

JURIES AND DEMOCRATIC LEGITIMACY: THE JURY TRIAL IN THE PUBLIC DEBATE IN ARGENTINA¹

Porterie Sidonie (INECIP) and
Romano Bordagaray Aldana (INECIP).

INTRODUCTION

In the past five years, Argentina has experienced a resurgence of interest in the installation of Juries, an institution ordained by the National Constitution since its first edition, but ignored for more than 150 years. With an only antecedent in the province of Cordoba that had instituted a mixed tribunal system in 2004, only in the year 2011, within an integral reform process of the criminal justice of the province, Neuquén enacted a law with an all-citizen jury model. It was followed by the province of Buenos Aires, the most populous of the country. These two developments have spread to other Argentinean provinces. Chaco and Rio Negro have recently enacted laws implementing all-citizen jury systems. At the same time, diverse provinces have joined the discussion by submitting bills in Chubut, Tucumán, Tierra del Fuego, La Rioja, and the Autonomous City of Buenos Aires.

As an undertone of this process, we find the concern about the democratic legitimacy of the justice system and the expectation that the introduction of Juries could rebuild trust in the justice administration among the citizenship.

This hypothesis that juries can promote legitimacy in justice is supported by the latest data elaborated by Latinobarometro, which states that the judicial branch is one of the institutions that suffer from the least trust in the Argentinean society. Although it could be stated that, in this sense, the judicial branch is not immune to the legitimacy issues of the public institutions, we are not talking about distrust in democracy. On the contrary, the majority of Argentines do trust in democracy as a system. Specifically, what is noticed and rejected is the lack of transparency and effectiveness in the acts and decisions of the criminal justice system.

On the other hand, in the public debate associated with justice reform and particularly with the jury trial system, the relationship between legitimacy issues and the opportunity that brings along the citizen participation in the justice administration, emerges with clarity in order to provide the system with transparency, proximity and trust.

The questions that guide this paper revolve around learning why after centuries (since 1832) of purposive ignorance, it is decided to comply with the constitutional mandate. That is, what is the political context that allowed the resurgence of the issue, to what

¹ The translation of this paper was made by Florencia Ini

public matter do the new initiatives for the regulation of jury trial respond, and what happened in this new wave of debate that led to the exclusion of mixed tribunals almost without further ado? Is jury trial a way of democratic re-legitimization?

All of these questions can be answered from a lecture of the general process in the country, specifically in the analysis of the case of Buenos Aires province.

This paper is based in two theoretical perspectives, the approach of the public policies and the reflexion on democratic legitimacy. For the proposed analysis, secondary sources were consulted; mainly institutional documents such as bills, transcript versions of parliamentary sessions, public speeches, and opinion surveys, among others.

Likewise, press articles and academic debates were collected. The analytical effort put emphasis in reconstructing the perspective of the principal institutional intervening actors: legislators and holders of the national and provincial executive power, during the period of law formation and the context from which it emerged.

2. NEW DEBATES ON DEMOCRACY AND LEGITIMACY

The democratic transitions in Latin America match a worldwide process of re-discussion of democracy in the world. Once the Cold War had concluded and the capitalist democracy had become widely accepted as the best possible regime, the political science and political sociology theorists put their attention to an emergent issue: the political representation through suffrage is a necessary mean but it does not terminate the problem of democracy legitimacy. New approximations arise, and they start to wonder from different perspectives how to build legitimacy in the contemporary political order.²

In democracy, the legality of the norms emanates from the representative system of government, whereby the people –as sovereigns- choose their representatives through the popular vote. The principle of democracy is the recognition of the fact that the people are the ones who hold the power and that is where the government gets its legitimacy. In this way, the State is the one that serves the citizens; the citizens do not serve the State.

At the beginning of the twentieth century, "in the classic age of the representative system, the (*legitimacy towards the ballot boxes*) was valid as an indisputable mandate

2 For more information, see among others: Manin, (1998): *Los principios del gobierno representativo*. Alianza. Madrid; Urbaniti (2006) Urbaniti, Nadia y Warren, Mark (2008): "The Concept of Representation in Contemporary Democratic Theory", en *Annual Review of Political Science*, nº11.; Saward (2006): "The Representative Claim", en *Contemporary Political Theory*, Nº 5.; Warren (2008) "Citizen representatives", en Warren, Mark y Pearse, Hilary (editores): *Designing Deliberative Democracy: The British Columbia Citizens' Assembly*, Cambridge University Press; Avritzer, (2012): "Democracy beyond Aggregation: the Participatory Dimension of Public Deliberation", en *Journal of Public Deliberation*, vol 8. Issue 2.; Abellán Artacho, (2013): "Representación política y democracia. Aportaciones desde la Teoría de la Representación en los últimos diez años", en *Revista Española de Ciencia Política*, Nº 33.

to then be able to govern freely. It was supposed that future policies were included in the terms of the electoral choice by the single fact of the inscription of that one in a foreseeable universe, structured by disciplined organization, with well-defined programs and clearly expressed discrepancies" (Rosanvallon, 2009: 25).

During the eighties, this way of basic legitimacy that the representative democracy foresees starts to be questioned, being the fiction for which it was accepted that the legitimacy of the electoral moment would project to the totality of the mandate broken. The "crisis of representation" is counteracted by the rise of new manners of citizen participation, strongly impregnated by a direct democratic spirit, that offer new ways of democracy legitimacy. Authors like Pierre Rosanvallon study the new institutions that produce legitimacy of a new kind, just like the named "proximity legitimacy".

The proximity legitimacy talks about a tie between governors and governed from a new position that reduces the traditional distance among them. "The proximity defines, primarily a position of power facing society" (Rosanvallon, 2009: 249). There is an idea of horizontal and vertical approach between representatives and represented, that comes to answer the unsatisfied social expectations.

So, on one side proposals and experiences arose, like the referendum or the shortening of mandates to increment the elective moments which aimed to enforce procedural legitimacy or improve electoral democracy. At the same time, on another plane, practices has been developed, social and informal counter-powers and institutions, destined to countervail the trust erosion through an organization of the distrust (Rosanvallon, 2011: 24). In the terms of Arrow, trust constitutes an invisible institution that has three elemental functions: 1) it produces an enlargement of the quality of legitimacy, adding a moral dimension to its procedural nature (integrity in a wide meaning) and a substantive dimension (the concern on common benefit) 2) it has, besides, a temporal paper, as it implies a continued in time nature of that enlarged legitimacy, and 3) it is an institutional economizer, as it allows to save a set of mechanisms of verification and evidence.

In conclusion, the distrust keeps a positive value for democracy. It is reflected in the portion of power not delegated from the people, which gets at stake looking for the government –in a wide sense- to be faithful to their compromises and respect the demand for serving the common benefit.

In that order, one of the emergent figures of the new democratic ways is the "judge of the people", crystallized in institutions such as jury trials, among others possibilities. These institutions have been a response that verifies the representation crisis, and in the case of Juries, of the recognition of the boundaries of professional justice. It is valid then to highlight the political dimension of the trial, and also of the jurors. The first, as an act of public decision that produces more tangible results compared to other ways of decision. The trial responds to a social demand, certainty diffused. It is a modality of general interest on a particular case. At the same time that it solves a conflict or a dispute, it performs a prescriptive function spreading the valid norms and the rules for its interpretation.

On the other hand, referring to the political dimension of the Juries creates an obligation to come back to the approaches of Tocqueville, who acknowledges in the jury a school of government, and also represents in this institution the idea of governing by equal and free men. "I consider it as one of the most efficient ways in which the society could be served for the education of the people" (Tocqueville, 1957:276)

Jury is based in the deliberation that is the prototypical way of interaction in democracy. "Specifically, the results are democratically legit if and only if they can be the subject of a free and reasoned between equals agreement" (Cohen, 1989: 132) "This democratic quality of the jury does not proceed of the equalitarian principle that works as a basis. It also proceeds of its way of functioning, which is the deliberative order" (Ronsanvallon, 2011:213) In other words, the jury is the realization of democratic ideals.

Numerous recent academic studies have acknowledged the particular virtues of public deliberation as a way to educate democratic citizens (Gastil, 2014). But the deliberation carries other effects, fundamentally in terms of its potential to centrally legitimate the institutions in which it occurs, but also beyond them. "By providing a direct experience from deliberation within, the jury system itself can promote a sense of legitimacy of juries, professional judges, and maybe, indirectly, more distant estate entities. As expressed by Jurgen Habermas, legitimacy of a government depends on our capacity to resonate and jointly debate the merits of its actions, and the jury puts that citizen right at the very heart of the legal process and allows them not only test its legitimacy, but also assume a real responsibility by issuing their verdicts. (Gastil, 2014: 155)

3- LEGITIMACY PROBLEMS IN THE JUSTICE SYSTEM

When talking about legitimacy problems in the Argentinean justice system, we must take the question back to the democratic transition process, the debts of a flimsy institutional system that has failed to respect constitutional principles or meet the expectations of citizens for justice.

Alberto Binder explains that the judicial crisis is based in the lack of responsiveness from the justice administration regarding three basic demands: protection, certainty and leadership (Binder, 1994). Each of these demands refers to different areas of individual and collective relationships. The demand for leadership alludes to the capacity of solving power struggles within legality and democratic continuity. The demand for certainty alludes to the change in the state's relationships, the citizen and the market, and it implicitly entails the market's claim for legal security. To those we must add the protection demand, the main complaint from citizens about the criminal justice system. The protection against power abuse by the same state (here we see the still open wound of state terrorism) and also against the increase of citizen insecurity (victimization and fear for the crimes against life and property).

Opinion surveys that were regularly made in our country and also in the rest of countries in Latin America reveal some data that allows us to characterize the crisis that is going through the justice system, or as we like to name it, the problems of legitimacy that affect the justice administration.

A starting point for such characterization is given by the question of the work evaluation of the judicial branch. An average 66,25% of the surveyed stated that its performance was bad or very bad, while only an average 26% answered that it was good or very good, according to registers gathered for the years 2006, 2007, 2008 and 2015.³

Congruent with that opinion, the judicial branch is one of the institutions that receives little trust from Argentines: an average of 3,94% of those surveyed said they have a lot of trust and 34,55% said they have no trust at all (with data based in measurements of 1999-2015, excluding 1999, 2012 and 2014)⁴ The police and the Congress share very similar averages. In a worst position, we only find the political parties, with pretty distant maximums and minimums (the average of the surveyed that said to have a lot of trust in political parties is 1,78% while almost half of the surveyed (47,55%) said they had no trust). In this ranking, above the judicial brunch, we find (even though it seems hard to believe) the armed forces, the government, the state and the church. This last one is, by far, the institution that inspires the biggest trust among the citizens according to a survey from Latinobarometro.

TRUST IN INSTITUTIONS		
INSTITUTIONS	Not trust at all %	Level of distrust
Church	17	LOW
Government	30	MEDIUM
Armed Forces	30,88	
Congress	33,16	
Police	34,05	HIGH
Judicial branch	34,55	
Political parties	47,55	

Table constructed from information of Latinobarometro

³ Own construction data from information elaborated by Latinobarómetro.

See: <http://www.latinobarometro.org/lat.jsp>

⁴ Data based in measures from the years 1995-2015 excluding 1999, 2012 and 2014. Own construction data from information elaborated by Latinobarómetro. See: <http://www.latinobarometro.org/lat.jsp>

A research from Di Tella University⁵ has constructed an index of perception from the citizen to measure the levels of trust in justice. This index measures the opinion of the surveyed regarding the attributes that are expected from the justice system in terms of impartiality, efficacy and honesty⁶. The results of this research reveal that by the year 2010, the index of perception reached 29,9 points (in a scale where 0 indicates the minimum of trust and 100, the maximum), indicating that those surveyed were far from believing that the system supplies those attributes. Impartiality is understood as "treating everyone equally, regardless of their economic means, their contacts or their political affiliations", but the lack of convictions for corruption crimes puts this idea into crisis. Efficacy is associated with the capacity to end conflicts, and is intrinsically related to the expectation that the system complies with a deterrent function regarding crimes. The honesty attribute refers to the integrity of the members of the justice system.

Now, the lack of trust in the judicial branch and the bad opinion that prevails regarding their performance matches the fact that the majority of the surveyed still believe that democracy is preferable to any other kind of government (an average of 68,11% between 1995 and 2015, excluding 2012 and 1999). This support increases still more when they are asked if they agree with the fact that "democracy can have problems but it's the best government system". The positive answers (agrees a lot or agrees) reach an average of 81,16% of the surveyed⁷. It is valuable then to put into perspective that the support and the agreement with the democratic regime are not accompanied by a high valuation of one of their main institutions, the judicial branch. In this regard, it is feasible to argue that the problems of the judicial branch legitimacy are mainly problems of trust in the fulfillment of its central mission.

In the scope of the criminal justice system, the crisis is manifested in confinement convictions without real trials, decisions that are made by the employees and not by the judges, the lack of a real defense for the accused, especially when he cannot afford an attorney, enormous trial delay, no public visibility, lack of respect for victim rights, and direct and permanent violations of the fundamental guarantees provided by international human rights treaties (Binder 1994:5). The heritage of a preeminently inquisitorial system explains why the trial is reduced to the management of a judicial file, where secrecy culture has prevailed and where a rigid and verticalized decision-making structure is consolidated. An absolutely depersonalized process, in which victims and accused are just data of a judicial file and the judge is nothing but a signature, contribute to the public opinion of a machinery that simply standardizes conflicts and produces answers, rather than transmitting a valid sense of justice to society

⁵ Di Tella University, et al. "Índice de confianza en la justicia. Marzo 2010" Available at: http://www.utdt.edu/ver_contenido.php?id_contenido=521&id_item_menu=1601

⁶ The paper refers to "efficiency" but taking into account the definition that it uses, the right concept in this case is "effectiveness"

⁷ Data based in measures from the years 1995-2015 excluding 1999, 2012. Own construction data from information elaborated by Latinobarómetro. See: <http://www.latinobarometro.org/lat.jsp>

This situation, common to most Latin American countries, led to a set of procedure reforms whose object was to give back to the trial the centrality of the process and to condense in there the necessity of contradiction, openness and proximity as the basic principles for conflict resolution. These reforms, initiated on the 90', are still in a debating and implementation process. Although incomplete, they have opened questionings on a deeper problem, which are the role and the legitimacy of the justice system into young democracies. (Langer, 2007).

In the last decade, the lack of citizen trust in the criminal justice system has become a social demand to the current government and the political class around it. In fact, security and justice issues have taken a big part of the public agenda and have won a dominant spot in electoral process (executive and legislative elections, in the three levels of government, national, provincial, and municipal).

The citizen distrust of the criminal justice system contains multiple dimensions, among them, its ineffectiveness regarding the control of crimes, the lack of results in punishing corruption, and the idea of a privileged "social class".

This interpretation is backed up by regional studies that situate Argentina among the 8 countries with the least trust in the effectiveness of the criminal justice system, among a total of 26 countries. In Argentina, a 36,9% indicated that they trust in the effectiveness of the criminal justice system, in the superior level we find the United States with a 56,1% and in the inferior level of the ranking, Ecuador, with a 30,5% (Herrmann, MacDonald, y Tauscher, 2011).

Justice administration is conceived as one of the main functions of the State, and this is the reason why the trust/distrust of the criminal justice system is related with the legitimacy of the State and the Government particularly. This association explains that citizen discontent has been chosen by the political class, and that the discussion for a judicial reform has pierced the specialized scopes to become a public debate. And it is in this context in which the discussion for the instauration of jury trial strongly reappears, creating awareness that it is not enough with the intra-organizational reforms, but what it is at stake is bringing legitimacy to the system.

4- A NEW WAVE OF JURIES AT THE PUBLIC ARGENTINE DEBATE

It was a goal of the Founding Fathers that the criminal trials were to be carried out by juries. The bill for the Assembly of 1813 established that "the criminal process will be carried out by juries and it will be public" and that "the criminal judges will apply the law after the citizen have been found guilty by their equals" Since then, with the exception of the Constitution of 1949, the jury has been ratified by all the constitutional texts. The current Constitution, amended in 1994 during the last democratic period, confirms that

legacy, establishing jury trial in three different articles, although it does not indicate restrictively that it must be an all-citizen jury (totally composed by citizens)⁸

In the provincial level, ten out of the twenty four Argentinean provinces have taken the mandate and established the jury trial. Excluding Cordoba and Chubut that use the system of mixed tribunal, the rest of the provinces made dependant to special laws.

Córdoba has been the province that broke the curse, by enacting in the year 1991 an operative law to implement the jury trial for the first time. That step was given through the law 8123, which integrally reformed the criminal procedure code. In that law, the optional mixed tribunal was incorporated -whenever the defense attorney, the prosecutor or the victim would require it- consisting of three professional judges and two citizens, for severe cases with penalties of 15 years or more. The sentences must be jointly elaborated by the juries and the professional judges that were a part of the mixed tribunal. But this law was not implemented until 1998 (Bergoglio, 2010:13).

An equal integration was expected, with the same faculties and duties of the professional judges. Between 1998 and 2004, only 33 cases were decided under this way of citizen participation, and even limited "the experience contributed to widen the acceptance of the institution in the judicial circles" (Bergoglio,2010:13) Maria Ines Bergoglio expresses in an interesting review and analysis of the local process: "this favorable appreciations were not founded in the contributions that the citizens could make to the solution of the case, but in the fact that this system of prosecution allows to show the common citizen the responsibilities, contributing that way into improving their trust towards the judicial branch (Ferrer and Grundy,2003) "

This law was amended on 2004, within a wider national debate on insecurity, led by the father of the victim of an extortive kidnapping that led to the death of the young boy, Axel Blumberg. The case resulted in a great citizen mobilization in the city of Buenos Aires, and led to a petition presented to the National Congress, that besides proposing the rising of penalties of certain crimes, also solicited the implementation of a system of all-citizen jury. This context explains the gravitating presence of the engineer Blumberg during the debates of the bill, which did not favor an all-citizen jury because of the strong pounding of the judicial branch corporation: "almost half of the criminal judges of the Court of Appeals (25 over 57) signed a note at the Legislature stating its

⁸ Section 24. Congress shall promote the reform of the present legislation in all its branches, and the establishment of trial by jury. Section 75 subsection 12- 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. Section 118.- The trial of all ordinary criminal cases not arising from the right to impeach granted to the House of Deputies, 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. For more information, see Penna C (2014)

rejection towards the bill” (Bergoglio,2010: 15). They also made their voice by heard by the Bar Association and Association of Magistrates, who highlighted their support to the current experience and a certain resistance towards the citizen participation being widened (Bergoglio,2010: 15).

Thus, a mixed tribunal was established, formed by 8 citizens and two professional judges, and the minimum age requirement was raised from 21 to 25 in order to be admitted as a jury (Law 9182). The eight titular juries and two professional judges deliberate to decide about the guilt or innocence of the defender. The president of the tribunal does not vote, unless there is a tie. Under this law, the jury system is mandatorily applied to crimes comprehended in the economic and anti-corruption jurisdiction⁹, and also to aggravated murder , sexual crimes integrity against followed by death, murder or on the occasion of torture and murder during robbery.

The province that followed Cordoba’s steps was **Neuquén**, several years later, with another model (all-citizen jury) and also within an integral reform of the criminal procedure code.

In Neuquén, the procedure was on charge of a special commission “inter-powers commission” composed by representatives of the three state branches, the magister association, and the association bar. That commission was convened by the Resolution 737/08 of the province Legislature, and began working in the year 2009. The law that regulates jury trials (Nº2784) was enacted unanimously on 24/11/2011 and the system came into force during early 2014.

In this province, the jury is obligatory under the prosecutor’s requirement for crimes with 15 or more years of prison penalty (against the persons or their sexual integrity, followed by death or serious injury). The jury is formed by twelve citizens from between 25 and 75 years old, who decide on the guilt or lack of guilt of the accused by a qualified majority of 8 votes.

Even though it was part of an integral project, jury trials were presented as the “central core of the criminal reform” that allowed the system to “open the door of the justice administration towards the common citizen” (Deputy Marcelo Inaudi, president and secretary of the Constitutional and Justice Matters Commission)¹⁰. Just as in the province of Buenos Aires years later, a recognition of the distance between criminal justice and citizenship underlies the initiative. The deputy governor Ana Pechén referred to the loss of trust of the society in the justice and in that sense she pointed out that the experience that will be carried out in a few days is “an historical event, that approaches the citizens to give out their opinion on transcendental matters” .¹¹ In the same way, the deputy Pino Russo, president of the ruling coalition considered that “the

⁹ Article 7 of the law 9.181

¹⁰ El núcleo de la reforma penal debe ser el juicio por jurados o mejorar la etapa de investigación? *Fuera del Expediente*, (April 13, 2010) Available at: <http://fuera del expediente.com.ar/2010/04/13/el-nucleo-de-la-reforma-penal-debe-ser-el-juicio-por-jurados-o-mejorar-la-etapa-de-investigacion/>

¹¹ <http://www.neuqueninforma.gob.ar/en-neuquen-preparan-simulacion-de-juicio-por-jurados/>

initiative matches the work that is being made in the Legislature for people to regain trust, legitimacy and credibility in their authorities”¹².

Unlike Córdoba, and even though Neuquén’s Constitution did not include jury trials, there was a unanimous political decision towards the all-citizen system. The three powers of the state converged to that position, as well as key actors such as the Magister Association, and the Bar Association, that were also favorable to the instauration of jury trials. The President of the Superior Justice Tribunal, Evaldo Moya, pointed out that “the political decision of introducing jury trials was made by the three Neuquén’s state branches, through a Commission that acknowledged that *the citizen was trained to participate in the judicial decisions*”.¹³

In the province of **Buenos Aires**, the debate was introduced by the provincial executive branch, early in 2012. Both statehouses had antecedents of legislative initiatives on this matter.

During the treatment at the Chamber of Deputies, the bill suffered modifications, but its integration of twelve citizens was never altered. The approval of that statehouse counted with more than two thirds of the present deputies in December 2012. The Senate approved the bill without modifications almost a year later. The law 14.543 was enacted on September 12, 2013 and its entry into force was on March, 2015.

In Buenos Aires, the jury is also applied to crimes with penalties of more than 15 years, but it is a right of the accused to choose between a jury trial and a trial with a professional judge. The juries must be between 21 and 75 years old and they decide on the guilt or not of the accused by the rule of qualified majority -10 affirmative votes-, or unanimity for cases of life imprisonment.

TIMELINE

PROVINCE	DATE OF APPROVAL	DATE OF IMPLEMENTATION	CONTEXT OF THE DISCUSSION	TYPE OF JURY
Córdoba	1991	1998	Integral reform of criminal process	Mixed Tribunal
Neuquén	2011	2014	Integral reform of criminal process	All citizen jury
Buenos Aires	2013	2015	Special law	All citizen jury
Río Negro	2014	2018	Integral reform of criminal process	All citizen jury
Chaco	2015	Unkown	Special law	All citizen jury

¹² <http://www.neuqueninforma.gob.ar/en-neuquen-preparan-simulacion-de-juicio-por-jurados/>

¹³ Realizarán simulacros de juicio por jurados en toda la provincia. (October 15, 2013). *Diario Andino*. Available at : <http://www.diarioandino.com.ar/diario/2013/10/15/realizaran-simulacros-de-juicio-por-jurados-en-toda-la-provincia/>

Submitted bills in Chubut, Tucumán, Tierra del Fuego, La Rioja, and the Autonomous City of Buenos Aires.

5- ALL CITIZEN JURY VS. MIXED TRIBUNAL

We asked, at the beginning, what happened to cause the new discussion process regarding the implementation of jury trial to have centered on discussion of the jury system. In this period, the discussions revolved around unanimity and majorities, admissibility requirements, the role of the judge, but, surprisingly, the dispute between all-citizen jury and mixed tribunal did not appear in scene.

Taking back the question into the historic process, in the year 2004, Córdoba modified its jury system but did not criticize the mixed tribunal system, incorporated in the province constitution in 1998. Only seven years after, the province of Neuquén modified its procedural law adopting and regulating a new prosecution model with an all-citizen jury system. From that moment on, all the provinces that have enacted laws of jury implementation have chosen the all-citizen jury system.

At Córdoba, the regulation of the jury in the Constitution was based on the necessity of people directly taking part into the justice administration, while the choice of a mixed tribunal was justified in recognition and the need of the technical knowledge of a professional judge. In the conception of the constituents, the combination of both systems would produce the best possible model.

“In a tribunal like the one we have projected, both classes of judges cooperate and lend each other those faculties that the other lack. The technique judges give out their law knowledge and the juries, their spontaneous and common-men-related vision on judicial realities.”¹⁴ (Urquiza, 2010: 37)

This decision was reached in 1991 with the enactment of the law that made the jury operative, although with much reduced scope, and was ratified with the modification of 2004, despite the fact that the questioned legitimacy of the judges and the system was an explicit motivation at that instance.

“During these last times, Argentinean society has passed through a very deep crisis, an atomization process of the institutions and the society, which almost lead into the national dissolution (...). Then, us, the legislators of the province of Córdoba, must give responses to the popular demand and create new institutions that allow us to replenish a social pact (...) jury trial, is another step

¹⁴ Words of José Cafferata Nores, conventional constituent of Cordoba, in the Session N°9 of the Honorable Constituent Convention of the Province of Cordoba, which took place between March 30 and April 1 of 1987

that takes us to the long way of bringing trust back to the institutions...”
(Urquiza, 2010:41)

The arguments of the advocates in favor of guarding the professional knowledge as a necessary condition for the justice administration express the distrust in citizen participation as to value the existence or not of a crime and, based on that, determine the liability of the interveners. That distrust states the same repairs that, back in the continental Europe of the XIX century, took to the replacement of the system of all-citizen jury for the one of mixed tribunals as a part of a counter-reformist movement. Behind the distrust, there is always nervousness regarding the progress of the exercise of power by the popular communities. It is worth remembering that while the “universal suffrage” was being consolidated, the political class denied people’s participation in the justice administration (Rosanvallon, 2009).

There are substantial differences among jury systems that are not mainly technical –as suggested by the arguments of the legislators from Cordoba - but rather deeply political (in the etymologic sense of the word) as they represent two very different power outlines. The all-citizen jury system is founded on the full trust in the jury as a manifestation of the sovereign people and fulfills the democratic ideal of the deliberation between equals. It is a procedure of contrasting between different points of view that obliges each of them to review and ponder their position regarding the others, generating in this way a better quality final choice. “Even though none of them is indifferent of its own good, all of them try to reach decisions that are found acceptable for those that share the compromise of deliberation...taking into account that that compromise requires surely to be willing to check the way in which one understands its own preferences and convictions” (Cohen, 1989: 134).

In contraposition to this, the mixed jury system breaks the balance of the deliberation stage by the infiltration of a judge, necessarily affecting the quality –and legitimacy- of the resulting decision. In the mixed tribunal system, the judge assumes a double faculty. On one hand, he acts as the person responsible for the control of legality of the proceedings and the rights guaranteed to the defendant. On the other hand, he acts as a member of the jury with a greater capacity than the other interveners, invested with the authority “to participate” in the determination of the criminal responsibility. The distrust of the citizen is directly proportional to the allocation of power to the judge. Under the argument of the necessity of a scientific knowledge or the foundation of the judicial decisions hides the resistance of a “corporation” to give in some of their main faculties. The mixed tribunal system is a partial and cosmetic withdrawal of the inquisitive tradition; as it does not abandon the distrust in the people, typical of the inquisition (Penna, 2014:124). Therefore, it would never be a sufficient antidote to solve legitimacy problems.

6- THE JURIES AS AN ANSWER TO THE LEGITIMACY PROBLEMS

In December of 2001, Argentina suffered the worst social, economic, and political crisis since the advent of the democracy with great repercussions on the institutional system. Different social discontents made the middle classes converge with the lower classes in

massive and spontaneous mobilizations, convened under the rallying cry "everybody out!"¹⁵ This simple but radical motto denounced the establishment, exceeding more than the current government. A symptom of that was that not even the departure of the current president achieved the stabilization of the institutional system¹⁶. However, the density of the crisis was such that the social claims were also extended to the Judicial Branch members, mainly represented by the members of the Supreme Court of Justice. In the highest moment of the crisis, the "popular manifestations claimed in the streets the departure of the Supreme Court Of Justice" (Bergoglio, 2010:11) According to the measurements made by Gallup, the average trust in the justice system of citizens reached a 57% in 1984, in the moment of recovery of the democracy. That figure dropped to a 26% in 1995, the first year of the second presidency of Menem, and during the crisis of 2001, it fell to 12%.¹⁷

In response to the crisis, there was a call for early elections, which were won by the president Nestor Kirchner. A few months after he assumed office, and with the intention of reversing the discredit of the judicial branch, the ex-president signed the 222/03 decree, which sought to make the process of nomination of candidates to the Supreme Court by the Executive Branch more transparent.. He also began a renewal process of the members of the Supreme Court by replacing three of the seven members that were a part of it.¹⁸

The first data to indicate that juries were perceived as part of an answer of the political class to the Judicial Branch's legitimacy problems is the quantity of bills presented to the Chamber of Deputies of the National Congress in 2004. In a survey of bills for the implementation of jury trials nationally, from the year 1999 to 2015 included, the evolution is evident and the highest numbers are found after the moments of bigger social demand for justice (2004 and 2013).

¹⁵ In the legislative elections of October 2001, the social unrest became noticeable. A sign of that were the high percentages of blank vote and null vote. To obtain the nullity, the candidature of a comic character, Clemente, had been "impulsed" a clear message towards the political class. In the City of Buenos Aires, the null vote gained the greatest percentage of all the presented candidates. See:

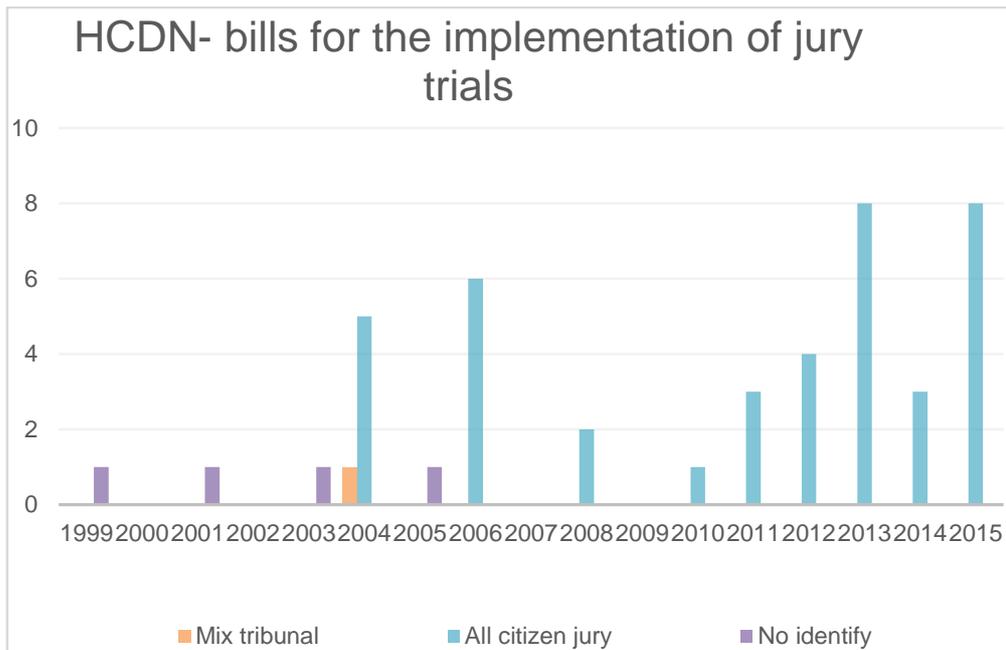
Base de datos políticos de las Américas. <http://pdba.georgetown.edu/Elecdata/Arg/congo1.html>.

“ The manifestations of rejection of political parties and leaders that were expressed both in the streets and in public opinion polls (...). The set of those who did not vote -year 2001- and of those who issued some form of "negative" vote (null or soft) reached 42.67% of the enabled votes, a percentage that far exceeded the sum of the votes received by the two political "majority" and with deeper roots in the national political parties, which garnered an unusually meager 34.6% of the potential vote. "See Cheresky, Pousadela (2004)

¹⁶ In ten days, Argentina had five different presidents

¹⁷ National Data Published by the National Plan of the Judicial Reform, Bergoglio (2010)

¹⁸ When he reached the power, Kirchner impulsed impeachments against the named "automatic majority" created by the president Carlos Menem, who by law increased the composition of the court from 5 to 9 members in 1993. The process concluded with the renounce of Julio Nazareno (president) Adolfo Vázquez and Guillermo Lopez and the destitution of Eduardo Moline O'Connor and Antonio Boggiano



Own construction on official data of the Chamber of Deputies

In December of 2012, in the midst of a confrontation scene between the national government and the judicial branch, the failed acquittal of a tribunal from Tucuman in a key case of trafficking, triggered a new and spontaneous social mobilization. In this scenario, the president of the Nation (Cristina Kirchner) announced by nationwide broadcast a call to extraordinary sessions of the National Congress to modify the trafficking current law, through a speech with strong criticism of the judicial branch.

“Last night, something very bad happened. There was a divorce between the society and the justice (...) humbly, it is high time each branch took care of what is happening. I compromise to impulse a process of justice democratization (...) I hope that this case is useful to reconsider a democratization of one of the three state powers, independent, but state. We must always preserve common benefit and state’s integrity because we represent common benefit”¹⁹ **Cristina Fernandez de Kirchner, President of the Nation**

Consequently with her declaration, a month later, in the speech that inaugurated the 2013 legislative year, the President announced the sending of a set of bills tending to transform the justice, under the name “democratization plan”.

It is interesting to observe that even though jury trials were not included at the executive branch democratization agenda, a great part of the political class acknowledged that it was a possible answer. The quantity of bills presented to

¹⁹ Tras el fallo por Martita Verón, Cristina anunció que impulsará la “democratización de la justicia (12 de diciembre de 2012) *Diario La Nación*. Available at: <http://www.lanacion.com.ar/1536137-despues-de-reunirse-con-federer-la-presidenta-encabeza-un-acto-en-escobar>

implement the jury trial by 2013 was an evident correlative of this political and social atmosphere.

The case of Buenos Aires: the dimensions of the crisis

The following day after the “Verón” case, in a session programmed in advance, the Deputies Chamber of the Province of Buenos Aires gave preliminary approval to the bill that regulates jury trial. The speeches, that had before referred to the crisis in the abstract, used the case as a support for the bill in the discussion. Although it was not an explicit message, it was insinuated that jury trials were an answer of the province to such a social discontent.

“Maybe it was not random, maybe God did not play dices when he made us debate this bill actually in this day. The issue of Marita Veron touches everyone very deeply in the political scene and for those of us who are still very committed lawyers more than everything and have a big respect for our profession and for the justice administration. We are deeply touched when we acknowledge a judgment like the one rendered yesterday that had an impact, not only on the ones who dedicate to the legal practice, but also in the whole society. Maybe these social consequences would not have occurred if a jury tribunal rendered the same judgment that was rendered yesterday.”²⁰ **Deputy Iván Budassi, Province of Buenos Aires**

“The Province is going to give a big step through jury trials, this is the justice democratization. This allows us to fulfill a society demand” (...) (Provincial mandatory pointed out that the case Marita Veron) “Has touched all of us very deeply and highlights the necessity of implementing justice democratization through citizen participation with popular tribunals, in the case of serious offenses, that guarantee a sentence according to the nature of the case”²¹ **Daniel Scioli, Governor of the Province of Buenos Aires**

In the framework of the parliamentary debate, that happened in two relatively distant times (December of 2012 in the Chamber of Deputies and September of 2013 in the Chambers of Senators), different political sectors recognized the crisis of the justice system and how it echoed in the political class.

An unavoidable dimension of the crisis has to do with the politicization of justice. There are those that denounce right away the connivance between the political power and the judicial branch, and those who suggest that the “wish for the judicial career” makes the Magisters be sensible towards the political opinion. The politicization shows a justice that is compliant with current governments and this explains the weak results in matter of corruption’s prosecution, one of the strongest demands of the citizen. Hence, the distrust in the judicial power has also become an accusation to the political power.

²⁰ Deputy Chamber of the Province of Buenos Aires (2012) *Diario de sesiones de la Cámara de Diputados*. First extraordinary session, December 13, 2012 (page. 9365) La Plata.

²¹ Media sanción para el proyecto de juicio por jurados (December 13, 2012). *Diario Página/12*. Available at: <http://www.pagina12.com.ar/diario/ultimas/20-209804-2012-12-13.html>

“President Cristina Fernandez has brought into the open, with a lot of emphasis these days that the criminal justice is in crisis. It is worth to be clear about it. What is in crisis is the professional judges justice (...) The professional judges justice, whose judges are not only public employees designed and controlled by the political power, governors and parliament, and that have as their principal clientele those who appoint them and control them”²² **Deputy Marcelo Sain, Province of Buenos Aires**

“I would like to highlight that when the people starts to make decisions regarding the justice, it is also a relief for us, from the point of view of the politicians that we are, because the responsibility is always, somehow, put in the state, and the state is made by all of us who are a part of the branches”²³ **Deputy Monica Lopez, Province of Buenos Aires**

In general, the crisis is also referred to the distance existing between the citizenship and the judicial branch. That distance has been contributed by an institutional culture with strong inquisitive nature that allows that many of the decisions to be written decisions, without the presence of the victims and accused, in a cryptic and bureaucratic language that in no way can work as a social message.

“That is the reason why the citizenship is no longer cooperating with justice. It turns their back, it does not believe in it, mister president, because the justice has become technic, bureaucratic, inaccessible (...) because the people finds the justice to be distant from the interest of the citizens.”²⁴ **Deputy Franco Caviglia, Province of Buenos Aires**

“There is a truly dissatisfaction because of the fact that when we deal with the judicial branch or when there is a judicial conflict, we tend to think about eternity and not about resolving it the next month or by the end of this month or by the end of the year.”²⁵ **Deputy Raul Perez, Province of Buenos Aires**

The crisis is also expressed in the eyes of the society on the members of the justice system, who are identified as part of a privileged social class.

“The last monarchic aftertaste of the republic is the judicial branch, which is administered by judges with life stability and with a series of procedural and

²² Deputy Chamber of the Province of Buenos Aires (2012) *Diario de sesiones de la Cámara de Diputados*. First extraordinary session, December 13, 2012 (page. 9370) La Plata.

²³ Deputy Chamber of the Province of Buenos Aires (2012) *Diario de sesiones de la Cámara de Diputados*. First extraordinary session, December 13, 2012 (page. 9379) La Plata.

²⁴ Deputy Chamber of the Province of Buenos Aires (2012) *Diario de sesiones de la Cámara de Diputados*. First extraordinary session, December 13, 2012 (page. 9376 and 9377) La Plata.

²⁵ Deputy Chamber of the Province of Buenos Aires (2012) *Diario de sesiones de la Cámara de Diputados*. First extraordinary session, December 13, 2012 (page. 9380) La Plata.

functional guarantees that make them to be away from common sense of the society. ²⁶ **Deputy Ivan Budassi, Province of Buenos Aires.**

Lastly,, there is also the complaint about the justice system because of its lack of results. A central element of the crisis of the criminal justice is its inefficiency. Promoters and detractors of jury trial agree on this.

“What do the people say about justice? They say that the offenders *enter through a door and leave through another...* (...) People say that the penalties are benign and that stronger convictions should be given... (...) that the justice is slow...”²⁷ **Senator Alfredo Meckievi, Province of Buenos Aires.**

Just as the provincial legislators have conceptualized the crisis, the inefficiency, the politicization, the distance and the privileges that the “judicial class” has are constitutive dimensions of the problem. The result of the crisis is the detriment of the citizen trust towards the institutions of the judicial branch in two different levels: the citizenship has stopped believing in the capacity of the system to achieve its goals (resolution of conflicts), but it also distrusts the said resolution, when it occurs, to be for the sake of common benefit. Actually, part of the complaint towards the justice system has to do with the fact that it is being unfaithful to its fundamental mission. The judicial decisions do not express a valid justice sense to the society.

Dimensions of the new legitimacy

If we understand that the capacity to define a problem means power, because in that act some possible answers (public policies) are included, while some others are excluded, then we can explain why jury trials were an understandable answer of the political system of Buenos Aires to the crisis of the criminal justice system and why the all-citizen system was the only considered option.

The jury offered the ruling class a “remedy” with chances to revert –in a great measure– all the enounced problems: impartiality to counteract the politicization, control to minimize the inefficiency, closeness to recompose the distance and democratization to counter the privileges.

Impartiality

The professional justice in Argentina has shown not only its dependence on political power but also its permeability to the factual powers and that constitutes a structural weakness of the system. It is not remedied by improving the mechanism of entry and

²⁶Deputy Chamber of the Province of Buenos Aires (2012) *Diario de sesiones de la Cámara de Diputados*. First extraordinary session, December 13, 2012 (page. 9364) La Plata.

²⁷ Deputy Chamber of the Province of Buenos Aires (2012) *Diario de sesiones de la Cámara de Diputados*. Ninth extraordinary session, September 13, 2013 (page. 813) La Plata.

removal of the judiciary. It is the time maintenance and the judicial career logic that undermine the expected impartiality in a republic.

“This initiative can collaborate with what we could call the *decorporativization* and *depoliticization* of the criminal justice. Decorporativizacion because it inserts a social actor that is not a part of that institution... Depoliticization because in some way it breaks the historic alliance between magistrates and political power, that forms part of the professional justice logic”²⁸ **Deputy Marcelo Sain, Province of Buenos Aires**

Only an all-citizen jury, formed by twelve citizens who accidentally exercise the judging power, offers the necessary level of impartiality. Although the risks of them being influenced are not eliminated, the real possibilities of that happening are substantially reduced, because the ones deciding are 12 and because they change for each different trial.

“A popular and democratic jury, that is not going to have aspirations of rise or political aspiration, or fear of political pressures, that our judges do have even though they could be unfounded”²⁹ **Deputy Ivan Budassi, Province of Buenos Aires**

This concept of impartiality as disinterest cannot be achieved through a mixed tribunal. Here is one of the main reasons why this system of jury trial has not been contemplated by the provincial legislators.

The impartiality also results from a selection process that starts with a raffle but that is later improved in a hearing in which the parties, each of them from their particular interest, seek to exclude those who can represent a partial interest towards a jury that must represent all the sectors of the society.

The disinterest lies behind the presumption of seeking of common benefit. As far as personal interests do not affect the decision, what guides the decision is the effort to materialize, through the application of a law in particular, the agreements on the values of the community and the rules of convenience. From the point of view of political construction, there is no possibility at all that a single person, judge or juror, within its particular/individual will, can express by itself the common benefit.

Control

²⁸Deputy Chamber of the Province of Buenos Aires (2012) *Diario de sesiones de la Cámara de Diputados*. First extraordinary session, December 13, 2012 (page. 9370) La Plata.

²⁹Deputy Chamber of the Province of Buenos Aires (2012) *Diario de sesiones de la Cámara de Diputados*. First extraordinary session, December 13, 2012 (page. 9368) La Plata.

The jury introduces a mechanism of social control on the functioning of the justice system that should make an impact in several instances: the quality of the investigation, the quality of the trial and the quality of the judicial decision.

It is notorious that, although the wide implications of the presence and participation of “the people”, in the trial, the legislators picked up mainly the potentiality of social control to put into evidence the deficiencies of the criminal investigations and, mainly, the ones of the police’s work.

“The social control that implies to have the common people checking how the police acts, how was the procedure that led to the investigation, efficiency or inefficiency of those who collected the evidence developed, is a substantial control that we do not have right now”³⁰ **Deputy Ivan Budassi, Province of Buenos Aires**

Regarding the quality of the trial, there is an expectation that the jury can cause each one of the participants to fulfill their function in a better way. Any institution functions better when there is control. But aside from that, mere citizen participation makes the transparency of the trial effective, a fact that is not guaranteed in a system that, through contraptions, allows eluding orality.

“It has come to end with an authoritarian ideological conception, which maintains a fiction of the victim having its right respected... (...) It comes to end with a sentence that does not validate a police investigation system, that infringes constitutional rights”³¹ **Deputy Franco Caviglia, Province of Buenos Aires**

The control of the jury establishes a mechanism that prevents the arbitrariness of all the intervening actors in the judicial process. And, for good measure, it raises the standard of the judicial decision, as the result of a more rigorous and adjusted to right process. In this concept, the jury *keeps an eye*, at the same time that it contributes the system to comply with its institutional mission. Therefore, an expectable effect of the jury is the reduction of the inefficiency of the criminal justice system.

“Each time we are closer to make true a citizen demand for a faster and efficient justice, for citizens to find in it the guard of their rights.”³² **Daniel Scioli, Governor of the Province of Buenos Aires**

³⁰ Deputy Chamber of the Province of Buenos Aires (2012) *Diario de sesiones de la Cámara de Diputados*. First extraordinary session, December 13, 2012 (page. 9369) La Plata.

³¹ Deputy Chamber of the Province of Buenos Aires (2012) *Diario de sesiones de la Cámara de Diputados*. First extraordinary session, December 13, 2012 (page. 9376) La Plata.

³² Daniel Scioli promulgó la ley que habilita los juicios por jurados (September 26, 2013). *Diario La Nación*. Available at: <http://www.lanacion.com.ar/1623510-daniel-scioli-promulgo-la-ley-que-habilita-los-juicios-por-jurados>.

In conclusion, the function of control exercised by the jury is a source of legitimacy of the criminal justice system as a whole. "What a stable democracy requires is a trust guarantee, this is trust in the institutions and the state actors from whom the direct knowledge of its effective and equal functioning" (Gastil, 2014:154)

Closeness

"(jury trial) has, for me, a vision of justice citizen closeness, of everyone getting involved"³³. **Deputy Juarez, Province of Buenos Aires**

As we pointed out earlier, the jury is a participation mechanism that breaks the distance between representatives and represented. The jury brings the people closer to the justice administration, from the delegation of the judging faculty. There are few institutions of the democracy in which this tie recomposition from closeness results so evident.

"The instrumentation of jury trials in the Province of Buenos Aires constitutes the most important democratic constitutional tool of the approach between Justice and the people"³⁴ **Ricardo Casal, Attorney General of the Province of Buenos Aires.**

The jury obliges the operators of the justice system to modify its language in an accessible and apprehensible way towards for community. The jury reduces the physical distance as well as the "communicative distance" between the operators and the juries, between the justice system and the community. The overcoming of the technical judicial language is the key to recovering the social function of law, and even more, the construction of a sense of justice that is applied to the case. The intelligibility of the judicial decision is a necessary condition to the diffusion of a message from the community and for the community.

"... when the simulacrum was over, a lady came near and told us: look, the truth is that I was victim of a serious crime. My husband passed away because a robbery that was made to our home and I attended the trial and, you know what? I did not understand what happened in that trial. Instead, in this simulacrum I did, because you spoke Spanish"³⁵ **Deputy Ivan Budassi, Province of Buenos Aires**

³³ Deputy Chamber of the Province of Buenos Aires (2012) *Diario de sesiones de la Cámara de Diputados*. First extraordinary session, December 13, 2012 (page. 9375) La Plata.

³⁴ San Martín tendrá en Marzo el primer juicio por jurados. (February 23, 2015). *Diario La Nación*. Available at: <http://www.lanacion.com.ar/1770655-san-martin-tendra-en-marzo-el-primer-juicio-por-jurados>

³⁵ Deputy Chamber of the Province of Buenos Aires (2012) *Diario de sesiones de la Cámara de Diputados*. First extraordinary session, December 13, 2012 (page. 9367) La Plata.

Democratization

“... what we want to give out is a clear signal, in the sense of empowering, the return of part of the power granted by the people to determined institutions, given back to the ones who originally gave it”³⁶ **Senator Carlos Alberto Fernandez, Province of Buenos Aires**

The jury democratizes, that is the most evident image of the contributions of the jury and that is the idea that the legislators choose to defend its implementation. It defines the democracy that is “the power of the people”. The people are a source of power and a source of legitimacy. The power is legitimate only as far as it comes from below, “only if it emanates of the popular will, which means, in concrete, if it is freely consented” (Sartori, 2013). From that place, the participation of the jury in justice administration is a return of the power originally given and, therefore, a redistribution of the political power.

“Besides, it has come to end with a justice isolated from its source of power, because the source of power of all our republican system is the popular sovereignty and the social reality regarding which they will have to operate and act in the jury in question”³⁷ **Deputy Franco Caviglia, Province of Buenos Aires**

The introduction of jury trial is the acceptance of the citizen knowledge as legitimate knowledge, differentiated from the expert knowledge, as it expresses a collective interpretation of the social reality applicable to the case.

“Because that is what jury trial is about: the recovery of the essential role of society into justice administration. A participation that contributes to “democratize” in its right sense of power delegated to impart justice, that is no less than deciding on the honor, the freedom and the patrimony of the citizens and that allows to combine the rigor and the generality of the “dead letter” of law regarding the particular case, what the classics used to call “equity” and with the alive feelings of the people, what Durkheim denominated “collective conscience”³⁸. **Gustavo Ferrari, National Deputy**, explaining the support of its party towards the approval of the law of jury trials in the province of Buenos Aires.

³⁶ Deputy Chamber of the Province of Buenos Aires (2012) *Diario de sesiones de la Cámara de Diputados*. Ninth extraordinary session, September 13, 2013 (page. 820) La Plata.

³⁷Deputy Chamber of the Province of Buenos Aires (2012) *Diario de sesiones de la Cámara de Diputados*. First extraordinary session, December 13, 2012 (page. 9376) La Plata.

³⁸ Ferrari, Gustavo (September 23, 2013). Se recupera el rol de la sociedad en la justicia. *Diario La Nación*. Available at: <http://www.lanacion.com.ar/1622301-se-recupera-el-rol-de-la-sociedad-en-la-justicia>

The jury reissues the founding equality of the democracy, it is twelve persons with equal weight regarding the making of a legally binding decision, through a deliberative process. It holds a symbolic place of institutional reproduction of the social pact, as an institutive moment of the power. That figuration is the other face of an aristocratic justice. It carries its denunciation and also the way it can be overcome

“And the jury trial can be a great positive step, because it changes procedures and terms, it opens and ventilates judicial files, and that is how it democratizes and teaches. And because it attenuates the pride, the pedantry and the alleged infallibility of “your honor” who think they are better than the others.³⁹ **Mempo Giardinelli**

The democratizing power of the jury, as it has been pointed out, resides both in its formation and its functioning. The deliberation is a way of interaction between equals, tending to the making of a decision of consensus. The ideal deliberation seeks to reach a rationally motivated consensus –find reasons that are persuasive for all of those committed to act according the results of a free and reasoned evaluation of alternatives between equals-. (Cohen, 1989: 133)

7 – THE POWER OF THE JURY

“By jury, I understand a certain number of citizens chosen randomly and invested temporarily with the right to judge”
(Tocqueville, 1957:274)

Throughout these pages, we have set to acknowledge a social and political process that, by the time that it denounced a crisis of the justice system, especially of the criminal justice, it glimpsed in the jury a possible answer to recompose the citizen trust. It is not that, suddenly, the political class felt an special attachment to the constitutional mandates, or that the citizens found that their right to decide on the guilt or not of their peers had been systematically denied. Behind the rise of the debate for the implementantion of the jury trial, we find latent the experience of a crisis that, on one hand evidenced the weakness of the representative tie, and on the other, showed the capacity of the citizenry to organize its discontent to manifest their (dissatisfied) demands through institutional channels, or out of them –if necessary, on the streets themselves-.

At this point of the paper, it is manifest that the jury trial constitutes a way of participation of the citizen into the justice administration, with the capacity to contribute at least to the legitimacy of the justice system. That level of legitimacy could be maybe have been reached by a mixed tribunal, but other necessities of the political

³⁹ Giardinelli, Mempo (May 19, 2014). Apuntes sobre el juicio por jurados. *Diario Página 12*. Available at: <http://www.pagina12.com.ar/diario/sociedad/3-246541-2014-05-19.html>

and the judicial system converged and the all-citizen system was chosen. In this discovery context, the all-citizen jury intervened the necessity of democratizing the system of justice and favour its impartiality. None of those attributes could be reached with the proposal of a mixed tribunal. Tocqueville says: "all the sovereigns who have wanted to extract from themselves the sources of their powers, and lead the society instead of being lead by it, have destroyed the jury trial institution, they have distorted it" (Tocqueville 1957:274) In other words, a mixed tribunal does not satisfy the democratic expectation. "The jury is, above all, a political institution, it must be considered as a way of sovereignty of the people and it must only be rejected entirely when the sovereignty of the people is rejected" (Tocqueville, 1957:275) The all-citizen jury implies a truly return of the power to the sovereign people, a fact that does not occur for grace of the political class or the generosity of the judges, but for the imperious necessity of protecting the reactions of the distant people.

The first statistical studies made by the Ministry of Justice of the Province of Buenos Aires recount the concerns for legitimacy of the criminal justice system ⁴⁰. These studies collected data about the first jury trials that were carried out, and they focused on the impact that the experience of participating as a jury had on the appreciation of the justice system. Although embryonic, those studies show a strong acceptance of the system among the summoned citizen that acted as jurors, and a high degree of civic satisfaction with its service. A 95,5% of the surveyed answered that the experience of being able to participate as a juror was positive. And 90,5% pointed out that the image of the justice system had improved after their experience.

Years before, the University of Belgrano carried out an opinion study in the City of Buenos Aires, which delved into the jury trial and the impunity, the functioning and corruption in the criminal justice system, among other issues. The conclusions of the report reveal that "it is believed that with jury citizens the impunity of the justice would be controlled (...), that the justice administration would be more efficient (...), that there would be less corruption, that the common citizen is less bribable (...), that there would be less political pressure and that the judicial processes would gain transparency.

41

Beyond the motivations –demagogical, opportunist or substantive – that concurred to make the jury trial a living institution in the Argentina, the jury trial triggers individual, social and institutional processes whose effects are not controllable. Jury trial is a civic practice with a democratizing potential that transcends its application. From there, its value is as a source of legitimacy in countries where it appears as an institution of the new kind. The task still remains to empirically explore the the jury's effects in order to determine its true value.

⁴⁰ Minister of Justice, Province of Buenos Aires (2015), "Informes y encuestas juicio por jurados". Available at: http://inecip.org/images/INFORME_DE_ENCUESTAS_A_JURADOS_28SEPT2015.pdf
41 Center of public opinion, University of Belgrano (2004). Page 12.

BIBLIOGRAFIA

- ❖ Aguilar Villanueva L. (1993): *Problemas públicos y agenda de gobierno*, Miguel Angel Porrua Grupo Editorial. México.
- ❖ Annunziata, R. (2011): "La política de la singularidad de la experiencia", en Cheresky, I. (comp.): *Ciudadanía y legitimidad democrática en América Latina*, Prometeo-CLACSO, Buenos Aires.
- ❖ Annunziata, R. (2014): "Más allá de la promesa electoral. Repensar la representación en Argentina" en *Revista Sudamérica- UNMdP*; Mar del Plata.
- ❖ Bergoglio, M. I. (ed.) y otros (2010): *Subiendo al estrado. La experiencia cordobesa del juicio por jurados*. Ed. Advocatus, Córdoba.
- ❖ Binder A (1994): "La justicia penal en la transición a la democracia en América Latina". Edición digital a partir de *Anuario de Derecho Penal*. En <http://www.cervantesvirtual.com/obra/la-justicia-penal-en-la-transicin-a-la-democracia-en-amrica-latina-o/>
- ❖ Bobbio N., Mateucci N. y Pasquino G. (2007) *Diccionario de Ciencia Política*. Tomo I. Siglo veintiuno editores. Buenos Aires.
- ❖ Bobbio N., Mateucci N. y Pasquino G. (2007) *Diccionario de Ciencia Política*. Tomo II. Siglo veintiuno editores. Buenos Aires.
- ❖ Cheresky, Pousadeka (2004) *El voto liberado*. Editorial Biblos, Buenos Aires.
- ❖ Centro de opinion pública de la Universidad de Belgrano (2004): *Percepción pública de la implementación del juicio por jurados de ciudadanos en Argentina*. Universidad de Belgrano. Ciudad de Buenos Aires.
- ❖ Cámara de Diputados de la Provincia de Buenos Aires (2012): *Diario de sesiones de la Cámara de Diputados*. Primera sesión extraordinaria, 13 de diciembre de 2012. La Plata.
- ❖ Cohen, Joshua (1989): "Deliberación y legitimidad democrática". Este artículo apareció por primera vez en A. Hamlin y P. Pettit (eds.), *The Good Polity*, Oxford, Blackwell,

1989. Disponible en:
https://repositorio.uam.es/bitstream/handle/10486/361/21813_Deliberaci%C3%B3n%20y%20legitimidad%20democratica.pdf?sequence=1
- ❖ Hans, V. y Gastil, J. (2014): *El Juicio por Jurados. Investigaciones sobre la Deliberación, el veredicto y la democracia*. Ed. AdHoc. Segunda Parte. Buenos Aires.
 - ❖ Herrmann, MacDonald, y Tauscher con Matthew L. Layton Vanderbilt University (2011) *Perspectivas desde el barómetro de las Américas. Confianza en el sistema de justicia penal de las Américas*, N°62. Disponible <http://www.vanderbilt.edu/lapop/insights/I0862es2.pdf>
 - ❖ Langer, M. (2007): *Revolución en el proceso penal latinoamericano: Difusión de ideas legales desde la periferia*. Centro de Estudios de las Américas. Publicado originalmente en la Revista Estadounidense de Derecho Comparado, Vol. 55.
 - ❖ Latinobarómetro. Opinión pública latinoamericana. *Informes anuales* (base de datos en línea) años 1999 a 2015. <http://www.latinobarometro.org/lat.jsp>
 - ❖ Ministerio de Justicia y Derechos Humanos de la Nación (2013) *Revista Derecho Penal. Participación ciudadana en la justicia*. Año I, N° 3. Infojus
 - ❖ Ministerio de Justicia de la Provincia de Buenos Aires (2015), "Informes y encuestas juicio por jurados". Disponible en:
http://inecip.org/images/INFORME_DE_ENCUESTAS_A_JURADOS_28SEPT2015.pdf
 - ❖ Penna C. (2014): "Prejuicios y falsos conocimientos: historia de los cuestionamientos al juicio por jurados en Argentina", en *Juicio por jurados en la Ciudad Autónoma de Buenos Aires*. Ediciones Jusbaire, Buenos Aires.
 - ❖ Rosanvallon, P. (2009): *La legitimidad democrática. Imparcialidad, reflexividad, proximidad*. Ediciones Manantial, Buenos Aires.
 - ❖ Rosanvallon, P. (2011): *Contrademocracia. La política en la era de la desconfianza*. Ediciones Manantial, Buenos Aires.
 - ❖ Sartori, G. (2003): *¿Qué es la democracia?* Editorial Taurus. México
 - ❖ Senado de Buenos Aires (2013): *Diario de sesiones del Senado de Buenos Aires*. Novena sesión ordinaria, 13 de septiembre de 2013. La Plata.

- ❖ Tocqueville, (1957): *La democracia en América*. Fondo de Cultura Económica. México.
- ❖ Universidad Di Tella, y otros. "Índice de confianza en la justicia. Marzo 2010". Disponible en: http://www.utdt.edu/ver_contenido.php?id_contenido=521&id_item_menu=1601
- ❖ Urquiza M. I. (2010): "El juicio por jurados y la problemática de su legitimación", en *Subiendo al estrado. La experiencia cordobesa del juicio por jurados*. Ed. Advocatus, Córdoba.

Diarios y periódicos:

- ❖ ¿El núcleo de la reforma penal debe ser el juicio por jurados o mejorar la etapa de investigación? *Fuera del Expediente*, (13 de abril de 2010) Recuperado de: <http://fueraexpediente.com.ar/2010/04/13/el-nucleo-de-la-reforma-penal-debe-ser-el-juicio-por-jurados-o-mejorar-la-etapa-de-investigacion/>
- ❖ Realizarán simulacros de juicio por jurados en toda la provincia. *Diario Andino* (15 de octubre de 2013). Recuperado de: <http://www.diarioandino.com.ar/diario/2013/10/15/realizaran-simulacros-de-juicio-por-jurados-en-toda-la-provincia/>
- ❖ Tras el fallo por Martita Verón, Cristina anunció que impulsará la "democratización de la justicia (12 de diciembre de 2012) *Diario La Nación*, Recuperado de: <http://www.lanacion.com.ar/1536137-despues-de-reunirse-con-federer-la-presidenta-encabeza-un-acto-en-escobar>
- ❖ Media sanción para el proyecto de juicio por jurados (13 de diciembre de 2012). *Diario Página12*. Recuperado de: <http://www.pagina12.com.ar/diario/ultimas/20-209804-2012-12-13.html>
- ❖ Daniel Scioli promulgó la ley que habilita los juicios por jurados (26 de septiembre de 2013). *Diario La Nación*. Recuperado de: <http://www.lanacion.com.ar/1623510-daniel-scioli-promulgo-la-ley-que-habilita-los-juicios-por-jurados>.
- ❖ San Martín tendrá en Marzo el primer juicio por jurados. (23 de febrero de 2015). *Diario La Nación*. Recuperado de: <http://www.lanacion.com.ar/1770655-san-martin-tendra-en-marzo-el-primer-juicio-por-jurados>
- ❖ Ferrari, Gustavo (23 de septiembre de 2013). Se recupera el rol de la sociedad en la justicia. *Diario La Nación*. Recuperado de: <http://www.lanacion.com.ar/1622301-se-recupera-el-rol-de-la-sociedad-en-la-justicia>
- ❖ Giardinelli, Mempo (19 de mayo de 2014). Apuntes sobre el juicio por jurados. *Diario Página 12*. Recuperado de: <http://www.pagina12.com.ar/diario/sociedad/3-246541-2014-05-19.html>

ANEXO. CUADRO CONSTITUCIONES PROVINCIALES

	CONSTITUCIONES PROVINCIALES / REFERENCIAS AL JUICIO POR JURADOS
Buenos Aires	No
Catamarca	No
Chaco	No

PARTE SEGUNDA - AUTORIDADES DE LA PROVINCIA

TITULO I - GOBIERNO PROVINCIAL

SECCION I - PODER LEGISLATIVO

CAPÍTULO II - FACULTADES, ATRIBUCIONES Y DEBERES

Atribuciones y deberes

ARTICULO 135. Corresponde al Poder Legislativo: (...) 27. Legislar sobre organización de los municipios y policía, planes y reglamentos generales sobre enseñanza, organización del Registro Civil de las Personas, organización de la justicia provincial y juicios por jurados; autorizar la ejecución de obras públicas y, en general, dictar las leyes y reglamentos necesarios para poner en ejercicio los Poderes y autoridades que establece esta Constitución y para todo asunto de interés público que por su naturaleza y objeto no ha sido delegado a la Nación.

SECCION III - PODER JUDICIAL

CAPÍTULO I - DISPOSICIONES GENERALES

Conformación. Unidad de jurisdicción

ARTICULO 162. El Poder Judicial es ejercido por un Superior Tribunal de Justicia, un Procurador General, un Defensor General, Jueces Letrados, Jurados y demás funcionarios judiciales, con la denominación, competencia material, territorial y de grado que establecen esta Constitución y las leyes orgánicas.

Constituye un poder autónomo e independiente de todo otro poder, al que compete exclusivamente la función judicial.

Jurados. Tribunales de Menores y de Familia

ARTICULO 171. La ley organiza los jurados para los delitos de imprenta o de cualquier otro medio de difusión del pensamiento, como asimismo Tribunales de Menores y de Familia.

Oralidad

ARTICULO 172. Gradualmente se propende a la implantación de la oralidad en todo tipo de proceso y a la organización del juicio por jurados.

En la etapa de plenario el proceso es, en todos los casos, oral y público.

Juzgamiento con vocales legos

ARTICULO 173. Para el juzgamiento de las causas criminales vinculadas a delitos dolosos cometidos por funcionarios públicos en perjuicio de la Administración Pública Provincial, los tribunales competentes se integran en forma minoritaria por vocales legos sorteados de una lista de ciudadanos que deben reunir las condiciones requeridas para ser diputados y en la forma que establece la ley.

<p>Ciudad Autónoma de Buenos Aires</p>	<p>CAPITULO SEGUNDO - ATRIBUCIONES ARTICULO 80.- La Legislatura de la Ciudad: (...) ARTICULO 81.- Con el voto de la mayoría absoluta del total de sus miembros: (...) 2. Sanciona los Códigos Contravencional y de Faltas, Contencioso Administrativo, Tributario, Alimentario y los Procesales, las leyes general de educación, básica de salud, sobre la organización del Poder Judicial, de la mediación voluntaria <u>y las que requiere el establecimiento del juicio por jurados.</u></p> <p>TITULO QUINTO - PODER JUDICIAL CAPITULO PRIMERO - DISPOSICIONES GENERALES ARTICULO 106.- Corresponde al Poder Judicial de la Ciudad el conocimiento y decisión de todas las causas que versen sobre puntos regidos por esta Constitución, por los convenios que celebre la Ciudad, por los códigos de fondo y por las leyes y normas nacionales y locales, así como también organizar la mediación voluntaria conforme la ley que la reglamente. <u>Ejerce esta competencia, sin perjuicio del juicio por jurados que la ley establezca.</u></p>
<p>Córdoba</p>	<p>SECCIÓN TERCERA - Poder Judicial CAPÍTULO PRIMERO - Disposiciones Generales Artículo 162.- La ley puede determinar los casos en que los tribunales colegiados son también integrados por <u>jurados.</u></p>
<p>Corrientes</p>	<p>SECCIÓN TERCERA - PODER JUDICIAL Capítulo I - De su Composición Artículo 178: El Poder Judicial será ejercido por un Superior Tribunal de Justicia, Cámaras de Apelaciones y demás Jueces Letrados de Primera Instancia e Inferiores y <u>por Jurados, cuando se establezca esa institución.</u></p>
<p>Entre Ríos</p>	<p>CAPÍTULO V - ATRIBUCIONES DEL PODER LEGISLATIVO ARTÍCULO 122 - Corresponde al Poder Legislativo: (...) 23º. Dictar las leyes de organización y de procedimientos de los tribunales ordinarios y la del <u>juicio por jurados.</u></p> <p>SECCIÓN VI - PODER JUDICIAL CAPÍTULO I - DISPOSICIONES GENERALES ARTÍCULO 186 - El Poder Judicial de la Provincia será ejercido por un Superior Tribunal de Justicia y demás tribunales o <u>jurados</u> que las leyes establezcan.</p>
<p>Formosa</p>	<p>No</p>
<p>Jujuy</p>	<p>No</p>
<p>La Pampa</p>	<p>No</p>

La Rioja	<p>SECCIÓN 3 - DE LA ADMINISTRACIÓN DE JUSTICIA</p> <p>ARTÍCULO 144°.- SISTEMA JUDICIAL. En la Provincia se aplicará el sistema oral en toda clase de procesos judiciales, y las cuestiones que se planteen en todas sus instancias se resolverán en audiencias públicas y contradictorias, cumpliendo con el principio de una justicia efectivamente rápida y eficiente.</p> <p>La ley determinará la utilización de mecanismos alternativos de resolución de conflictos que disminuyan y pongan fin a la judicialización de los litigios.</p> <p><u>Se promoverá la instalación del juicio por jurado en la medida y oportunidad que la ley lo establezca.-</u></p>
Mendoza	No
Misiones	<p>Título Segundo - DERECHOS INDIVIDUALES</p> <p>Capítulo único: Derechos y seguridad individuales</p> <p>Artículo 12.- Los habitantes de la Provincia gozarán de la libertad de expresar sus pensamientos y opiniones por cualquier medio y recibir o suministrar toda clase de informaciones. Los abusos de estos derechos serán reprimidos por la justicia ordinaria <u>o el jurado</u>, conforme a la ley que dicte la Provincia. Esta no podrá dictar leyes u otras medidas que, so pretexto de sancionar los abusos, restrinjan o limiten tales derechos, como tampoco tendientes a coartar la difusión o libre expresión de las ideas; ni impedir o dificultar el funcionamiento de los talleres de imprenta, difusoras radiales y demás medios idóneos para la propagación del pensamiento; ni clausurar los locales en que ellos funcionen.</p>
Neuquén	No
Río Negro	<p>SECCION QUINTA - PODER JUDICIAL</p> <p>CAPITULO I - DISPOSICIONES GENERALES</p> <p>COMPOSICION</p> <p>Art. 197 - El Poder Judicial de la Provincia es ejercido por un Superior Tribunal, demás tribunales y <u>jurados</u> que establece la ley, la que también determina su número, composición, sede, competencia, modos de integración y reemplazos.</p>
Salta	No
San Juan	No
San Luis	<p>CAPITULO XXI - PODER JUDICIAL</p> <p>Composición</p> <p>Artículo 191</p> <p>El Poder Judicial de la Provincia es ejercido por un Superior Tribunal de Justicia, integrado por cinco o más miembros, y por los demás tribunales inferiores y <u>jurados</u> que la ley establezca.</p> <p>Jurados</p> <p>Artículo 215</p> <p><u>Una vez que en el orden nacional se establezca el juicio por jurados, el Poder Legislativo dictará las leyes necesarias para el funcionamiento de esa institución en la Provincia.</u></p>

Santa Cruz	No
Santa Fe	No
Santiago del Estero	TITULO IV - Poder Judicial CAPITULO I - Principios generales Art. 184. - Participación de los ciudadanos. <u>Las leyes fomentarán la participación de los ciudadanos en la administración de justicia mediante la institución de jurados en la forma y respecto de aquellos procesos penales que la ley determine.</u>
Tierra del Fuego, Antártida e Isla del Atlántico Sur	No
Tucumán	No