles Dickens or French Honoré de Balzac, Emile Zola or Victor Hugo, the latter three even getting personally involved in the much publicised defense of Sébastien-Benoît Peytel, Alfred Dreyfus and Charles Hugo. If Balzac often viewed jurors as being “ignorant and naïve”³, Zola praised the jury in his famous diatrib *J'accuse!*: “this is the law of the chosen people that I wished for, which I highly respect, as a good citizen [...]”.⁴

This shows that the maxim “great minds think alike” does not apply to France's and Britain's perception of jury trials. Their respective governments have both recently passed opposite reforms, England and Wales decreasing the scope of its criminal jury trials, France increasing it. Part 7 of sections 44 to 49 of the Criminal Justice Act (CJA) 2003 which came into force on 24th July 2006 makes provision for non-jury Crown Court trials where there is “danger of jury tampering or where jury tampering has taken place”.⁵ This is reminiscent of the no-jury Diplock courts which existed in Northern

¹ “Freedom's lamp dims”. *The Economist* 23 June 2005.

² Twain, Mark. *Roughing it*. Stilwell: Digiread.com. 2007 [1870-1871]: 145-146.

³ Baudouin, Patricia. 2003. “Justice, Presse et Politique: l'engagement de Balzac dans l'affaire Peytel”. *Revue d'histoire du XIX^{ème} siècle* 26/27 (2003): 336, 331-348.

⁴ Zola, Emile. *J'accuse! La Vérité en Marche*. Ed. Jean Guillemin. Paris: Editions Complexe, 1988 [1898]: 119.

⁵ Web. 20 Dec. 2011. <<http://www.legislation.gov.uk/ukpga/2003/44/section/44>>.

Ireland from 1973 to 2007. In France jury trials were previously only available for *crimes* before the *cour d'assises*. Pursuant to a statute n° 2011-939 passed on the 10th August 2011 relating to the participation of citizens in the operation of criminal justice and the trial of minors⁶, two citizen-assessors have since January 2012 been introduced in the *tribunaux correctionnels* of the Dijon and Toulouse jurisdictions (in charge of *délits*) before the reform is extended to the rest of France in January 2014.⁷

The aim of criminal law is to defend the interests of society as a whole, achieve punishment, deterrence, prevention and rehabilitation of the accused. Our aim is not to examine the legal role of jurors but to determine to what extent and how these lay citizens who are in charge of judging their peers express themselves in French courts and in the courts of England and Wales, whether they exercise any influence on the judicial process and to what extent the language of Justice might be affected by the recent reforms.

II. A LONG LASTING JURY CULTURE

If jury trials are part of the criminal legal culture on both sides of the Channel, the French legal system is a civil law one as opposed to the common law system which applies in England and Wales. This reflects on the place given to jurors in those countries and the scope of jury trials.

A. *Respective criminal legal cultures*

Common law developed in England from the 11th century. Jury trials set up by Alfred the Great already existed. He encouraged education and developed his country's legal system. He is seen as the inventor of the old "writ" system by which a legal claim can be issued out of court and which survived – albeit in a different form – until the implementation of the Civil Procedure Rules in 1999.⁸ For Tocqueville: "the English [...] have boasted of the privilege of trial by jury. They have established

⁶ Web. 22 Dec. 2011. <http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=DB21FBB8711B5AC984427C64AD8CD912.tpdjo04v_1?cidTexte=JORFTEXT000024456769&dateTexte=&oldAction=rechJO&categorieLien=id>.

⁷ Web. 21 Dec. 2011. <<http://www.service-public.fr/actualites/002010.html>>.

⁸ Gadbin-George, Geraldine. "The Woolf reform of civil procedure: a possible end to legalese?". *LSP Journal* 1/2 (2010): 45, 41-49.

it”.⁹ Women's first appearance as jurors – incidentally before Charles Dickens' son – was in January 1921 at the “Central Criminal Court” and this was deemed “an event of considerable importance”.¹⁰

The French civil legal system finds its origins in Roman law. Trials by jury appeared during the French Revolution in 1791. Montesquieu commented that “The judicial power [...] must [...] be exercised by persons taken from the body of the People [...]”.¹¹ And “this idea became that of the nation when the 1789 Revolution started”.¹²

It is usually said that a common law system relies on caselaw as opposed to a civil law system in which the legislator plays a major part. With time this simplistic description has been blurred. More legislation was passed in Britain and French courts had to generate caselaw in order to interpret statutes passed by Parliament. Both legal systems “certainly defy oversimplification”.¹³ However there remain two major differences between common law and civil law systems which are the way judgments are drafted and the procedure applicable in court.

Common law judgments “extensively expose the facts [...], and decide (if not create) the specific legal rule relevant to the present facts. Civil law decisions first identify the legal principles that might be relevant, then verify if the facts support their application [...]”.¹⁴ American Supreme Court judge Ruth Ginsburg reminds us that in civil law countries, no dissenting opinions are expressed in the court judgment:

In the civil-law tradition [...] courts [...] issue a collective judgment, cast in stylized, impersonal language. [...] Disagreement [...] is not disclosed.

⁹ Tocqueville, Alexis de. *Democracy in America*. Ed. Bruce Frohnen. Washington: Regnery Publishing, 2002 [London: Longmans, Green & co. 1889]: 224.

¹⁰ See article from the Guardian archives, “The woman juror's new sphere”, first published on 12 Jan. 1921 and re-published on 12 Jan. 2011 on *The Guardian* website. Web. 10 Dec. 2011. <<http://www.guardian.co.uk/theguardian/2011/jan/12/archive-the-woman-jurors-new-sphere-1921>>.

¹¹ Montesquieu, Charles de Secondat. *De l'esprit des lois. Livre XI. Chapitre 6. Oeuvres complètes de Montesquieu*. John Boyd Thacher collection, Library of Congress, 1835: 265.

¹² Pouyer, Achille. *Le jury en France et en Angleterre*. Rouen: Lecerf, 1869: 18.

¹³ Barth, Stephen C. & David K. Hayes. “Hospitality law: managing legal issues in the hospitality industry”. Ed. Steven Berger. *Fundamental of Health Care Financial Management*. Hoboken: John Wiley & sons, 2009: 4.

¹⁴ Tetley, William. “Mixed Jurisdictions: common law vs. civil law (codified and uncoded)”. *Uniform L. Rev. (N.S.)* 3 (1999): 603, 591-619.

The British common-law tradition lies at the opposite pole. [...] the judges hearing the case composed their own individual opinions which, taken together, revealed the court's disposition.¹⁵

For Letsas: "Separate opinions in the common law allow individual judges publicly to develop, much like an academic would, their own legal philosophy [...]. In the tradition of civil law by contrast, judges remain largely unknown to the public and to the legal profession [...]"¹⁶

Another difference is that England and Wales have an adversarial system. The parties are responsible for presenting evidence to a neutral judge or jury. Conversely the system in France is more inquisitorial. It is the judge's (or the judge's and jury's when there is a jury trial) responsibility to find out the truth by gathering evidence for or against the accused. There is no guilty plea in inquisitorial jurisdictions.¹⁷ The adversarial system revolves around "reliance on oral testimony, a dialectical paradigm for truth searching, decision making by lay jurors [...]"¹⁸

These discrepancies between the two systems are important: the French system comes across as more secretive than the English and Welsh system. Although proponents of the plain language movement like Tiersma remind us that "legalese does not go over well with a jury"¹⁹ experience shows that reading and understanding a common law judgment is easier to a layman than a civil law one.

B. *The place and role of jurors*

Before which courts are juries available? In England and Wales there are three types of offenses "of increasing seriousness: summary, triable-either-way and

¹⁵ Ginsburg, Ruth Bader. "The Role of Dissenting Opinions". *Minnesota Law Review* 95 (January 2010): 2, 1-8.

¹⁶ Letsas, George. *Judge Rozakis's Separate Opinions and the Strasbourg Dilemma*. Presentation made at the Faculty of Laws of University College London on 25 June 2011: 1-2, 1-16.

¹⁷ See page 77 of the chapter "Advantages and Disadvantages of the Adversarial System in Criminal Proceedings" of the report of the Law Reform Commission of Western Australia. Web. 12 Jan. 2012. <<http://www.lrc.justice.wa.gov.au/2publications/reports/P92-CJS/consults/1-3crimadvers.pdf>>.

¹⁸ Strier, Franklin. "What Can the American Adversary System Learn from an Inquisitorial System of Justice?". *Judicature* 76 (1992-1993): 109, 109-120.

¹⁹ Tiersma, Peter M.. *Legal Language*. Chicago: the University of Chicago Press, 2000: 5.

indictable”.²⁰ Summary offences are tried by the magistrates courts where no jury is available. According to the Lord Chief Justice “over 95% of criminal cases are disposed of” in the Magistrates' Courts²¹. This means that only 5% of criminal cases will be tried by other courts with or without a jury.

Jury trials in England and Wales are only available before the Crown Court, either for indictable offenses if the accused pleads not guilty (there is no need for a jury if the facts are admitted) or triable-either-way offences if the defendant gives up his right to a non-jury trial in the Magistrates' Court. The jury is composed of twelve jurors selected from a venire. By taking the oath these jurors undertake to give a fair verdict. After deliberating over the evidence the foreman acting on behalf of the whole jury delivers the verdict i.e. says whether the accused is believed, beyond reasonable doubt, to be guilty or not of the offences with which he was charged. If so the (single) professional judge decides on the sentence. The jury is usually considered as the judge of fact as opposed to the professional judge who is the judge of law.

Section 44 (4 & 5) of the Criminal Justice Act 2003 provides that the court will not hold a jury trial when there is “evidence of a real and present danger” of jury tampering. Relevant examples are set out in section 44 (6) such as “a case where jury tampering has taken place in previous criminal proceedings involving the defendant or any of the defendants”.²²

In France and up to the August 2011 reform jury trials were limited to the most serious offences (*crimes*) similar to indictable offences. These *crimes* are tried by the *cour d'assises*. For Donovan the recent reduction of criminal jury trials could be due to the phenomenon of *correctionalisation*: “i.e., transferring cases that would normally be tried by the *cour d'assises* [...] to the *tribunaux correctionnels* [...] which use

²⁰ Riley, David & Julie Vennard. *Triable-either-way cases: Crown Court or magistrates court? Home Office Research Study n°98*. London: HMSO, 1988.

²¹ Lord Chief Justice. *Protocol for the control and management of heavy fraud and complex criminal cases: Transcript of proceedings: 22 March 2005*. 2005, 3: 1-7. Web. 23 Dec. 2011. <http://www.judiciary.gov.uk/Resources/JCO/Documents/Protocols/control_and_management_of_heavy_fraud_and_other_complex_criminal_cases_transcript.pdf>.

²² See the September 2010 update of the “Crown Prosecution Service Guide :CPS guide on non-jury trials”. Web. 5 Dec. 2011. <http://www.cps.gov.uk/legal/l_to_o/non_jury_trials/>.

[...] panels of judges only”.²³ *Tribunaux correctionnels* and *tribunaux de police* respectively know of *délits* (second most serious category of offences) and *contraventions* (i.e. the least serious offences).

A *cour d'assises* is currently composed of three professional judges and nine jurors in first instance or twelve on appeal.²⁴ In view of the evidence adduced at trial the jurors decide in their “intimate conviction” whether the accused is guilty or not. If so, both jurors and professional judges will decide on sentencing. Unlike the English and Welsh system there is no distinction “between fact and law”.²⁵

The French August 2011 reform aims at bringing “citizens and Justice closer” in *tribunaux correctionnels*.²⁶ Two citizens now form an integral part of the *tribunal correctionnel* for the trial of its usual offences. The reform also affects the *cour d'assises*. For crimes punishable by a maximum of fifteen or twenty years imprisonment the former nine jurors are now replaced by two citizen-assessors. Generally speaking the number of jurors has been reduced from nine to six in first instance and from twelve to nine on appeal²⁷.

When a jury is empanelled jurors are informed that their freedom of speech is restrained. In England and Wales once trial starts a juror:

should not discuss the trial on websites like Facebook or Twitter [...] (nor) with anyone, except the other jury members in the jury deliberation room. Even when the trial's over you must not discuss what went on in the deliberation room with anyone, even with family members. If you do, you are in 'contempt of court' and can be fined [...].²⁸

Similar provisions are set out in article 306 of the French Criminal Procedure Code whereby jurors must undertake to the presiding judge “not to communicate

²³ Donovan, James M. “Magistrates and Juries in France, 1791-1952”. *French Historical Studies* 22/3 (summer 1999): 379, 379-420.

²⁴ Web. 30 Dec. 2011. <<http://www.justice.gouv.fr/organisation-de-la-justice-10031/lordre-judiciaire-10033/cour-dassises-12027.html>>.

²⁵ Pradel, Jean. “Le jury en France”. *Revue internationale de droit pénal* 1/2001/72 (2001): 176, 175-179.

²⁶ Web. 30 Nov. 2011. <<http://www.textes.justice.gouv.fr/projets-de-reformes-10179/participation-du-citoyen-a-la-justice-22039.html>>.

²⁷ Web. 30 Dec. 2011. <<http://www.senat.fr/dossier-legislatif/pjl10-438.html>>.

²⁸ See the HMCS website. 30 Nov. 2011. <http://www.direct.gov.uk/en/CrimeJusticeAndTheLaw/Juryservice/DG_196118>.

with anyone until after (their) declaration” and “to keep the secret of the deliberations, even after the end of (their) duties”²⁹. These restrictions on the right of jurors to express themselves are probably justified by the need to ensure a fair trial to the accused. But is that the only reason for it? We will show that this is probably not the case.

III. THE LANGUAGE OF THE PEOPLE

Jurors who are supposed to be a representative cross-section of the population are lay people who judge one of their peers. It is therefore important to consider the language they use at all stages of trial.

A. *At the selection stage*

This is when jurors are selected and sworn in. The procedure is fairly similar in France and England and Wales. In France both prosecution and defense are entitled to peremptory challenges but the prosecution's right to choose jurors is slightly more limited in England and Wales. Generally speaking the conditions of the selection are fairly secretive in Europe unlike Canada or the United States.

The choice of jurors seems to revolve around various aspects. For American authors Barry Montgomery and Nahrstadt it is necessary to identify how potential jurors: “interact with each other, who [...] they speak to, who does the speaking, is there one or more individuals who seem to be the center of juror attention?”³⁰ Trial lawyers must “focus on a juror's style of speaking, involuntary qualities of speech, and body language used in speaking”³¹ Body language and other non-verbal clues are a major element to be taken into account. United States authors Uehara and Candlin explain that in the Joan Little trial (an African American woman charged with the murder in 1974 of a white prison warden) the selection of the jury involved “employing the services of psychic and body-language experts during the detailed

²⁹Web. 22 Dec. 2011

<http://www.legifrance.gouv.fr/affichCode.do;jsessionid=9DD4828C20D134052F419DCBD82836DA.tpdjo17v_3?idSectionTA=LEGISCTA000006167464&cidTexte=LEGITEXT000006071154&dateTexte=20111107>.

³⁰ Barry Montgomery, C. & Bradley C. Nahrstadt. *Some Thoughts on Jury Selection* (2007): 43, 36-48.

³¹ Waites, Richard. *Courtroom psychology and trial advocacy*. ALM Publishing, 2003: 304.

questioning of prospective jurors [...]”.³² The Quebec Bar organises training courses to help lawyers understand body language³³ with a view to jury selection.

We have no certainty that similar implicit rules apply in France or England and Wales but we believe so as the United States and Quebec legal systems are derived from the European ones. Verbal and body language would enable lawyers to twist the way a jury is formed in order to best fits their client's interests. The jury will no longer represent a cross-section of the community and the democratic judicial process will thus be affected.

B. *During trial*

The role of the jurors is to consider evidence with a view to reaching a decision on guilt (in England and Wales) and also on sentencing if the accused is found guilty (in France). Jurors may be discharged if they have an inappropriate behaviour or if outside pressures are likely to tarnish their judgment. In England and Wales further to the Criminal Evidence Act 2003 Recorder Caroline English discharged a jury in June 2011 at London's Wood Green Crown Court after allegations of jury tampering before giving her own verdict in a benefit fraud case.³⁴ Commenting on one of the jurors' attitude at the criminal trial of Guy Turcotte, Canadian Desjardins explained that one of the jurors was discharged by the judge after he was denounced by his eleven co-jurors who sent the judge a note stating:

that their colleague had indicated more than once that his mind was made up although trial was not yet over. [...] the body language of this juror was enough to raise curiosity as he never once looked at Guy Turcotte whilst he gave evidence – he was looking straight in front of him [...].³⁵

³² Uehara, Randal J.K. & Christopher N. Candlin. “The Structural and discorsal characteristics of *voir dire*”. Ed. Hywel Coleman. *Working with language: a multidisciplinary consideration of language use in work context*. The Hague: Mouton de Gruyter 1989: 472, 453-475.

³³ See for instance the following course advertising on “ Décoder le langage corporel ”. Web. 29 Dec. 2011. <<http://webpro.barreau.qc.ca/decoder-le-langage-corporel.html>>.

³⁴ Casciani, Dominic. “Jury 'tampering trial' challenged”. *The Guardian*. 16 June 2011.

³⁵ Desjardins, Christiane. “Point de rupture”. *La Presse*. 12 May 2011.

On both sides of the Channel jurors are allowed to ask the defendant direct questions at trial but their freedom of expression seems very restricted. In France a 1981 circular from the Ministry of Justice encourages judges to inform jurors that they may:

directly ask questions to the accused [...] but only if they sought prior leave from the president who runs the debates [...]. They must ensure that whilst wording their question they don't divulge their opinion. If they wish or are concerned about a mishap they can pass a note to the president and ask him to word the question on their behalf.³⁶

Things are no different in England and Wales. According to the Cheshire police: “In a Crown Court trial, the jury can write down questions which they pass to the judge. The judge then asks the witness³⁷ or the accused to reply. Jurors are therefore encouraged not to express themselves verbally at trial thus leaving it up to the professional judges to use what seems to be the appropriate words.

C. *After bearing the evidence*

Not much is known about what happens in French, English or Welsh deliberation rooms where discussions are kept strictly secret. Asked in 2005 whether “the ban on research [...] in the jury room itself” should be lifted in Britain, law professor and barrister Michael Zander commented: “the research might show that there is what any reasonable person would say is an intolerably high degree of irrationality, prejudice, stupidity and other forms of undesirable conduct in the jury retiring room”.³⁸

It is therefore impossible to study the actual language of the jurors during the deliberation process but let us consider what happens just before and after the deliberations.

³⁶ See the September 2011 “Guide à l'usage des usagers” published by the *Conseil départemental de l'accès au droit* of the Moselle county on <http://www.cdad-moselle.justice.fr/article.php?id_article=243>.

³⁷ See Cheshire Constabulary's website: <<http://www.cheshire.police.uk/advice—information/victims-and-witnesses/witnesses/whos-in-the-courtroom.aspx>>.

³⁸ Zander, Michael. *Jury Research and Impropriety: a Response to the Department of Constitutional Affairs – Consultation Paper (CP 04/05)*. London: London School of Economics, March 2005: 1-2, 1-22.

At the outset instructions are given to the jurors as to what they should do and how. Despite being laymen jurors and judges are supposed to be on a par as jurors represent the voice of the People. It is therefore essential for them to understand the judge's instructions as to how justice should be rendered. But even this seems to cause problems. In England and Wales a formal study suggested that: "Two-thirds of jurors in criminal trials do not fully understand a judge's legal directions [...]".³⁹ The problem is similar in France where respected daily paper *Le Monde* recently set up a blog on which former (and often traumatised) jurors expressed their opinions and concerns about the pre-deliberation or deliberation stage.

After he was a juror in two rape cases Kamel Z referred to the deliberation stage as a "comedy": the first time "even if this was not done willingly the judge and her two assessors were trying to influence the debate". For Jean-Paul R who referred to juries as a "Republican fantasy" one of the potential jurors enquired: "we know nothing about justice and laws? How can we give advice on sentencing?". The prosecutor's reply would have been: "we will guide you". Jean-Paul R wondered: "why this popular jury masquerade if the reply is dictated to you?".⁴⁰ A former French juror who recently and publicly expressed his regret of the decision taken in a case could be fined 3750 euros and imprisoned for a year for breach of the duty of confidentiality. He explained that he felt an urge to talk to the press to be able once again to "look at [himself] in the mirror".⁴¹

Ideally the speech of jurors in the deliberation room should be considered at two levels i.e. with each other and with the judges. It seems from the above information that the legalese used by judges as well as the gowns they wear (Isani referred to "flamboyant colours [...] of the British judiciary [...] [a] visual pageantry

³⁹ Casciani, Dominic. "Jurors struggle to understand judges, says major study". *BBC News*. 17 Feb. 2010. Web. 1 Dec. 2011. <http://news.bbc.co.uk/2/hi/uk_news/8519138.stm>.

⁴⁰ "Article interactif: Etre juré d'assises, 'une expérience d'une rare intensité, qui marque à vie'". *Le Monde*. 22 Feb. 2010. Web. 30 Nov. 2011. <http://www.lemonde.fr/societe/article_interactif/2010/02/22/etre-jure-d-assises-une-experience-d-une-rare-intensite-qui-marque-a-vie_1309528_3224_2.html>.

⁴¹ "Procès d'assises : un juré brise la loi du silence". *Le Parisien* 1 April 2011.

[which] bestows a certain aura”⁴² even if the French judiciary's attire is less colourful) may have an adverse effect on the jurors' freedom of expression. Under current article 353 of the French criminal procedure code: “The law requires [judges] to question themselves in silence and contemplation and to seek, in the sincerity of their conscience what impression was made, on their mind, by the evidence against the accused, and the grounds of his defense” in order to determine their ‘intimate conviction’ ”.⁴³ The word “judges” here includes jurors. The wording of these provisions is interesting.

You would normally expect jurors to discuss the case freely amongst themselves and/or with the judges in the deliberation room but the message conveyed here is that this discussion has limits and most of the jurors' and judges' work should be done silently or even religiously. There may be a discrepancy between the jurors' deep thoughts and what they verbally express perhaps through fear of expressing different views from the others. A group of senators working on the recent French reform of August 2011 commented that some of their interlocutors had observed “that some jurors expressed no opinion in the deliberation or voted by secret ballot in a sense different from that expressed publicly”.⁴⁴

Regarding the interrelations jurors have with each other Roberts recalls that:

The jury in the iconic film *12 Angry Men* would have reached a very different verdict if not for the Henry Fonda character, “juror 8”. His lone dissenting voice prompts a fierce debate in which prejudices are exposed, and a previously reticent young juror finds the confidence to share a knowledge of knives gleaned from his tough upbringing to convince the others that the accused could not have inflicted the fatal wound.⁴⁵

⁴² Isani, Shaeda. 7 Jan. 2010. “Bench & Bar in Popular Legal Fiction. A Comparative Approach to Fictional Representations and Public Perceptions”. *GRAAT* (2010): 196, 182-200.

⁴³ Web. 9 Dec. 2011. <http://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI_000006576293&cidTexte=LEGITEXT000006071154&dateTexte=20111206&oldAction=rechCodeArticle>.

⁴⁴ Web. 23 Nov. 2011. <<http://www.senat.fr/rap/110-489/110-4899.html>>.

⁴⁵ Roberts, Caroline. “Jurors work better in small groups, researchers find”. *The Guardian* 11 July 2011.

Roberts points out that psychologists from Portsmouth University have been looking at ways of “improv[ing] the quality of jury debate” and quotes Dr Bridget Waller for whom: “Four is the magic number, because it's the maximum number of people you can interact with effectively at any one time [...]”. So we may assume that the current number of jurors in England and Wales or in France (at least before the *cour d'assises* and even after the forthcoming reform when the number of jurors will be reduced) is incorrect to prompt a proper democratic debate giving each juror a fair chance to express his views. Whether the two citizen-assessors introduced in January 2012 in the *tribunaux correctionnels* of the Dijon and Toulouse jurisdictions will be sufficient to have a democratic debate is an unresolved question at this stage.

The above shows how strategic the initial choice of jurors through peremptory challenges is on how the jury will subsequently function. It seems that throughout trial pressure is put on jurors not to express themselves. It may be construed in different ways: professional judges who have a heavy workload may be keen on keeping the upper hand to ensure fairly short deliberations and a prompt trial; alternatively wishing for a fairly quiet and unified jury means that no charismatic but potentially biased juror will distort the course of justice.

Being a trial juror is no easy task as voiced by one of Dickens' characters who was the foreman in a murderer's trial. Throughout trial he saw (or thought he saw) the ghost of the victim: “My Lord, I knew I was a doomed man [...], I knew he would never let me off, because, before I was taken, he somehow got to my bedside in the night, woke me, and put a rope round my neck”.⁴⁶

D. *The Transposition of the jurors' language in judgments*

We said above that the former strict delimitation between the common and civil law cultures was now blurred but here a distinction is necessary between English and Welsh judgments and French judgments. We wish to refer here to the verbal judgment rendered after trial and the written decision subsequently handed down.

⁴⁶ Dickens, Charles. “The trial for murder”. *Best Ghost Stories*. London: Wordworth Classics, 1997: 261.

1. In France

French judgments are rendered “in the name of the French People” of whom jurors are representatives at the *cour d'assises* and soon also in some *tribunaux correctionnels*. After the deliberation stage judges and jury return to the court room where the foreperson will give a *oui* or *non* reply to a number of specific questions put to him by the court which relate to the charges brought against the accused. Each juror will have previously and secretly written his *oui* or *non* reply on a piece of paper which is opened by the presiding judge and the foreperson. The range of vocabulary made available to the jury is, to say the least, very limited.⁴⁷

Until recently the major difference between English and Welsh judgments and French ones was the lack of justification in French written judgments of the reasons (called the *motivation*) why a particular decision was handed down. In a landmark decision rendered on the 16th November 2010 the European Court of Human Rights held Belgium liable for failure to set out the reasons why a particular criminal decision was rendered on the grounds that it went against the fair trial principle of article 6-1 of the European Convention⁴⁸.

The legal action brought by the French *Cour de Cassation* with the *Conseil Constitutionnel* (in charge of checking the compliance with the French Constitution of French statutes etc.) which aimed at reinforcing the reasoning of criminal judgments led to a disappointing court order on the 1st April 2011. The *Conseil Constitutionnel* held that the failure of a *cour d'assises* to set out the grounds on which it relies in support of its sentencing decision does comply with the French Constitution. Evidence was not adduced that the *cour d'assises* would have exercised “an arbitrary power to decide of someone's guilt”.⁴⁹

Things are now due to evolve. Firstly the reform implemented in January 2012 introduces a new article 365-1 into the French criminal procedure code requiring a formal express reasoning of *cour d'assises* judgments. According to a Senate

⁴⁷ Valdman, Edouard. *Pour une réforme de la cour d'assises: entretiens avec François Staechele, Jean-Georges Diemer, Xavier de Roux... [et al.]*. Paris: L'Harmattan, 1996 : 82.

⁴⁸ [2010] ECHR 1806 *Taxquet v. Belgium*.

⁴⁹ “Motivation aux assises: avis des Sages”. *Le Figaro* 1 April 2011.

report, a “reasoning sheet” (or *feuille de motivation*) annexed to the list of questions submitted to the jurors during the deliberation will set out the grounds of the decision reached which will be signed by both “the court president and the jury foreperson in order to guarantee the control by the jury over the reasoning adopted by the professional judge”. However the “reasoning sheet” (which will be made public when judgment is handed down) will be drafted by the judge and not the jurors⁵⁰ thus leaving the upper hand to the judges. We also wonder whether the fact of reading aloud the contents of the “reasoning sheet” may not cause concern to the jurors and restrict their freedom of expression for fear of the consequences this may have on and from the accused. However the reform, which gives a bit more weight to the jurors (albeit a limited one), will no doubt require a change of culture from the professional judges.

Another important issue to consider is who drafts and signs *cour d'assises* judgments. Under article 376 of the French criminal procedure code judgment is drafted by the *greffier* or court clerk⁵¹. Under article 377 the actual judgment is signed by both the judge presiding the *cour d'assises* and the court clerk. So the foreperson does not seem to have any input in the drafting of the judgment, nor does he endorse any responsibility in the part taken by signing the *cour d'assises* decision. This lack of direct involvement is shocking as the jury is supposed to represent the voice of the People.

Extracts of recent *cour de cassation* French judgments are set out in annex 1. Recent *cour d'assises* judgments are only accessible to the parties themselves until they fall into the public domain many years later. The *cour de cassation* only deals with issues of law and therefore provides a limited opportunity to examine the language of the jurors but some conclusions can however be drawn from the cases referred to.

The first case refers to the requirement for the judges to put specific questions to the jury in order to obtain specific replies; those replies are the grounds

⁵⁰ Web. 23 Nov. 2011. <<http://www.senat.fr/rap/110-489/110-4899.html>>.

⁵¹ See its latest version amended on 17 May 2011 on <<http://www.legifrance.gouv.fr/affichCodeArticle.do?pidArticle=LEGIARTI000024042678&cidTexte=LEGITEXT000006071154&dateTexte=20111201&oldAction=rechCodeArticle>>.

(probably meaning the implicit *motivation*) on which the *cour d'assises*' decision is based. The second case gives us a chance to see the type of questions which the jury has to answer after the deliberations and the third case confirms that the reply given by the foreperson at court to the various questions raised is only either positive or negative.

The chances given to the jury to express itself at all stages of a criminal trial in France are still limited although we may hope that the changes brought by the August 2011 in *tribunaux correctionnels* will help restore the democratic conception of jury trial.

2. In England and Wales

Under the Data Protection Act 1988, only interested parties can request an official transcript of Crown Court proceedings unlike other court decisions which can be consulted on a number of official websites⁵². Under the Public Records Act 1967 Crown Court records are closed for thirty years before they become public⁵³. If the issues raised by the jurors in the deliberation room are secret, whatever impact they may have on the drafting of criminal judgments remains a mystery. Unlike civil law decisions, common law ones clearly set out the opinions of the judges but this does not necessarily apply to Crown Court decisions and more particularly to the factual issues which led the jury to find the accused guilty or not guilty.

Annex 2 contains extracts of various appeal courts' decisions and here again, some conclusions can be drawn from it. The first case shows how the appeals judges quashed convictions when the jurors misinterpreted evidence. The second case contains a reminder of the respective duties of the jury and the judge. The third case stresses the fact that the jury is the judge of evidence as opposed to the judge of the law as well as the importance of the directions given by the judge on the outcome of trial. What is not clear but would have transpired from a Crown Court transcript is that like in France, the jury's freedom of expression at trial is limited to the foreperson

⁵² Such as <www.bailii.org>.

⁵³ Web. 23 Nov. 2011. <<http://www.justice.gov.uk/downloads/global/foi-requests/moj-disclosure-log/copy-of-the-crown-court-manual-annex-a.pdf>>.

saying whether on each count, the accused is guilty or not of the offence with which he or she is indicted. The foreperson has no leeway as to what he can say in court.

Far from bringing an improvement like the French reform of August 2011 appears to, the Criminal Evidence Act 2003 allows juryless trials if there is a risk of jury tampering. We must point out that five years after it came into force the 2003 reform has only been used a couple of times. If it can't be denied that in the 2010 Twomey case there was a risk of jury tampering, the protection of the jury could have been ensured but at a substantial cost. It was estimated that prior to the judge opted for a juryless trial, the case had already cost the taxpayer twenty five million pounds i.e. more than fourteen times the amount stolen by Mr Twomey and his accomplices and that round-the-clock police protection for the jurors would have cost a further six million pounds.⁵⁴ When it came to striking the balance between spending public money and dispensing with a jury the second option was chosen. Whether the presence of a jury would have benefitted the judicial process is of course another matter.

IV. CONCLUSIONS

According to Van Koppen and Penrod:

Comparing criminal justice systems is like shooting rabbits on a fair: you always shoot too high or too low, you always hit another rabbit than the one you were aiming at, and if you hit one in the belly, you are under the illusion that you shot the whole rabbit. [...] Each national system is also a moving target that keeps on changing all the time [...].⁵⁵

At the end of 2008, jury trials for terrorism and treason were abolished in Russia whilst trial by jury was introduced or developed in Japan, South Korea and China “in a bid to increase the impartiality and independence of their legal systems”.⁵⁶

⁵⁴Wright, Stephen. “Jailed without a jury: Armed robbers who tried to nobble juries are sent down by judge who reached verdict alone”. *The Daily Mail* 1 April 2010.

⁵⁵ Van Koppen, Peter J. & Steven Penrod. *Adversarial versus inquisitorial justice: psychological perspectives on criminal justice systems*. New York: Kluwer & Plenum publishers, 2003: 2.

⁵⁶ “The jury is out”. *The Economist* 12 Feb. 2009.

It is obviously difficult to try to compare the reforms carried out by countries which have a different legal culture but England and Wales and France all have (or at least used to have) a democratic approach to the role given to the People in jury trials. Over time the number of jury trials has substantially decreased in France through the *correctionalisation* of a number of offenses. A similar comment can be made about England and Wales where the defendant is under pressure to opt for a Magistrates' Court trial for offenses triable-either-way or to plead guilty of an indictable offense to ensure a juryless trial before the Crown Court.

The English and Welsh reform is justified by the need to avoid jury trials when there is a risk of jury tampering. As mentioned above and since its implementation in the summer of 2006 the courts have only resorted to the provisions of Parts 44 and 46 on a couple of occasions partly because of the cost which the police protection of the jurors would have entailed. Should financial concerns prevail over the voice of the People? We don't think so.

The recent French reform is due to affect the judicial process in two ways. *Cour d'assises* trials now have a limited number of jurors which should be an improvement as research shows that a smaller number of jurors get a better chance of expressing themselves. The introduction of the *feuille de motivation* with which jurors will have some involvement seems to go towards a greater transparency of justice. *Tribunaux correctionnels* which deal with average offences (*délits*) have since January 2012 seen the introduction in the relevant courts of the Dijon and Toulouse jurisdictions of two citizen-assessors who should theoretically play a proper part in the way defendants are convicted and sentenced. This is certainly a positive step. It is worth pointing out that five months after his election, President François Hollande has not questioned the merits of the reform passed by his predecessor.

At today's date and even if the French reform may help restore some form of dialogue between the People and judges (although only time will show) we must express concern over the fact that for years and contrary to the very democratic principles for which juries were set up (and to their very popular image) jurors seem to have been constrained to a nominal or even non-existent role. The fact that in

France, England and Wales, jurors are encouraged to ask questions to the accused via the professional judge can be seen as a way to ensure the accused a fair trial or alternatively to silence the jury. The concern expressed by some jurors on both sides of the Channel as to their failure to understand the professional judges' instructions or legalese shows the judges' conscious or unconscious wish to have the upper hand in the judicial process. Judges have a heavy workload and do not want to waste time with lay people. The fact that when it comes to delivering the verdict the jury foreman is only entitled to use words such as *oui*, *non*, guilty or not guilty does not encourage jurors to take pride in their input in the judicial system. And last but not least the threat that jurors who are in breach of the paramount principle of the secret of court deliberations may end up in prison prompts them to remain silent.

Our aim is not to criticise judges whose daily job is to deal with an ever increasing and overly complex workload. But a better dialogue between them and jurors would give more weight to the democratic institution of the jury. The purpose of the French reform is to bring Justice closer to people and is a positive step as opposed to the British reform for which the suppression of juries in exceptional circumstances seems to be motivated by the need to save public money.

As a final word let us just remember the words of Jeremy Bentham, Sir John Bowring, John Stuart Mill for whom:

[...] though we undoubtedly think that better securities might be provided for the due administration of justice than can be obtained from the jury system [...] yet it is of the highest importance that the securities which such a system undoubtedly may and does offer to that all-important end, should not be swept away by that arbitrary determination of our judges, aided and assisted by the misrepresentations of despotism-advocating scribes.⁵⁷

⁵⁷ Bentham, Jeremy, Sir John Bowring and John Stuart Mill. *The Winchester Review, volume VIII*. London: Baldwin, Cradock & Joy, 1827: 432.

Annex 1: French criminal decisions

All decisions to be found on <www.legifrance.gouv.fr>.

Author's own translations.

Case details	Extract of court decision
N°11-85478; decision handed down by the <i>cour de cassation</i> on 04 Oct. 2011; appellant Mme Diane Z... X... decision appealed against: chambre instruction, Montpellier appeals court, 28/6/2011- imprisonment	“after a contradictory debate [before the <i>cour d'assises</i>] and after the jury's deliberation, we may consider that the replies to the very precise questions put to the jurors constitute the very reasons on which the decision taken against Mrs X... (by which she was sent to prison) is based...”. Appeal dismissed.
N°10-88284; decision handed down by the <i>cour de cassation</i> on 28 Sept. 2011; appellant M. Sébastien X..., decision appealed against: Alpes-Maritimes cour d'assises, 22/10/10 – murder + another crime and armed robbery	“The 1 st question put to the judge and jury was in the following term: did the accused [...] willingly killed Z... Janie [...]? Question n°1, which repeats all the elements constituting the offense, was put in the terms required by article 349-1 of the French criminal procedure code [...]; the procedure is lawful and the sentence was lawfully applied to the facts declared constant by the court and jury”. Appeal dismissed.
N°10-88582; decision handed down by the <i>cour de cassation</i> on 01 Sept. 2011; appellant M. X...; decision appealed against: Ille-et-Vilaine cour d'assises, 29/10/10 - rape	The defendant alleged that a “fair trial” implies that the decision made against him should set out the reasons on which it relies and that “the absence of factual information allowing him to understand the reasons why a positive or negative reply was given to the questions put to the court and the jury”, the court held that: “the procedure was followed and the sentence lawfully applies to the facts as stated by the court and the jury”. Appeal dismissed.

Annex 2: English & Welsh criminal decisions All decisions retrieved from
 <www.bailii.org>.

Case details	Extract of court decision
<p>[2011] EWCA Crim 1885 Decision handed down by the Court of Appeal (crim. Div.) on 20 July 2011 Appellant: Barkshire Leighton, Kitchen & others On appeal from Nottingham Crown Court, 14/12/10 - conspiracy to commit aggravated trespass</p>	<p>“(1) Something went seriously wrong with the [first instance] trial [...]. The jury were ignorant of evidence helpful to the defence which was in the possession of the prosecution but which was never revealed. As a result justice miscarried [...]. (4) When the judge came to sum the case up to the jury in a written “route to verdict”, repeated orally, it was recorded that: “Each of these defendants admit that they have committed all of the acts which are necessary for the prosecution to prove the case against each of them. In other words, in the absence of a defence they admit they have committed the offence but say they were justified in doing what they did.” (5) The defence was described as “the justification of necessity” and the jury was directed: “Each defendant is innocent of this offence if they reasonably believed (even if mistakenly): [...] 2. That in the circumstances that they believed them to be, it was reasonable and proportionate to do what they were going to do [...]” - first instance convictions quashed.</p>
<p>[2011] EWCA Crim 1260 Decision handed down by the Court of Appeal (crim. Div.) on 19 May 2011 Appellant: Abdulla Ahmed Ali and Others On appeal from Woolwich Crown Court- conspiracy to murder & others</p>	<p>LJ Thomas: “(34) It is necessary first to consider the extent to which a court is entitled to use different counts in an indictment to enable a jury to decide the different factual bases in which a defendant had committed an offence and where it is the function of the judge to make that decision. (35) In many common types of offending, legislation defines those aspects of conduct or intention that places the criminal behaviour of a defendant into different offences that can be separately indicted so that the jury can decide on the level of conduct or intention [...]. (36) However, what cannot be done is to put two different counts into the indictment to enable the jury to determine a factual issue where the difference in the facts does not make the offence in each count a different offence [...]. (81) If the jury had reached a verdict on count 1A in respect of some of the defendants, it was the duty of the judge to take that verdict. We can see no basis whatsoever for suggesting that a verdict which a jury had decided on should not be taken [...]. (89) In considering whether a jury can, in circumstances of great publicity about defendants, act as a fair and impartial tribunal, the court has to have regard to the trial process and its ability to deal with the publicity that had arisen” - appeal dismissed.</p>
<p>[2011] UKSC 24 Decision handed down by</p>	<p>“(1) [The appellant] was found guilty of her murder and sentenced to life imprisonment [...]. He was granted leave to</p>

<p>the UK Supreme Court on 25 May 2011 Appellant: Fraser v. Her Majesty's Advocate On appeal from the Appeal Court (Scotland) 29/3/09 - murder</p>	<p>appeal [...]. (2) The indictment on which the appellant went to trial included an allegation that, after the murder and with intent to defeat the ends of justice, he did" (iii) on 7 May 1998 [...] place a wedding ring, engagement ring and eternity ring belonging to said Arlene Fraser in said house." [...] In [the Advocate Depute's] address to the jury he said that the discovery of the rings was a most compelling piece of evidence. He invited the jury to conclude that eight or nine days after Arlene Fraser's death the appellant had removed the rings from her dead body, taken them to the house and placed them in the bathroom to make it look as though she had decided to walk away from the life that she had had there. [...] The trial judge directed the jury that, if they reached the view that they were not prepared to hold that it was the appellant who placed the rings in the bathroom on 7 May, it would not be open to them to convict the appellant [...]. (39) The proposition that the appellant had returned the rings to the bathroom on 7 May was, as the Advocate Depute said in his address to the jury, the cornerstone of the Crown's case. It is clear, in view of the direction that was then given to them by the trial judge, that the jury must have concluded that the appellant put the rings in the bathroom on 7 May. [...]" - appeal allowed.</p>
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