The historical development of the Jury in Argentina

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Introduction

The jury in Argentina is distinctive. Since 1853, its Constitution has stated in three sections that trials should be conducted with juries. Despite such clarity in its rules, the jury, at a national level, is still an outstanding debt.

The sections of our Constitution that regulate trial by jury in our country are section 24; section 75 subsection 12 and section 118. Each was inspired by the Constitution of the United States. [1]

Our Constitution consists of two parts, a part in which the rights and guarantees of citizens are described –and where Section 24 is included- and a part in which the powers and functions of the various branches of government are presented, where Sections 75 and 118 are located.

As this coverage shows, the jury trial institution is repeated throughout our fundamental law, making it clear that our constituents chose this -and no other- form of trial. According to our Constitution, the National Congress is the one in charge of enacting a law regulating the trial by jury, but it has still made no progress in this regard.

In the first years of operation of the Constitution, the President of the Republic at that time ordered introduction of a national law on jury trials. A bill was presented to the Congress in 1871. It was an almost exact copy of the code of procedures of the State of Virginia (USA). Unfortunately, that crucial bill was never passed and, instead, a written and completely inquisitorial procedural code was enacted. It was one of the greatest tragedies of democracy in Argentina that we are now beginning to remedy.

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1 **Section 24**.- Congress shall promote the reform of the present legislation in all its branches, **and the establishment of trial by jury;**

Section 118.- The trial of all ordinary criminal cases not arising from the right to impeach granted to the House of Representatives, **shall be decided by jury** once this institution is established in the Nation. The trial shall be held in the province where the crime has been committed; but when committed outside the territory of the Nation against public international law, the trial shall be held at such place as Congress may determine by a special law.

Section 75 subsection 12º.- Congress is empowered: To enact the Civil, Commercial, Criminal, Mining, Labor and Social Security Codes, in unified or separate bodies, provided that such codes do not alter local jurisdictions, and their enforcement shall correspond to the federal or provincial courts depending on the respective jurisdictions for persons or things; and particularly to enact general laws of naturalization and nationality for the whole nation, based on the principle of nationality by birth or by option for the benefit of Argentina; as well as laws on bankruptcy, counterfeiting of currency and public documents of the State, **and those laws that may be required to establish trial by jury.**

NATIONAL CONSTITUTION OF ARGENTINA (1994)

Throughout the years -in the few periods of democracy until 1983- many bills that sought to establish the trial by jury were filed, but all of them suffered the same fate.

It has even been argued that the jury guarantee in our country has become unenforceable as it has not been enacted at a national level for more than 150 years, an assumption which is completely unjustified in light of the fact that all these three sections of our constitution have been preserved with each reform and amendment to the language of our constitution, even in the last one in 1994.

There were several excuses given by Congressmen to postpone indefinitely the adoption of a jury law, which ultimately conceal an effort to retain power by certain judicial actors. Some arguments had to do with the cost of the jury, the possible influence of the media in their decisions, the lack of experience of citizens, the potential use of a *tough policy* and their ignorance of the law. These arguments have been falling one by one throughout the years. The last charge against the jury is the lack of transparent motivation of their decisions, as the jury is limited to deciding whether a person is guilty or not guilty for the crimes for which he is accused, without explanation about its decision.

A remarkable view of the jury system expressed by some detractors in Argentina is that the jury -despite being mentioned three times in our Constitution- is unconstitutional because it does not allow the right to appeal provided in the International Covenants on Human Rights signed by Argentina. Their error is to confuse the fact that the jury is not required to give reasons with a lack of reasoning underlying the verdict. In addition, if the jury acquits and no appeal is permitted, the reasoning would not have any use. While it is true that the defendant who appeals a conviction does not have a written opinion explaining the jury's reasoning as a ground for the appeal, the appellate court can overturn a conviction if the verdict is unreasonable in light of the evidence presented at trial and the truth is that jurors come to a decision based strongly on their individual and collective reasoning.[2]

Likewise, it cannot be validly argued that a defendant -who witnessed his entire trial- does not know the reasons behind a verdict. Moreover, the requirement for motivated decisions applies only on professional judges, because of the republican principle of government and to allow proper control of the judicially from a superior authority. In summary, this argument is untenable.

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2 Andrés Harfuch, Inmotivación, secreto y recurso amplio en el juicio por jurados clásico, , "Derecho Penal", Año I N° 3 "Participación ciudadana en la justicia", Infojus Rev. P. 113 ff. (2013). Available at: http://www.infojus.gov.ar/revistas/revista_derecho_penal/rvdpe003-derecho_penal_nro_3.htm;jsessionid=safv66vsh3da1m0ja3rksvdq6?0.

Faced with such resistance in the federal order, a peculiar phenomenon began to take place, perhaps because the Argentine *"jury movement"* has always been very powerful: the greatest democracy advances were coming from the provinces. These provinces were the first to abandon the inquisitorial model of criminal proceedings and to enact their own trial by jury laws, as required by the Constitution.

Evolution among Provinces

Among all of our 23 provinces, the first one to add laypersons to its justice system was the province of Cordoba. In 2005, Cordoba adopted a mixed court system[3] composed of two professional judges and eight lay judges. The experience has been viewed as a success, despite the problems of having professional judges inside the jury room. [4]

Although there was an initial distrust context of this new system, the truth is that the Cordoba experience was extremely positive and opened a path to the jury system in Argentina.

Then, there was a period of stillness until 2011, when the province of Neuquén adopted a new procedural code in which jury trial is regulated under the *common law* model. This sparked a huge national revival of trial by jury in its classic way, with twelve lay jurors, which we consider highly superior to the mixed court system chosen by the province of Córdoba.

Thus, the province of Buenos Aires, Argentina's largest province, with nearly 20 million inhabitants, issued in 2013 its trial by jury law, also regulating trial by jury in its classic way. This implied the greatest advance in this *"jury movement"* in recent times since Buenos Aires is an example to follow for many provinces.

Neuquén and Buenos Aires have already had their first jury trials with great success, showing the effectiveness of the system and the commitment to citizens. By now, Neuquén has celebrated approximately 20 jury trials, and the province of Buenos Aires about 60; over 150 are scheduled for 2016. With its virtues and flaws, all these trials accomplished the goal of breaking the initial barrier against jury trials and began the transformation from outdated systems to actual adversarial systems.

The next provinces that decided to incorporate the trial by jury system were Río Negro and Chaco.

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3 Valerie P. Hans, *What Difference Do Juries Make?*, 105 EMPIRICAL STUDIES OF JUDICIAL SYSTEMS 2008 (Kuo-Chang Huang ed., 2009).

4 Edmundo Hendler, Presentation at the round table held on July 25th in Berlin, Humboldt University, organized by The Law and Society Association. Available at: http://www.catedrahendler.org/doctrina_in.php?id=31

It is planned that this year Chaco will begin to hold its first jury trials, although the Province has not drawn the list of citizens who could be summoned for jury duty yet, Río Negro has provided by law that the first jury trials will take place in 2018, one year after the introduction of the accusatory system, in 2017.

Therefore, nowadays five provinces already have laws, which explicitly include lay participation, and others such as Santa Fe, La Rioja, Chubut, Salta, Santa Cruz and the City of Buenos Aires have their projects in a state of legislative debate.

Thus, an unprecedented process has been initiated in which many of the Argentine provinces took the initiative to adopt processes paying respect of the Constitution, as opposed to the inaction of our National Congress, constituting an example to be followed by the rest of the provinces.

This is an essential step forward in the matter, since some years ago it was unthinkable that such a thing could happen. It is a great cause for celebration in our country.

Differences in regulations among provinces

While most provinces that enacted their laws opted for the *common law* model, we can see some differences among provinces in the regulations that control the cases that are eligible for jury trial and the procedures used to reach verdicts.

Many times these differences arose as the result of a political negotiation, in which it was preferred to adopt a not-so-perfect jury system, but introduce lay participation in justice at last. Many legislators did not have enough knowledge about jury trials, and their fear of this new system led them to discard some important features, such as unanimity for instance. These matters ended up in the laws, producing in some cases a less-than-perfect jury.

From the Argentine Association of Trial by Jury, we consider it appropriate to pass the laws -though they may have flaws- rather than lose the battle for issues that can be corrected in the future.

So even though the Law of Neuquén had some flaws, which were later removed in the other provinces that adopted laws, the truth is that Neuquén is also aware of the idea that improving its existing law is important and therefore organized there among other activities, an international workshop jury trial in 2015 in which several experts in jury trials were invited. The aim was not only to celebrate the implementation of the jury in that province but also to highlight the disadvantages that the law presented, for example by not requiring unanimous verdicts. Thus, we see that there is awareness -even in provinces where the system is already implemented- of the need to improve the brand new laws.

Let´s see some of these differences …

First, the provinces of Neuquén and Chaco understood that trial by jury is **mandatory** (Section 118 NC), while the Province of Buenos Aires considered that the defendant might **waive** this right and therefore choose a bench trial in lieu of a jury trial. Those who are inclined to permit waiver understand that trial by jury is a right for the defendant. Only the defendant should be able to decide whether to be tried by peers or to be tried on a bench trial. Yet,, the law in the Province of Buenos Aires, which generally permits jury waiver, states that in a case with multiple defendants, the waiver of one of them to be tried by a jury affects the rest of the defendants, who lose the right to be judged by their peers. As we see this could be something to change in future reforms.

In the Province of Buenos Aires, there is a high waiver rate; some of the reasons are related to this very start of a whole new culture. Many public defenders and private attorneys, and even the defendant, do not fully comprehend what a jury trial is. Also, logically the defense attorneys are selecting those cases for jury trial in which they feel they have a better chance of winning before a jury, but not a judge.

By contrast, those who favor its obligatory nature consider trial by jury as a guarantee for the accused but at the same time, as a right of the people to participate in the administration of justice, especially in the most serious crimes. In our society there is a great distrust towards decisions of the judiciary so it is extremely important that people become actively involved in the administration of justice, as a way to enrich its legitimacy.

Another difference can be seen in the **number of votes required for a valid verdict.** For example, Neuquén requires majorities of 8/4 to deliver a guilty verdict and does not recognize the hung jury. Failure to achieve the required majority results in an acquittal. In the case of the Province of Buenos Aires, unanimity is only required for conviction in cases with a penalty of life imprisonment and majorities of 10/12 are required for felony convictions.

Possibly fearing that crimes go unpunished, some provinces chose not to require unanimity, and settle for majority verdicts, which we think is a mistake.

With the passing of time, the system of majorities is evolving. In Río Negro, the English variant[5] was adopted: unanimity to convict or acquit and if after a reasonable time of deliberation jurors fail to reach a verdict, they will be informed that verdicts of 10/12 are allowed to convict -in cases of a jury of twelve members- and 6/7 in cases of a jury of seven members.

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5 Juries Act 1974, subsection 17(4). Available at: http://www.legislation.gov.uk/ukpga/1974/23#l1g19

Finally, the law of Chaco progressed steadily and established the classical model of the common law: twelve jurors and unanimity for guilty and not guilty verdicts.

The INECIP and AAJJ[6] have always been against majority verdicts and have demanded the requirement of unanimity. The truth is that unanimity has never been an obstacle to achieving valid verdicts and it has shown that, contrary to common belief, the percentage of hung juries is minimal. The requirement of unanimity is the recognition of the constitutional guarantee of last resort of criminal law and the principle of innocence, since a person can only be sentenced after a unanimous decision of the people. Also, it brings a more robust debate among jurors [7] while conferring a highest legitimacy to decisions, among many benefits. Therefore, we believe that future reforms of existing laws in Argentina should be oriented towards the implementation of unanimity.

Another difference among different regulations is **what happens when jurors are not able to reach a verdict.** The solutions adopted by each province are very different.

As stated above, Neuquén does not recognize the hung jury and failure to achieve the required majority of eight results in an acquittal. On the other hand, the province of Buenos Aires does permit hung juries. So, if the jury fails to achieve the required majority, and there are eight jurors in favor of a conviction, they will be asked to return to the jury room to deliberate again up to three times. The idea is to overcome the deadlock and if they cannot do that, there will be a new trial in front of a new jury under prosecutor´s request, but with one restriction: It allows a hung jury only once, if the jury hangs more than once, the judge will acquit the defendant.[8] This differs from the American jury as it limits the state persecution: the prosecution is limited in its pursuit of conviction.

In Chaco, where unanimity is required for acquittal or conviction, the hung juries are permitted, along with the possibility of reopening the trial to overcome one. Among the options identified in dealing with a jury at an impasse, the judge might solve it by giving additional instructions; clarifying earlier instructions; directing the attorneys to make additional closing argument; reopening the evidence; etc. (Ariz. R. Crim. P. 22.4 comment). If the deadlock persists as the jury still cannot reach a unanimous verdict, there can be a new trial at prosecutor's request, but with the same restriction as in the law

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6 Institute of Comparative Studies in Criminal and Social Sciences and the Argentine Association of Trial by Jury.

7 Shari Seidman Diamond; Mary R. Rose; Beth Murphy, Revisiting the unanimity requirement: The behavior of the non-unanimous civil jury, Northwestern University Law Review. 2006; 100(1):201-230.

8 Andrés Harfuch (dir), El Jurado Clásico. Manual Modelo de Instrucciones al Jurado. Ley Modelo de Juicio por Jurados, Ad Hoc Publishers (2014).

of the Province of Buenos Aires: if the jury hangs more than once, the judge will acquit the defendant.

Finally, the law of the province of Río Negro does not permit hung juries. If the jury fails to reach unanimity, or the supplementary majority, the jury shall render a "not guilty" verdict.

Also -and although all provinces established jury trials for the **most serious crimes-** in some provinces such as Neuquén, Buenos Aires and Río Negro, a jury serves in a trial based on the number of years of sentence requested by the prosecution, while in Cordoba and in Chaco is limited to a certain list of crimes.

Novel Features

Jury trials in Argentina have also adopted some novel features. Many of these inclusions are associated with the sociocultural context of our country, together with the procedures to which we are accustomed.

Firstly, every one of the provincial laws require that the jury be composed of **equal numbers of men and women**. Here, our laws have a different regulation than the classical jury system of the *common law*. What is sought is to eliminate any alleged gender discrimination, and ultimately that the jury will be representative of our society and not exclude any group.

It is noteworthy in this regard that the draft bill of the City of Buenos Aires, makes an adjustment to this approach to gender. It requires that the jury consist of at least 5 men and 5 women, allowing the remaining two people to be of either gender, which also guarantees that there will be no discrimination, and at the same time it allows some leeway for the strategic activity of the parties.

Secondly, the province of Chaco adopted the **"indigenous jury"** in cases where the defendant is a member of an aboriginal community, being a pioneer in this regard. Although the province of Neuquén does not foresee that this possibility will arise frequently, in a recent trial where the defendant belonged to a Mapuche tribe, the jury was partly composed of members of the indigenous Mapuche community. [9] This is a breakthrough, since indigenous people, who have their own customs, rules and ways of conflict resolution, populate several Argentine provinces, so if it is intended that the jury should be representative of each society, the enactment of such rules becomes appropriate.

Thirdly, in Argentina we have the "**Private Prosecutor**" who is a third party in a criminal case, and is given most of the tools and rights of a Public Attorney. Thus, the victims of a crime, their families or certain organizations are also entitled to participate in criminal trials by jury, independent of the Public

9 Available at: http://www.juicioporjurados.org/2015/11/not-guilty-historical-verdict-of-jury.html

Attorney. In all cases, the participation of a Private Prosecutor is completely optional.

Also, while today the jury is summoned only in cases of serious criminal offenses, the bill of La Rioja has set an elective **jury trial for civil cases** and the proposed bill of Chubut foresees a mixed jury for minor offenses and a classic jury for the most serious crimes.

Finally, the Province of Río Negro establishes that defendants are eligible for a jury trial in front of **7 jurors** if the sentence is more than twelve years in prison and less than twenty-five years in prison, and they are eligible for a jury trial composed of **12 jurors** only if their sentence is greater than twenty-five years in prison.

New Challenges

This new mode of trial brings significant changes, leading to the end of certain practices and introduction of new ones. Therefore judicial actors are in the need of a proper training. We are abandoning a written system and adopting new litigation techniques where the biggest challenge is to talk and above all engage in storytelling based on a new form of language, one aimed at people and not professional judges, as we were used to.

Another new institute is the *voir dire* -or jury selection procedure-. Each province has regulated the form of this procedure in different ways, permitting different numbers of peremptory challenges. We believe that the procedure will probably be adjusted as the provinces gain greater experience with juries.

In addition, rules of evidence will need to be regulated to know exactly what to do and what not to in a jury trial. For example, exposing –or not- the criminal record of the defendant is a question. Until now there was not much to rule about that because these records were always attached to the file, which ended in the hands of the judge. With the trial by jury, this changes and we will need to determine specifically in which cases and under what circumstances a criminal record might be exposed. In Chaco, for instance, the new law prevents the jury from knowing about the criminal record of the defendant.

In a significant change that has accompanied the new jury system, Argentina finally managed to end the system of bilateral appeals that was so common until the jury arrived. Now, the finality of the verdict prevents the defendant from being put at risk again once a jury determines that he is not guilty. There is no appeal for the prosecution. In fact, in the province of Buenos Aires a prosecutor argued that the finality of the verdict was unconstitutional, but the Court of Cassation of the province expressed that the system is correct and that prosecutors have only one chance to achieve the conviction of a

defendant. [10] This is a challenge for a judicial culture prone to give greater prominence to an appeal than to the trial itself.

Final Remarks

As it can be seen, the provinces occupied a central place in what was the passing of a justice system monopolized by professional judges to a system with citizen participation, giving validity to our National Constitution.

In this new renaissance of trial by jury in recent years, a critical role was played by various organizations -such as the INECIP and the AAJJ- which promoted different activities to encourage lay participation in the administration of justice. Now, all those huge efforts have begun to bear fruit. Not only have the Provinces made progress, but the Nation has also taken a big step by introducing the trial by jury in the new federal code of adversarial proceedings, which now has been left in suspense.

Finally, we cannot help but to celebrate the fact that today in Argentina we are no longer discussing the application or non-application of this form of citizen involvement. Instead, we are discussing which version of the jury is the best choice for our system. With the advantage of learning from the years of history and experience of other countries with long term jury traditions, but, at the same time, acknowledging that we must make our own path, to finally create a truly effective Argentine jury.

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10 BA High Court of Appeals, Case N° 71.912: López, Mauro Gabriel s/ recurso de Queja interpuesto por Agente Fiscal, 02/04/2016. Available at: http://www.juicioporjurados.org/2016/02/the-buenos-aires-high-court-of-appeal.html and a full version in Spanish available at: https://drive.google.com/file/d/0B2yvs_8DQr4dV1Q5bU9NS2pTZGJuVW80dm9QNXpmZzNLaWJn/view