

## LAY PARTICIPATION IN ARGENTINA: RECENT EXPERIENCE AND NEW TRENDS

### Legal situation in Argentina

Three provisions of the Argentine Constitution mandate jury trials. One of them gives Congress the power to pass any law required to establish jury trials.<sup>1</sup> Those provisions were enacted in 1853 but, notwithstanding, Argentina has yet to establish jury trials. The Federal Supreme Court ruled that any action was excluded until Congress passed the required legislation. Nevertheless the court has stated for many years that the Constitutional provisions “do not require Congress to immediately establish jury trials”.<sup>2</sup> The basis for that statement was the wording of article 118 of the Constitution: [...] *criminal trials will be decided by juries ... once this institution has been established in the Republic.*

The Argentina federal organization is similar to that of the USA, with a significant difference: all “substantive” (as opposed to “procedural”) legislation is enacted by the Federal Congress but rules of procedure are enacted by each one of the provinces (states). Therefore, in Argentina there are as many Criminal Procedure codes as provinces there are.

In the course of the year 2005, Cordoba, one of 23 provinces of Argentina, introduced lay participation in criminal trials through mixed tribunals composed of 8 jurors and 3 professional judges (law 9182). This was the first and is, up to now, the only experience of lay participation in legal decision making in Argentina. The highest court of Cordoba province has ruled that Cordoba Constitution authorizes to integrate courts with jurors --meaning mixed tribunals, which are different from the trial by jury referred to in the Federal Constitution. Consequently, it has been included under the power of the provincial Legislature to establish that kind of mixed courts notwithstanding the power of the Federal Congress to legislate on trial by jury.

### The influence of professionals over lay citizens and some experiences from Córdoba, Argentina

It is well known that there exist reasons in favor and against mixed tribunals and in favor and against classical English style bifurcated tribunals. The French author Francois Gorphe thought that the replacement of a classical jury by a mixed tribunal in France in 1941 had improved the criminal justice system of this country.<sup>3</sup> On the other hand, it is clear that one of the main inconveniences of mixed tribunals is the excessive influence of professional judges over lay citizens.

On October 19, 2007, a Criminal Court in Córdoba City, by the unanimous vote of eight jurors and two professional judges, decided that two defendants charged with aggravated homicide were guilty. Two weeks later, on November 2, 2007, a panel of

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<sup>1</sup> Article 75-12

<sup>2</sup> December 7<sup>th</sup>. 1911 "Vicente Loveira v. Eduardo Mulhall" *Fallos* 115:92; March 22<sup>nd</sup>. 1932 "Ministerio Fiscal v. Director Diario La Fronza" *Fallos* 165:258; June 9<sup>th</sup>. 1947 "Tribuna Democrata" *Fallos* 208:21; August 25<sup>th</sup>. 1947 "David Tieffemberg" *Fallos* 208:225

<sup>3</sup> Francois Gorphe *Les decisions de justice-étude psychologique et judiciaire*, Paris, Presses Universitaires de France, 1952, p. 90

three professional judges sentenced each defendant to eighteen years in prison despite the existence of aggravated circumstances which, in accordance with the law, mandated that they should have been condemned to life imprisonment. The professional judges, explaining the rationale for the verdict and the reasons for the penalty imposed, announced that ten citizen jurors (eight acting jurors and two alternates), felt that the life imprisonment penalty was not proportionate to the crime.<sup>4</sup> It was not under discussion that jurors only vote on the question of guiltiness and that professional judges are the only ones empowered to determine the penalty to apply. Anyhow, and quoting the jurors opinion, the judges considered whether the law was in accordance with the Constitution and determined that it was not. This determination was quite remarkable because it is unusual for the courts to declare an article of the Criminal Code unconstitutional. Obviously the citizens' feelings carried weight with the professional judges.

In the opinion of a very well known author and Cordoba Province public prosecutor, Marcelo Altamirano, the mixed court organized by the 2005 law operates, as a matter of fact, like a classical English style jury: the citizens imposing their criteria over the professional judges.

The citizen's criteria in the case referred to above shows its reasonableness. They warned the judges about the inconveniences of the criminal law that has recently been amended, increasing its penalties under the influence of some sort of "law and order" movement. Some authors praised the soundness of the jurors and commented favorably on the judge's decision. Nevertheless, this was not a final decision: the highest court of Cordoba Province, three years later, quashed the sentence and imposed the life imprisonment penalty to both defendants. The Cordoba Province Supreme Court expressly stated that it was not in the jurisdiction of the mixed Trial Court to declare the law unconstitutional.<sup>5</sup> It is clear from this determination that the Supreme Court purposely disregarded the citizen's opinion in order to impose the strict enforcement of the law and also to reassert the higher authority of professional judges.

#### Jury verdicts and the expression of its motives

The reasons for the preference of mixed tribunals are well known. They are mainly centered round one objection frequently mentioned, referring to the way jurors pronounce their verdicts: in the classical English model they do not express their motives. This is a practice many authors criticize because they say that it means arbitrarily decision making and that it sets aside the possibilities of arguments in appeal. Of course this preference means that one professional judge is in charge of preparing and wording the rationale for the verdict and explaining the law applied in the case. But this advantage has also its drawbacks. What happens when professional judges are outvoted by the majority? It becomes a contradiction to impose on them the duty of expressing reasons in favor of a verdict with which they do not agree.

This last inconvenience was resolved by the law enacted in the Cordoba Province in Argentina by an apparent sound device. In the system implemented by such law, there are three judges participating in the deliberation but only two of them are to vote. In

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<sup>4</sup> 2/11/2007, available at <http://www.pensamientopenal.com.ar/16112007> "Bachetti Sebastián Alejandro y otra p.ss.aa de Homicidio calificado per el vínculo / homicidio"

<sup>5</sup> (Córdoba TSJ, Sentence number 271: October 18, 2010)

case the two voting judges become outvoted, then the third one, who is the panel chairman, is to write the reasons for the verdict. So it is for sure that the writing will be prepared by somebody who could be either concurring with the opinion of the majority or, at least, somebody who has not voted against it.

The experiences with the mixed tribunals of Cordoba province in Argentina reveal another drawback of this way of formulating judgments: the use of the bureaucratic language of the courts which makes the reasoning obscure and artificial. They use plenty of transcripts, including discussions of aspects that were not argued by the parties, like the detailed description of wounds inflicted to the victim, and also word by word narrations and statements made by defendants. They say very little –if anything— about the true reasons for the verdict. Lay people sign it as a formula. They have obviously no idea of what it means.

### Argentina's new developments on lay participation

Some developments concerning lay participation are now under way in Argentina. In November 2011, another of the 23 provinces, Neuquén, enacted a new Criminal Procedure Code establishing trial by jury. It is not a mixed tribunal but a classical twelve-juror jury deciding independently from the professional judge. Verdicts are to be adopted by majority vote (eight out of twelve). The opinion expressed by most of the authors is that the provinces are empowered to legislate in the subject matter of trial by jury as long as the Federal Congress does not exercise its own power.

The role of professionals is contemplated by various provisions of the Neuquén new code. The judge is in charge of deciding about the applicable law and the penalty to impose. This last determination must be adopted with no lay participation but only after the jury has pronounced a guilty verdict. The lawyers are called, previously to the final instructions to be announced to the jurors, to participate in a conference with the judge where they have the opportunity to propose the instructions they believe appropriate. After that the judge has to address the jury summing up the case and explaining the applicable law. Article 206 of the new Criminal Procedure Code reads: “Once the instructions have been discussed with the lawyers, the Judge will address the jury announcing the rules for their deliberation. Then he will explain the issues under discussion and the essentials of the decision providing clear explanation of the applicable law and of its meaning”

There is one particular provision in the new Code referred to the rationale of the verdict: article 211 says that in cases tried by juries the sentence must contain, **instead of the motives of the decision**, a full transcript of the instructions announced by the judge. Then it is clear that there are no reasons for the objection concerning the expression of motives for the verdict. The new Neuquén law is in line with the interpretation of the European Court of Human Rights on this issue: the previous announcement of the judges serves as expression of motives.<sup>6</sup>

The trend towards the implementation of lay participation is now under way in several other provinces in Argentina and also at the federal legislature there are draft projects to this purpose. All of these projects chose the classical jury and not the mixed tribunal

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<sup>6</sup> I am referring, particularly, to the *Grande Chambre* resolution of November 16/2010 in the case of *Taxquet v. Belgique*

system. Most of them establish the same rule as the new Neuquén code including in the sentence a transcript of the judges' instructions instead of the expression of the motives for the jury verdict.

This trend and the preference for classical juries clearly mean that a change has happened in the last few years. Anyway and notwithstanding its shortcomings and inconveniences, the mixed tribunals of Cordoba in Argentina are showing a great deal of approval by the people. They have helped to overcome the old fears and mistrust about lay participation. Compared with the situation and the prevailing opinion from thirty years before, the law enacted in the province in 2004 launched a revolution. Nowadays it seems that lay participation will be in use in the near future, if not all over the country, at least on various parts of it, and it looks like trial by jury will soon be a reality in Argentina.

#### Final remark

As was shown by historical experiences (I quote Andrew Thomas Green on the history of England) and as it results from Argentina's recent experience (I refer to cases adjudged in Cordoba province), jurors have frequently played a significant role in mitigating the punishment for specific crimes or particular defendants as well as lessening tensions between legal rules and social norms. By their part, professional judges have not always agreed and have frequently tried to prevail over them. The role of professionals and the role of lay citizens is not a simple issue. There is always a struggle of a political nature. The option between mixed or bifurcated tribunals and the question of the expression of motives of verdicts are just a consequence of that unfinished struggle.