Argentina's Indigenous Jury

Andrés Harfuch, Mariana Bilinski & Andrea Ortiz

Although democratic representation is often claimed as a goal for juries, it is generally acknowledged that juries in the United States fail to achieve optimum representativeness[1]. To this point, no country has designed a perfect system that guarantees the full representation from all walks of life on juries. On the contrary, highly developed countries, like the USA and the UK have still serious problems regarding their minorities, especially Afro-Americans in the U.S. and Asians in Great Britain.

Argentina´s recent introduction of jury trials may represent an important opportunity for future research and continued discussion of the matter, since the six jury bills in our country all require that the final panel of twelve jurors **must consist of six women and six men.**

Moreover, provinces like Chaco and Neuquén have gone even further and have established special juries for indigenous nations. In these two provinces, whenever an Indian defendant faces a criminal jury trial, half of the members of the twelve person jury ***must be*** individuals from the defendant's tribe. This final feature represents an innovative approach designed to ensure individual justice, as well as the participation of all peoples in the jury process.

As in other countries, Argentina draws prospective jurors from electoral lists. But in Argentina, unlike in the U.S., elections are mandatory, so all citizens are represented. Furthermore, Chaco province, for example, has official standards for each of the three indigenous nations living in its territory. These indigenous lists are separate but supplementary to the electoral lists.

From this point of view, and even if it seems paradoxical, Argentina does not have the problems that are presented, for example, to the United States in designing jury pools and venires who represent a *fair cross section of the community*. The ideal of impartiality as represented by a fair cross section of the community can only be achieved if the initial list includes everyone without discrimination[2].

The Argentinian choice to require that the jury consist of six men and six women breaks with the historical tradition of *common law* in favor of a completely random selection of the panel of jurors. Thus, Argentinian jury laws guarantee beforehand that any potential gender discrimination cannot affect the composition of the jury.

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1 DIAMOND, Shari & ROSE, Mary: "Real Juries" in 1 ANNUAL REVIEW OF LAW & SOCIAL SCIENCE 255-83 (2005).

2 HARFUCH, Andrés: "Juicio por jurados en la Provincia de Buenos Aires: ley provincial 14.543", Ed. Ad-Hoc, Buenos Aires, Argentina, 143 (2013).

We know that in other countries, well into the ´70s, women, young people. Indians, blacks, racial or religious minorities could be systematically excluded from serving as jurors[3]. Thus, the jury was never representative, due to discrimination and systematic exclusion of these groups from the lists of jurors[4]. While gender discrimination is no longer legally permissible in the U.S. or other countries, systematic representative gender make-up of juries around the world is nowhere assured except in Argentina.

American constitutional law holds that the guarantee of impartiality requires random selection of potential jurors from a fair cross section of the community. The accused is never entitled to a special jury made up of a certain number of members similar to the accused on any characteristic, e.g., female, African-American, Indian, etc.[5] Perhaps due to recurring problems of racism in jury selection in many common law countries, and because the selection process often has resulted in unrepresentative juries, the legislators of Argentina decided to choose a different approach to achieving a representative jury, at least with respect to gender.

The almost *all-white jury* (10 whites, one Latino and one Asian) that acquitted the four police-officers at the Rodney King´s trial, that triggered the 1992 Los Angeles riots, in which 53 people were killed and over 2,000 were injured, seemed to have a profound effect among the Argentine State congressmen, particularly when the issue of the future composition of the jury came up.

Without the problems of race of other countries, Argentina decided to impose compulsory gender equality. This system has a high social acceptance and no one has questioned this decision or observed any problems with this approach. But Chaco and Neuquén have gone further.

Although Argentina does not have the racial tensions observed in other countries, several provinces do have distinct indigenous populations. These groups are not considered minorities, but rather preexisting native peoples ancestral to Argentina.Observing that racial minorities continue to be strongly underrepresented on juries in other countries,[6] the Argentine provinces of Chaco and Neuquén decided to give a different status to the indigenous nations and people of their territory.[7]

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3 GASTIL, John & HANS, Valerie: *"El juicio por jurados: Investigaciones sobre la deliberación, el veredicto y la democracia"*, Ed. Ad-Hoc, Buenos Aires, Argentina, 134 (2014).

4 GOBERT, James: *"Justice, Democracy and the Jury"*, Dartmouth, 136 (1997).

5 ABRAMSON, Jeffrey: *"We the jury...."*, Harvard University Press, 10 (2003).

6 HANS, Valerie y VIDMAR, Neil: *"Judging the jury"*, Perseus Publishing, 63 (1986).

7 Currently, in Argentina, across its geographical size there are 38 different indigenous nations. The largest indigenous populations in descending order are: "Mapuches" with 113.680 inhabitants, "Kollas" with 70.505 inhabitants and "Qom" with 69.452 inhabitants. In addition, there are five documented languages.

These laws state:

> Section 198 "6" **CPP Neuquén**: "*The jury must be integrated, including alternates, by men and women equally. It will be that at least half the jury belongs to the same social and cultural environment of the accused. It will also try, whenever possible, to have seniors, adults and youth in the panel of juries".*
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> 4th Section 7661 law **Chaco**: "*When the accused belongs to the Native Peoples Qom, Wichi or Mocoví, half the jury of twelve (12) members shall consist compulsory for [must consist of] men and women of the same original community*".

No other jury system today systematically determines jury composition in this way.[8]

One reason this method of jury selection was chosen was because, despite the fact that all indigenous citizens are registered on the electoral lists, the statistical possibility that any of them will be selected for a jury is very low due to their low numbers in the population. Therefore, to give special consideration to these peoples and their ancestral community standards, the legislators wanted to devise a system that would guarantee a strong tribal representation on the jury. In the province of Chaco, the three indigenous nations Qom, Wichi or Mocoví have their own official electoral lists and, therefore, there is no possibility that the tribal or nation composition of the jury that will judge a case can be manipulated. The annual draw remains random and representative of the community.

The first intercultural trial by jury in Argentina.

These rules were set in motion very quickly. By the end of 2015, in Neuquén Patagonic province, the first and historic intercultural trial by juries of Latin America and, maybe, of the whole world took place. An over-reaching prosecutor requested 15 years in prison for Mapuche leader Relmu Ñanku, a mother of three children, who represents the Newen Winkul community, located in Portezuelo Chico, about 30 kilometers from Zapala. She was accused of attacking the bailiff Veronica Pelayes during an eviction that occurred in indigenous ancestral territory. On December, 28, 2012, Pelayes -along with a group of agents, private security and a backhoe- entered Mapuche property and delivered an order issued by a civil district judge from Zapala allowing the progress of the work of the Apache Oil Co. that was operating in the area.

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8 But see the mixed juries described by Marianne Constable, "*The Law of the Other: The Mixed Jury and Changing Conceptions of Citi*zenship, Law and Knowledge," University of Chicago Press, (1994).

The Mapuches had put up gates and fences to prevent oil drilling in the area, arguing that it contaminated their land spills. Despite the order, the members of the community attacked the group by throwing stones when the backhoe began removing the fences. One of the stones thrown by the Mapuches hit the officer Pelayes´ face, breaking her nose. Pelayes identified Relmu Ñanku as the one who threw the stone. Mauricio and Martin Maliqueo Rain, also prominent Mapuche leaders, were also charged in connection with the attack, but with a lesser charge of "aggravated harm."

In the beginning, prosecutor Sandra Gonzalez Taboada stated the case as "assault with severe bodily injuries", but then she changed the charges to "attempted murder" and "aggravated harm" and called for a 15-year prison sentence — disproportionate given that eight years is the norm for manslaughter cases. But a sentence as severe as this one required a trial by jury, enabling the defense, in line with the province's new criminal code, to request an inter-cultural jury. The code stipulates that half of the jury members should come from the same social and cultural background as the accused.

And thus on October 27, Argentina's first ever inter-cultural trial began with a 12-member jury, six of whom were Mapuche. The big news was not only the intercultural jury, but also that the entire trial was simultaneously held in two languages: the one from the defendants, Mapudungun, and the one from the victim, Spanish. It was unprecedented.

Over six days, the grave injustices suffered by the tribe at the hands of both the oil companies and the judicial system were revealed. More important, the prosecutor could not produce neither the famous big stone nor any other eye-witnesses, apart from the victim herself. The victim was also represented by a private prosecutor, who referred to the members of Mapuches community as: *"delinquents who live at illegality"*. On the other hand, the testimony of Relmu Ñanku came to an end with this powerful statement: "*they want to convict me for being poor, indian and woman*"

On the morning of the eighth day, the jury received the judge´s instructions. The jury was then told it had 48 hours to reach a decision. It took them just two hours. When the foreperson announced the "not guilty" verdict, the packed courtroom erupted with applause and cries of *"marici weu!*" (Victory!, in Mapuche language).

After the not guilty verdict, Relmu Ñanku´s words left the feeling that justice has been done. She expressed: *"The jury that represents the people has much more awareness than judges and prosecutors. We knew that the jurors were going to feel like ourselves, when we resisted to be enslaved"*.

This historic trial marks an important step in curbing attempts to criminalize indigenous leaders defending their territory. According to reports, in the province of Neuquén alone there are 241 Indigenous leaders with criminal charges, 60 percent of which relate to land struggles.

"The decision made by the jury today is a sign of hope and a historic revindication of the rights of the Mapuche," defense lawyer Dario Kosovsky said. This exemplary verdict "vindicates a tenacious woman who was prosecuted in order to threaten and punish indigenous people, but this jury did not allow it (...). [T]here is so much persecution and racism here, and it is necessary to organize to fight on. To be acquitted by a jury is an enormous political vindication for her. The verdict was not told by a judge; it was told by the People".

This trial had a huge national and international impact. Two of the reasons were very clear. It was a trial by jury, and, in addition, half of the jury was indigenous. Any researcher would have longed to be there to study this unique experience, and a great thought experiment would be to compare this verdict with the one that would have been rendered by a traditional civil law bench, formed by three professional judges. Of course, it is impossible to know whether the verdict would have been different in this case, but it would be interesting to conduct a study comparing the evidence and outcomes of the many criminal charges against Indigenous leaders when the cases are dealt with by judicial panels versus juries.

Conclusion

The legal requirement of women and men in equal numbers at jury panels has been in place for ten years in Córdoba and two years in Neuquén and Buenos Aires. It seems to be a readily accepted requirement that has produced no opposition. While the Argentine Judiciary consists mainly of men, the jury, with its required composition, is the only Argentine´s judicial body which ensures *ex ante* gender equality to all.

In sum, the requirement of equal numbers of men and women and existence of an inclusive electoral register greatly increases Argentina's ability to achieve the democratic ideal of fairness that comes from the notion of the jury as fair cross-section of the community. This approach maximizes the goal of obtaining in the jury an impartial decisionmaker.

The approach of ensuring substantial representation of the Indigenous Peoples in particular trials is another way Argentina is attempting to maximize fairness and impartiality. Experience will tell if this special integration with Indigenous Peoples is successful in achieving these goals, and if it is accepted by the real peers, the people themselves.

At least, with this first and highly celebrated case, Argentina seems to have successfully started this new approach to representation and acceptance, important features of the jury.