

**THE IMPLEMENTATION OF TRIAL BY JURY IN ARGENTINA:  
THE ANALYSIS OF A LEGAL TRANSPLANT AS A METHOD OF REFORM**

by

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## **Abstract**

This thesis examines the implementation of trial by jury in Argentina as an encouraging example of a successful transplant. It further considers how jury implementation became a powerful instrument to transform justice. The transplanted Anglo-American jury model to a civil law country with a rooted inquisitorial heritage – one that has been slowly transitioning to adversarial procedures for over three decades – represented a major enterprise. Through literature review, case law analysis and the study of local jury laws, this thesis tracks the history of a legal reform whose path has been affected by military governments, economic crises, and socio-political events. It also examines the characteristics of Argentine legal culture, including the dominant burden of the inquisitorial heritage from Continental Europe. The thesis explains that Argentina's National Constitution was inspired by the United States Constitution -and has guaranteed the right to trial by jury since 1853- and yet jury trials were only implemented in Argentina in the 21st century. It argues that the transplant of the jury represents the culmination of a series of reforms that started more than 30 years ago. Through the analysis of case law, and study data collected in surveys conducted by other groups in two Argentine provinces, the thesis concludes that a more accountable, open and legitimate judiciary has been advanced by the implementation of a justice system with lay participation. These sources also help to explain why the imported system was adapted to fit local needs. The implementation of equal gender composition of the jury panel and the adoption of a rule regarding Indigenous representation are examples of innovation and adaptation of foreign rules to the local culture. Finally, beyond its domestic significance the thesis also argues that this transplant conveys an important message that surpasses the Argentine borders. At a time when the use of jurors is in decline in many

common-law jurisdictions, the Argentine jury puts lay participation into a place of prominence. It works as a reminder of the significance of the benefits of this form of justice.

## **Lay Summary**

As heirs of the Continental European model of criminal justice system, legal procedures in Argentina have until recently held certain characteristics. They were judge-centered, mostly written, notoriously lengthy, bureaucratic and outdated by comparison with other western democracies. However, Argentina's National Constitution is inspired by the United States Constitution and has guaranteed the right to trial by jury since 1853. Jury trials were only implemented in the 21st century. In this thesis, I study the events that triggered the change, and how the arrival of the jury is a powerful instrument to transform justice. I assert that the idea of a more accountable, open and legitimate judiciary has been advanced by the implementation of a justice system with lay participation. Finally, I suggest that the Argentine jury has incorporated some innovation by introducing adaptations to the Anglo American jury model. This makes it worthy of consideration beyond the Argentine borders.

## **Preface**

This thesis is original, unpublished, independent work by the author, Natali Daiana Chizik.

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*To Danko and Elena, my loves.*

# Chapter 1: Introduction

## 1.1 Introduction

*What struck me the most, was to have in my hands the decision about the life of a person, which was going to change forever.<sup>1</sup>*

On April 11, 2014, twelve lay jurors, some of them teachers, homemakers and farmers rendered a unanimous guilty verdict against a man accused of murder.<sup>2</sup> To learn how a juror felt after jury duty is nothing extraordinary in some jurisdictions but this was the first time in the history of Argentina that a jury composed of six lay men and six lay women served in a criminal case.

Argentina is a South American country that declared its independence from Spain in 1816, after a process that began during the “May Revolution” of 1810.<sup>3</sup> As a former European colony, the country developed its laws and legal system on the basis of voluntary borrowings from their former colonizers, at a time when these colonizers had long ago abandoned the territory, but their influence remained rooted in the soil.<sup>4</sup>

Before the adoption of trial by jury, the criminal justice system in Argentina was judge-driven; judges were triers of both facts and law. A criminal trial was conducted before three professional justices who would deliver a reasoned verdict to decide the fate of defendants under majority rules. Heir to the legal culture of civil law from Spain, France and Portugal, criminal trials in

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<sup>1</sup> Florencia P. (Juror serving in the first trial by jury in the Province of Neuquén, translation by the author). Irina Hauser, “Doce hombres en pugna en Neuquén” *Página 12* (15 April 2014), online: <[www.pagina12.com.ar/diario/elpais/1-244125-2014-04-15.html](http://www.pagina12.com.ar/diario/elpais/1-244125-2014-04-15.html)>.

<sup>2</sup> Policiales, “Por unanimidad, el primer jurado popular declaró culpable al acusado” *LMNeuquén* (11 April 2014), online: <[www.lmneuquen.com/por-unanimidad-el-primer-jurado-popular-declaro-culpable-al-acusado-n221095](http://www.lmneuquen.com/por-unanimidad-el-primer-jurado-popular-declaro-culpable-al-acusado-n221095)>

<sup>3</sup> Melissa Petruzzello, “Argentina Celebrates 200 Years of Independence” *Encyclopedia Britannica* (9 July 2016), online: <[www.britannica.com/story/argentina-celebrates-200-years-of-independence](http://www.britannica.com/story/argentina-celebrates-200-years-of-independence)>.

<sup>4</sup> See Alberto Binder, “La Fuerza de la Inquisición y la Debilidad de la República” in Alberto Binder & Gonzalo Rúa, eds, *Elogio de la audiencia oral y otros ensayos* (Nueva León: Coordinación Editorial, 2014) 11 [Binder, “La Fuerza de la Inquisición”].

Argentina were marked by specific mechanisms and customs.<sup>5</sup> The judicial system was characterized by an emphasis on formalities, no public trials, written procedures, lack of transparency, and an unrestrained concentration of power in the hands of judges. Collectively, these elements increased the gap between society and the judiciary.

The structure described above is characteristic of what has been called the inquisitorial justice system,<sup>6</sup> which has been the product of the civil law family.<sup>7</sup> Inquisitorial systems operate in marked contrast with the adversarial justice system,<sup>8</sup> developed within the common law family.<sup>9</sup> It is under the logic of the inquisitorial heritage that Argentina built its criminal trials and under the same logic in which the legal actors developed customs and behaviours reflecting that way of delivering justice.

Since 1492, the country's legal procedures mirrored the European-Continental justice system. Notwithstanding, the National Constitution of 1853 and its precedents since 1812 found its inspiration in the United States Constitution.<sup>10</sup> But why did the framers of the constitution

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<sup>5</sup> See Mirjan Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven and London: Yale University Press, 1986) [Damaška, *Faces of Justice*]; Peter G. Stein, "Roman Law, Common Law, and Civil Law" (1992) 66:6 Tul L Rev 1591 [Stein].

<sup>6</sup> Binder, "La Fuerza de la Inquisición" *supra* note 4 (Author describes the main characteristics of the inquisitorial model as a written, secret criminal procedure, with judges that play an active investigative role) See also Mirjan Damaška, "Structures of Authority and Comparative Criminal Procedure" (1975) 84:3 Yale L J 480 at 484 [Damaška, "Structures of Authority"] (Damaška explains that the inquisitorial model rests on a bureaucratic, vertical and hierarchical judicial organization).

<sup>7</sup> See Stein, *supra* note 5.

<sup>8</sup> Máximo Langer, "From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure" (2004) 45:1 Harv. Int'l L J 1 at 4. [Langer, "From Legal Transplants"] According to the author "the adversarial system conceives criminal procedure as governing a dispute between two parties (prosecution and defense) before a passive decision-maker (the judge and/or the jury)." See also Máximo Langer, "Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery" (2007) 55:4 Am J Comp L 617 at 621. [Langer, "Revolution"] Author explains that it also involves "criminal procedures that are oral and public; distinguish between investigatory and adjudicatory functions; and provide the prosecutor, the victim, and the defendant with a number of mechanisms to terminate the case without going to trial. This model also includes broad defendant's rights and lay adjudicators and allows the victim to play a larger role in criminal proceedings."

<sup>9</sup> See Stein, "Roman Law" *supra* note 5.

<sup>10</sup> "As José Benjamin Gorostiaga, the most prominent member of the 1853 Constitutional Convention, expressed it, the new Constitution was 'cast in the mold of the Constitution of the United States'" Statement of José Benjamin Gorostiaga, Constitutional Convention of 1853, Session of April 20, 1853 in Carlos F. Rosenkrantz, "Against borrowings and other nonauthoritative uses of foreign law" (2003) 2:1 OUP 269 at 270, citing Emilio Ravignani, *Asambleas Constituyentes Argentinas* (Buenos Aires: Talleres S. A. Casa Jacobo Peuser, LTDA, 1937) Vol. 4

envision a constitution that was so dissimilar to the European-Continental model? Harfuch explains that the founding fathers were seeking to break with years of colonization<sup>11</sup> by importing a constitutional model that would secure more guarantees for the people, as that of England and the United States.<sup>12</sup> Harfuch asserts that in all constitutional precedents since 1812, until the definitive sanction of the 1853 National Constitution, framers of the Constitution intended to implement Anglo-American models of legal process, including the jury trial.<sup>13</sup>

Three sections of the first National Constitution of 1853 contemplated jury trials for criminal cases. Today, the National Constitution specifically provides that criminal trials shall be decided by jury. Accordingly, section 24 establishes that the Congress shall promote [...] the establishment of trial by jury. This mandate is to be found in Part One of the Constitution, which defines the declarations, rights, and guarantees enjoyed by the people. Section 118 (former section 102 in the 1853 National Constitution) specifies that “the trial of all ordinary criminal cases [...] shall be decided by jury, once this institution is established [...].” When tracking the historical background of section 118, Schiffrin also places its origins in the United States Constitution of 1787.<sup>14</sup> Finally, section 75 subsection 12° mentions that the Congress is empowered to enact [...] those laws that may be required to establish trial by jury.<sup>15</sup> These latter two sections are to be found in the Second Part of the Constitution, which defines the powers of each branch of the government.<sup>16</sup> The fact that jury trials are mentioned in both parts of the National Constitution highlights the intention of the framers to provide the defendant the right to be tried before a group of peers, as well as the right of the people to participate in government

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[Rosenkrantz]; See also Mitchell Gordon, “Don’t copy me Argentina: Constitutional Borrowing and Rhetorical Type” (2009) 8:3 Wash U Global Stud L Rev 487.

<sup>11</sup> Andrés Harfuch, *El Juicio por Jurados en la Provincia de Buenos Aires*, 1 ed (Buenos Aires: Ad Hoc, 2013) at 43 [Harfuch, *El Juicio por Jurados*].

<sup>12</sup> *Ibid* at 44.

<sup>13</sup> *Ibid*.

<sup>14</sup> See Leopoldo Schiffrin, “El Forum Delicti Commissi como exigencia del art. 102 de la C.N.” (1974) 52:531 El Derecho 50.

<sup>15</sup> Argentina, *National Constitution of Argentina* (1994), see Ministerio de Justicia, *Constitución Argentina en lectura fácil*. – 2nd ed (Buenos Aires: Ediciones SAIJ, 2017), online (pdf): <[https://www.argentina.gob.ar/sites/default/files/constitucion-argentina\\_lectura-facil\\_0.pdf](https://www.argentina.gob.ar/sites/default/files/constitucion-argentina_lectura-facil_0.pdf)> [National Constitution].

<sup>16</sup> Denise Bakrokar & Natali Chizik, “La Evolución del Jurado en la Argentina” in Gustavo Letner & Luciana Piñeyro, eds, *Juicio por Jurados en el Procedimiento Penal*, (Buenos Aires: Jusbaire, 2017) 13 at 3 [Bakrokar & Chizik]; Ministerio de Justicia, *supra* note 15.

affairs.<sup>17</sup> Moreover, the fact that, with the exception of the constitutional reform of 1949,<sup>18</sup> all constitutional reforms (in 1860, 1866, 1898, 1957 and 1994) have preserved the requirement illustrates the aim of later congressmen to prefer this form of trial. In addition, trial by jury has also been recognized in many provincial constitutions, which establish similar provisions to those contained in the *Magna Carta*.<sup>19</sup>

Despite these Constitutional provisions, arriving at the day when twelve lay persons were serving in a jury seemed to be at odds with the Continental European tradition that prevailed in Argentina. Recognizing the normative choice that accompanies the constitutionally stated preference for trial by jury, the implementation of the jury system still represents a borrowing of an alien institution from other countries and legal traditions. In 1974, this kind of borrowing was dubbed by Alan Watson as a “legal transplant” and described as “the moving of a rule or a system of law from one country to another, or from one people to another,”<sup>20</sup> representing “the most fertile source of legal development.”<sup>21</sup>

Argentina embarked on a process of transplantation when some of its provinces decided to implement trial by jury. Today, the country has introduced jury trials for severe criminal cases in 7 out of 23 provinces. The possibility of having provincial jury laws in lieu of a federal bill (that still awaits to see the light) has arisen thanks to the autonomy granted by the National Constitution to the provinces to adopt their local procedural codes and system of courts.<sup>22</sup>

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<sup>17</sup> Harfuch, *El Juicio por Jurados*, *supra* note 11 at 37.

<sup>18</sup> It is believed that the amendment of 1949 was to enable the then-president Juan Domingo Peron to run for a second consecutive term, conf. Gustavo Bruzzone, *El Juicio por Jurado en el Proceso Penal*, (Buenos Aires: Ad Hoc, 2000) at 114-117. The amendment also included the removal of all jury provisions. For the Review Commission, the provision that established trial by jury had become a “dead letter” since it had not been implemented for almost a century, and attributed this failure to its Anglo-American origin. In the later amendment of 1957, the jury provisions were reinstated.

<sup>19</sup> References to trial by jury can be found in the Provincial Constitutions of Córdoba (Section 162), Chubut (Section 135, subsection 27 °, 162, 171 and 172), Entre Ríos (Section 122, subsection 23 °), La Rioja (Section 144), Rio Negro (Section 197), Corrientes (Section 178), Santiago del Estero (Section 190) and the City of Buenos Aires (Section 81, 82 and 106).

<sup>20</sup> Alan Watson, *Legal Transplants: An Approach to Comparative law*, 2<sup>nd</sup> ed (Athens: University of Georgia Press, 1993) at 21 [Watson].

<sup>21</sup> *Ibid* at 95.

<sup>22</sup> Langer, “From Legal Transplants,” *supra* note 8 at 54, n 260.

Accordingly, in 2005, the province of Córdoba introduced a “mixed court”, a form of lay participation that resembles those we can find today in civil law European countries.<sup>23</sup> In Córdoba the mixed court is composed of eight lay jurors and three professional judges who jointly deliver a decision. In 2011, Neuquén established jury trials but the province adopted the “classic” jury for serious criminal cases, borrowing the main features from the Anglo-American model. These features include the presence of a trial judge who acts as an umpire between the parties, and 12 lay jurors who, unanimously or under majority rules, deliver a “guilty” or “not guilty” verdict, without providing reasons for their decision.

By 2013, the province of Buenos Aires also implemented the “classic” jury model. In 2015, the provinces of Chaco and Río Negro, also enacted provincial jury laws but today they are still postponing implementation.<sup>24</sup> In 2018, Mendoza and San Juan also enacted jury laws. In the former the system is scheduled for implementation before the end of 2019. In Entre Ríos, Chubut, Santa Fe, Jujuy, and Santa Cruz jury bills are being debated in the local legislatures, but the enactment of laws has experienced both advances and setbacks in each of these provinces.

As mentioned earlier, Argentina’s legal system with its roots in civil law differs from those common law countries that originally gave birth to justice systems with lay participation. This means that Argentina is in a process of incorporating one part of the larger common law package,<sup>25</sup> and opens the door to questions about the success of a reform that adopts a foreign legal mechanism, one that seems so odd and alien for the recipient environment. Furthermore, after more than 165 years of non-compliance with the mandates of the national constitution, it is important to investigate the series of events that triggered the transplant. Why has this change come now?

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<sup>23</sup> Valerie Hans, “Trial by Jury: Story of a Legal Transplant” (2017) 51:3 Law & Soc’y Rev. 471 at 483 [Hans, “Trial by Jury”] citing Jackson, John D., & Nikolay P. Kovalev (2007) “Lay Adjudication and Human Rights in Europe,” 13 CJEL 83 at 123.

<sup>24</sup> Bakrokar & Chizik, *supra* note 16 at 16-7.

<sup>25</sup> David Nelken, “Towards a Sociology of Legal Adaptation” in David Nelken & Johannes Feest, eds, *Adapting Legal Cultures* (Portland: Hart, 2001) 3 at 26 [Nelken].

By the beginning of the 1980s, the inquisitorial justice system was showing its weaknesses. Besides being bureaucratic and lengthy, it was strongly associated within the public mind with a secret procedure and a marked lack of rights for defendants. Secret trials resonated in a negative way after 1983, once the country emerged from one of the most ruthless military dictatorships that ever took place in the region. In addition, the prestige of the judiciary was eroded after decades of military governments, as the judiciary was seen as highly corrupt and inefficient, an issue that ultimately led to the removal of Supreme and Federal Court justices and the appointment of new ones.<sup>26</sup> Even with the appointment of new court members, a justice system that had facilitated a totalitarian regime was not the ideal model once democracy was reinstalled. During the late 1980s, a new wave of reformers started to build the basis for a change regionwide. Despite facing resistance, they slowly managed to initiate change from pure inquisitorial procedural practices to more adversarial ones, a trend that was repeatedly seen within the region. The aim was to carry forward reforms towards procedures that were viewed as more transparent and efficient than the pure inquisitorial practices that long prevailed in Argentina<sup>27</sup> and to legitimize and uplift the image of the judiciary branch.

Adversarial features transplanted from North America, such as oral and public trials and the division of tasks between judges and prosecutors, arrived earlier in the country, during the 1990s and early 2000s, in the hands of a first generation of reformers.<sup>28</sup> However, this first wave of reforms did not bring any immediate change towards a system with lay decision-making. While trial by jury is one of the most well-known features of an adversarial system,<sup>29</sup> and while most of the reformers that were advocating for the introduction of adversarial practices were also promoting the implementation of the jury institution, its arrival in the country took some more years.

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<sup>26</sup> Gretchen Helmke, “The Logic of Strategic Defection: Court-Executive Relations in Argentina under Dictatorship and Democracy”, *Am Political Sci Rev*, 96:2 (2002) 291 at 292.

<sup>27</sup> Langer, “Revolution” *supra* note 8 at 617.

<sup>28</sup> Prestigious legal scholars such as David Baigún, Julio Maier and Alberto Binder have been leading legal reforms towards adversarial systems for more than 30 years, all across Latin and Central America. See e.g. Eberhard Struensee & Julio B.J. Maier, “Introducción” in Julio B.J. Maier, Kai Ambos & Jan Woisjchnik, eds, *Las Reformas Procesales Penales en América Latina* (Buenos Aires: Ad Hoc, 2000) 17 [Struensee & Maier].

<sup>29</sup> Langer, “Revolution” *supra* note 8 at 621.

It was a context of social discontent, growing violence and economic crisis across the country that prompted the enactment of the first trial by jury law. After the outrageous kidnapping and killing of a young man,<sup>30</sup> the province of Córdoba decided to implement the “mixed court” in 2005.<sup>31</sup> Even so, the judiciary across the country was generally prone to preserve former inquisitorial practices and unable to bridge the existing gap with society. Simultaneously, levels of insecurity and violence kept rising, as the lack of trust increased towards the other branches of government.

Again, more horrifying and scandalous criminal cases opened the door to lay participation in verdicts as a suitable solution to the democratization of the judicial system. The transplant continued its course, and the idea of implementing jury trials evolved as part of the trend to incorporate adversarial features that started decades ago. By 2013, the network built among legal reformers and politicians along the past decade created a more welcoming environment for the implementation of lay participation in the administration of justice.

Part of this research will elaborate on the reasons behind 165 years of non-compliance with the three constitutional mandates that order jury trials for criminal cases. The implementation of trial by jury has always gone beyond modernizing and improving the judiciary. It has been about opening the door of one of the most elite and specialized areas of the government to the ordinary citizen. It represents a profound and ultimate sign of democratization of the judiciary for the Argentine society. The delegation of power to the people was first resisted in Argentina, but this research will show that these barriers have begun to break down and lay participation is blossoming across the country.

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<sup>30</sup> Maria Inés Bergoglio, “Metropolitan and Town Juries: The Influence of Social Context on Lay Participation” (2011) 86:2 Chi-Kent L Rev 831 at 840 [Bergoglio, “Metropolitan”].

<sup>31</sup> The province of Córdoba introduced a “mixed court” composed by eight lay jurors and three professional judges.

## 1.2 Overview of my thesis

Today, after over four years of jury trials under the “classic” model, this research considers the importance of this legal transplant for Argentina. Moreover, it also aims to find out about what can be learned from this transplant that may be useful for other countries. Argentina is one of many countries undertaking legal reforms by voluntary borrowings. However, due to the combination of multiple features that will be examined in this research, there are reasons to believe in the uniqueness of the Argentinian adoption of the jury system as well as to recognize its importance at a regional and international level.

I argue that one of the features that makes this transplant (and its study) so valuable is that it is about a transplant in motion, where we can observe a slow but steady transition from resistance and a marked willingness to preserve the *status quo*, especially on the part of the judiciary, to one of cooperation and interest in the “classic” jury. It is a transplant in motion that is entangled with the course of politics, evolving as this research is being written, although entrenched in a hope for an auspicious outcome.

In addition, what distinguishes the Argentine case from most other countries undertaking legal reforms is that this is not the usual case of a reform at a national level. The transplant has been developing province by province and what initially started as an international transplant from the Anglo-American model, turned into an exceptional process of a within-country transplant. Today, provinces that are implementing or considering the implementation of the “classic” jury are no longer copying the original model offered by the international donor, but rather they are transplanting the model implemented by neighbouring provinces. Remarkably, while the contagion effect among provinces may be seen as a positive sign of the legal transplant spreading, the more variables involved in the environment of the recipient, the greater the risk of affecting the transplant and causing rejection.<sup>32</sup> While promising, the “province by province” form of transplant carries with it a great peril. The reasons for any legal transplant to fail are

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<sup>32</sup> Inga Markovits, “Exporting Law Reform - But Will It Travel” (2004) 37:1 Cornell Int'l L J 95 at 110 [Markovits].

multiple and uncountable and, in the case of Argentina, any sign of failure in one jurisdiction may resonate in others. Signs of rejection of the transplant in one province may not only affect the future of the jury in that jurisdiction but it might also jeopardize its future in other provinces that have operational jury trials or enacted jury laws. Moreover, it may also affect the outcome in provinces where legislators are currently considering its implementation. In addition, any chance of a future enactment of a federal jury law may be undermined if the province by province reform becomes stymied.

Be that as it may, the way in which the transplant evolved has made it multilayered and therefore, more complex. Each province that adopted the jury system borrowed much of the content of their laws from neighbouring provinces. Notwithstanding, even if all provincial jury laws resemble each other, they all have distinctive features that local governments understood as more suitable for their jurisdiction. We will observe that, for instance, Neuquén, being the first province to introduce the “classic” jury, adopted a decision rule that dispensed with unanimity and we will try to find some reasons behind the decisions of the legislators and reformers to opt for majority verdicts.

In terms of its importance, I argue that the transplant of the jury represents the culmination of a series of reforms that started over 30 years ago. The original idea of a more accountable, open and legitimate judiciary through the borrowing of adversarial features finds its ultimate enshrinement in the implementation of a justice system with lay participation. This is because jury trials positively impacted the opinion of the people, managed to bring the incomprehensible and distant world of the criminal justice system closer to society, and taught judges about the power, capacity and intelligence of the people. In this way, the transplant worked as a tool to bridge the gap between the judiciary and society. Moreover, its importance is also reflected in how the jury became a powerful instrument to transform justice. Paradoxically, an ancient institution such as trial by jury is helping to modernize an outdated criminal justice system. The jury is helping the judiciary to disassemble malfunctioning inquisitorial habits, such as the abuse of written documentation introduced as evidence, or the biased involvement of the judge in the

course of a trial. With the arrival of the laymen in the courtroom, the “game” changed and so did the behaviour of the “players”. I suggest that, in Argentina, the game changed for the better.

Finally, beyond its domestic importance the transplant conveys an important message that surpasses the Argentine borders. In a time when the use of jurors is in decline in many common law jurisdictions,<sup>33</sup> the Argentine jury puts the jury back in a place of prominence. It works as a reminder of the significance of preserving and ennobling this form of justice due to its multiple benefits. This research will show that some of these benefits, such as improving the civic engagement of the citizens who served as jurors,<sup>34</sup> are also reflected in the implementation of the jury in Argentina. As a result, we may infer that, as long as this transplant is capable of adapting the jury institution without distorting it, the country would become an example of how some of the most important features attributed to the institution are still standing.

In addition, despite its youth, the Argentine jury has incorporated some level of innovation to the institution by way of introducing some adaptations to the original borrowed law. For example, all seven provincial jury laws reflected a concern for the potential underrepresentation of women in the jury panel. By way of a solution, all provinces enacted laws that request an equal gender composition of the jury panel. Likewise, the province of Chaco is vastly populated with Indigenous communities, and there was a concern about the underrepresentation of Indigenous people. As a measure to deal with that issue, reformers and legislators worked to develop an *avant-garde* legal procedure that establishes six Indigenous jury members -of twelve jurors- when the crime involves Indigenous people.<sup>35</sup>

My argument is that these features not only make the transplant unique and special for Argentina, but also make it worthy of consideration and study beyond the Argentine borders. I claim, furthermore, that the level of adaptation and innovation showed in the import of the jury law demonstrates that, not only is the institution of the jury being adapted successfully, but also

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<sup>33</sup> Hans, “Trial by Jury”, *supra* note 23 at 484.

<sup>34</sup> See John Gastil et al., *The Jury and Democracy: How Jury Deliberation Promotes Civic Engagement and Political Participation*, ed. (New York: OUP, 2010) [Gastil et al.].

<sup>35</sup> Act 7661, 2015, Ley de Juicio por Jurados de Chaco (Arg) s 4 [Act 7661] (The law provision states that when both the accused and the victim of a crime belong to the native tribes, Qom, Wichi or Mocoví, half the jury of twelve members must consist of men and women of the same Indigenous community).

that in adaptation, there is still room for innovation. By considering some of these novel features, other countries with a long-standing tradition in jury trials may then regain interest in the institution and reevaluate the great potential of the jury.

Beyond the uniqueness and importance of this transplant this research also considers whether we are in the presence of a successful legal transplant. This is because we cannot circumscribe the analysis of the reform only to its originality or distinctiveness. We need to assess whether the reform resulted in a positive outcome after four years of trial by jury. This dissertation considers the gains, the losses and the learned lessons that this legal transplant leaves us with.

Chapter III introduces the viewpoint of other authors about what needs to be considered in the study of transplants and their outcomes. However, this research also supplies its own definition of “success” by asserting that, since historically, we may identify multiple forms of legal transplants, there may also be multiple ways of defining success. My understanding is that the measure of success is inevitably context-specific. In the case of the Argentine jury, success is measurable and definable if we can determine that the magnitude and complexity of this legal reform has been proportional to the socio-political perils and challenges it managed to overcome. This transplant should then be defined as successful by the variety of purposes it managed to accomplish. Given the discussion of the inquisitorial roots that have long prevailed in Argentina, the frailty of Argentine democracy, the implication of the judiciary in corrupt and tyrannical government and the mistrust in the legal system, perhaps success can be defined in terms of (a) whether it has resulted in a more open legal system and (b) whether it has introduced a measure of citizen supervision of the work of State actors, including judges, while (c) disassembling malfunctional habits and producing adaptation among the local legal culture (especially amongst judges and legal practitioners). In addition, we want to identify if this transplant is also serving larger purposes. In a time where the use of jury trials around the world is decreasing,<sup>36</sup> the implementation of trial by jury in Argentina puts the jury back in a place of prominence.

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<sup>36</sup> Hans, “Trial by Jury”, *supra* note 23 at 484.

Argentina has been a legitimate democratic country for more than 30 years now, but the ghost of a series of military governments has always haunted and tormented the country. Politicians come and go with campaign promises of stability and development but none of them manage to fulfill what they committed to do. Within this context, its economy has constantly been at stake. “The policies of the last decade have left Argentina with a 40 per cent annual inflation rate, increasing unemployment, a three-year long recession, declining foreign trade, and almost no foreign direct investment. Not surprisingly, around US \$80 billion have fled the country during the last seven years.”<sup>37</sup>

As mentioned earlier, Argentina is one of many other countries undertaking legal reforms. While the challenging socio-economic and political scenario of this country does not appear to be a welcoming environment for a transplant, in many other occasions, other legal transplants also faced adverse circumstances.<sup>38</sup> Perhaps what makes the Argentine case so special is the promise of an auspicious outcome. What one would most likely expect within an unpredictable socio-economic and political environment is that it would be very unlikely for a legal transplant to flourish. Extraordinarily, however, contrary to these expectations, the jury system in Argentina does seem to be flourishing. This work will aim to take a look at the plausible reasons that triggered the reform, those that slowed its progress and those that helped it flourish to what has become an example of a successful legal transplant.

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<sup>37</sup> Domingo Cavallo & Sonia Cavallo Runde, *Argentina's Economic Reforms of the 1990s in Contemporary and Historical Perspective*, 2nd ed (London: Routledge, 2017) at 6. See also this source for a full explanation of the economic history of Argentina from the Spanish colonial period to 1990, as well as a detailed account of the last 25 years of economic reforms until 2017.

<sup>38</sup> For example, the Afghanistan's Interim Criminal Procedure Code of 2004, which was a transplant from the Italian Criminal Procedure Code of 1988, happened in a time when Afghanistan was seeking to make the transition from the Taliban rule to peace, in an attempt to establish the rule of law after the regime. Not quite surprisingly, the transplant failed for a series of reasons which explanation escape the scope of this work. See more at John Jupp, “Legal Transplants as Solutions for Post-Intervention Criminal Law Reform: Afghanistan’s Interim Criminal Procedure Code 2004” (2013) 61:1 Am J Comp L 51.

### **1.2.1 Methodology and theoretical framework**

In order to address my research questions, I will consider several and varied sources. Literature and journalistic articles on the history of Argentina allow me to describe the history that led to the jury transplant. It is important to contextualize these reforms within the series of events that the country went through, especially over the last three decades. The uniqueness and importance of the transplant will become clearer because we will know the past historical socio-political threats, nuances and details in which it arose.

As mentioned before one of the complexities of a reform taking place in Argentina is the instability and multiple disrupting events that affect the development of legal reforms.

Looking at the history of political events that originated and shaped the course of the transplant will allow me to comprehend and answer one of the questions posed by this research. Why has this change come now? Moreover, it will also help me to assess on the evolving state of the reform.

In the same way, the content of the jury laws and the higher court decisions adopted after the implementation of the jury system will also be part of the analysis. The history of Argentina shaped the minds of the citizens, legal professionals, and members of the government, and contributed to enlarge the gap between society and the judiciary. Notwithstanding, legal rules and judicial decisions are also the product of that history. Drawing from these sources will also help to assess the development and the outcome of the transplant. As the thesis moves forwards throughout the different chapters, we will be able to appreciate the evolution in the jury laws and in the quality of higher court decisions. It will be part of the material that would allow us to confirm or reject the hypothesis that I propose in this research, that Argentina's borrowing and adaptation of the jury is a case of a successful legal transplant.

Along with the decisions of the courts, I will use data collected in two different surveys conducted in the provinces of Neuquén and Buenos Aires, the only two jurisdictions with an operational jury. First, I will evaluate the answers of 10 judges from Neuquén that conducted

jury trials from May 2016 until July 2017.<sup>39</sup> Second, I will rely on the report “El poder del Jurado” (The Power of the Jury)<sup>40</sup> which has been developed after surveying 25 judges, 25 defense attorneys (both public and private) and 57 prosecutors that participated in jury trials in the Province of Buenos Aires, during the first three years of the implementation of the institution.<sup>41</sup> In addition, journalistic articles and open interviews given by legal professionals who were part of the experience will become a complementary source.

Furthermore, the outcome of the transplant will also be assessed from the perspective of those citizens who served in jury trials in Neuquén and Buenos Aires. Regarding Neuquén, the information was extracted from two different surveys. One survey was carried out by the Criminal Judicial Office of Neuquén and corresponds to the first year of implementation of the institution, in which over 189 jurors responded to voluntary and anonymous questionnaires.<sup>42</sup> The other survey corresponds to research conducted (in two stages) by an international group of scholars for around two years. In addition to a multiple choice format, 200 jurors were asked to respond to some open-ended questions.<sup>43</sup> With respect to the province of Buenos Aires, I will rely on a survey conducted by the Under Secretariat of Criminal Policy of the Ministry of Justice of the Province. In this case, 132 jurors responded to voluntary questionnaires submitted since

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<sup>39</sup> The surveys were carried out by the Superior Court of Justice of Neuquén, the INECIP, with supports from scholars from Cornell University Law School, Northwestern University Law School, the University of Pennsylvania and the Center for Jury Studies of the United States of the National Center for State Courts. See Valerie Hans et al, “Proyecto de Investigación Empírica sobre el Juicio por Jurados en Neuquén: Informe Preliminar Agosto 2017” at 8 in *Diario Judicial*, “Visto bueno al juicio por jurados” (16 August 2017), online (pdf): <<http://public.diariojudicial.com/documentos/000/075/140/000075140.pdf>> [Hans et al, “Proyecto de Investigación”].

<sup>40</sup> The report was carried out by Sidonie Porterie and Aldana Romano Bordagaray for the Institute of Comparative Studies in Criminal and Social Sciences [INECIP], with support from the British Embassy. My deepest appreciation to the authors who generously allowed me to reproduce the results of the report.

<sup>41</sup> Sidonie Porterie & Aldana Romano, *El poder del jurado: descubriendo el juicio por jurados en la Provincia de Buenos Aires* (Buenos Aires, Ediciones del Inecip, 2018), online (pdf) <<http://inecip.org/wp-content/uploads/El-poder-del-jurado-October-2018.pdf>> [Porterie & Romano].

<sup>42</sup> Helou Fabian Alejandro Feres, “Informe de Encuesta realizada a los Integrantes de Jurados Populares NO 01-2014 A 12-2015 de la I Circunscripción Judicial” (Neuquén, 23 April 2015) Pensamiento Penal,online: <<http://www.pensamientopenal.com.ar/miscelaneas/40998-neuquen-encuestas-jurados-populares-del-ano-2014>> [Feres].

<sup>43</sup> Hans et al, “Proyecto de Investigación”, *supra* note 39.

May to September 2015.<sup>44</sup> To assess these sources, this thesis will rely on literature on legal culture and legal transplants, as well as on scholarship that highlights the relationship between law and politics.

### **1.2.2 Organization by chapter**

Chapter II portrays the rocky road towards the implementation of trial by jury. It takes us to the political events that shaped the history of the country, especially over the last 40 years. It is by revisiting these political events that chapter II provides the context to understand the transition from the old inquisitorial justice system, traditional in Continental Europe, to the borrowing of adversarial features, a process that started in the 1990s. Even those provinces that enacted adversarial criminal codes and jury laws could not escape the inquisitorial heritage and the political history of the country. Córdoba opted for a “mixed” court with professional judges and the rest of the provinces implemented some specific modifications to the “classic” jury due to the burden of that inquisitorial past and in response to the prevailing socio-political reality. The chapter will take a look at some of the distinctive features of the provincial jury laws, that depart from the “classic” jury. The analysis will be focused on the reasons for and the consequences of departing from the donor and how that may affect the outcome of the transplant. For example, what can be inferred when some jurisdictions enacted jury laws adopting a system of majorities in lieu of unanimous verdicts, and what are the consequences of adopting such decision rule.

Chapters III and IV, analyze the results of the reform in the provinces of Buenos Aires and Neuquén, the only two provinces with a functioning “classic” jury. While chapter II elaborates on the “mixed court” of Córdoba, the province has been excluded from further analysis in chapters III and IV. Córdoba represents an important milestone in the history of jury trials in Argentina as it has acted as an agent of change and therefore is part of the historical background that led to the later development of the “classic” jury. However, due to the different origins and

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<sup>44</sup> Under Secretariat of Criminal Policy of the Ministry of Justice of the Province of Buenos Aires, “Informe y Encuestas - Juicio por Jurados”, Pensamiento Penal (28 September 2015), online (pdf): <[pensamientopenal.com.ar/system/files/2015/12/miscelaneas42508.pdf](http://pensamientopenal.com.ar/system/files/2015/12/miscelaneas42508.pdf)> [Informe y Encuestas].

dissimilarities between the “mixed” court and the “classic” jury it will not be part of my analysis on this legal transplant.<sup>45</sup>

In order to weigh the implications of the transplant, the analysis has been divided into two stages. Chapter III explores the response of the judiciary and legal professionals to the implementation of the jury and chapter IV is concerned about the response of those who do not have a professional role within the legal system, more specifically, those citizens who served as jurors.

I asserted that one of the purposes of the transplant of the jury has been to disassemble malfunctioning inquisitorial habits and to modernize the country’s outdated criminal justice system. Chapter III is especially concerned about the reaction of the judiciary to the transplant. However, although it takes a closer look at the Magistrates’ opinion about trial by jury, it also addresses some of the reactions of the bar to the transplant. The chapter considers whether most of the core features of the “classic” jury, such as the absence of expressed verdict reasons, made the journey from the common law to this civil law country.<sup>46</sup> The aim is to evaluate whether core features of the “classic” jury are gradually remedying some of the malfunctioning habits of the Argentinian justice system. Chapter III takes a look at the content of higher court decisions delivered in the years of implementation of trial by jury. Moreover, it also looks at the performance of legal professionals in court and how they transitioned from judge-alone trials to jury trials. The chapter evaluates the problems in the implementation of the jury in one of Buenos Aires municipalities, Bahía Blanca. Finally, as indicated in the subsection about “methodology and theoretical framework”, the analysis relies on journalistic articles and data collected in surveys to assess the reaction of court judges from Neuquén and Buenos Aires who took part in jury trials throughout these years.

This legal transplant represents a crucial means of democratization of the judicial system for the Argentine people. In Chapter IV I want to find out whether the implementation of the jury system has resulted in a more open legal system for the provinces of Buenos Aires and Neuquén.

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<sup>45</sup> Chapter II includes a thorough description of the institution as is currently in force in Córdoba and the rest of Argentina, which will allow the reader to further assess on the differences among the provinces.

<sup>46</sup> See Markovits, *supra* note 32.

To that end, the chapter looks at the reaction of society to the jury system, focusing the analysis on the citizens who served as jurors in those two provinces.

The chapter takes a look at the opinion of lay people who shared their experience after jury duty in different surveys conducted in both provinces. Questionnaires aim to learn about issues such as the level of agreement between judges and jurors, the opinion of citizens about e.g. trial by jury, the justice system, and the judiciary. Ultimately, the purpose of this last chapter is to consider whether the reform has been embraced by society, as an indicator of success.

Finally, the conclusion will summarize the findings of the previous chapters and will review the development of jury laws across the country to make a final evaluation on the outcome of the transplant. Taking into consideration that there are other provinces awaiting the implementation of the jury system, the conclusion will explore the main content of these laws. More specifically, it will briefly talk about the Indigenous jury in the province of Chaco as an extraordinary innovation that contributes to the uniqueness and importance of this transplant. What is more, the conclusion will also consider the time frame of implementation of the other provincial jury laws as an indicator of a successful or failed transplant.

With the limitation that an ongoing reform affects the completeness of my findings, the conclusion will still aim to support or reject the hypothesis that the transplant of the jury has been successful. It will aim to show that there are some lessons that this transplant leaves us with and strong reasons to consider its importance and uniqueness, overturning any potential claim that a reform in full swing should prevent me from reaching some conclusions.

### 1.3 Debates about legal transplants as methods of legal reforms

In his 1974 book, Alan Watson defines legal transplants as “the moving of a rule or a system of law from one country to another, or from one people to another”<sup>47</sup> and deems transplants as the “most fertile source of legal development”.<sup>48</sup> For him, all transplants are socially easy.<sup>49</sup> This means that legal rules succeed in their travel from one system to the other, even if the system of the recipient varies.<sup>50</sup> His concern is whether the recipient has a similar rule and not whether that rule produces a similar effect in a different system.<sup>51</sup> Consequently, his theory would explain why our history is replete with examples of movement of laws, whether they are the result of colonization or imposition,<sup>52</sup> or the product of voluntary imports of foreign models.<sup>53</sup> Law moves and in this movement legal transplants play a crucial role.<sup>54</sup>

The theory of legal transplants suggests that without law traveling across space and time, similarities and differences among countries with regard to their laws, legal systems and institutions would be much more difficult to explain. However, observing that law travels does not address whether transplanting or borrowing a rule or a system of law from another legal system represents a successful model of reform.

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<sup>47</sup> Watson, *supra* note 20 at 21.

<sup>48</sup> *Ibid* at 95.

<sup>49</sup> *Ibid*.

<sup>50</sup> *Ibid*.

<sup>51</sup> *Ibid* at 96 n 3.

<sup>52</sup> For example, followed the defeat of Japan after World War II, the forced introduction of the criminal jury trial in the Ryukyu Islands in 1963, represented an imposition of one of most emblematic Anglo-American institutions into to the occupied eastern country. See Meryll Dean, “Legal transplants and Jury Trial in Japan” (2011) 31:4 Legal Studies 570 at 576 [Dean].

<sup>53</sup> Another way for the law to travel is by way of a voluntary importation of foreign law, either by the offer of countries that often act as exporters or suppliers of law and/or by the demand of those countries that, in general, behave as importers. See Yves Dezalay & Bryant Garth, “Hegemonic Battles, Professional Rivalries, and the International Division of Labor in the Market for the Import and Export of State-Governing Expertise” (2011) 5 Int'l Pol Soc 276 [Dezalay & Garth, “Hegemonic”].

<sup>54</sup> Toby Goldbach et al, “The Movement of U.S. Criminal and Administrative Law: Processes of Transplanting and Translating” (2013) 20:1 Ind L J 141 at 142.

In fact, there are authors, such as Pierre Legrand, who believe that Watson's conception of legal transplants is impossible in reality.<sup>55</sup> For Legrand, rules have meanings,<sup>56</sup> which are molded and conditioned by historical and cultural factors.<sup>57</sup> When law travels across cultures, the meaning changes and therefore the rule changes, causing the impossibility of transplants.<sup>58</sup> From a less skeptical standpoint, other authors have developed a preference for a different terminology or metaphor to refer to transplanting a law or institution from another legal system,<sup>59</sup> but each one of these metaphors has its own strengths and limitations.

At the heart of the controversy, there is an unsettled discussion among scholars about the role played by legal culture in the process of transplanting legal rules or institutions. Lawrence Friedman defines legal culture as "the ideas, values, attitudes, and opinions people in some society hold, with regard to law and the legal system".<sup>60</sup> According to Roger Cotterrell, legal culture can be defined as a "concept with which to refer provisionally to a general environment of social practices, traditions, understandings, and values in which the law exists."<sup>61</sup> For his part, David Nelken considers that "the idea of legal culture thus points out the differences in the way features of law are themselves embedded in larger frameworks of social structure and culture which constitutes and reveal the place of law in society".<sup>62</sup>

Today, scholars still disagree on the definition of legal culture, arguing that the concept is too vague or discussing the real contribution culture can make to law. "Is legal culture that which is

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<sup>55</sup> Pierre Legrand, "The Impossibility of 'Legal Transplants'" (1997) 4:2 Maastricht J of European and Comp L 111 [Legrand].

<sup>56</sup> *Ibid* at 114.

<sup>57</sup> *Ibid* at 115.

<sup>58</sup> *Ibid* at 117-8.

<sup>59</sup> Michele Graziadei, "Comparative Law as the Study of Transplants and Receptions" in *The Oxford Handbook of Comparative Law*, Mathias Reimann & Reinhard Zimmermann, eds, (Oxford University Press, 2006) 441 at 443 [Graziadei] Author refers to other terminology such as "circulation of legal models," "transfer," "reception," and "cross-fertilization;" See also Nelken, *supra* note 25 at 15-8.

<sup>60</sup> Lawrence M. Friedman, "Is There a Modern Legal Culture?" (1994) 117 Ratio Juris L J 7:2 at 118 [Friedman].

<sup>61</sup> Louis F. Del Duca & Alain Levasseur, "Impact of Legal Culture and Legal Transplants on the Evolution of the U.S. Legal System" (2010) 58: Am J Comp L 1 at 2, citing Roger Cotterrell, "The Concept of Legal Culture" in David Nelken ed, *Comparing Legal Cultures* (Dartmouth, 1997) [Del Duca & Levasseur].

<sup>62</sup> Nelken, *supra* note 25 at 25.

being adapted or that which helps shape the process of adaptation?”<sup>63</sup> responses do not manage to satisfy everyone.

Without taking the drastic standpoint that transplants are impossible, and under the premise that legal reforms cannot always be conceived solely in terms of measurable goals,<sup>64</sup> this thesis seeks to establish whether the adoption of the jury law represents a successful form of law reform, given Argentina’s history and legal culture.

While borrowing foreign models eases the burden of time and resources upon the importer of the law, that is only one aspect of what can be considered as a successful method of reform. Though resources may be saved, the jurisdiction that acts as a recipient of a transplant could still end up with an imported model that does little to fulfil the aims originally intended by the reform.<sup>65</sup> In this sense, one of the plausible reasons for a failed or successful legal transplant has been attributed precisely to the role played by “legal culture” during a transplant, and again, more controversy arises.

When Watson wrote about legal transplants, he was of the view that legal culture did not play any major role.<sup>66</sup> His concern was whether law was transplanted, whatever happened to the law afterwards.<sup>67</sup> A different view developed among other scholars afterwards, the idea that there is a value in considering legal culture in the movement of law.<sup>68</sup> The claim is based on the connection between law and culture as a fundamental feature in assessing the feasibility of a transplant.

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<sup>63</sup> *Ibid* at 27.

<sup>64</sup> *Ibid* at 46

<sup>65</sup> Roger Cotterrell, “Is there a logic in Legal Transplants?” in David Nelken & Johannes Feest ed, *Adapting Legal Cultures* (Portland, Or: Hart, 2001) 71 at 79 [Cotterrell].

<sup>66</sup> Watson, *supra* note 20 at 96. (Although in the “Afterword” of the second edition of his book (1993) Watson realizes that the context in which the transplant takes place does play its part and should be taken into account in order to appreciate the impact of any transformation. Conf. Watson at 108).

<sup>67</sup> Nelken, *supra* note 25 at 36.

<sup>68</sup> See e.g. Gianmaria Ajani, “By Chance and Prestige: Legal Transplants in Russia and Eastern Europe” (1995) 43:1 Am J Comp L 93 [Ajani]; Dean, *supra* note 52, Friedman, *supra* note 60, Markovits, *supra* note 32.

A scenario where people and governments would embark in a process of borrowing foreign laws or institutions without caring about what would happen to the law afterwards is certainly divorced from reality. Even if today legal development has been expanded to include judicial reform as desirable on its own right,<sup>69</sup> in general, transplants tend to carry economic, social, and political consequences. The assessment about the feasibility of a reform urges those in charge of performing the transplant to -at the very least- consider and assess the alleged connection between law and culture and the consequences of embarking on a process of transplantation. In fact, for Friedman, that connection is such that any “law reform is doomed to failure if it does not take legal culture into account”.

In a globalized world, one may agree that legal cultures are likely to be more similar,<sup>70</sup> they are inclined to merge more, and legal systems are increasingly being conceived as the product of borrowing, translating and reassembling laws and institutions from across the globe.<sup>71</sup> Moreover, these claims may be even more valid regarding western societies. Nonetheless, even if we can assert that today the differences among legal cultures are diminishing, it would still be naïve to underestimate the role played by legal culture in the outcome of a reform. This research adopts the idea that legal transplants are possible but since law is a product of society,<sup>72</sup> their success would necessarily be linked to the proper analysis and due respect to the history, traditions, idiosyncrasy, values, and ideas of the recipient society.

The prevailing legal culture among the bench and the bar in Argentina is one born out of inquisitorial, secret and bureaucratic practices inherited from Continental Europe. Beyond the legal profession, the Argentine society has also been subjected to bureaucratic and secret procedures. It is a society that, after years of military dictatorships and corrupt governments, formed a dual relationship with the law and the authority. It created a distrustful feeling about the

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<sup>69</sup> David M. Trubek & Alvaro Santos, “The third moment in law and development theory and the emergence of a new critical practice” in David M. Trubek & Alvaro Santos, eds, *The New Law and Economic Development: A Critical Appraisal* (New York: C.U.P., 2006) 1 at 9.

<sup>70</sup> Friedman, *supra* note 60 at 125.

<sup>71</sup> Sally Engle Merry, “What Is Legal Culture – An Anthropological Perspective” (2010)5 *Am J Comp L* 40 at 52 [Merry].

<sup>72</sup> Friedman, *supra* note 60 at 130.

actions of the government, the judiciary, and the legitimacy of the law but it still kept the faith in their democratic power.

I suggest that the proper approach to analyze the jury transplant, as any other transplant, is not to assume that the existence of different legal cultures between recipient and donor will lead to disaster. While divergence between recipient and donor in terms of social, economic and institutional conditions, may work against a successful transplant,<sup>73</sup> it may well be overlooking these differences that may lead to failure, rather than failure being an inevitable consequence of the differences themselves.

My research will not deliver a universally valid response to the question of whether legal transplants are successful methods of reforms. Instead, I propose that the transplant of a law, system or institution may be a useful method of legal development but with an important restriction. There is no room for generalization; each legal transplant should be considered individually. What this research can do is to provide an exemplary case of a transplant that successfully made the journey from one jurisdiction to the other, notwithstanding the disparities between the legal cultures of donor and recipient.

The transplant of the jury in Argentina, which has a high potential of success, can contribute to the literature available that understands that “reforms cannot be designed in splendid isolation.”<sup>74</sup> For a transplant to become an adequate method of reform, its content should always be connected to the cultural background of the recipient. The best way to do that is by embracing, and not underestimating, the differences between the exporter and the importer of the law, and transform this exercise in one of adaptation. Adaptation to the local conditions is what would ultimately bring success to a legal transplant.<sup>75</sup>

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<sup>73</sup> Daniel Berkowitz et al, “The Transplant Effect” (2003) 51:1 Am J Comp L 163 at 171 [Berkowitz].

<sup>74</sup> Markovits, *supra* note 32 at 101.

<sup>75</sup> Berkowitz, *supra* note 77 at 179.

Today, it is outdated to pretend that law travels without suffering important changes.<sup>76</sup> However, we can still consider these travels as legal transplants. To contemplate the initial conditions and the local legal culture, and to make a proper early assessment about the necessary changes that would bring success to the transplant is what would constitute a proper exercise of adaptation.<sup>77</sup> Even when what is being transplanted is a longstanding traditional institution such as trial by jury, in modern days, society can still reinterpret ancient institutions by giving them new meaning.<sup>78</sup>

However, in the name of reinterpretation, reformers and consumers of law should still avoid radical modifications to the imported models. The perils of performing drastic alterations is that these may contribute to alter the original function and nature intended with the transplant.<sup>79</sup> The due balance may be found in preserving the essence of the foreign model that belongs to a different legal culture, but still being able to provide it with local meaning.

The Argentine society is one that recognizes its turbulent past and its unstable present, but it is also one that sees and celebrates its roots. I propose that the only way for this transplant to succeed in Argentina is by way of accepting its history and embracing its origins. The transplant was welcomed in a country with a rooted inquisitorial heritage, that has been slowly transitioning to adversarial procedures for over three decades. I therefore suggest that legal culture played a crucial role in this legal transplant, from the moment of explaining the reasons of why it took so many years to introduce the jury system to the final stage of its implementation. I argue that the transplant was performed because it managed to adapt a common law institution into the local culture, but without distorting the true essence of the imported. Some of these alterations generated not so desirable outcomes, such as the adoption of a flexible system of majorities in

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<sup>76</sup> William Twining, "Diffusion of law: a global perspective"(2004) 36:49 J. of Legal Pluralism and Unofficial Law 1 at 35 [Twining].

<sup>77</sup> Berkowitz, *supra* note 77 at 179.

<sup>78</sup> Graziadei, *supra* note 59 at 461.

<sup>79</sup> Elisabetta Grande, "Legal Transplants and the Inoculation Effect: How American Criminal Procedure Has Affected Continental Europe" (2016) 64:3 Am J Comp L 583 at 617 [Grande] (The reaction of Continental European countries to the borrowing of American institutions resembles to an "inoculation effect", explained as the injection of a small portion of American adversarial procedure into the body of European procedure, producing the strengthening of its inquisitorial nature, which is the exact opposite result intended by that the transplant).

lieu of unanimous verdicts, while others produced some extraordinary adaptations which lead to the creation of novel institutions, such as the Indigenous jury.

## Chapter 2: the transplant of the jury in Argentina

### 2.1 Introduction

A successful legal transplant-like that of a human organ- will grow in its new body, and become part of that body- just as the rule or institution would have continued to develop in its parent system.<sup>80</sup>

If we apply Watson's medical metaphor regarding transplants, prior to surgery, the first element to consider is the medical record of the patient. It is meaningless to try to anticipate the reaction of the recipient body without understanding her past medical history.

As part of her record, we can identify that Argentina belongs to the civil law family, and she has a history of inquisitorial traditions inherited from Continental Europe.<sup>81</sup> We can also identify that, especially over the last three decades, she developed an interest in the common law family, and she has been especially in touch with one of its members, the United States, acquiring some of the adversarial practices that characterized that family.<sup>82</sup>

The transplant of the jury to Argentina, this critical moment of performing the surgery, is inevitably linked to the previous history of a country that underwent a slow transition from inquisitorial to adversarial justice systems. Inspired by the ideas of a first generation of Latin American reformers who created a blueprint for legal change, this chapter highlights the characteristics of the inquisitorial system and its implications for the Argentine legal culture.

Moreover, it also tracks the evolution towards adversarial systems and with lay participation and the series of events that may be inferred to have been responsible for triggering these changes. There is a history behind the transplant of the jury that can be linked to a series of social and political events that this chapter also explores.

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<sup>80</sup> Watson, *supra* note 20 at 27.

<sup>81</sup> Binder, "La Fuerza de la Inquisición" *supra* note 4 at 59; See also Damaška, "Structures of Authority" *supra* note 6 at 484.

<sup>82</sup> See Langer, "Revolution," *supra* note 8; See also Langer, "From Legal Transplants," *supra* note 8.

Furthermore, this part of the research also offers the first approach and analysis of the two provincial jury laws currently in force in the country, Neuquén and Buenos Aires. Specifically, it is interested in exploring some specific features adopted by the laws of these two provinces. The local importers made some adaptations to the original imported jury model and it is important to evaluate the plausible reasons behind these adaptations and the scope of consequences to the prognosis of the legal transplant.

## 2.2 Argentina before the transplant

The country declared its independence from Spain in a process that began in 1810. However, as in most of Latin America, inquisitorial criminal procedures remained fully in place.<sup>83</sup> From the time of independence, criminal procedures reflected those from European-Continental countries, nonetheless, the first National Constitution of 1853 found its inspiration in the United States Constitution.<sup>84</sup> The borrowing of the United States model did not prevent the country from preserving an inquisitorial form of justice, shaped in the 13<sup>th</sup> and 19<sup>th</sup> centuries by the Catholic Church and the Continental European monarchies.<sup>85</sup> The legacy was so strong that by 1888, the country enacted an inquisitorial Federal Procedural Criminal Code which incorporated rules that were no longer valid in Spain.<sup>86</sup>

Heir to the Continental European inquisitorial justice system, Argentina developed legal procedures characterized by specific features. Written and secret procedures<sup>87</sup> “structured as an official inquiry”<sup>88</sup> into the truth,<sup>89</sup> that come accompanied with obstructionist formalities, lack of

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<sup>83</sup> Struensee & Maier *supra* note 28 at 19.

<sup>84</sup> Rosenkrantz, *supra* note 10 at 270.

<sup>85</sup> Langer, “Revolution,” *supra* note 8 at 628.

<sup>86</sup> Andrés Harfuch et al, “Del Common Law al Civil Law: El Gran Potencial del Jurado para poner fin a la Cultura Inquisitiva” in Gustavo Letner & Luciana Piñeyro, eds, *Juicio por Jurados en el Procedimiento Penal*, (Buenos Aires: Jusbaire, 2017) 187 at 188, citing Julio B.J. Maier, *Derecho Procesal Penal*, vol 1, 2nd ed (Buenos Aires: Editores Del Puerto, 2004) at 406-7 [Maier].

<sup>87</sup> Binder, “La Fuerza de la Inquisición” ” *supra* note 4 at 59.

<sup>88</sup> Damaška, *The Faces of Justice*, *supra* note 5 at 3.

<sup>89</sup> William L. Dwyer, *In the hands of the people: The trial jury's origins. Triumphs, troubles and future in American Democracy* (New York: Thomas Dunne Books, 2002) at 155 [Dwyer].

transparency and no public trials. During the entire legal procedure, judges perform most activities, taking over the role of the prosecutor (as it is conceived in common law systems), and playing an active investigative role.<sup>90</sup> Almost inevitably, the concentration of power in the judge affects her impartiality to deliver an unbiased decision.<sup>91</sup> In its more pure form, historically imported from Continental European countries, inquisitorial procedure is judge-centered, and is generally divided in a first phase called the pretrial investigation (etapa de instrucción) and a later trial phase (juicio) where the case is decided, both phases conducted by the same judge.<sup>92</sup> In Argentina, this is how cases were tried in the federal courts, under the Criminal Procedural Code of 1888.<sup>93</sup>

Far from what in the adversarial system has been known as “a day-in-court,”<sup>94</sup> inquisitorial criminal procedures are notoriously lengthy and bureaucratic. From beginning to end, all the evidence gathered, including the statements of witnesses, is registered in a written file (expediente) that leads the judge to deliver her sentence at the end of a trial.<sup>95</sup> Even in the case of an acquittal, the verdict is only provisional, since the State has many subsequent opportunities to appeal and quash the decision.<sup>96</sup> The written file maintains a central role throughout numerous appeal processes. All the information gathered and produced allows superior courts to revisit and exercise control over what has been decided by judges at the lower level, satisfying the needs of a judicial organization designed to be vertical and hierarchical.<sup>97</sup>

The logic of the inquisitorial trial is also reflected in how lawyers practice criminal law.<sup>98</sup> Since the crucial aim is to influence higher courts, what is written in the file is more important than

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<sup>90</sup> Langer, “Revolution” *supra* note 8 at 629.

<sup>91</sup> Harfuch, *El Juicio por Jurados*, *supra* note 11 at 32.

<sup>92</sup> Dwyer, *supra* note 89 at 156.

<sup>93</sup> Langer, “Revolution,” *supra* note 8 at 630.

<sup>94</sup> Damaška, *The Faces of Justice*, *supra* note 5 at 62. Damaška recognizes that in recent times there has been a professionalization of the judiciary and litigation has increased its complexity which has led to more longer and complex adversarial procedures, but concentrated trials are still one of the main characteristics of the adversarial systems as opposed to more inquisitorial forms of trials.

<sup>95</sup> Langer, “Revolution,” *supra* note 8 at 629.

<sup>96</sup> Dwyer, *supra* note 89 at 157.

<sup>97</sup> Maier, *supra* note 86 at 706.

<sup>98</sup> Binder, “La Fuerza de la Inquisición,” *supra* note 4 at 52.

what is said during the trial.<sup>99</sup> Another consequence of this way of practicing law is the lack of training in oral and adversarial techniques. A civil law lawyer simply does not need these skills in a procedure that gives much more prominence to the written appellate stage than to the trial itself.<sup>100</sup>

Today, pure inquisitorial procedures no longer prevail in Argentina. The country has been enhancing the rights of defendants through oral and public trials and the implementation of adversarial criminal codes. However, some of the old inquisitorial habits and features remain fully in place. In general, the judiciary has resisted change and legal professionals have found it difficult to cope with changes too. In the next sections we will see how the transition to adversarial procedures took place in the country and what has been the scope of that change. Moreover, we will see how the transplant of the jury started to mature within the context of these reforms and the socio-political events that contributed to its development.

## **2.3 The transition**

Since jury trials are rooted in the adversarial justice system, a jury transplant was inconceivable without a prior transition from an inquisitorial to an adversarial procedure; one that would mirror the criminal procedural practices of the common law. Each of the provinces that currently have jury laws enacted adversarial criminal codes prior to the adoption of a trial by jury law.

The challenge with the transition to adversarial systems and to a later implementation of lay participation was how to adapt a legal culture born out of an inquisitorial tradition, one that endured for centuries among the civil law family. The influence was such that it was not until the end of the 20<sup>th</sup> century that the region started to walk away from pure forms of inquisitorial justice.<sup>101</sup> In general, legal change was accompanied with resistance and wariness on the part of legal professionals, although we will observe that, with the passage of time, these feelings have

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<sup>99</sup> Harfuch et al, “Del Common Law,” *supra* note 86 at 191.

<sup>100</sup> Bakrokar & Chizik, *supra* note 16 at 23.

<sup>101</sup> Binder, “La Fuerza de la Inquisición,” *supra* note 4 at 62-3.

been ceding ground to more open and optimistic views about the transition, including the implementation of trial by jury.

The early pioneer in making a change was the province of Córdoba, in Argentina.<sup>102</sup> As explained in chapter I, the National Constitution grants autonomy to the provinces to adopt their local procedural codes and system of courts.<sup>103</sup> In 1940, the province of Córdoba relied upon that constitutional provision to develop a new procedural criminal code.<sup>104</sup> An *Avant Garde* scholarly movement of law professors from the University of Córdoba and the support of a progressive government set the basis for its enactment.<sup>105</sup> The Code implemented oral and public trials, in marked contrast to the then-in force federal procedural criminal code and the provincial procedures enforced across the rest of the country.<sup>106</sup>

From 1940 onwards, many Argentine provinces followed Córdoba and implemented public and oral trials.<sup>107</sup> In contrast to the progress observed in many provinces, at the federal level, the implementation of orality and publicity only occurred in the 1990s.<sup>108</sup> The moment for the implementation of this new federal procedural criminal code for the country reflected the wave of reforms that took place across Latin America. Moreover, in 1992, Córdoba reformed its local procedural code, deepening its adversarial features.<sup>109</sup> In 1997, the province of Buenos Aires also enacted a new procedural criminal code that proclaimed oral and public trials and implemented alternative procedures such as plea bargaining.<sup>110</sup> Behind the national and local advances there was a group of local legal reformers comprised of judges, prosecutors and defense attorneys, as

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<sup>102</sup> Struensee & Maier, *supra* note 28 at 5.

<sup>103</sup> Langer; “From Legal Transplants,” *supra* note 8 at 54, n 260.

<sup>104</sup> Act 3839, 1939, Code of Criminal Procedure of Córdoba (Arg).

<sup>105</sup> Struensee & Maier *supra* note 28 at 25.

<sup>106</sup> *Ibid.*

<sup>107</sup> Santiago del Estero (1941), San Luis (1947), La Rioja (1950), Mendoza (1950), Catamarca (1959), Salta (1961), La Pampa (1964), Entre Ríos (1969), Corrientes (1971) and Chaco (1971). Conf. Roberto Omar Berizonce, & Roberto Daniel Martínez Astorino, “Los Juicios Orales en la Argentina” in Eduardo Ferrer Mac-Gregor & Alberto Said Ramírez, eds, *Juicios orales. La reforma judicial en Iberoamérica. Homenaje al maestro Cipriano Gómez Lara* (México: U.N.A. de México Instituto De Investigaciones Jurídicas, 2003) 39 at 40 [Berizonce & Martínez Astorino].

<sup>108</sup> Act 23.984, 1991, Code of Criminal Procedure of Argentina, online: <<http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/383/texact.htm>>.

<sup>109</sup> Act 8123, 1992, Code of Criminal Procedure of Córdoba (Arg); Langer, “From Legal Transplants,” *supra* note 8 at 641.

<sup>110</sup> Berizonce & Martínez Astorino, *supra* note 107 at 51-3.

well as members of the bar, and legal scholars, who were all interested in implementing adversarial codes across the region.<sup>111</sup> The interest of foreign agencies in the solidification of democracy across the region motivated agencies such as the United States Agency for International Development [USAID] to provide Argentina with financial and structural assistance to make this transition.<sup>112</sup>

It is not by chance that changes occurred during the 1990s. For many years in the mid-twentieth century, Argentina's democratic governments were removed by military regimes before being able to finish their terms. This military practice lasted for more than 50 years (between 1928-1983) and the only elected president that was able to finish his term was Juan Domingo Peron, in the year 1946 and until 1952.<sup>113</sup>

The country suffered its most violent military dictatorship between 1976 and 1983. The armed forces that took over power designated themselves as the "National Reorganization Process" (Proceso de Reorganización Nacional) and designed a practice of massive and systematic violation of human rights, unlike any other ever experienced before in Argentina. Tens of thousands of people were kidnapped and killed. The "disappeared" (desaparecidos) were systematically taken to clandestine detention centers, tortured, and in the majority of cases, murdered.<sup>114</sup> Pregnant women were also kidnapped and tortured until they gave birth, their babies were illicitly and secretly handed over to military supporters and allies, while their biological mothers were being murdered.<sup>115</sup>

The judiciary was marred by this *de facto* government. With a closed Congress and a suspended Constitution,<sup>116</sup> people were denied their political and civil rights.<sup>117</sup> The families of the

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<sup>111</sup> Langer, "Revolution," *supra* note 8 at 651.

<sup>112</sup> Langer, "Revolution," *supra* note 8 at 619.

<sup>113</sup> *Ibid.*

<sup>114</sup> Alison Brysk, "The Politics of Measurement: The Contested Count of the Disappeared in Argentina" (1994) 16:4 Hum Rights Q 676 at 679 [Brysk].

<sup>115</sup> *Ibid.*

<sup>116</sup> Anthony W. Pereira, "Explaining judicial reform outcomes in new democracies: The importance of authoritarian legalism in Argentina, Brazil, and Chile" (2003) 4:3 Hum. Rights Rev. 3 at 4 [Pereira].

<sup>117</sup> Brysk, *supra* note 114 at 679.

disappeared looked for answers by entering *habeas corpus* requests and organizing demonstration in the Plaza de Mayo,<sup>118</sup> but these answers were rarely found.

During that period, while many judges were under attack, many others became accomplices of the state terror. Many aided and abetted the military forces, and facilitated the commission of crimes against humanity by ignoring and not investigating the crimes that were denounced before their courts, and by systematically denying *habeas corpus* requests.<sup>119</sup>

Even though judges at the National Supreme Court are granted lifetime tenure, the regime removed its members and appointed new ones.<sup>120</sup> This practice was not unusual during past military governments,<sup>121</sup> as it helped the regime to be in control of the judiciary branch. “Between 1976 and 1983 there were no fewer than 10 compositions of the Supreme Court,”<sup>122</sup> and statistics have shown that, for years, Supreme Court judges tended to be servile to the *de facto* government. It was only during the last two years of the regime, when the transition to democracy was approaching, that members of the Court began to decrease their support towards the outgoing government and to elaborate reasonings against it, for instance in how *habeas* cases were decided.<sup>123</sup>

In 1983, Raúl Alfonsín was elected to office in democratic elections and members of the court were once more replaced.<sup>124</sup> In terms of a legal reform of the ancient federal procedural criminal code of 1888, it took years of debates among reformers and confrontation between political parties to enact a new code.<sup>125</sup> Finally, in 1992, the new law introduced orality, publicity, as well as some important changes at the federal level. For instance, during the pretrial investigation,

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<sup>118</sup> See Abuelas de Plaza de Mayo, online: <<https://www.abuelas.org.ar/>>.

<sup>119</sup> Pereira, *supra* note 116 at 6; see also Federico Rivas Molina, “Argentina condena a cadena perpetua a cuatro jueces por delitos de lesa humanidad” *El País* (27 July 2017), online: <[https://elpais.com/internacional/2017/07/27/argentina/1501177434\\_819392.html](https://elpais.com/internacional/2017/07/27/argentina/1501177434_819392.html)>.

<sup>120</sup> Helmke, *supra* note 26 at 292.

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid* at 299.

<sup>123</sup> *Ibid* at 300-1.

<sup>124</sup> *Ibid* at 292.

<sup>125</sup> For a detailed account of the history behind the enactment of the Code of Criminal Procedure of Argentina see Langer, “Revolution” *supra* note 8 at 637-41.

instead of allowing the same judge to investigate and decide in a later trial, the new system left the pretrial investigation phase in the hands of a prosecutor or (at least) of a different judge than the one who was to conduct the later oral and public trial.<sup>126</sup>

Although there were significant changes such as those described above, the reform kept some primary inquisitorial characteristics. “The main activity continued to be the production of written documentation, formalistic and bureaucratic”<sup>127</sup> which turned the idea of an adversarial federal code into one that kept the inquisitorial footprint alive. This combination of inquisitorial and adversarial system was deemed a “mixed” or “inquisitorial reformed” system.<sup>128</sup>

During the last decade, the implementation of a new adversarial procedural criminal code<sup>129</sup> that intended to leave behind the inquisitorial reformed system was suspended by decree in 2015,<sup>130</sup> after Mauricio Macri won the presidential elections. Whether Macri did not support the implementation of an adversarial criminal code remained in the background. The true reason behind the decree was the intention of the newly appointed government to reduce the faculties, budget and strength of the Attorney General, Alejandra Gils Carbó, who remained loyal to the former government of Cristina Fernandez de Kirchner,<sup>131</sup> with the ultimate intention of the new president to force her resignation.

In contrast to what still happens at the federal level, due to the autonomy granted to the provinces, many of them have been moving towards more pure forms of adversarial procedural criminal codes.<sup>132</sup> Most importantly, in some cases, recent reforms have included changes in the structure of the judiciary to make it more flexible and, as a result, more prone to break with the

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<sup>126</sup> Harfuch et al, “Del Common Law,” *supra* note 86 at 189.

<sup>127</sup> Langer, “Revolution” *supra* note 8 at 191.

<sup>128</sup> Harfuch et al, “Del Common Law,” *supra* note 86 at 189.

<sup>129</sup> Act 27.063, 2014, Code of Criminal Procedure of Argentina, online: <<http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=239340>>.

<sup>130</sup> Presidential Decree 257/2015 (Arg).

<sup>131</sup> Política, “Oficial: el Gobierno suspendió la aplicación del nuevo Código Procesal Penal y traspasó las escuchas judiciales a la Corte Suprema” *La Nación* (29 December 2015), online: <<https://www.lanacion.com.ar/politica/oficial-el-gobierno-suspendio-la-aplicacion-del-nuevo-codigo-procesal-penal-y-traspaso-las-escuchas-judiciales-a-la-corte-suprema-nid1857916>>.

<sup>132</sup> For example: Córdoba, Neuquén, Province of Buenos Aires, Chubut, Entre Rios and Santa Fe.

inquisitorial legacy of a hierarchical and secretive judicial organization.<sup>133</sup> The implementation of specialized judicial offices, new designs in the way prosecutors are organized and perform their task, not as “servants of the monarch” but as an advocate for the victims,<sup>134</sup> are some of the changes that are being experienced by the provinces in an effort to break with the past.

## **2.4 Along comes the jury**

### **2.4.1 The “mixed court” in the province of Córdoba**

In Argentina, the framers of the National Constitution did not specify which form of jury trial was envisaged for criminal cases.<sup>135</sup> Today worldwide there are many possible forms of lay participation,<sup>136</sup> but the tendency is to have jurors as fact finders for criminal cases. Likewise, the trend is for civil law countries to adopt mixed tribunals (composed of professional judges and lay citizens deciding a case together) and for common law countries to preserve the “classic jury”,<sup>137</sup> at least in criminal cases (twelve lay citizens who, unanimously or under majority rules, render a “guilty” or “not guilty” verdict, also characterized by the absence of expressed verdict reasons and with a professional judge acting as a “referee” between the parties).

As happened in 1940 with the *Avant Garde* criminal procedural code, the province of Cordoba was once again the pioneer in the transformation of the country’s criminal justice system. In 1998, the province introduced the mixed jury (jurado escabino) for serious criminal offenses and only when the parties requested that form of trial. Inspired by the German jury, the Cordoba legislators established that the verdict would be the result of a joint decision reached by lay citizens and professional judges, in this case, two lay jurors outnumbered by three professional judges.<sup>138</sup>

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<sup>133</sup> Binder, “La Fuerza de la Inquisición,” *supra* note 4 at 84.

<sup>134</sup> *Ibid* at 86.

<sup>135</sup> See *supra* note 15.

<sup>136</sup> See Nancy Marder & Valerie P. Hans, “Introduction to Juries and Lay Participation: American Perspectives and Global Trends” (2015) 90:3 Chi-Kent L Rev 789.

<sup>137</sup> Hans, “Trial by Jury,” *supra* note 23 at 483.

<sup>138</sup> Bergoglio, “Metropolitan,” *supra* note 30 at 832.

In 2001, while the escabino jury was at an early stage in Córdoba, the country was suffering a profound economic crisis. At the end of that year, during massive riots and protests, 20 demonstrators were killed on the streets, the then-president De La Rúa resigned, and the country was run by 5 different presidents in less than two weeks.<sup>139</sup> The aftermath of the economic crisis represented an increase in the loss of jobs, a marked rise of poverty levels, violence and crime.

By 2004, the country was more stabilized but crimes and safety were major concerns among citizens. Within this context, the murder of a 23-year-old man during his kidnapping shook up the entire society and generated massive demonstrations. The movement was led by Juan Carlos Blumberg, the father of the murdered man. In an unprecedented demand for concrete and harsher measures against rising crime, he gathered over 5 million signatures from fellow citizens.<sup>140</sup> Among the demands was the introduction of the “classic” jury and, behind this request, was the Manhattan Institute of New York, advising Mr. Blumberg.<sup>141</sup> The requests for legal change came from the pressure exercised by this group in the society but it also responded to the actions of foreign interest groups that got involved in the reform, for example by giving policy advice.<sup>142</sup>

Over forty years, Argentina went through a spiral of destabilizing factors. A ruthless military dictatorship until the beginning of the 1980s, a profound political and economic crisis that devastated the country in 2001, and the social consequences of that crisis, reflected in the increase of unemployment, poverty and crime. While in Argentina, it is not strange to find the judiciary “under attack for inefficiency and corruption, and especially for its reported subservience to the politics of the executive branch,”<sup>143</sup> the same general mistrust of corruption and inefficiency are also true with respect to the legislative and executive branches. In 2001, with a shattering crisis, no one in the government was enjoying much credibility.

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<sup>139</sup> See International Monetary Fund, “Lessons from the Crisis in Argentina” (8 October 2003), online (pdf): <<https://www.imf.org/external/np/pdr/lessons/100803.pdf>>.

<sup>140</sup> Maria Inés Bergoglio, “New Paths towards Judicial Legitimacy: The Experience of Mixed Tribunals in Cordoba” (2008) 14:2 Sw J L & Trade Americas 319 at 326 [Bergoglio, “New Paths”].

<sup>141</sup> *Ibid.*

<sup>142</sup> Cotterrell, *supra* note 65 at 86-7, citing Ajani, *supra* note 68 at 110-3.

<sup>143</sup> Yves Dezalay & Bryant Garth, “The Import and Export of Law and Legal Institutions: International Strategies in National Palace Wars,” in David Nelken & Johannes Feest, eds, *Adapting Legal Cultures* (Portland, Or: Hart, 2001) 241 at 248 [Dezalay & Garth, “The Import”].

At the national level, the government needed to show some response and, in accordance to the requests made by a raging society, in 2004, the Congress amended the Criminal Code and increased the penalties for certain criminal offenses, among other amendments.<sup>144</sup>

The Blumberg case also resonated in the province of Córdoba, where the non-mandatory mixed jury then in force was not really much in use.<sup>145</sup> The same year, with the burden of a national context of anger and discontent, the local legislature envisaged the passing of a new jury law that could be more useful and meaningful to the people of Córdoba. During the parliamentary debates, one of the legislators said:

The Argentine people demanded justice for they felt they had none; the Argentine people demanded security for they felt none; the Argentine people demanded to believe in their institutions for they no longer believed. So, we legislators in Córdoba must provide answers to the people's demands and create those institutions which will allow us to restore the social contract that has been lost, in order to generate a bridge between the people and their leaders; to generate that belief that got lost in time. We must reconstruct the social contract. That is why trial by jury is necessary, because it is an instrument that leads toward the aforementioned goal.<sup>146</sup>

According to Professor María Inés Bergoglio, scholar at the National University of Córdoba, the law had the aim of legitimizing the judiciary.”<sup>147</sup> She reaches that view after her analysis on the debates, in which she quotes Victor Velez, the then-president of the Magistrates Association of Cordoba, who spoke during the debate at the local legislature.<sup>148</sup> In support of the enactment of a new law, Velez viewed lay participation as “...a healthy feeling of natural equity...” and “...a good idea about the functioning of justice.” Bergoglio insists that his speech had the aim of understanding jury trials as a tool to rebuild the confidence of the people in the justice system.<sup>149</sup>

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<sup>144</sup> Bergoglio, "New Paths" *supra* note 140 at 326 n 31.

<sup>145</sup> "Only 33 resolved cases from 1998 to 2004" *conf.* Bergoglio, "Metropolitan" *supra* note 30 at 832.

<sup>146</sup> Bergoglio, "New Paths" *supra* note 140 at 327, quoting provincial legislator Juan Manuel Cid.

<sup>147</sup> María Inés Bergoglio, "Participación Popular y Legitimidad Judicial: A Propósito del Juicio Por Jurados," *Pensamiento Penal* (2015) LJ at 10, online: <<http://www.pensamientopenal.com.ar/doctrina/41041-participacion-popular-y-legitimidad-judicial-proposito-del-juicio-jurados>>.

<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.*

Finally, a new jury law was sanctioned in Córdoba. This time, the jury was established as mandatory and the new law stipulated a specific list of crimes (such as aggravated homicide) that, from that moment on, needed be tried before a mixed court.<sup>150</sup> The number of lay jurors was raised from two to eight, outnumbering the number of professional judges (two judges and one presiding judge). Despite the fact that lay jurors and judges deliberate and decide on the verdict jointly, the law stipulates that only professional judges are in charge of elaborating a reasoned and written decision afterwards. Judges are obliged to expound on the reasons of the decision delivered by the mixed court.<sup>151</sup>

On this occasion, the discussion before passing the bill was around the implementation of the “classic” jury in lieu of the “mixed” jury. The presence in Córdoba of Mr. Blumberg and his advisor from the Manhattan Institute of New York and a meeting with the Governor were not enough to persuade the province to opt for a jury of 12 lay citizens.<sup>152</sup> It is not unusual to witness how foreign actors (especially from North America) may generate some degree of influence in the course of a reform. Notwithstanding, the presence of other influential national groups, who have their own degree of influence and pursue their own interest, can also influence the course of a legal reform.<sup>153</sup>

In the case of Córdoba, the quarrel was solved in favor of implementing a mixed court.<sup>154</sup> The impediment to embracing a classic jury was the dominant burden of the inquisitorial heritage. Jumping from the then mixed tribunal, in which lay jurors were outnumbered by judges, to one with lay majority was already a major change that was causing resistance: “Almost half of the criminal judges of the Court of Appeals (25 over 57) signed a note at the Legislature stating its rejection towards the bill.”<sup>155</sup> Consequently, the idea of a jury solely composed of lay citizens,

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<sup>150</sup> See full list of crimes at *Act 9182*, 2004, *Ley de Juicio por Jurados de Córdoba* (Arg) s 2.

<sup>151</sup> *Ibid*, section 44.

<sup>152</sup> Bergoglio, “New Paths” *supra* note 140 at 328.

<sup>153</sup> Cotterrell, *supra* note 65 at 87.

<sup>154</sup> Bergoglio, “New Paths” *supra* note 140 at 328.

<sup>155</sup> Sidonie Portorie & Aldana Romano, “Juries and democratic legitimacy: The jury trial in the public debate in Argentina” (2016) [unpublished] at 8, online (pdf): Academia

delivering a “guilty” or “not guilty” verdict, without providing a reasoned sentence to support their decision, was to move too far away from the Continental European model where the legal professionals felt more comfortable.<sup>156</sup> In the center of the controversy was the idea that, without the presence of professional judges, who can provide a reasoned sentence, the defendant was going to see her right to appeal restricted, in violation of the International Covenants on Human Rights signed by Argentina.<sup>157</sup> That discussion was going to be settled some years later with the arrival of the classic jury to Neuquén.

#### **2.4.2 Neuquén: the first jury under the “classic” jury model**

During the years that followed the Blumberg case and the jury law of Córdoba, some federal jury bills were presented to the National Congress. Among them, in 2006, the then Senator -and later President of the country- Cristina Fernandez de Kirchner presented a bill that had been produced by the National Department of Justice, under the auspices of the Libra Foundation<sup>158</sup> and with monetary funding from the United States Embassy.”<sup>159</sup> According to Miller, the active involvement of the donor may affect the recipient perceptions of the legitimacy of the legal transplant.<sup>160</sup> As Bergoglio points out, the auspices and financial support from the United States in the design of the federal bill portrays the influential role played by that country in the adoption of a “classic” type of jury for the proposed federal jury bill.<sup>161</sup> The endorsement of the United States was providing greater legitimacy to the envisaged bill.

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<[https://www.academia.edu/32284058/JURIES\\_AND\\_DEMOCRATIC\\_LEGITIMACY\\_THE\\_JURY\\_TRIAL\\_IN\\_THE\\_PUBLIC\\_DEBATE\\_IN\\_ARGENTINA\\_1](https://www.academia.edu/32284058/JURIES_AND_DEMOCRATIC_LEGITIMACY_THE_JURY_TRIAL_IN_THE_PUBLIC_DEBATE_IN_ARGENTINA_1)> [Portorie & Romano, “Juries”], citing María Inés Bergoglio et al, *Subiendo al estrado. La experiencia cordobesa del juicio por jurados* (Córdoba, Arg: Advocatus, 2010).

<sup>156</sup> *Ibid.*

<sup>157</sup> Bakrokar & Chizik, *supra* note 16 at 15.

<sup>158</sup> See The Libra Foundation, online: <<https://www.thelibrafoundation.org/>>.

<sup>159</sup> Bergoglio, “Metropolitan” *supra* note 30 at 833.

<sup>160</sup> Jonathan Miller, “A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process” (2003) 51:4 Am J Comp L 839 at 874 [Miller].

<sup>161</sup> Bergoglio, “New Paths” *supra* note 140 at 328.

The series of events that happened before Córdoba's jury law, the precedent of the new mixed court in Córdoba, and the federal jury bill submitted before the National Congress were some important catalyzers for the beginning of the transplant of the "classic" jury from the common law. To boost change, these catalyzers were also combined with a set of other components, specially, the active role played by local leading actors and organizations.

Under the guidance of the first generation of reformers, who envisaged the change towards adversarial justice systems decades ago, a second generation of reformers got enthusiastically involved. A small group of young lawyers and law students worked pro bono for non-governmental organizations [NGOs] such as the Institute of Comparative Studies in Criminal and Social Sciences [INECIP] and the Argentine Association of Trial by Jury [AAJJ]. Eventually, these activists were able to influence the government's agenda.<sup>162</sup> With their involvement, they were able to trigger legal change and serve in the process of importing the law.<sup>163</sup> Advocating for the implementation of the "classic" jury, reformers travelled across the country and worked alongside legislators and governors from different political parties, as well as with members of the bench and the bar. These sister NGOs were behind the drafting of jury bills, advising and helping the different provinces in assembling the system.

While local governments started to show real interest in embarking on the change of introducing lay participation, the necessary step for the transition was the implementation of adversarial codes of criminal procedure, either beforehand or simultaneously. That is how, in November 2011, the Legislature of Neuquén unanimously passed the provincial Procedural Criminal Code, which was the product of the joint work of a multidisciplinary commission comprised of members of the executive, legislative and judiciary power, the Bar Association of Neuquén, and the local Police force, among others. The commission reviewed previous projects of reforms and

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<sup>162</sup> Emilie M. Hafner-Burton et al, "Network Analysis for International Relations" (2009) 63:3 Int'l Org 559 at 561.

<sup>163</sup> Dezalay & Garth, "Hegemonic" supra note 53 at 280.

drafted the bill that was finally passed in 2011, where the first “classic” jury in Argentina was established.<sup>164</sup>

It involved a change in which all branches of government were in agreement, and it affected the whole structure and way in which the judiciary was organized. Orality and publicity were extended to all stages of the criminal process and the boundaries between the role of the judge and the prosecutor were clearly delimited. A horizontal organization of judges and the creation of a Judicial Office to take care of the administrative issues were essential for the proper functioning of the adversarial procedure and the implementation of the jury system.<sup>165</sup>

Regarding the newly implemented system, while the province did adopt the “classic” jury model from common law countries, the final product of the enacted law introduced a series of modifications that are worth considering. The law contemplates jury trials for severe criminal offenses, and establishes that it is mandatory to try the case before a jury panel when the State requests more than fifteen years in prison.<sup>166</sup> The law in Neuquén also takes into account the gender composition of the 12 jurors that compose the panel, which needs to be comprised equally of 6 men and 6 women.<sup>167</sup>

The mandatory nature of the jury in this province, understood as the impossibility of the defendant to waive a jury trial in lieu of a bench trial, has caused some controversy among legal professionals. Defense attorneys have claimed that section 35 of the law that establishes a mandatory jury is unconstitutional, in the understanding that jury trials should be considered a right for the defendant, not a prerogative of the State.<sup>168</sup> In 2015, the Superior Court of Neuquén

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<sup>164</sup> María Celeste Bolan Reina, “Planificación de la implementación de la oficina judicial” in Jaime Arellano & Alberto M. Binder, eds, *Sistemas Judiciales: Las Nuevas Oficinas de Gestión de Audiencias* at 15, online: CEJA INECIP <<http://inecip.org/publicaciones/no-18-las-nuevas-oficinas-de-gestion-de-audiencias/>> [Reina].

<sup>165</sup> *Ibid* at 20.

<sup>166</sup> *Act 2784*, 2011, Ley de Juicio por Jurados de Neuquén (Arg), s 35 [*Act 2784*]; see also Bakrokar & Chizik, *supra* note 16 at 18.

<sup>167</sup> *Act 2784*, s 198: The jury shall be integrated, including alternates, by men and women equally. It will be that at least half the jury belongs to the same social and cultural environment of the accused. It will also try, whenever possible, to have seniors, adults and youth in the panel of juries (translation by the author).

<sup>168</sup> See José Cafferata Nores et al, *Manual de Derecho Procesal Penal*, 3rd ed (Córdoba, Arg.: Advocatus, 2012); see also Ministerio Público de la Defensa de Provincia de Neuquén, *El Juicio por Jurados es una Garantía del*

had the opportunity to address this specific claim.<sup>169</sup> The claim of one defence attorney mainly rested on the fact that section 24 of the Constitution (Congress shall promote [...] the establishment of trial by jury) is in the part of the Constitution that sets out principles, rights and guarantees to citizens. In view of the decision of the framers of the constitution to regulate jury trials in that specific section, trial by jury should be considered as a prerogative of the defendant, not the State. The Superior Court interpretation differed, and contended that the part of the Constitution referred to by the defence counsel included more than just guarantees for the defendant. Moreover, the court explained that in view of the autonomy reserved to the provinces by the National Constitution, the way in which the provinces comply with the constitutional mandate falls within that granted autonomy.

The reality in the province has shown that, while the Superior Court of Neuquén may be accurate in its assertion, the section which provides a mandatory jury has caused significant consequences, especially by giving too much leeway to the State to select their cases.<sup>170</sup> This is because prosecutors have taken great advantage of the “mandatory clause” by using it as a tool to prosecute only in cases where they feel comfortable.

The strategy lies in making use of the “mandatory clause” jointly with the first part of that same section of the law. Section 35 foresees mandatory juries only for cases where the State requests more than fifteen years in prison. The combination of both parts of section 35 has turned into a powerful tool for prosecutors to pick up their cases and has affected the balance between State and defendant. If the prosecutor believes that a bench trial would better meet her interest, and on the contrary, that she would have fewer chances of succeeding before a jury, she only needs to request a penalty of less than fifteen years in prison to avoid a jury trial. Contrariwise, if the prosecutor is convinced that a panel of jurors would be more appropriate to win the case, she

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Imputado, (Provincia de Neuquén: Ministerio Público de la Defensa, 2015), online: <<http://www.mpdneuquen.gob.ar/index.php/2-sin-clasificar/302-diez-el-juicio-por-jurados-es-una-garantia-del-imputado>>.

<sup>169</sup> Carvajal, D. A. y otros *s/homicidio doblemente calificado*, Tribunal Penal de Impugnación Penal de Neuquén (2015), online: <<http://181.168.124.69:81/cgi-bin/koha/opac-detail.pl?biblionumber=135>> [Carvajal].

<sup>170</sup> Mariana Bilinsky & Natali Chizik, “Is Unanimity a Nightmare? Research about Decision Rules and Verdicts from the Jury in Argentina” (2017) [unpublished], online: Cornell Law School <[https://www.lawschool.cornell.edu/research/lay\\_participation\\_in\\_law/international\\_research.cfm](https://www.lawschool.cornell.edu/research/lay_participation_in_law/international_research.cfm)>.

only needs to request a penalty of more than fifteen years. Due to the mandatory nature of the jury, if the prosecutors requests fifteen years or more, the defendant would have no choice but to face a jury trial, preventing defendants from being able themselves to decide what type of trial (bench or jury) may be in their best interest.<sup>171</sup>

Even so, section 35 of the law can also be viewed as a positive development from the perspective of making proper use of trial by jury. In 2015, out of a total of 104 criminal trials, 10 were tried before a jury,<sup>172</sup> representing 9.61% of jury trials. One may infer that it is only the strong cases with compelling evidence that are tried before a jury.<sup>173</sup> As happens today in common law countries, the jury is summoned for a reduced number of cases. The vast majority recourse to the “procedimiento abreviado,”<sup>174</sup> the equivalent of the American plea bargaining (imported from the United States into the Federal Code of Criminal Procedure in 1997)<sup>175</sup> or are tried before professional judges. The aim is to preserve the jury for certain cases and prevent resources from being wasted in terms of time and money.

Under that premise, we may infer that section 35 would not only avoid unnecessary trials, but it would also prevent public disenchantment with the newly implemented institution. Jurors would probably feel that there is not an inadequate use of their time, that they have been summoned to serve on a case that has strong and compelling evidence. It may be viewed as a sign of efficient use of resources and proper weight of the case on the part of the State. All of these elements may

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<sup>171</sup> *Ibid.*

<sup>172</sup> Fuera del Expediente, “En Neuquén, la fiscalía lleva a juicio casos de abusos sexual, robos y homicidios” *Fuera del Expediente* (27 January 2016), online: <<http://fuera del expediente.com.ar/2016/01/27/en-neuquen-la-fiscalia-lleva-a-juicio-casos-de-abusos-sexual-robos-y-homicidios/>>.

<sup>173</sup> Bilinsky & Chizik, *supra* note 170.

<sup>174</sup> “According to the ‘procedimiento abreviado’, the prosecution and the defense can reach an agreement about the sentence at any time between the production of the information (indictment) at the end of the pretrial phase and the determination of the date for trial. This negotiated sentence cannot be greater than six years of imprisonment. As part of the agreement, the defendant must admit to the offense and his participation in it as described in the indictment. The trial court can reject the agreement if it considers the production of additional evidence necessary, or if it fundamentally disagrees with the charges. However, if the trial court accepts the agreement, it must reach a verdict based on the evidence collected in the written dossier. The trial court can still acquit the defendant, but if convicted, the defendant’s sentence cannot exceed the length agreed to by the parties.” Conf. Langer, “From Legal Transplants” *supra* note 8 at 54.

<sup>175</sup> To learn more about the import of the plea bargaining and the differences between the juicio abreviado and the American plea bargaining in Argentina, see Langer, “From Legal Transplants” *supra* note 8.

then contribute to development of jury trials as a successful transplant. However, this claim is difficult to support when we observe that the number of jury trials in the province has decreased steadily since the first year of its implementation. From April 2014 to July 2018, there were 44 trial by jury, the first year of implementation of the system registered 15 jury trials,<sup>176</sup> by 2015 the number was reduced to 10, and by the first semester of 2018, the province only registered two cases.<sup>177</sup>

It is difficult to reach one conclusive reason for this steady decrease, but it may be inferred that prosecutors might be opting for “procedimientos abreviados” or choosing bench trials to escape the work load involved in preparing a jury trial. In addition, we may infer that this also avoids the frustration of losing a case when the law has given prosecutors great leeway to decide which cases go before a jury. In any event, the wording of section 35, as it has been drafted, demonstrates that the outcome of a transplant is so delicate that even one section of a law could jeopardize the utility of the reform.

Another distinctive aspect of Neuquén trial by jury law is that it stipulates a majority of 8-4 votes to convict. According to this system of low majorities, the jury cannot hang, if jurors are not able to reach the majority requested by law, they have to acquit the defendant.<sup>178</sup> The law differs from the United States, the main donor of the transplant, where unanimity is required in all states, except for Oregon. While non-unanimous verdicts represented a significant departure from the common law jury, the low “majority rule” in Neuquén was passed without any objection.<sup>179</sup>

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<sup>176</sup> Leticia Lorenzo, “Un año de juicio por jurados en Neuquén” (2015) [unpublished] at 2, online (pdf): INECIP<<http://inecip.org/wp-content/uploads/Un-A%C3%B1o-de-Juicio-por-Jurados-enNeuqu%C3%A9n-Leticia-Lorenzo-1.pdf>>.

<sup>177</sup> Poder Judicial de Neuquén, “Juicio por Jurados en Neuquén” (10 August 2018), online: <<http://www.jusneuquen.gov.ar/juicios-por-jurados-en-la-provincia-de-neuquen/>> [Poder Judicial Neuquén].

<sup>178</sup> Act 2784, s 207, *supra* note 166; see also Bakrokar & Chizik, *supra* note 16 at 19-20.

<sup>179</sup> *Ibid.* At the legislature meeting number 26, sections 203, 204, 205, 206, 207, 208, 209, 210, 211 and 212 were passed without any discussion; see Legislatura de Neuquén, “Aprobación en particular” (11/24/2011) at 57, online (pdf): *Legislatura de Neuquén*<<https://www.legislaturaneuquen.gob.ar/LegislaturaCodigoProcPenal/SesionParticularCPPLegislaturaNeuquen.pdf>>

While there isn't a written statement or explanation on why the province opted for a majority of 8-4, there are some underlying reasons that can be found to explain this departure from its Anglo-American donor. Neuquén trial by jury law was the first one in the country to incorporate the "classic jury" and this step alone represented a major break with the burden of the civil law tradition. The decision to opt for an all lay jury, instead of a mixed court, was already an outstanding venture and it was nearly impossible to prevent the heritage of the inquisitorial legal culture from influencing the reform. The way "deliberation" works out according to the Argentine legal tradition greatly differs from that of common law countries. As a general rule, three judges decide on a criminal case and deliberation among them is achieved by the passage of the written dossier from one judge to the other.<sup>180</sup> In the end, valid decision is reached with a majority vote of 2-1.<sup>181</sup> Therefore, "if three professional judges cannot agree in one case and are allowed to reach a majority decision, then how can 12 lay citizens agree on the same verdict?".<sup>182</sup> We may conclude that the system of majorities in Neuquén was conceived under that logic, in a way that may dispense with the thorough and robust deliberation that most likely will be accomplished by a rule requiring a unanimous verdict.<sup>183</sup>

Paradoxically, some of the same set of national events that influenced the enactment of the jury law might also have been behind the decision to adopt the 8-4 majority rule. Issues of public safety and distrust towards the criminal justice system, realities that triggered reforms, might have also been the reasons to opt for a low majority rule to convict. The increase of crimes and the nation-wide feeling of insecurity was also present in Neuquén, and so the possibility of scandalous acquittals by requiring more members of the jury to agree on a conviction seemed too much of a risk.<sup>184</sup>

What is more, introducing unanimity was not only about getting more people to discuss and agree on the verdict, it also meant to incorporate the idea of deadlocks in the event of a

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<sup>180</sup> Bilinsky & Chizik *supra* note 170.

<sup>181</sup> *Ibid.*

<sup>182</sup> *Ibid.*

<sup>183</sup> Shari S. Diamond, Mary R. Rose & Beth Murphy, "Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury" (2006) 100:1 Northwestern University LR201 at 230.

<sup>184</sup> Bilinsky & Chizik *supra* note 170.

disagreement among all jurors. Consequently, this brings with it two main fears for a civil law country that is also concerned about resources. On the one hand, there were concerns about the functional and economic aspects of a deadlock. Retrying a case means that the state has to expend more resources and, again, face the outrage of society after a failed attempt to get a conviction. On the other hand, the fear of deadlocks originated in the misconception that this civil law country has with respect to hung juries.<sup>185</sup> The country's legal culture has distorted the scope and meaning of hung juries which (for many) are viewed as a mechanism that affects the guarantee of *ne bis in idem*. The *ne bis in idem* is the prohibition of multiple criminal prosecutions for the same offense, which in the United States would be known as “double jeopardy” instituted in the 5th Amendment.<sup>186</sup> While the guarantee of the *ne bis in idem* has an undeniably universal validity, there are also a number of exceptions to its application that are also universally recognized. One of these is the hung jury and the judge's order for a new trial. Notwithstanding, for the prevailing culture of the country, it is still difficult to comprehend that with a hung jury technically, a verdict is not reached, that a deadlock and an acquittal are not the same.<sup>187</sup> If there is no verdict, there is no decision, and this is what allows the state to renew the possibility of criminal prosecution.<sup>188</sup>

After reviewing the plausible causes that may have led Neuquén to opt for a majority rule, and while one might not agree with that decision, there is still a chance to interpret the drafting of the “majority rule” as an aspect that contributes to the proper course of the transplant. Adapting the imported law to the local conditions is believed to contribute to the efficiency of legal transplants.<sup>189</sup> The introduction of adjustments suggests that “the appropriateness of these rules has been contemplated and modifications have been made taking into account domestic legal practice and other initial conditions.”<sup>190</sup>

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<sup>185</sup> *Ibid.*

<sup>186</sup> See Natali Chizik, “Jurado Estancado y Nuevo Juicio como respuesta a la Unanimidad” in Alberto Binder & Andrés Harfuch, eds, *Teoría y Práctica del Juicio por Jurados: III Congreso Internacional de Jurados en Argentina* (Buenos Aires: Ad Hoc, 2019) 33 [Chizik].

<sup>187</sup> *United States v Ball* (1896) 163 US 662 (This case clarified the difference between defendants who had been acquitted and others that had been convicted in the same trial).

<sup>188</sup> See Chizik, *supra* note 186.

<sup>189</sup> Berkowitz, *supra* note 77 at 179.

<sup>190</sup> *Ibid.*

The transcripts of the parliamentary debates may not tell anything about the reasons behind the drafting of a majority rule. However, we know that the enactment of the law has been the product of debates among an interdisciplinary group of professionals -from inside and outside the government- and that the drafting of a procedural criminal code that includes a jury law took several years to see the light.<sup>191</sup>

It may be the case that during the drafting of the law, the drafters were sensitive about the initial conditions that prevailed in the local legal culture and adapted the law in accordance. Dispensing with unanimity may have offered the imported rule a familiar meaning to a legal culture that was used to majority decisions reached by professional judges and that resented the idea of hung juries. The adaptation may have then responded to the intention of the drafters to enact an effective law.<sup>192</sup> With its successes and failures, the truth is that Neuquén became the first province to take the lead in the transplant of the classic jury.

### **2.4.3 Province of Buenos Aires: the game changer**

The context for the enactment of the jury law in Buenos Aires was, once more, one of poverty and increasing rates of crimes. As happened with the Blumberg case, on this occasion it was the ruling of a criminal court that shook the nation. In the year 2002, in the province of Tucumán, 23-year-old Marita Verón was abducted with the purpose of trafficking and prostitution. Ten years later, in 2012, the 7 men and 6 women accused of her disappearance were brought to trial in a court in Tucumán. The three judges that decided the case acquitted all 13 defendants, delivering a hollow and suspicious ruling that triggered the anger of society.<sup>193</sup> Massive protests and general discontent aggravated the already tense relationship between the then-president Cristina Kirchner and the judicial branch.<sup>194</sup> Kirchner publicly denounced the worrisome and

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<sup>191</sup> Reina, *supra* note 164.

<sup>192</sup> Berkowitz, *supra* note 77 at 178-9.

<sup>193</sup> José Ignacio Sbrocco “Conmoción: sin culpables en el juicio por Marita Verón” *La Nación* (12 December 2012) online: <<https://www.lanacion.com.ar/1536071-conmocion-sin-culpables-en-el-juicio-por-marita-veron>>.

<sup>194</sup> Porterie & Romano, “Juries” *supra* note 155 at 14.

growing gap between society and the judiciary and called for the democratization of the judiciary.<sup>195</sup>

Even though the then-president did not include jury trials in the subsequently proposed reforms,<sup>196</sup> some later federal jury bills were presented by other political parties. These included one introduced by senator Eugenio Artaza in 2014, that lapsed in March 2016.<sup>197</sup> In addition, it also included one presented by a group of deputies from different parties in late 2016, which is currently being revised.<sup>198</sup> What the federal bills have in common is that they opt for the “classic” model of jury trials. One of the most outstanding characteristics of the lack of a national jury is that, despite the fact that all the federal bills were presented by different political parties, to this day there is no federal jury bill in force.

As was also true when Neuquén enacted the jury law, the promise of a national jury bill with real changes of enactment was not on the horizon. It was the province of Buenos Aires, that, in September 2013, ended up passing a jury bill for severe criminal offenses following the “classic” model.<sup>199</sup> The passing of the law occurred in 2013, a year in which Argentina started to look at the upcoming presidential elections. Daniel Scioli, the then-governor of Buenos Aires and presidential candidate for the “Frente Para la Victoria” (the political party led by Kirchner), submitted a jury bill to the Buenos Aires legislature a year and a half prior to the elections. While he was able to get the law passed, he later lost the presidential elections before Mauricio Macri, candidate for the political party “Cambiamos.” Shortly after, in early 2015, the jury still became a reality for that province.

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<sup>195</sup> *Ibid.*

<sup>196</sup> *Ibid.*

<sup>197</sup> Record 1554/14, *Proyecto de Ley Estableciendo el Juicio por Jurados*, Honorable Senado de la Nación Argentina, 2014, online: <<http://www.senado.gov.ar/parlamentario/comisiones/verExp/1554.14/S/PL>>.

<sup>198</sup> Record 8199-D-2016, *Juicio Penal por Jurados. Creación*, Honorable Congreso de Diputados de la Nación, 2016, online <<https://www.hcdn.gob.ar/proyectos/textoCompleto.jsp?exp=8199-D-2016&tipo=LEY>>.

<sup>199</sup> Política, “Aprueban el juicio por jurados para delitos graves en la provincia” ( 13 September 2013) *La Nación* online: <<https://www.lanacion.com.ar/1619480-aprueban-el-juicio-por-jurados-para-delitos-graves-en-la-provincia>>.

With a population of more than 16 million people, and a territory of 307,571 km<sup>2</sup>, Buenos Aires is the largest and most populous province of the country.<sup>200</sup> Unfortunately, today it also represents an epicenter of violent crimes, with 385,575 criminal offenses reported in 2015,<sup>201</sup> the year in which the jury law was implemented.

The first jury trial took place in March 2015, in the town of San Martín, where 12 lay citizens delivered a unanimous “not guilty” verdict in favor of the defendant, a man accused of murdering his brother in law.<sup>202</sup> As in Neuquén, jury trials are reserved for the most serious offenses but, in Buenos Aires, the charged offense needs to contemplate a possible maximum sentence of 15 years in prison, as provided by the Criminal Code.<sup>203</sup>

Buenos Aires has also introduced the principle of equality in the gender composition of the jury<sup>204</sup> and a system of majorities for the verdict. In this case, the law requests 10 jurors favoring a conviction, except in cases where the defendant faces a penalty of life in prison, in which case the jury is required to reach unanimity.<sup>205</sup> The law also regulates what happens in the event of a deadlock, which occurs if 9 jurors agree on a conviction. In that event, there will be a new trial under prosecutor’s request, but if this new jury also hangs, the defendant will be acquitted.<sup>206</sup> This regulation prevents the State from re-trying a case more than once.

As what happened in the parliamentary discussions in Neuquén, legislators of Buenos Aires introduced a majority rule of 10/2 for felony convictions without an open debate, so it is

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<sup>200</sup> Junta Federal de Cortes y Superiores Tribunales de Justicia de las Provincias Argentinas y Ciudad Autónoma de Buenos Aires, “Estadísticas de los Poderes Judiciales de las Provincias Argentinas y Ciudad Autónoma de Buenos Aires” 5th ed (2014-2015) at 30, online (pdf): <[http://www.jufejus.org.ar/images/doc/ACTIVIDADES/Estadisticas/Publicaciones/DELGREPJ/Publicacion\\_5.pdf](http://www.jufejus.org.ar/images/doc/ACTIVIDADES/Estadisticas/Publicaciones/DELGREPJ/Publicacion_5.pdf)> [Estadísticas].

<sup>201</sup> See Ministerio de Seguridad, “Estadísticas Criminales,” online: <<https://estadisticascriminales.minseg.gob.ar/>>.

<sup>202</sup> En los Medios, “Chronicle of a great day: the first trial by jury in the Province of Buenos Aires. Verdict: Not guilty” (13 March 2015) *AAJJ*, online: <<http://www.juicioporjurados.org/2015/03/chronicle-of-great-day-first-trial-by.html>>.

<sup>203</sup> *Act 14.543*, 2013, Ley de Juicio por Jurados de la Provincia de Buenos Aires (Arg) s 222 [*Act 14.543*].

<sup>204</sup> *Ibid* s 338 *quáter* subsection 6 (Ordering equal number of 6 men and 6 women).

<sup>205</sup> *Ibid* s 371 *quáter*, subsection 1.

<sup>206</sup> *Ibid* s 371 *quáter*, subsection 2.

impossible to know the true reasons behind this decision.<sup>207</sup> It seems likely that the unspoken political intention was to introduce changes gradually, while obtaining the desired result, getting enough convictions. The pressing need to comply with the demands made by the Argentine society, and especially with the victims, seems to have played in favor of adopting this type of decision rule.

Even if true, the law shows a noticeable improvement in comparison to Neuquén law, since it requests a greater majority to convict for a felony conviction and a unanimous verdict for life imprisonment.

We could imagine that, for those who designed and passed the law, for reasons of procedural economy, a 10-2 majority to convict could help prevent the State from retrying felony convictions, and the same can be said on limiting the number of deadlocks to one retrial. In addition, it appears to be another good way to prevent greater economic costs for a newly implemented system. Moreover, by requesting unanimous verdicts when there is a punishment of life imprisonment involved, the law was also able to narrow the power of the prosecution and prevent scandalous convictions. In addition, by limiting the prerogative of the State to retry the case only once in the event of a deadlock, apart from reducing times and costs, the law also helps to regulate State power.

One major difference with the Neuquén jury law is the non-mandatory nature of the jury in Buenos Aires. The law specifies that the defendant can waive her right to be tried before a jury and choose a bench trial.<sup>208</sup> From March 2015 to July 2018, the province has held more than 220 jury trials.

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<sup>207</sup> Bilinski & Chizik, *supra* note 170; To access the parliamentary discussion see also Colegio de Abogados de San Isidro, “Fundamentos de la Ley 14.543,” online (pdf): CASI <<http://www.casi.com.ar/sites/default/files/Fundamentos%20de%20la%20ley%2014543.pdf>>.

<sup>208</sup> Act 14.543, s 22 bis, *supra* note 203.

The use of the “procedimiento abreviado,”<sup>209</sup> and the waivable nature of the jury are two regulations that could have put the success of the jury in serious jeopardy. While this research is unable to provide a number of criminal cases that could have been tried by a jury but concluded in a plea agreement or before a bench court, the number of cases tried before a jury during over four years of implementation is still remarkable. If we take into account that by 2015 the estimate of criminal reports introduced in Buenos Aires rose to 746,526 but only 2.5 % of the reported crimes were settled with a sentence delivered by a magistrate,<sup>210</sup> the number of jury trials seems to indicate the willingness of legal actors to try this new form of trial. Moreover, contrary to what happened in Neuquén,<sup>211</sup> and with a law that allows the defendant to waive her right, the number of trials held in Buenos Aires has steadily increased since the first year of its implementation. In 2015, there were 38 jury trials, 59 trials in 2016, 77 trials in 2017 and 104 in 2018.<sup>212</sup>

The long distances to cover in the immense territory of Buenos Aires, the multiple realities among the judicial departments and a different economic situation than the one faced in Neuquén (a rich province of mining and petroleum), represented a major enterprise for a jury law in Buenos Aires.

Notwithstanding, if the enterprise turns to be successful, then this is the only law capable of conveying a powerful message to the leaders of other provinces, to join the wave of jury bills and introduce lay participation in their jurisdictions. What is more, the implementation of jury trials in Buenos Aires represents the most prominent possibility of opening the door for its implementation at a national level.

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<sup>209</sup> See *supra* note 174.

<sup>210</sup> Estadísticas, *supra* note 200 at 132.

<sup>211</sup> Poder Judicial Neuquén, *supra* note 177.

<sup>212</sup> Suprema Corte de Justicia de Buenos Aires, “Causas Elevadas a Juicio por Jurados: Juicios Realizados 2014-2018” (28 December 2018), online (pdf): *Suprema Corte de Justicia de Buenos Aires* <<http://www.scba.gov.ar/juiciosporjurados/archivos/estadisticas.pdf>> [Causas Elevadas].

## 2.5 Final remarks

Chapter II has been about context, background and history. Through specific examples, the chapter depicted how – from the beginning – the Argentine legal culture developed its criminal justice system as heir to Continental European models. For example, the chapter looked at why, instead of implementing the “classic” common law jury, the province of Córdoba opted for a mixed jury, inspired in the Continental European model of lay participation.

Chapter II has not been able to provide a conclusion about the outcome of the transplant, but that was never its promise or intention. It was about considering the reasons behind the time-frame for the development of the classic jury and why the transplant is taking place today, showing its unique path. It explained why this cannot be considered as a classic case of a “country to country” transplant, but one that developed as a within country transplant, in which provinces have been transplanting from each other’s.

The chapter was also about understanding the progress and setback of a transplant that was immersed in a larger set of events, especially since the 1970s. It framed the evolution of reforms within the socio-economic and political context that determined its course and looked at the implementation of the jury as part of a process of legal reforms that incorporated adversarial features.

What is more, it evaluated the positive and negative aspects of some of the designed features implemented by local jury laws. For instance, by analyzing the plausible reasons and the visible consequences of implementing non-unanimous verdicts. The chapter recognized and made an analysis of the perils that resulted from departing from the donor in the drafting of jury laws, but it also examined the possible reasons behind the drafters’ decision. It asserted that, in principle, departure from the donor may also be interpreted as a sign of adaptation to the local culture and therefore, it should not necessarily be considered as failure. On the contrary, for the aim of preventing rejection, departure could represent a sign of success.

Finally, chapter II served as a compass that will guide us through the upcoming two chapters. Context, background and history are crucial elements to fully appreciate what chapters III and IV have to offer: an analysis of the success of the transplant and how its implementation is impacting society and legal professionals in Argentina, and an opportunity to think about its usefulness for other countries undertaking legal reforms.

## Chapter 3: Is this the case of a successful transplant?

### 3.1 Introduction

So far, this research has been able to give us a picture of the Argentine legal culture as one embedded in an inquisitorial form of criminal justice system, inherited from Continental Europe. It also depicted the origins of the transplant in a socio-political context that led to legal reforms from 1980 onwards. It looked at the advances and setbacks that would explain why it took so many years to implement some form of lay participation in the administration of justice in Argentina. Moreover, it has analyzed some features of the provincial jury laws which enabled us to comprehend the scope of change, as well as the achievements and shortcomings of the enacted laws.

This chapter turns to the question of whether this legal transplant represents a successful vehicle for law reform in Argentina. The answer to that question is strongly linked to the aftermath of the transplant and how to make a proper assessment of this outcome. In general, problems arise if one seeks to analyze the outcome of a legal transplant in terms of its success. The term “success” could be deemed as vague, or overly ambiguous.<sup>213</sup> Some authors consider a transplant successful only when the legal and politic culture that imported the law, system or institution has accepted it completely.<sup>214</sup> Some contend that the proper way to assess its results is by testing whether there has been an adequate “fit” between the imported rule and the local environment.<sup>215</sup> Sometimes, success would depend on whether society accepts and complies with the transplanted norm,<sup>216</sup> or on the extent of its penetration into society.<sup>217</sup> While for some authors it could entail “its origins being forgotten,”<sup>218</sup> others think about the results of transplants in terms of “efficiency”.<sup>219</sup>

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<sup>213</sup> Nelken, *supra* note 25 at 38.

<sup>214</sup> Nelken, *supra* note 25 at 36.

<sup>215</sup> Hideki Kanda & Curtis J. Milhaupt, “Re-Examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law” 51:4 Am J Comp L 887 at 891 [Kanda & Milhaupt].

<sup>216</sup> Markovits, *supra* note 32 at 99.

<sup>217</sup> Nelken, *supra* note 25 at 38.

<sup>218</sup> *Ibid* at 36.

<sup>219</sup> Ugo Mattei, “Efficiency in Legal Transplants: An Essay in Comparative Law and Economics” (1994) 14:1 Int. Rev. Law & Econ. 3 at 8.

Moreover, there are those who believe that success can be achieved if the source of the transplant is considered authoritative and prestigious in the recipient country.<sup>220</sup> Time-frame of legal transplants has also been considered by scholars as a significant measurement for success, because time and transformation are needed for a transplant to succeed.<sup>221</sup>

As someone who has been actively involved in advocating for the implementation of jury trials in Argentina, questions of confirmation bias also arise. How far am I able to separate myself from injecting too much subjectivity into an analysis of success? Working with only one definition of what is considered successful may be too limited, but working with too many definitions may broaden the chances of finding “success” by some measure.

Despite these drawbacks, there is plainly value in embarking upon an analysis of the transplant of the jury and assessing the progress of this reform. My work as an advocate for the jury in Argentina, and my active work as part of two Argentinian NGOs committed to expand the jury across the country<sup>222</sup> equip me well to perform this analysis. The experience of working from inside the reform showed me the challenges that this legal transplant is facing, and allowed me to have direct access to reliable sources and to the opinion of people who are part of this change. What is more, it provided me with a thorough notion of what is happening countrywide with the implementation of the new system.

For my research, I will draw upon the existing literature on legal transplants and the parameters of success described above because I consider that, while I may not agree with the entire theory posed by one specific author, to some extent, each of those theories contributed to my analysis. However, as indicated in the introduction of this research,<sup>223</sup> it is also necessary to supply my own definition of success. In the introduction I suggested that, since there are multiple forms of transplants, perhaps there are also multiple ways of defining success. It is the context in which

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<sup>220</sup> Nelken, *supra* note 25 at 40, Nelken explains the position of Cotterrell regarding legal transfers; see Graziadei *supra* note 59, who uses the notion of prestige as one of the most important factors behind legal transplants.

<sup>221</sup> *Ibid* at 41.

<sup>222</sup> See ch 2 at 38-9.

<sup>223</sup> See ch 1 at 11.

the legal transplant takes place what would provide us with a measure of success. I explained that the success of this transplant would only be measurable and definable if the size and complexity of this change is viewed in a socio-political context in which we can comprehend the perils and challenges it managed to surpass. Within this specific context, the success of the Argentine jury may then be defined by the variety of purposes it accomplished.

Given the years of military governments, the frailty of democracy, the preference amongst the legal professionals for an inquisitorial criminal justice system, the increasing bridge between the people and the judiciary, the people's mistrust in the legal system, perhaps success can be defined in terms of (a) whether it has resulted in a more open legal system and (b) whether it has introduced a measure of citizen supervision of the work of State actors, including judges, while (c) disassembling malfunctioning habits and producing adaptation among the local legal culture (especially judges and legal practitioners). In addition, for a greater measure of success, we want to find out if the reform is also serving larger purposes. This transplant puts the jury back in a place of prominence in a time when researchers have identified that the use of the jury system is decreasing worldwide.<sup>224</sup>

However, it is important that Argentina is able to adapt the jury institution without distorting it. An equal gender composition of the jury or even the adoption of a system of majorities in lieu of unanimous verdicts may distance the Anglo-American jury from the Argentine jury. While adaptation of the transplant to the local legal culture may contribute to the development of the jury countrywide, the essence of the "classic" jury should remain intact for the country to become an example worth of duplication in other parts of the world.

In order to assess the success of this legal transplant, the next two chapters address my criteria for success at two separate levels. First, the level of the judiciary and legal professional and then, the level of the jury. The analysis will be focused on the two provinces where the classic jury is

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<sup>224</sup> Hans, "Trial by Jury", *supra* note 23 at 484.

operating, Neuquén and Buenos Aires. The sphere of the judiciary will be addressed in this chapter and I will leave the sphere of the jury for chapter IV.

The sphere of the judiciary refers to those members of the judicial branch and legal profession whose work has been affected by the implementation of trial by jury. The analysis is primarily focused on trial court judges who participated in one or more jury trials and higher courts judges who decided appeals brought by the parties after a jury's verdict. However, the chapter also includes an evaluation of the response of other legal professionals.

To conduct an analysis on what was the outcome of the transplant in relation to the judiciary, the first part of this chapter will be informed by some of the important rulings delivered by higher courts in both provinces, and the content of provincial jury laws. I consider these rulings and the local jury laws as elements to further the context-specific analysis that I suggested in chapter II, as is necessary to evaluating the success of a legal transplant. These rulings give us an idea of the battle between former and novel practices in the context of an inquisitorial legal culture. In this sense, for example, by looking at the reaction of judges to unanimous and non-unanimous verdicts, we can evaluate their position, not in isolation, but within the context of the challenges and perils of a reform.

Higher court judges are aware that they are an influential group within the judiciary, and so any decision delivered by them can work either as a disruptive or constructive element for the outcome of a legal reform. We will see that, when presented with appeals from jury trials, they have chosen to draw from common law principles to solve appeals in a manner that promotes the effective and efficient working of a jury system. We will see how these rulings support the new system while being careful not to lose sight of the fact that the reform was taking place in a civil law country that is accustomed to operating under civil law patterns.

Appellate decisions are also helpful to assess the reaction of prosecutors and defence attorneys to this new system. These appeals were brought to higher courts by these legal professionals and, therefore, what these litigators argued in their appeals is also important for this research to have a

richer understanding of the Argentine legal culture. For example, given that one of the purposes of jury trials is to change former inquisitorial practices, a provincial jury law that contemplates non-unanimous verdicts prompted defence attorneys to demand unanimous decisions for their clients. In the end, higher court rulings tell us something about how system actors responded to this reform and therefore they bear upon the success of the transplant. They represent concrete examples of how Argentina is transitioning to jury trials as a new form of practicing and understanding law and litigation. These rulings also point the way towards a harmonized transition, in which key institutions involved in legal change are safeguarding the core principles of the common law jury while preserving those of the local civil law tradition that deserved to be protected.

Chapter III also includes an evaluation of the performance of legal professionals and lower courts. While in the majority of cases the development of jury trials across both provinces has not been problematic, this research presents the example of Bahía Blanca (one of Buenos Aires municipalities) to exemplify a series of things that went wrong with this legal transplant. Bahía Blanca presented great resistance to change, especially on the part of prosecutors, the city has been the focus of serious issues, such as acquittals outnumbering convictions and the difficulty of getting prospective jurors to show up in court. If a successful transplant should be defined by the variety of purposes it accomplishes, challenges and subsequent solutions should not be left out of the analysis, especially in places where these purposes were harder to achieve. This part also explains how things improved over the course of time and what lessons can be learned from what happened in that municipality. The research draws on journalistic articles, mainly from local newspapers, documenting the problems that arose during the first years of implementation of the system in Bahía Blanca.

The second part of the chapter is informed by published interviews and empirical data collected by researchers in the provinces of Neuquén and Buenos Aires. The questionnaires aim to learn more about issues such as the level of agreement between professional judges and lay jurors, how judges evaluated the jury's performance and, in general, their opinion about the new system.

While the sample is still too small to reach definitive conclusions, it is a valuable source of high-quality information about the transition to the new system. In both provinces, questionnaires were anonymous and so trial judges were able to openly reveal their views about the system. Judges' responses allow us to dispel misconceptions about the transplant of the "classic" jury into a civil law country. For example, we can confirm or rebut the presumption that civil law judges, who are used to maintaining control over the outcome of trials might be uncomfortable leaving the verdict in the hands of lay jurors. Given that I have maintained that one of the hallmarks of success of this legal transplant is whether jury trials resulted in a more open legal system, survey data showing that trial court judges hold favorable views about jurors' decision may work as an indicator to assess the success of the legal transplant.

Finally, these questionnaires also allow us to evaluate the judges' opinion about the performance of the parties. This finding, along with the information obtained in the section about the rulings of higher courts, suggests how well legal professionals are adjusting to the demands of jury trials, what is missing, and what can be learned.

### **3.2 Responses at the level of the judiciary and legal professionals**

#### **3.2.1 Ruling of the courts**

With the introduction of trial by jury, lower court judges in both provinces faced the challenge of trying a case in a completely different fashion. In a bench trial, judges were used to addressing the parties using complex legal terms, they were used to performing an active role that tended to overlap with the core functions expected from the parties in an adversarial system, in general, that of the prosecution. But the greatest challenge has been the loss of control in the outcome of the trial. Not so long ago, the ultimate decision was always in the hands of the judge. With the advent of the jury trial, judges are changing how they fulfill their function. They are adopting more plain language in Court, because lay people are part of the equation in a criminal trial. Moreover, judges are now behaving more as "umpires" in court and ceding ground to the parties to perform their tasks, as is customary in adversarial legal systems. Remarkably, judges are also embracing the fact that the verdict is no longer in their hands, but in that of the ordinary citizen.

Within this scenario, appellate courts also found themselves adapting to the transplant, now drawing from common law principles as the main source for their decisions.

In the early years, there were moments of clumsiness, especially at the lower courts level, not only because judges were facing the challenge of trying a case under a new system, but also because it is not unusual even for judges trained in the common law tradition, to make mistakes in the course of an ongoing trial.

During these years, both prosecutors and defenders brought appeals before the higher courts of Neuquén and Buenos Aires. In some cases, what can be observed from these appeals is the strong influence of former practices among litigants in their complaints before higher courts. In other cases, these appeals were intended to indicate some of the deficiencies of the enacted provincial laws and to demand a solution from higher courts. The most important rulings addressed topics such as: trial by jury as a guarantee for the defendant; finality of the not guilty verdict; beyond a reasonable doubt standard; the constitutionality of the absence of expressed verdict reasons; control of jury convictions on appeal; as well as unanimous verdicts.

To evaluate the success or failure of a transplant, we need to look at the role played by key players.<sup>225</sup> Higher courts justices are among these key players as they constitute a professional elite.<sup>226</sup> The support of this influential group may be inferred from the manner in which these cases were going to be decided. Common law jurisprudence and principles that were used for these appeals were interpreted through the lenses of civil law justices<sup>227</sup> and therefore, the content of these rulings was crucial for the early consolidation (or collapse) of the jury system.

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<sup>225</sup> Graziadei, *supra* note 59 at 470.

<sup>226</sup> *Ibid.*

<sup>227</sup> *Ibid* at 471.

### 3.2.1.1 Trial by jury as a guarantee for the defendant

In chapter II, we learned that in the province of Buenos Aires, the defendant can waive her right to be tried before a panel of jurors and choose a bench trial instead. According to the law in Buenos Aires, in a case where multiple defendants are tried jointly, the waiver of one of the defendants affects the others who are then forced to face a bench trial.<sup>228</sup> In a case where one defendant waived his right, one co-defendant (Ms. Villalba) asserted the unconstitutionality of this principle before the Court of Appeals of the Province of Buenos Aires. On appeal, the majority of the Appellate Court rejected Ms. Villalba's claims and denied her the possibility of a jury trial.<sup>229</sup> In June 2017, the case was brought before the Court of Cassation of Buenos Aires, which ruled that the relevant section of the law was unconstitutional.<sup>230</sup> With this ruling, the Court of Cassation endorsed the jury as the "natural" trier in a criminal case, in virtue of the fact that while the provincial jury law regulates its implementation, the right to trial by jury has been guaranteed in the country's Constitution since 1853.

The Court of Cassation was of the view that, according to the wording of the National Constitution and, in virtue of the implementation of jury trials, the presumptive judge in a criminal case (that is appointed by law before the offense takes place) is the jury:

In summary, once the constitutional clause that provides for the implementation of criminal prosecution through juries has been made operational (...) no citizen can be deprived of being tried by that "most natural among the natural Judges," which is the jury of their peers.<sup>231</sup>

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<sup>228</sup> Act 14.543, s 22 bis.

<sup>229</sup> *Diaz Villalba, Blanca Alicia s/ homicidio agravado (ap. denegatoria de inconstitucionalidad art. 22 bis del CPP, etc)*, Tribunal de Casación Penal de la Provincia de Buenos Aires, Sala IV (2016), online: <[https://drive.google.com/file/d/0B2yvs\\_8DQr4dcDVEVm8xWGEyejA/view](https://drive.google.com/file/d/0B2yvs_8DQr4dcDVEVm8xWGEyejA/view)>.

<sup>230</sup> *Diaz Villalba, Blanca Alicia s/ Recurso de Casación*, Tribunal de Casación Penal de la Provincia de Buenos Aires, Sala IV (2017), online: <[https://drive.google.com/file/d/0B2yvs\\_8DQr4dYkRITWZZZ1dJSnM/view](https://drive.google.com/file/d/0B2yvs_8DQr4dYkRITWZZZ1dJSnM/view)>[Diaz Villalba].

<sup>231</sup> *Ibid* at 11; see translation to English of excerpt of the ruling by the AAJJ, En los Medios, "Buenos Aires High Court of Appeals: The Jury is the Rule; Bench Trial the Exception" (3 July 2017) AAJJ, online: <<http://www.juicioporjurados.org/2017/07/ba-high-court-of-appeals-jury-is-rule.html>> [the rule].

Even if the jury law in Buenos Aires, permits one accused to waive the right to a jury, the prevailing solution should be to allow the co-defendant to have a separate jury trial, this is so, even if that causes a disadvantage in terms of procedural economy. In that sense, the Court stated that:

The dilemma related to the coexistence of several accused persons with conflicting interests as to whether they are tried by juries or professional judges must be resolved in favor of the first of the systems, making prevail the intention of the national constituent over any other that derives from the local laws.<sup>232</sup>

According to the Court of Cassation, jury trials are now the rule and bench trials are the exception.<sup>233</sup> Months later, the Appellate Court of the neighbour city of Mar del Plata, in a similar case, cited the “Diaz Villalba” ruling and ordered separate trials for the defendants of a different case.<sup>234</sup> The fact that jury trials are becoming the rule and not the exception constitutes a sign of the endorsement of the judiciary elite to the newly implemented system. The more institutional support the reform receives, the greater are the chances of success.<sup>235</sup> What is more, in “Diaz Villalba,” the Court of Cassation went a step further and urged legislators to consider a revision of that portion of the law in a future amendment. They suggested that it would be desirable to reverse the rule currently in force, and proposed legislators to enact a new rule where the decision of the defendant to be tried by jury would prevent her co-defendants from choosing a bench trial.<sup>236</sup>

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<sup>232</sup> *Ibid* at 14.

<sup>233</sup> *Ibid* at 15.

<sup>234</sup> *B., H.N.G. y R., B.H. s/ homicidio doblemente agravado criminis causa y por la condicion de policia de la victima*, Cámara de Apelaciones y Garantías en lo Penal de Mar del Plata, Sala I (2017), online: <<https://drive.google.com/file/d/0Bwe2TCccLL1HXzRuZkhneFJGNUk/view>>.

<sup>235</sup> Markovits, *supra* note 32 at 110.

<sup>236</sup> Diaz Villalba, *supra* note 230 at 15.

### 3.2.1.2 The absence of expressed verdict reasons and control of jury convictions.

Another aspect of jury trials that was hard to assimilate for a civil law lawyer was how to deal with the jury's verdict. Under the "classic" jury system, both "guilty" and "not guilty" verdicts are delivered without a reasoned written explanation for the parties. It is worth remembering that when the law in Córdoba was passed in 2005 one of the main arguments in favour of the "mixed jury" was that the joint deliberations of judges and lay jurors would produce a reasoned verdict.<sup>237</sup>

For many within the legal profession, the absence of expressed verdict reasons represented a violation to the international treaties signed by Argentina and incorporated in the 1994 amendment of the National Constitution.<sup>238</sup> How would a defendant know the reasons behind a conviction? How would higher courts thoroughly revisit a conviction in accordance to the treaties and the jurisprudence of the Inter-American Courts of Human Rights?<sup>239</sup>

After the first "classic" jury trials, appeals after convictions quickly followed in both provinces. In 2017, Almeida and Bakrokar reported that, in Neuquén, between 2014 and 2016, 30 jury trials produced 24 convictions and 6 acquittals.<sup>240</sup> They also registered 22 appeals, 17 of them on the motion that the jury convicted under insufficient evidence.<sup>241</sup> In Buenos Aires, between 2015 and 2016, 93 jury trials produced 60 convictions and 33 acquittals and 54 convictions were appealed.

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<sup>237</sup> See ch 2 at 37.

<sup>238</sup> *National Constitution*, *supra* note 15 at section 75 subsection 22 (The treaties enumerated by that section have the same status as the rest of the constitutional rights).

<sup>239</sup> *Herrera Ulloa v Costa Rica* (2 July 2004), online: Corte IDH <[www.corteidh.or.cr](http://www.corteidh.or.cr)>; *Mohamed v Argentina* (23 November 2012), online: Corte IDH <[www.corteidh.or.cr](http://www.corteidh.or.cr)>, *Recurso de hecho deducido por la defensa de Matías Eugenio Casal en la causa Casal, Matías Eugenio y otro s/robo simple en grado de tentativa*, Suprema Corte de Justicia de la Nación (2005), online: <<https://sjconsulta.csjn.gov.ar/sjconsulta/documentos/verDocumentoById.html?idDocumento=5921392&cache=1514678500001>>.

<sup>240</sup> Vanina Almeida & Denise Bakrokar, "Beyond a Broad Appeal" (2017) [unpublished], online: Cornell Law School <[https://www.lawschool.cornell.edu/research/lay\\_participation\\_in\\_law/international\\_research.cfm](https://www.lawschool.cornell.edu/research/lay_participation_in_law/international_research.cfm)> [Almeida & Bakrokar] The authors followed the criteria of taking into account only the verdict rendered for the main charge, and regardless the number of defendants.

<sup>241</sup> *Ibid.*

By the time the authors produced the sample, the Court of Appeal had reviewed 9 of these appeals. In 6 of those cases, the issue was insufficient evidence to convict.<sup>242</sup>

In all cases, the lack of reasons for a verdict did not impede judges from widely revisiting the convictions. Higher Courts draw from international jurisprudence to explain how they were able to review the facts and the evidence of cases decided by jurors.<sup>243</sup> In their decisions, justices in both provinces adopted common law principles,<sup>244</sup> such as the notion of “unreasonable verdict” (*Yebe/Biniaris* Test) to evaluate ‘whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered’<sup>245</sup> and if it was ‘reasonable for the jury to be satisfied beyond a reasonable doubt’ in order to deliver a guilty verdict.<sup>246</sup> According to Almeida and Bakrokar, in the reported cases, higher court judges found the decision reached by the jury reasonable, although some decisions were overturned due to error in the judicial instructions.<sup>247</sup>

Before the advent of trial by jury, none of these concepts were used by higher court judges. The review of a jury conviction on appeal was an exercise that was entirely new. Prior to jury trials, higher courts judges were comfortably dealing with verdicts written by magistrates who are well versed in the law. Although higher courts had occasionally relied on common law principles and jurisprudence in the past, the gap between revisiting a judge vs a jury conviction is such that one might expect some resistance coming from these magistrates or at least an awkward or distorted way of performing that task.<sup>248</sup> Instead, common law principles were read through the lenses of civil law judges<sup>249</sup> without resulting in any misrepresentation. Judges showed a thorough and

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<sup>242</sup> *Ibid.*

<sup>243</sup> *Ibid.*; see also *Posse, Carlos Bruno s/ homicidio simple*, Tribunal Penal de Impugnación Penal de Neuquén (2014); *González, José Sebastián*, Tribunal Penal de Impugnación Penal de Neuquén (2014); *Ramírez, Leopoldo s/ abuso sexual agravado*, Tribunal Penal de Impugnación Penal de Neuquén (2016) (where the Higher Court in Neuquén argued that international covenants signed by Argentina do not require expressed verdict reasons to convict).

<sup>244</sup> *Castillo, Rodolfo Marcelo s/ recurso de casación*, Cámara de Apelaciones de Buenos Aires (2016); *Valdéz, Roberto Marcelo s/homicidio doloso agravado*, Tribunal Penal de Impugnación Penal de Neuquén(2016).

<sup>245</sup> *R v Biniaris*, [2000] 1 S.C.R. 381 at para 36.

<sup>246</sup> *Ibid.*

<sup>247</sup> Almeida & Bakrokar, *supra* note 240.

<sup>248</sup> See Miller *supra* note 160 at 881 (Author mentions the invention of the “*per saltum*” by the Supreme Court of Justice in Argentina as an example of a distortion of the U.S. model of judicial review).

<sup>249</sup> *Ibid* at 471.

efficient way of drawing from already existent solutions provided by common law countries, with their longstanding expertise in jury trials.

The way concepts are understood and captured in these higher courts' decisions portrays how comfortable justices appear to be with the jury system and with looking to common law countries for solutions to the particular challenges that arise with appellate review of jury verdicts. We cannot be certain about the reasons that encouraged judges to incorporate common law principles in such a thorough and efficient manner. On the one hand, it may represent the easiest and most efficient way of managing time and resources, since there is no need to reinvent the wheel. On the other, it may also be that the reputation of common law countries with jury trials seemed indisputable for the Argentine magistrates. Therefore, the factor of "prestige" of the donor may have led reviewing courts to comfortably apply foreign principles.<sup>250</sup>

Whatever reasons they had to draw on common law principles, higher courts were also delivering a political message with these rulings. Comparative lawyers have long recognized that issues of power and politics are integral to the outcome of a legal transplant<sup>251</sup> and, there is inevitably a strong political component in the way magistrates decide their cases. Consequently, the performance of higher courts in both provinces worked as a powerful driving force to support the implementation of the "classic" jury institution also at the level of politics.

In the municipality of Azul, Province of Buenos Aires, an interesting case of judicial resistance to juries ended up before the Court of Criminal Appeals. Oddly, in this case, the appeal was introduced by a defense attorney, not because his defendant was convicted but because a lower court judge of Azul proclaimed *sua sponte* the unconstitutionality of the Buenos Aires jury law, ordered a bench trial, and prevented the defendant from exercising his right to trial by jury. The lower court judge argued that trial by jury was unconstitutional because it violated the national representative, republican and federal system, as established by the National Constitution, since jurors are not elected by the people but are the result of a random selection from the provincial

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<sup>250</sup> Graziadei, *supra* note 59 at 457.

<sup>251</sup> Otto Kahn-Freund, "On Uses and Misuses of Comparative Law" (1974) 37:1 Mod L Rev 1 at 27 [Kahn-Freund].

lottery. More specifically, the judge claimed that the lack of expressed verdict reasons made the system unconstitutional.

The Court of Criminal Appeals reversed the judge's decision and ordered a jury trial. The ruling legitimated the jury's origins as a Constitutional mandate inspired by the United States Constitution and reinforced the idea that the verdict in a criminal trial is also the province of the people.<sup>252</sup> Once more, the reviewing courts were showing a clear support for the jury system.

### **3.2.1.3 The finality of the not guilty verdict**

The lack of expressed verdict reasons is not the only challenging issue with the implementation of this new system. The design of criminal trials under the logic of the inquisitorial justice system produced litigants and a judiciary familiar with the idea of endless opportunities to convict. Before the implementation of jury trials, prosecutors had many opportunities beyond the trial to get a conviction. Even in the case of an acquittal, they were entitled to appeal and seek for a favorable verdict.<sup>253</sup> To make things more complicated for the transplant, many civil law countries incorporate a third party in a criminal trial, the private prosecutor ("querella" or "particular damnificado"). The figure of the prosecutor for the victim, who enjoys similar prerogatives and rights to the State, is a feature inherited from Continental European countries. The rights of the "querella" are such that, in some countries, (e.g. Spain, Portugal and Germany) victims are entitled to appeal, even in cases where the State refrains from doing so.<sup>254</sup> Even if the private and the public prosecutor may not share joined strategies and resources,<sup>255</sup> almost inevitably, the presence of a third party that favours a conviction represents an uneven battle for the defence.<sup>256</sup>

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<sup>252</sup> Barboza, Diego Javier s/ *Homicidio simple en concurso real con homicidio en grado de tentativa (dos hechos)*, Cámara de Apelaciones y Garantías de Azul, Provincia de Buenos Aires (2015), online: *Red de Jueces Penales de la Provincia de Buenos Aires* <<http://reddejueces.com/?p=3261>>.

<sup>253</sup> Dwyer, *supra* note 89 at 157.

<sup>254</sup> Grande, *supra* note 79 at 595 n 47.

<sup>255</sup> See more at Stephen C. Thaman, "Europe's New Jury Systems: The cases of Spain and Russia" (1999) 62:2 *Law & Contemp Probs* 233.

<sup>256</sup> *Ibid.*

According to the new law in Neuquén, there is no appeal against a jury's acquittal, except that prosecutors can demonstrate the commission of bribery,<sup>257</sup> and in Buenos Aires, the law simply states that "prosecutors cannot appeal a 'not guilty' verdict rendered by a jury".<sup>258</sup> Given a culture of private and public prosecutors prone to seek endless stages of appeal, provincial jury laws that prevented them from exercising their recent right to appeal was something that was going to generate some controversy. Consequently, higher courts dealt with the appeals of prosecutors and private prosecutors who were claiming the right to continue to seek a conviction after a jury's not guilty verdict.

In a ruling of February 2016, one of the Chambers of the Court of Cassation of the Province of Buenos Aires declared that the benefit of an appeal has only been granted to the defendant, as the intention is to limit the power of the State. The Court also recognized that, as happens with the people's votes during an election, a verdict rendered by lay jurors is the expression of sovereignty of the people, whose will should never be affected by any of the State powers.<sup>259</sup> Since the prosecution's claim in that case was that the law affected the principle of equality between the parties, the Court expressed that, the fact that the defendant is entitled to appeal a guilty verdict stems from the constitutional right of the defendant to be tried before her peers (Sections 24, 75 subsection 12 and 118 of the National Constitution), with her right to a broad appeal granted in the international covenants signed by Argentina (Sections 14.5 of the ICCPR; 8.2.h of the ACHR).<sup>260</sup>

The legal bases adopted by the Court in this case were later applied by a different court in another case that followed a few months later.<sup>261</sup> This may be inferred as a sign of agreement

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<sup>257</sup> Act 2784, s 238, *supra* note 166; Act 14.543, s 371 *quáter*, subsection 7, *supra* note 203 (Prosecutors cannot appeal a "not guilty" verdict).

<sup>258</sup> *Ibid.*

<sup>259</sup> López, Mauro Gabriel *s/ recurso de queja (art 433 CPP) interpuesto por agente fiscal*, Tribunal de Casación Penal de la Provincia de Buenos Aires, Sala VI (2016), online: <[https://drive.google.com/file/d/0B2yvs\\_8DQr4dV1Q5bU9NS2pTZGJuVW80dm9QNXpmZzNLWJn/view](https://drive.google.com/file/d/0B2yvs_8DQr4dV1Q5bU9NS2pTZGJuVW80dm9QNXpmZzNLWJn/view)>.

<sup>260</sup> *Ibid.*

<sup>261</sup> Antonacci, Kevin Gustavo *s/ recurso de queja interpuesto por agente fiscal*, Tribunal de Casación Penal de la Provincia de Buenos Aires, Sala I (2016), online: <[https://drive.google.com/file/d/0B2yvs\\_8DQr4dLULOtRWF0Y2NtQzQ/view](https://drive.google.com/file/d/0B2yvs_8DQr4dLULOtRWF0Y2NtQzQ/view)>.

among judges on the weight of the jury's decision and the ultimate purpose of ending a culture of endless appeals, conceived for more inquisitorial practices.

In September 2017, the Court of Cassation dealt with a similar claim, in this case on the part of a private prosecutor. The victim, an ordinary citizen who does not have any of the State powers, claimed that by denying her the possibility of an appeal, her rights to access to justice and legal protection were being jeopardized.<sup>262</sup> The Court declared that the constitutional right to an appeal is only granted to the defendant, not to the prosecutor, whether public or private. Once more, judges emphasized the sovereignty of the jury's decision, as recognized for centuries in well-respected democratic countries, which are also signatories of the same international covenants than Argentina. According to the Court, the meaning of access to justice, due process, and legal protection do not entail the right of the victim to pursue an appeal. They are circumscribed to provide the victim with the right to be heard, in accordance to the legal procedures.<sup>263</sup>

The possibility of enjoying endless stages of appeals was a practice immersed in the core of the judiciary system, a naturalized inquisitorial behavior shared by the bench and the bar. In fact, the new jury laws only mention that an acquittal from a jury is final, but for the remaining criminal offenses that are still decided by professional judges, appeals against acquittals are still permitted.

To make things more complicated, the sole presence of a third party in a criminal trial already undermines the chances of success of the jury system. Conceived under the logic of an adversarial procedure, the involvement of multiple parties in a jury trial inevitably alters its adversarial character.<sup>264</sup>

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<sup>262</sup> *Bray Juan Pablo y Paredes Javier Maximiliano s/ recurso de queja (art. 433 cpp) interpuesto por el particular damnificado*, Cámara de Casación Penal de la Provincia de Buenos Aires, Sala V (2017), online: <[https://drive.google.com/file/d/0B2yvs\\_8DQr4ddnFsWEYzZ3NuQm8/view](https://drive.google.com/file/d/0B2yvs_8DQr4ddnFsWEYzZ3NuQm8/view)>.

<sup>263</sup> *Ibid.*

<sup>264</sup> Grande, *supra* note 79 at 613.

None of the provincial jury laws and new procedural criminal codes abolished the figure of the private prosecutor, but they did consider the “not guilty” verdict as final. In their interpretation, higher courts did not depart from the wording of the law and instead of undermining the new system, Courts maintained course and reinforced the local National Constitutional values in tune with common law principles.

### **3.2.1.4 Unanimity and other principles from the common law**

As time went by, these rulings kept strengthening the emerging system of jury trials. In a decision from 2017, the justices from the Court of Cassation of the Province of Buenos Aires clarified the fundamental procedural elements that constitute and guide trial by jury.<sup>265</sup> The Court of Cassation stated that:

Just as our constitutional model pointed towards a system of popular participation inspired by the jury tradition of the common law, especially by the model arising out of the United States of America’s Constitution, the solidification of our system of fundamental rights seeks to clarify the fundamental cornerstones of its strength which, regarding trial by jury, rests on these unbreakable premises: (i) that the jury should consist of twelve persons, six women and six men, no more no less; (ii) that the trial should be in the presence of and under the supervision of a judge with the power to instruct the jurors on the constitutional framework, the application of the law, and the rules of evidence (iii) a final verdict with the option to appeal only for the defendant, and (iv) although only partially regulated by the court, the aspiration of a unanimous verdict.<sup>266</sup>

Citing common law jurisprudence,<sup>267</sup> the Court explained that:

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<sup>265</sup> *Ruppel, Néstor Fabián s/ recurso de casación*, Cámara de Casación Penal de la Provincia de Buenos Aires, Sala I (2017), online:<[https://drive.google.com/file/d/0B2yvs\\_8DQr4dRGNpeWVWNHVBeG8/view](https://drive.google.com/file/d/0B2yvs_8DQr4dRGNpeWVWNHVBeG8/view)> [Ruppel].

<sup>266</sup> *Ibid* at 7. See translation to English of excerpt of the ruling by the AAJJ, En los Medios, “Buenos Aires High Court of Appeals: Our Constitutional Jury Model Consists Of A Twelve Person Jury With A Unanimous And Final Verdict” (29 July 2017) AAJJ, online: <<http://www.juicioporjurados.org/2017/07/buenos-aires-high-court-of-appeals-our.html> - more> [Our model].

<sup>267</sup> *Patton v United States*, (1930) 281 US 276.

These are elements that were developed and perfected after centuries of evolution that included the English Middle Age and the Modern Age of England and the United States.<sup>268</sup>

Aside from -once more- drawing from common law jurisprudence and principles to solve cases on appeal, one can observe that there is a message sent from the Cassation Court of Buenos Aires, since justices found that one of the premises of jury trials is unanimous verdicts.<sup>269</sup> Unanimity has been one of the common law principles that has been abandoned in both provincial laws,<sup>270</sup> for what seems to have been political and economic reasons. These reasons include seeking easier convictions, preventing hung juries, and avoiding re-trials, all in order to satisfy society's claim for justice and prevent a waste of state resources. The support of the Court of Cassation of Buenos Aires for unanimous verdicts is worth considering when analyzing the response of the judiciary to the transplant of the jury from the common law.

Notably, the response of the Superior Court of Neuquén about unanimity has not been the same. In a case where the defendant claimed that a majority requested by law was illegitimate because "*it was based on doubt, affecting the principle of innocence guaranteed in the National Constitution*,"<sup>271</sup> the Superior Court of Neuquén rejected the claim. Justices understood that it is the realm of the provinces to enact their own procedural codes (Section 75, Subsection 12 National Constitution), and in this case of Neuquén, by regulating a type of decision rule for a conviction rendered by lay jurors. In this specific case, the court determined that the defendant was not able to explain how that section of the law violated the principle of innocence, so as to overturn the conviction.<sup>272</sup>

While the wording of the decision of the Court can only inform us about the procedural and legal reasons for the Court to support a low majority of 8-4 to convict, there is another explanation that we might draw from this ruling. The decision is from 2014, the first year of implementation of jury trials in Neuquén. It could be plausible that, regardless of whether the Superior Court

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<sup>268</sup> Ruppel, *supra* note 265 at 8. Our model, *supra* note 266.

<sup>269</sup> *Ibid* at 7.

<sup>270</sup> Buenos Aires allows 10-2 majority for felony convictions and Neuquén only requests 8-4 for any type of crimes.

<sup>271</sup> Carvajal, *supra* note at 169.

<sup>272</sup> *Ibid* at 38.

magistrates agreed or not with an 8-4 decision rule, the primary intention was to support the jury institution with these first decisions. At this early stage of implementation, proclaiming the unconstitutionality of a section of the law that was controversial, without sufficient arguments delivered by the defence counsel, would have probably contributed to the weakening of the new jury system.

In this sense, while at first sight, one might not agree with a decision rule that incorporates a majority verdict in lieu of unanimity, one cannot ignore the possibility that the decision rule reflects what legislators and reformers envisioned as more suitable given the conditions described above.<sup>273</sup> If the law, in this case the adoption of a low majority to convict, was conceived to match the demands of society, then superior courts were more effective by enforcing the law, than by disregarding the social demands, at least at this early phase of implementation.<sup>274</sup> Moreover, if we examine the ruling Court of Cassation of the Province of Buenos Aires from 2017,<sup>275</sup> the Court confines itself to express an aspiration of a unanimous verdict, but does not go beyond that.

In both provinces, the superior courts have shown a sensitive approach to the early conditions of the transplant.<sup>276</sup> As Markovits explains, “reforms cannot be designed in splendid isolation,”<sup>277</sup> in general, lawmakers in both provinces have paid attention to the context of the enacted jury laws and this context has been later recognized and preserved by the judiciary in a responsible manner. In this sense, the success of the transplant is also connected to how legislators and the judiciary were able to accommodate the law mirroring the local context. A strong indicator of the success of the transplant can also be appreciated in the support received by the judiciary, expressed through its rulings during the past years.<sup>278</sup>

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<sup>273</sup> Berkowits et al., *supra* note 73 at 178.

<sup>274</sup> *Ibid* at 179.

<sup>275</sup> Ruppel, *supra* note 265.

<sup>276</sup> Berkowits et al., *supra* note 73 at 178.

<sup>277</sup> Markovits, *supra* note 32 at 101.

<sup>278</sup> Markovits, *supra* note 32 at 110.

Today the province of Neuquén is considering some amendments to the jury law. In this regard, members of the Superior Court of Neuquén have recently declared that one of the issues they will suggest that local legislators consider is revisiting the decision rules that are currently in force.<sup>279</sup> This dialogue among all branches of government towards improving the existing law demonstrates how progressive and steady changes are helping the transplant to succeed. Through their rulings, higher courts have been conscious of the time-frame of the transplant<sup>280</sup> and the political circumstances that affect its initial stage. The fact that the Superior Court of Neuquén upheld a system of majorities in 2014 with a ruling, while in 2018 they were openly suggesting that legislators introduce changes to the law, does not portray a failure of the transplant. On the contrary, it is an expression of its success. It is proof of when and how it is appropriate for them, as legal intermediaries, to support the existing law and when it is time to endorse some changes.<sup>281</sup>

### 3.2.2 Performance in court

One of the main challenges for a reform is to transition from the law on the books to law in action. Besides the guiding decisions from higher courts, jury laws needed to make their way through the rigid, archaic, and inquisitorial atmosphere that one can breathe within the courts' corridors. In Argentina, the main characters of this rigid scene are judges, clerks, defense attorneys, and private and public prosecutors.

Under the new jury system, people in the legal profession were compelled to adapt to new litigation techniques, such as facing a jury selection hearing, or the direct examination and cross-examination of witnesses. Litigators were suddenly asked to become better speakers and to address a new type of audience, one comprised of lay citizens. To incorporate new forms of narrative, to build “a theory of the case,” as well as to abandon pompous vocabulary and adopt a

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<sup>279</sup> La Mañana, “Proponen ampliar el ámbito de delitos para los juicios populares” *LM Neuquén* (7 November 2018), online: <<https://www.lmneuquen.com/proponen-ampliar-el-ambito-delitos-los-juicios-populares-n612144>> [La Mañana].

<sup>280</sup> Nelken, *supra* note 25 at 41.

<sup>281</sup> *Ibid* at 39.

simpler language, one aimed to convince jurors and not professional judges. In general, NGOs such as INECIP and the AAJJ organized several lectures, conferences, workshops, and mock jury trials to understand the new system, and to help litigants to develop the appropriate techniques and skills to try cases before juries.<sup>282</sup> In general, these NGOs work alongside the provincial governments in an effort to help legal professionals gain knowledge about trial by jury. In most cases, respected scholars and lawyers from common law countries are invited to participate and share their expertise with the locals. This portrays the economic and logistic support provided to the local NGOs and the provincial governments by common law countries, such as Canada and the United Kingdom, but especially from the United States.<sup>283</sup>

When it comes to specifically evaluating the performance of trial judges, the behaviour of the majority of trial judges showed an adequate adaptation to their new role. Although Argentina did not adopt all the rules of evidence from common law countries, during the transplant, many of these rules were incorporated in the jury law legislation,<sup>284</sup> and in general, they have been given due importance and adequate interpretation by trial judges. For example, in a preliminary hearing that took place in the province of Neuquén, the trial judge decided to exclude as evidence the pictures of a dead baby for its potential prejudice, a decision that was later confirmed by the Superior Court of that province.<sup>285</sup> What can be observed is how common law concepts such as relevant evidence, prejudice, etc. started to make their way through the lower and higher courts.

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<sup>282</sup> Hans, “Trial by Jury” *supra* note 23 at 475.

<sup>283</sup> E.g.: Conference about jury trials held at the Bar Association of La Plata, Buenos Aires, with lecturers such as Paula Hannaford-Agor (U.S. National Center for State Courts) and Valerie Hans (U. of Cornell and jury expert), organized by the U.S. Embassy, the INECIP and the Public Prosecutor's Office, see Public Prosecutor's Office of Buenos Aires, *La experiencia del juicio por jurados en los EEUU* (August 2018), online: <<https://cec.mpba.gov.ar/actividad/899>>; another conference was organized by the Government of Chaco under the auspices of the Canadian Embassy, Justice Russell Jurianz from Canada was the key speaker at Sociedad, “Primer Congreso Nacional sobre Juicio por Jurados” *Diario Chaco* (19 October 2013), online: <<http://www.diariochaco.com/noticia/primer-congreso-nacional-de-juicio-por-jurados>> .

<sup>284</sup> E.g. *Act 14.543*, s 342 *bis*, *supra* note 203, and *Act 2784*, ss 182-187, *supra* note 166, introduce concepts such as admissible and inadmissible evidence, as well as some rules for the direct and the cross-examination of witnesses.

<sup>285</sup> *Fiscalía de Zapala s/inv.Torres Antilef Pamela*, Tribunal de Impugnación Penal de Neuquén, (2018), online:<[https://drive.google.com/file/d/0B2yvs\\_8DQr4dM05ueVFIVm50ZGUzdGRqV0p5OUt3U2F5V3Jz/view](https://drive.google.com/file/d/0B2yvs_8DQr4dM05ueVFIVm50ZGUzdGRqV0p5OUt3U2F5V3Jz/view)>.

Even so, there were numerous clumsy moments in court, and others where the parties had serious issues coping with the new system. In some cases, appeals introduced by the parties were later rejected by higher courts. It is predictable that a defence attorney or a prosecutor would try to find any (even remote) lawful argument that could serve his interest in overturning a verdict within a new system. In accordance with the prevailing legal culture, it was predictable that there would be claims from civil law lawyers arguing about the validity of the system, its unconstitutionality (even if it is recognized three times in the National Constitution) and invoking other Constitutional rights that allegedly collided with the system. For their part, higher courts have been dealing one by one with these claims and have been endorsing the new system.

In this sense, the issue at stake in the following paragraphs will not focus on the appeals introduced by the parties but rather on their behaviour in court. The core of this analysis will be focused in one specific city of the Province of Buenos Aires, Bahía Blanca. From the beginning of the implementation of the system the transplant did not show many signs of rejection in the 135 municipalities that comprise the territory of the Province of Buenos Aires. The exception to the rule was the city of Bahía Blanca, which became the centre of controversy about the jury system.

Official statistics show that between 2015 and 2017, the number of acquittals in jury trials across Bahía Blanca exceeded the number of convictions,<sup>286</sup> a phenomenon that did not occur in any other municipality. The fact that the State is not able to get convictions is something that produces undesirable consequences. From a legal and procedural perspective, a properly functioning jury system is expected to produce more convictions than acquittals, prosecutors are expected to try cases before a jury when they have gathered convincing and sufficient evidence, even if in this province defendants are entitled to waive their right to trial by jury.

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<sup>286</sup> Causas Elevadas, *supra* note 212.

A case from 2016, in which a man accused of sexual abuse was acquitted, reflects the atmosphere in which the city implemented the new system. After this acquittal, the prosecutor in charge of the case openly said that it was time to revisit the jury law and blamed the system of majorities currently in force. Since the law stipulates a majority of 10-2 in favor of a conviction, this prosecutor claimed that the law favoured the defendant who only needs to cast doubts among three jurors to get an acquittal.<sup>287</sup>

Contrary to his argument, a system of majorities is detrimental to the defendant and a means to help the State to get more convictions. In 2018, we witnessed how the people in Louisiana, United States, voted to end non-unanimous jury verdicts and as of January 2019 the State needs the unanimous approval of the 12 members of the jury for a conviction.<sup>288</sup> Since 1898, and before this change, Louisiana was one of the only two states in the United States<sup>289</sup> where prosecutors needed only 10 of 12 jurors to agree on guilt in felony cases.<sup>290</sup> One of the most worrisome issues in Louisiana was the racial component that was behind this decision rule, to enable black jurors to be overruled by a white majority.<sup>291</sup> The New Orleans Advocate reported that, in nearly 1,000 convictions over six years, 40 percent of convictions included one or two holdouts among the members of the jury, a number that goes up to 43 percent for black defendants and goes down to 33 percent for white defendants.<sup>292</sup>

While Argentina does not share a similar history of systematic racism against the black community, the same principles apply when it comes to stress that majority verdicts allow prosecutors to get more convictions and are detrimental for defendants. In contrast, among its many benefits, unanimity fosters a more robust deliberation, and allows the voices of minorities

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<sup>287</sup> Seguridad, “Juicio por jurados: “Llegó el momento de revisar la ley” *La Nueva* (17 March 2016), online: <<https://www.lanueva.com/nota/2016-3-17-1-12-0-juicio-por-jurados-llego-el-momento-de-revisar-la-ley>>.

<sup>288</sup> German Lopez, “Louisiana votes to eliminate Jim Crow jury law with Amendment 2” *Vox Media* (6 November 2018), online: <<https://www.vox.com/policy-and-politics/2018/11/6/18052540/election-results-louisiana-amendment-2-unanimous-jim-crow-jury-law>> [Lopez].

<sup>289</sup> The other state is Oregon, where the non-unanimous verdict is still in force.

<sup>290</sup> Lopez, *supra* note 288.

<sup>291</sup> *Ibid.*

<sup>292</sup> Jeff Adelson, Gordon Russell & John Simerman, “How an abnormal Louisiana law deprives, discriminates and drives incarceration: Tilting the scales” *The New Orleans Advocate* (1 April 2018), online: <[https://www.theadvocate.com/new\\_orleans/news/courts/article\\_16fd0ece-32b1-11e8-8770-33eca2a325de.html](https://www.theadvocate.com/new_orleans/news/courts/article_16fd0ece-32b1-11e8-8770-33eca2a325de.html)>.

to be heard inside the jury room.<sup>293</sup> Moreover, a unanimous verdict reached by all members of the jury brings legitimacy to the decision-making process and reinforces the standard of reasonable doubt in favour of the defendant.<sup>294</sup>

Some supporters of non-unanimous juries have argued that there are certain benefits to dispensing with unanimity. For example, they claim it may be a good procedure for reducing the chance of a deadlock, and consequently, the costs of retrying a case. In addition, it may be useful as a way of dealing with unreasonable holdout jurors.<sup>295</sup> Even if this cannot be strictly considered as a benefit, the fact that non-unanimous juries may favour defendants seems to be another possible consequence of dispensing with unanimity. In this regard, taking the case of the state of Louisiana, dispensing with unanimity may well be helpful for a white defendant. Nevertheless, in the example of Bahía Blanca, the expressions of this prosecutor did not reflect any racial bias but rather were the reflection of the resistance to trial by jury observed in that municipality. It was a way of diverting the attention from the underlying difficulty, acquittals outnumbering convictions in jury trials, and the best explanation behind this was the resistance of local prosecutors to change former habits.

In a different case, the acquittal of a man accused of murder may also serve as an example of that resistance.<sup>296</sup> Prosecutors who were only comfortable trying a case before professional judges learned that, due to the prevailing inquisitorial legal culture, a trial judge in Argentina tended to perform as a second accuser.<sup>297</sup> By performing as a second accuser, instead of an impartial umpire, the judge would most likely compensate for any flaw in the preparation of the State's case.<sup>298</sup> By the time a bench trial takes place, judges under the inquisitorial model have already read the *dossier* and are familiar with the evidence that will be presented at trial, where they

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<sup>293</sup> Shari S. Diamond, Mary R. Rose & Beth Murphy, "The Costs and Benefits—But Mostly Benefits—of Unanimity" (2006) 78 California Courts Review 10 at 11.

<sup>294</sup> *Ibid* at 13.

<sup>295</sup> *Ibid* at 10.

<sup>296</sup> Bilinski & Chizik, *supra* note 170.

<sup>297</sup> *Ibid*.

<sup>298</sup> *Ibid*.

actively intervene and don't necessarily play an impartial role as that role is conceived within common law systems.<sup>299</sup>

In contrast, jurors cannot compensate for this lack of training or preparation and therefore, the possibility of a “not guilty verdict” increases.<sup>300</sup> In this case, the lack of preparation was due to the change of State's representative two weeks before trial. The leading prosecutor for the case left on holiday and had to be replaced,<sup>301</sup> leaving the replacement with insufficient time to prepare a complex case that concluded with the defendant being acquitted by the jury.<sup>302</sup>

From a political angle, these acquittals were not helpful either. If the purpose of trial by jury was to change the image of a jaded judiciary, even if an acquittal was the result of the people's decision, the lingering feeling is still one of craving justice for the victims. This is exactly what happened in this last case. The acquittal not only brought the discontent of the people but it also jeopardized the stability of the transplanted institution. The family of the murdered man campaigned in favor of abolishing the jury law, and their demands resonated so loudly that even the Minister of Justice of the province expressed the plausible need for an amendment of the law.<sup>303</sup> With the passage of time, these claims dissipated and no change was introduced.

Bahía Blanca also presented another problem that has also been present in other municipalities across the province. For prospective jurors to be properly notified of their duty to appear in court, they must be personally notified by a duly appointed court employee. The province of Neuquén created a Judicial Office in charge of the administrative issues involved in a jury trial, which includes summoning prospective jurors. In the province of Buenos Aires, this task is performed by a resourceless and outdated office located in each municipality which, in many cases, has led

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<sup>299</sup> *Ibid.*

<sup>300</sup> *Ibid.*

<sup>301</sup> La Ciudad, “Familiares de una víctima piden que se derogue la ley de juicios por jurados” *La Nueva* (29 September 2016), online: <<https://www.lanueva.com/nota/2016-9-29-18-56-0-familiares-de-una-victima-piden-que-se-derogue-la-ley-de-juicios-por-jurados>>.

<sup>302</sup> Bilinski & Chizik *supra* note 170.

<sup>303</sup> *Ibid.*

to inefficient subpoenas and caused delays and cancellations of several jury trials.<sup>304</sup> To deal with inefficiency and delays, criminal courts are sending their own employees or police officers to summon jurors.<sup>305</sup> These inefficient methods, combined with the use of peremptory challenges and the parties excessive use of challenges for cause during jury selection have prevented trials from taking place. This combination of factors has at times resulted in the lack of a sufficient number of jurors to conduct a trial.<sup>306</sup>

The issues presented in the municipality of Bahía Blanca represent a series of impediments in the quest for legal change and that can leave us with some learned lessons, especially about the perils of overlooking these intrusions. Nelken explains that one way to study legal adaptation is to ask ourselves about “the part played by institutions, social structure and culture in facilitating or blocking success.”<sup>307</sup> In the case of Bahía Blanca, the initial rocky road towards the adaptation of the transplant was due to the resistance posed by the local prosecutors. The part played by this group was to present resistance to change in ways that could potentially become really prejudicial to the transplant.

Since multiple factors may interfere in its operationalization, the success of a transplant may be at the mercy of a local conflict that a more superficial analysis might have easily disregarded. While other municipalities may have opted to follow Bahía Blanca, that did not happen, and the efforts to disrupt the course of the transplant faded with the passage of time. Today, Bahía Blanca is the municipality that registers the largest number of jury trials in the province.<sup>308</sup> For the last two years, none of the proposed amendments of the law took place and when it comes to Bahía Blanca, the city has been slowly embracing the jury system in its current form. By the beginning of September, 2018, the city was able to reverse the statistics and the new numbers

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<sup>304</sup> Policiales, “Nuevamente cancelaron un juicio por falta de personas para el jurado” *El Popular* (2 October 2017), online: <<http://www.elpopular.com.ar/eimpresa/267263/problema-repetido-que-retrasa-a-los-juicios-por-jurado-en-la-region>>.

<sup>305</sup> Porterie & Romano, *supra* note 41 at 104.

<sup>306</sup> La Ciudad, “No pudieron integrar el jurado y postergaron el inicio de un juicio por un crimen” *La Nueva* (27 September 2017), online: <<http://www.lanueva.com/la-ciudad/917109/no-pudieron-integrar-el-jurado-y-postergaron-el-inicio-de-un-juicio-por-un-crimen.html>>.

<sup>307</sup> Nelken, *supra* note 25 at 21.

<sup>308</sup> Porterie & Romano, *supra* note 41 at 33.

show a total of 26 convictions and 17 acquittals in jury trials.<sup>309</sup> Moreover, to cope with inefficient subpoenas and the lack of jurors, one of the solutions implemented by the courts in Bahía Blanca and other jurisdictions was to double or even triple the number of jurors summoned for jury selection.<sup>310</sup> Courts have also been summoning prospective jurors and provided them with a guide about trial by jury as a way of encouraging them to show up in court.<sup>311</sup> While this does not constitute a long-term or ideal solution, it is a reflection of the willingness of members of the court to find creative ways to overcome the daily difficulties they face, in an effort to uphold the jury system.

The lesson to be learned from Bahía Blanca is that those who are pushing for legal change should never overlook the multiple actors involved in a transplant and how colliding interests may plot against its implementation. Since this reform disrupted the foundations of what legal professionals were used to, Bahía Blanca can teach us about the need for more training for legal professionals, and most crucially, about the need of conducting an early and continuous monitoring of the development of reforms. Different alliances are built and dismantled during a transplant, and there is always an adequate or inadequate timing to push for legal change or to push back into former habits. The lesson for those who are pushing for change is to work harder with those who are going to push back and present resistance.

What is more, the example of Bahía Blanca reinforces some of the views of the World Bank in terms of rethinking the paradigm of reforms.<sup>312</sup> By holding the view that there is no longer a one-size-fits-all approach for legal transplants, one should focus on the need for context-specific projects.<sup>313</sup> We could assert that this view not only applies to our understanding of legal

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<sup>309</sup> *Ibid.*

<sup>310</sup> Porterie & Romano, *supra* note 41 at 105.

<sup>311</sup> *Ibid.* at 106.

<sup>312</sup> World Bank, “The World Bank: New Directions in Justice Reform. A Companion Piece to the Updated Strategy and Implementation Plan on Strengthening Governance, Tackling Corruption” (May 2012), online (pdf): *World Bank*<documents.worldbank.org/curated/en/928641468338516754/pdf/706400REPLACEM0Justice0Reform0Final.pdf> [World Bank].

<sup>313</sup> David M. Trubek, “The Rule of Law in Development Assistance: Past, Present, and Future” in David M. Trubek & Alvaro Santos, eds, *The New Law and Economic Development: A Critical Appraisal* (New York: C.U.P., 2006) 74 at 92 [Trubek].

transplants taking place across countries, but also to our analysis of the different reactions that may arise among diverse jurisdictions of the same recipient country. To anticipate these reactions in accordance with the prevailing legal culture of different jurisdictions is what could make a difference for a successful transplant.

### **3.2.3 The opinions of justices and legal professionals**

As noted in the introduction of the chapter, to learn about the opinion of judges and legal professionals, this thesis uses published interviews and empirical data collected in research carried out in the provinces of Neuquén and Buenos Aires.

To weigh the success of this legal transplant, it is important to look at the role played by key players.<sup>314</sup> While higher courts justices are among these key players, as they constitute the elite of the judiciary branch, legal professionals and lower court judges are the people who keep the transplant functioning on a daily basis. Following Watson's metaphor on medical transplants, we can think of higher court judges as the board of directors of a hospital but litigants and lower court judges are those professionals who receive the patients, perform the transplant, and administer the drugs that prevent rejection. Part of the success of a transplant is in their hands, and for that reason we need good professionals who can be confident and comfortable performing the task.

The questionnaires and the anonymous interviews conducted by researchers provide insights into the opinions of these professionals about, for example, the new jury law, their view about lay citizens as triers of fact, and the performance of the parties in court. During this transplant there were many fears and misconceptions about trial by jury concerning what could be expected from lay citizens, what could be expected from judges in their new role and how this common law institution would fit in a civil law court room. Empirical research helps to answer these questions.

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<sup>314</sup> Graziadei, *supra* note 59 at 470.

In my definition of success, I emphasized the idea that success in the legal transplant of the jury includes the goal of achieving a variety of purposes. While research is still developing and the number of interviews conducted in both provinces is too small to reach absolute conclusions, the interviews and surveys discussed here still represent high quality research that supply important information about the early prospects for this legal transplant. If we can conclude from these interviews that litigants and lower court judges are feeling comfortable trying a case with lay jurors, we will be able to expect that the system will continue to expand and become stronger. Moreover, we will be able to assert that the “classic” jury is achieving the goal of gradually addressing the shortcomings of inquisitorial processes.

### **3.2.3.1 The province of Neuquén**

Research conducted in Neuquén over 10 jury trials from May 2016 until July 2017 included questionnaires distributed to jurors, attorney and lower court judges.<sup>315</sup> A preliminary report launched in August 2017 published the responses of the surveyed judges that participated in these 10 trials. Neuquén criminal courts tried 8 cases of homicide and 2 cases of sexual assault. The length of the trials varied from 1 to 6 days and 7 of them finished with a “guilty” verdict. Although it was a voluntary survey, all judges responded to the questionnaire.<sup>316</sup>

The transplant included the introduction of a new step in the practice of trying a criminal case, the jury selection hearing. Litigants now face the challenge of selecting twelve jury members and a group of alternates to produce an unbiased panel of jurors, and of deciding which prospective jurors to reject. By learning about prospective jurors, the parties aim to pick those who seem more favourable to their case. In this sense, while the idea is to look for unbiased jurors, the strategy at this stage is about using the challenges for cause and peremptory challenges in the most tactical and partisan manner.

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<sup>315</sup> The information corresponds to research carried out by an international and interdisciplinary team: Valerie Hans of Cornell University, Andrés Harfuch, Sidonie Porterie and Aldana Romano of INECIP, Shari Diamond of Northwestern University, John Gastil of U. of Pennsylvania, and Paula Hannaford-Agor of the Center for Jury Studies of the United States of the National Center for State Courts and the Court Administration of Neuquén.

<sup>316</sup> Hans et al, “Proyecto de Investigación,” *supra* note 39.

The research in Neuquén included questions that attempted to learn about the opinion of judges about the jury selection hearing. Judges were asked about the efficiency of jury selection and 6 of them agreed that the hearing has been efficient or very efficient in producing an unbiased jury, while the remaining 4 judges said that it was more or less efficient.<sup>317</sup> The judges' perception about the efficiency and outcome of the jury selection hearing is significant because, apart from telling us about the genuine possibility of defendants in Neuquén to be tried before an unbiased jury, it also inform us about the quality of the work performed by the parties in court.

In the open-ended section of the questionnaire, one of the observations made by a judge was that she noticed a lack of training among litigants.<sup>318</sup> However, a different judge expressed: "*With the development of more jury trials, the quality of the debate increases.*"<sup>319</sup> What may be inferred from both of these anonymous comments is that it takes time for a transplant to take root. These ten judges were surveyed during the first years of implementation of a new system and the jury selection hearing represents a completely novel step in the procedure for the parties. Moreover, this hearing represents the first time in which the parties are confronted face to face with those who will decide their case. We may also infer that if these same judges are surveyed again in a couple of years, their view about the performance of the parties will change. With the passage of time, lawyers are likely to be more comfortable facing a panel of prospective jurors and their litigation techniques will likely tend to improve.

Regarding the development of the trial, all of the judges agreed that jurors understood (well or really well) the law applicable to the case. Regarding the jurors' assessment of the evidence, 9 of the judges considered that lay citizens made a good or really good assessment and only 1 judge believed that jurors were not able to properly assess the evidence presented before them.<sup>320</sup> These numbers operate as an important indicator to rebut the presumption among legal professionals that lay citizens in Argentina are not ready to comprehend the law and the evidence

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<sup>317</sup> *Ibid* at 38.

<sup>318</sup> *Ibid.*

<sup>319</sup> *Ibid.*

<sup>320</sup> *Ibid* at 39.

in a criminal trial.<sup>321</sup> There is no one in a better position than a trial judge to assert the real response of the citizens to the challenge of understanding issues of law and evidence.

This finding is really significant since, of the three branches of the government, the judiciary is the most likely to lose its contact with the common person.<sup>322</sup> Civil law judges have kept a detached relationship with the people for centuries and their answers about the excellent performance of lay citizens may be a good sign of how judges are starting to believe in the power and wisdom of the ordinary people. This change of mind is a first step to bring the judiciary closer to the people, which would ultimately work in favor of a successful transplant.

Even so, judges were also asked about the difficulty of the law applicable to the case, and 6 of them reported that it was easy. Regarding the difficulty of the evidence, 7 were of the opinion that it was not complex, and 8 judges agreed that the jury trials they presided were not complex.<sup>323</sup> One should not lose sight of this information for a more thorough assessment of what judges think about the performance of lay jurors. In this sense, one might expect a slight change in the judges' perception about the performance of jurors in future cases with more complicated evidence or applicable law. However, that does not overshadow the fact that, even given that these were not complex cases, the majority of judges believed that jurors were up to the task and, in their answers, they did not underestimate the performance of the citizens.

The fact that the first trials were not complex may seem to operate in favor of and not against this legal transplant. It is more likely that the new system will do better if during the first stage of its implementation everyone is presented with a non-complex case. All the parties involved are gaining practice, even the citizens. All of them for the first time in their lives are exposed to the unknown world of jury trials. Therefore, to avoid complexity seems like a good recipe for the success of the transplant. By the time more complex cases arise, jurors in Neuquén will likely be

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<sup>321</sup> E.g. *Diario Judicial*, "Zaffaroni: 'Yo no sé si el juicio por jurados puede funcionar en la práctica'" *Diario Judicial* (16 January 2015), online: <<http://www.diariojudicial.com/nota/35719>>. In this interview, Zaffaroni, the former judge of the National Supreme Court of Argentina, is reluctant to believe that lay citizens would understand legal concepts such as "self-defense."

<sup>322</sup> Lon L. Fulle, "The Case of the Speluncan Explorers" (1949) 62:4 Harv L Rev 616 at 637.

<sup>323</sup> Hans et al, "Proyecto de Investigación" *supra* note 39 at 39.

more familiar with the system, they will know what to expect and what is expected from them,<sup>324</sup> and this will allow them to deal with more complex trials. Moreover, litigants will also be better trained to present complex evidence and the judge will be more comfortable about instructing the jury on more difficult applicable law. Once again, we can appreciate the strong connection between the success of the reform and the need for adequate training among legal professionals, something that will take more time to develop in a successful manner.

The comprehension of the law and the evidence by the jury is reflected in the rendered verdict. For civil law judges, so used to being in control of the final decision in a criminal trial, the resistance to delegating that power to the people was one of the major challenges to overcome in this legal transplant. Earlier in this chapter we learned about a judge in Azul, Buenos Aires, who proclaimed *sua sponte* the unconstitutionality of the jury law and ordered a bench trial. We also came to learn throughout the previous chapters that inquisitorial practices are at odds with diminishing the power of “the sovereign” and giving it to the people. The verdict in the hands of lay citizens came to change a paradigm entrenched among many judiciary members.

In view of this prevailing reality, the positive opinion of trial judges about the task of the jury might be useful for a successful transplant. We may infer that, during this first stage of implementation, a high level of agreement between judges and jurors, would probably encourage the judiciary to support the new system. Moreover, those judges who were less supportive and were unenthusiastic about the ability of lay jurors to adequately perform the task may start changing their minds. The results of the survey showed that 7 judges were satisfied or very satisfied with the verdict reached by the jury and 3 of them were little satisfied or not satisfied.<sup>325</sup> Although only one of the magistrates considered that the jury misunderstood the evidence, the rest of the judges expressed that the jury understood the evidence “well” or “really well”, and all

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<sup>324</sup> Gobierno de la Provincia de Neuquén, “Manual ciudadano de Juicio por Jurados” (2016) online (pdf): *INECIP*<<http://inecip.org/wp-content/uploads/Manual-ciudadano-de-jurados-Neuquén.pdf>> [Manual](Neuquén presented a handbook for the citizens with general information about trial by jury, the role of judges, parties and jurors and a glossary with important terms that are used during a trial. The province distributed this handbook among students attending to secondary schools).

<sup>325</sup> Hans et al, “Proyecto de Investigación” *supra* note 39 at 39(Judges were asked about satisfaction with the verdict. In cases with multiple charges, the questionnaire referred to the most severe crime).

10 judges agreed that the jury understood “well” or “really well” the applicable law.<sup>326</sup> In addition, 8 judges reported a “very positive” and 2 a “positive” opinion about the jury system.<sup>327</sup> In the open-ended section of the survey, a judge stated:

I perceived that the jury was focused every day during the trial/ they deliberated for 5 hours/ the development of the trial was really good, with a lot of respect and professionalism among the parties/the organization of the judicial office was really good.<sup>328</sup>

While the view of 10 judges represents a small sample to arrive at general conclusions, a 100% rate of positives opinions about the jury system among judges anticipates a promising future for the jury in Neuquén. Instead of massive signals of support from the local judiciary, the confidence of judges seems to be gained one by one as more jury trials develop. We could also expect that judges who already had a good experience with jury trial would share their positive views with fellow judges, something that would work as good advertisement for future trials and in favor of the legal transplant.

In the open-ended section of the survey, judges were asked about the changes they would make to the current jury law and two of them suggested to change the majority rule for unanimous verdicts to convict or acquit.<sup>329</sup> This suggestion may allow us to assert that lower court judges are aware that unanimous verdicts have been a distinctive feature of the “classic” jury, a feature that has been lost in the course of the transplant from the common law to the province of Neuquén. Their suggestion also shows that appellate court judges are not the only ones who are familiar with the benefits of unanimity. The observations made in this survey reflect that some trial judges also appear in favor of introducing a feature that would increase the legitimacy of the verdict, even if reaching unanimous consensus may produce lengthier deliberations, which would ultimately represent more hours in court for trial judges.

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<sup>326</sup> *Ibid* at 39.

<sup>327</sup> *Ibid.*

<sup>328</sup> *Ibid* at 40.

<sup>329</sup> *Ibid.*

Finally, one of the judges indicated the need to change some aspects of the procedural criminal code, to improve the infrastructure of courts and to provide the judicial office with better resources.<sup>330</sup> Administrative issues and issues of infrastructure are complementary aspects of the reform that bear relationship to a successful implementation of the system.

The problem observed in the city of Bahía Blanca to summon prospective jurors is a perfect example of the importance of supplying adequate resources to support a legal transplant. As part of the reform, Neuquén implemented the judicial office to take care of the administrative issues of jury trials. With this new office, the province anticipated the difficulties that could arise by leaving administrative tasks to the courts. Within this context, the suggestion to improve the resources of the judicial office does not seem worrisome but mainly an assessment of the things that still need improvement. In fact, by 2016, the Superior Court of Justice of Neuquén also showed concern about infrastructure issues and proposed building a model court room designed and equipped for jury trials.<sup>331</sup>

### **3.2.3.2 The province of Buenos Aires**

Researchers Porterie and Romano from the INECIP and the Criminal Policy Secretariat of the General Attorney of the Province of Buenos Aires conducted research to evaluate the implementation of trial by jury in that jurisdiction.<sup>332</sup> The findings and conclusions reached by Porterie and Romano were published in 2018.<sup>333</sup> The sample used by these two researchers included interviews with 25 judges that participated in 53 trials, 57 prosecutors that tried 116 trials and 25 defense attorneys (both public and private) who participated in 43 trials. Most of the surveyed judges and prosecutors had tried more than one jury trial.<sup>334</sup>

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<sup>330</sup> *Ibid.*

<sup>331</sup> Fuera del Expediente, “Así será la nueva sala de audiencias para juicios por jurado” *Fuera del Expediente* (29 September 2016), online: <<http://fuera del expediente.com.ar/2016/09/29/asi-sera-la-nueva-sala-de-audiencias-para-juicios-por-jurado/>>.

<sup>332</sup> See *supra* note 41.

<sup>333</sup> *Ibid.*

<sup>334</sup> *Ibid* at 36.

The survey included some questions that were aimed exclusively at the lawyers, in which they were asked to rate the aspects or moments that they found most challenging. The jury selection hearing represented a completely new feature for the parties. Presumably due to its novelty, this hearing reached a 70% rate as challenging or very challenging.

In an interview, one of the judges made the following observation regarding the performance of the litigants during a jury selection procedure:

It is a completely new experience, as they get more comfortable and learn from experience, they become aware of the importance of the jury selection hearing (Anonymous judge, interview from 2017).<sup>335</sup>

Earlier I briefly revisited the characteristics of jury selection and what are the purposes it fulfils.<sup>336</sup> It is due to those purposes that we want to make sure that all the parties involved are getting comfortable and more used to this new feature of the jury system. In this survey, the majority of the respondents participated in more than one trial, so the sample allows us to make some inferences. As suggested by the comments of this anonymous judge, the adequate techniques to select a panel of jurors seem to be developing, as well as the awareness of the parties about the importance of the hearing.

During her interview, one of the defence attorneys mentioned that she worked alongside psychologists both to identify jurors who showed overly extreme and overly negative profiles for her theory of the case and to identify those jurors who seemed more open to her theory.<sup>337</sup> While this statement would not surprise a US-based legal professional, it does have a great significance for a civil law country. One can agree (or not) with the use of psychologists during jury selection, or with the fact that more professionals intervening in a case increases the costs of the trial, or that “profiling” is not a helpful technique to select prospective jurors. Yet, what this anonymous defender is expressing represents an example of the new faces and novel techniques

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<sup>335</sup> Porterie & Romano, *supra* note 41 at 152 (translation by the author).

<sup>336</sup> See ch 3 at 79.

<sup>337</sup> Porterie & Romano, *supra* note 41 at 145.

that are being used in civil law courtrooms to adjust to the transplant. It is a representation of the commitment of the litigants to every stage of the trial and how to adapt to novel features introduced by the reform.

The survey also showed that in addition to difficulties with jury selection, litigants found other aspects of jury trials complex. Sixty-three percent found “closing statements” complex, and 56% found both “cross-examination of witnesses and preparing a theory of the case complex.”<sup>338</sup> As has been discussed, the transition to a jury system and associated trial practices represents a major challenge for lawyers, and Porterie and Romano were able to capture those features of the implementation of jury trials that represent the greatest challenge for the parties. It is worth stressing that, although the parties feel challenged, in upcoming paragraphs we will be able to appreciate that it did not have a negative impact in their opinion about the system.

One issue that would have contributed to the failure of this transplant would have been a marked resistance to change from the legal actors that intervened in the daily development of the transplant. On the contrary, the attitude of the legal professionals in Buenos Aires seems to indicate a powerful willingness to make the necessary adjustments for the reform to succeed. For example, one prosecutor mentioned that the members of the prosecutors’ office are taking litigation techniques courses as it is something that contributes to improve the system.<sup>339</sup> Moreover, at the cost of feeling like freshmen in a court room, the majority of these civil law litigants are showing a great commitment in order to face this novel form of trial and one can perceive the enthusiasm in some of their comments. In this sense, a different prosecutor expressed:

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<sup>338</sup> *Ibid* at 41 [The following were the remaining aspects and rates that litigants were asked to rank as challenging or very challenging: preparation of jury instructions (53%), opening statements (46%) direct examination of witnesses (41%), preliminary hearing (40%) and the penalty hearing (12%)].

<sup>339</sup> *Ibid* at 76.

I tell you that we really have a trial when we have juries. The performance, the dynamic, the evidence, the audiovisual support, to awareness of the language, the way we use it, our tone (Anonymous prosecutor, personal interview from 2017).<sup>340</sup>

In addition, many of the research questions aimed to learn more about the opinion of legal professionals about the system after having the chance of going through the experience. As happened in Neuquén, there were many misconceptions about the performance of jurors. Porterie and Romano were interested in learning whether -after the experience- legal professionals considered the jury as capable vs not capable, too severe vs reasonable, unbiased vs easily influenced.

One of the indicators to evaluate the capacity, reasonableness and unfairness of jurors was to look at the jury-judge agreement rates. The research reported that 76% of judges agreed on the verdict reached by jurors.<sup>341</sup> As has been shown above, similar results were found in Neuquén, where 70% of the judges were satisfied or very satisfied with the jury's decision.<sup>342</sup> Remarkably, even in those cases where judges would have decided the case differently, 63% of them still viewed the jury's verdict as reasonable and 37% of them expressed a disagreement on the charge, but not on the guilty verdict.<sup>343</sup> What is more, none of the judges reported an arbitrary guilty verdict that would have forced them to invalidate the jury's decision.<sup>344</sup> By removing the judges from the same question, the level of agreement declines to 65%, which, according to these researchers, might be due to the parties' own interest in the outcome of the case.<sup>345</sup> Even so, the respondents did not see the jury as too severe. On the contrary, this is the kind of comment made by the parties after the jury's verdict. In a personal interview from 2017, a defence attorney said:

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<sup>340</sup> *Ibid* at 77.

<sup>341</sup> *Ibid* at 37.

<sup>342</sup> See ch 3 at 83.

<sup>343</sup> Porterie & Romano, *supra* note 41 at 37.

<sup>344</sup> *Ibid*.

<sup>345</sup> *Ibid*.

Although I thought that they were going to be more prejudiced, or that the verdicts were going to be more adverse, or that they were going to be less fair, it seems to me that citizens, when you give them the responsibility to decide, are very responsible, it's what I see, and it has a lot of common sense.<sup>346</sup>

The great majority of respondents conveyed a positive (32%) and very positive opinion (43%) about the jury system, while 16% reported a neutral opinion, and only a few expressed a negative (6%) or very negative opinion (3%).<sup>347</sup> As part of the questionnaire, all of them were asked to associate the jury system with three characteristics and were given a list of 3 positive and 3 negative characteristics.<sup>348</sup> Legitimacy and impartiality came first and second as the features that best describe the system, followed by hardworking, efficient and costly. In tune with the rest of their answers, all of them placed “arbitrariness” in the last place.<sup>349</sup> In this sense, in an interview from 2017, one of the judges said:

It is very difficult to accommodate everyone's needs, but I believe that is the magic of this system, in terms of the unquestionable of their decision.<sup>350</sup>

When it comes to evaluating issues of bias, one of the prosecutors mentioned that since the verdict is in the hands of jurors, that eases the burden on professional judges.<sup>351</sup> Jurors do not have an interest in the result of the trial and, unlike judges, what they decide inside the jury room will not impact their professional careers. In fact, one of the judges expressed that even if he has delivered many decisions throughout the years, today it is a relief to delegate the verdict to the people.<sup>352</sup> In an interview from 2017, another judge said:

For me, for the judiciary it seems that it is even more reassuring and you begin to understand what is the role played by each of us... it is all millimeter-fitted system, so that each one truly fulfills its function.<sup>353</sup>

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<sup>346</sup> *Ibid* at 55.

<sup>347</sup> *Ibid*.

<sup>348</sup> Impartiality, legitimacy, efficiency, arbitrariness, costly, hard-working.

<sup>349</sup> Porterie & Romano, *supra* note 41 at 38.

<sup>350</sup> *Ibid* at 65 (translation by the author).

<sup>351</sup> *Ibid* at 66

<sup>352</sup> *Ibid* at 87.

<sup>353</sup> *Ibid* at 71.

One of the purposes of this transplant was to enhance the legitimacy of the judiciary, and the answers given by legal professionals represent a valuable tool to achieve that goal. While we will primarily need to take a look at jurors' opinions about the judiciary, the fact that legal professionals believe in trial by jury as a source of legitimacy and impartiality is the first step to get lay citizens to share that belief. It would be odd if lay citizens were to appreciate the legitimacy of jury trials if judges and the parties involved have the opposite perception.

Very few of the respondents showed signs of prejudice against jurors. In very few interviews one can appreciate that legal professionals are mainly worried about an alleged impossibility of the jury's task to incorporate the legal and technical tools needed to fulfil their task.<sup>354</sup> For example, in a personal interview from 2017, one judge said:

It is impossible that jurors can incorporate all the information, even for me -that I know the law- it is difficult to do that. I believe this is an issue with jury trials that is very hard to solve. It is a problem intrinsic to trial by jury.<sup>355</sup>

However, the majority of the respondents were confident about the capacity of the jury. When judges, prosecutors and defenders were asked: "If you or a family member were accused of a homicide, which system would you prefer?" 67% of them expressed a preference for a jury trial.<sup>356</sup> This is a clear display of support from the majority of the respondents to the new system. Not only that, 77% agreed that the panel of jurors who served in their trials were heterogeneous and a representative sample of their community.<sup>357</sup> When these two questions and the respective answers are jointly analyzed some important inferences may be made. Legal professionals tend to belong to the elite, and in general they consider themselves as superior in intellectual capacity. After experiencing jury trials, legal professionals seem to be showing signs of humility and an earned respect for the capacity of fellow citizens. What the majority is saying is that they would feel safer and more represented by a group of peers from the community than by a professional

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<sup>354</sup> *Ibid* at 45-6.

<sup>355</sup> *Ibid* at 46.

<sup>356</sup> *Ibid* at 39.

<sup>357</sup> *Ibid* at 64.

judge. The gap that has always separated the inquisitorial judiciary from the people is beginning to be bridged with the transplant of the jury. As happens with legitimacy, the gap between society and the judiciary needs to be bridged from both sides.

It is not sufficient for a successful transplant to have jurors who would like to be tried by a group of jurors. The confidence from legal professionals in the jury system is an essential component to amend that gap. It is what would take the transplant to a lasting success.

### **3.3 Final remarks**

Measuring the success of a reform constitutes a great challenge for researchers. In the case of the Argentine jury, I used parts of other authors' theories on legal transplants to evaluate the outcome of the reform. In addition, I defined the success of the Argentine jury in my own terms, giving due importance to the context as provided in chapter II. I stated that the success of this transplant was defined by the purposes it accomplished. Some of these purposes were described at the introduction of this chapter, such as the goal of bridging the gap between society and an eroded judiciary.

In Germany and France, the classic jury was imported from the common law tradition during the nineteenth century. The bench and the bar showed a powerful antipathy towards the transplant, which ultimately lead to its failure and its later replacement by a "mixed court."<sup>358</sup> In Spain, the jury also suffered a similar fate. Although mixed courts are still standing, legal professionals of this civil law country undermined the core features of the institution and disrupted the purposes originally intended by legal reformers.<sup>359</sup> Contrary to what happened in those civil law countries, the role of most of the legal professionals involved in the transplant of the jury in Argentina was one of support and commitment. After a thorough analysis of news articles, court decisions and the content of research conducted in Neuquén and Buenos Aires, we are able to confirm that some of the main purposes intended by this reform have been accomplished, and part of this

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<sup>358</sup> Kahn-Freund, *supra* note 251 at 17-8.

<sup>359</sup> Grande, *supra* note 79 at 614-6.

successful outcome has been due to the welcoming response shown by members of the bench and the bar.

The process of transplanting the jury law has not proven to be without flaws. On the contrary, it has been one of “trial and error, innovation and correction.”<sup>360</sup> The series of problems witnessed in the first years of implementation of the jury in the city of Bahía Blanca constitute a clear example. However, the active involvement of legal professionals as users of the law has contributed to an overall effective process of transplantation.<sup>361</sup> Most of the people involved made some adjustments to help the transplant to succeed. Higher court judges supported the core values and features of the “classic” jury through their rulings and contributed to the consolidation of the institution. Lower court judges and the parties reconfigured their roles on how to perform in court, which included a tedious learning process of training. The bench and the bar seem to have embraced the transplant beyond any initial expectation, so much so as to assert that they are more willing to be tried by a panel of lay jurors than by professional judges.<sup>362</sup>

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<sup>360</sup> Berkowitz et al, *supra* note 73 at 189.

<sup>361</sup> *Ibid.*

<sup>362</sup> Porterie & Romano, *supra* note 41 at 45.

## Chapter 4: The people have spoken

### 4.1 Introduction

Chapter III gave us a definition of what a successful transplant means for the purposes of this investigation. The definition of success, the goals pursued with the implementation of jury trials, and the historical background of the reform were important elements that were considered throughout the chapter. In chapter III, the analysis of success focused on appellate decisions and surveys of the judiciary and legal professionals in Neuquén and Buenos Aires.

The analysis of higher court decisions in both provinces gave us a picture of the endorsement of higher court justices of the newly implemented jury system. In addition, the chapter analyzed the problems that arose in the course of these years, putting the emphasis on one specific municipality of Buenos Aires, the city of Bahía Blanca. That city represented an epicenter of problems for the implementation of the system, and the chapter used that case to exemplify the complications that arose during the transplant, in an effort to reach some valuable learned lessons. The chapter also included an evaluation of two surveys conducted in both provinces, in which members of the bench and/or the bar who participated in jury trials were able to express their views regarding trial by jury. In both provinces we discovered that the positive reactions of lower court judges and litigants surpassed the negative responses.

This final chapter is interested in learning about the response of society to the implementation of trial by jury. Chapter IV evaluates the reaction of some of the citizens who served as jurors since Buenos Aires and Neuquén implemented jury trials for criminal cases.

The chapter is informed by surveys that were conducted with jurors in both provinces.<sup>363</sup> Jurors were given the choice whether to participate in these surveys, and responses were gathered anonymously. First, we will take a look at the province of Neuquén, where two different surveys

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<sup>363</sup> Feres, *supra* note 42.

were conducted. The first survey dates to the first year of implementation of the system (January 14, 2014 to March 13, 2015) and was conducted by the Criminal Judicial Office of Neuquén. 189 jurors from over 12 trials responded to questionnaires that were later analyzed and made publicly available.

The second set of surveys corresponds to research conducted in that province by a multidisciplinary group of scholars from Argentina and the United States, in cooperation with the provincial government.<sup>364</sup> The full report covered over 17 trials from May 2016 until July 2018.<sup>365</sup> A first preliminary report covered over 10 jury trials that took place from May 2016 to July 2017, and over 116 surveyed jurors. The second part of the report was presented a year later, in August 2018, in the context of a session organized by the local Attorney's Office.<sup>366</sup> At that point, researchers had surveyed 200 jurors. In all cases, jurors were asked to respond to some open-ended questions and some multiple choice questions.

Second, we will focus on the province of Buenos Aires where the Under Secretariat of Criminal Policy of the Ministry of Justice of the Province conducted surveys during 2015.<sup>367</sup> The survey covered eight judiciary departments and research involved 11 jury trials from May to September 2015. The method consisted of questionnaires that were submitted before and after jury service by 132 jurors.

While each separate sample may not be fully representative of jurors' experiences, these surveys provide a fair picture of the viewpoint of those citizens who have had practical exposure to jury trials. The content of the surveys is part of a larger analysis that has been developing through this thesis, so the numbers and statistics presented in this last chapter are not introduced in isolation. Most importantly, while the information from different research is presented separately, as a whole, they represent the opinion of a large number of jurors across two provinces. While the

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<sup>364</sup> Hans et al, "Proyecto de Investigación" *supra* note 39.

<sup>365</sup> Poder Judicial de Neuquén, "La Experiencia de ser Jurado Popular Aumenta la Confianza en el Funcionamiento de la Justicia"(7 August 2018), online: <<http://www.jusneuquen.gov.ar/la-experiencia-de-ser-jurado-popular-aumenta-la-confianza-en-el-funcionamiento-de-la-justicia/>> [La Experiencia de ser Jurado].

<sup>366</sup> *Ibid.*

<sup>367</sup> Informe y Encuestas, *supra* note 44.

content of the surveys diverged, many of the questions overlapped or depicted a similar intention on the part of researchers. Moreover, while the context in each province may differ, all surveyed jurors belong to the same country and we can infer that the Argentinian society shares similar problems, concerns, values and demands, that are reflected in the answers provided by jurors.

The fact that jurors responded to voluntary and anonymous questionnaires increases the chances of getting reliable research material and honest answers from them. As in the case of legal professionals, how lay citizens react to this new system is a significant element in the analysis of a successful transplant. There is much value in looking at a small but significant number of people and cases at an early point in the history of the Argentinian jury when there is still time to straighten out the course of the transplant if needed.

If we are to look at the purposes accomplished with the transplant, one of the goals pursued by local governments and legal reformers with this reform was to bridge the gap between society and the judiciary. In chapter III, we were able to observe from the questionnaires submitted to legal professionals that part of that goal was accomplished. Notwithstanding, the greatest share in bridging this gap remains in the hands of society. The best means to find out how jury duty impacted this goal is by asking jurors some specific questions. How did you feel when you were summoned? What changed after jury duty? What is your opinion about the performance of trial judges and the parties? The questionnaires submitted in both provinces provide the answers to these questions.

In addition, these questionnaires are a good source to evaluate whether some of the most important functions attributed to jury trials have been accomplished. These functions include the educational and civic role that the jury plays. In the surveys conducted in Argentina, some of the questions were directed to learn more about whether the introduction of jury duty served these purposes. The fact that juries in the recipient country may be showing similar reactions to those fellow jurors in common law jurisdictions is also an important point to consider in our analysis about success. It may help to demonstrate that the legal institution was able to make the journey. While the transplanted institution was not immune to changes, and while donor and recipient do

not share the same history and reality, the core principles and functions of the jury survived the journey and were embraced by the recipient country.

Finally, the responses provided in these questionnaires serve as guidelines for future reforms across the country. In the open-ended section of the survey, jurors gave advice on what could be improved and what they disliked. Since the implementation of jury trials in Argentina has been achieved province by province, the opinion of jurors could help to trigger the interest of other provinces to adopt the institution. Contrariwise, a discouraging opinion on the part of the jury could deter local governments from embarking on legal change.

The time frame of a reform also represents one significant feature to consider when we evaluate the outcome of a transplant.<sup>368</sup> Therefore, if the responses obtained in these questionnaires are not encouraging, we may infer that it may delay any further reform across the country. Other provinces would probably not see the point of implementing jury trials if the new system does not seem to be embraced by society. In the end, what jurors in Neuquén and Buenos Aires think about the system would have political significances that would surpass the territorial boundaries of the two provinces. A good response could resonate across Argentina in terms of aiding the transplant to blossom in other jurisdictions, improving the chances of calling this a successful legal transplant.

## **4.2 Jurors in Neuquén**

### **4.2.1 Survey by the Criminal Judicial Office**

During the first year of implementation of the jury system the Criminal Judicial Office of Neuquén conducted a survey of 189 jurors (144 seated jurors and 45 alternates) from over 12 trials that took place from January 14, 2014 to March 13, 2015.<sup>369</sup>

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<sup>368</sup> Nelken, *supra* note 25 at 41.

<sup>369</sup> Feres, *supra* note 42.

A first set of questions was asked of all the 189 surveyed jurors with the aim of learning about their initial reaction to the possibility of becoming jurors in a criminal trial. When summoned, 44,44% felt anxiety and concern, 27,51% expressed a feeling of acceptance, 11,11% satisfaction and only 10,58% felt resistance<sup>370</sup> Neuquén was the first province to implement the classic jury in Argentina and none of these prospective jurors were ever in contact with the remote possibility of deciding a criminal case. Unlike fellow jurors in common law countries, (who are familiar with the system) the Argentinian relationship with trial by jury had only been through foreign movies. In view of this context, the spectre of Pierre Legrand's claims about the significance of legal culture as an absolute deterrent for legal transplants<sup>371</sup> resonated loudly.

To learn that most jurors felt anxious and worried seems quite discouraging for the success of the transplant. However, it also seems like a natural reaction on their part, considering the absolute lack of familiarity with jury duty and the burden of responsibility attached to it. Within this context, it does not seem unreasonable to be satisfied with a 27,51% level of acceptance and a 11,11% of satisfaction to the first contact they had with jury trials.

Most importantly, 70,90% of jurors never thought about the possibility of excusing themselves from jury duty.<sup>372</sup> There is a significance in understanding these two questions together. If the gut reaction of jurors was anxiety and fear, our first assessment about the future of the transplant would probably be quite negative. However, in a context of anxiety and fear, jurors still displayed an impressive early level of commitment by showing up in court and playing their part. This transplant was not only about the cooperation of the bench and the bar, but also about the support of the citizens to be successful.<sup>373</sup> It is the committed reaction of the citizenry that also contributed to a positive transplant.

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<sup>370</sup> *Ibid* at 3.

<sup>371</sup> Legrand, *supra* note 55 at 114.

<sup>372</sup> Feres, *supra* note 42 at 3.

<sup>373</sup> Markovits, *supra* note 32 at 99.

Jurors were also asked about their familiarity with the criminal justice system. The majority (60.32%) said that they had no knowledge whatsoever and 32,8% indicated partial knowledge.<sup>374</sup> As in common law countries, jurors are not versed on the law. They are ordinary lay citizens who are summoned to decide a specific case and receive instructions from the trial judge in order to fulfil their duty. What is more, the jury law in Neuquén specifically states that lawyers and members of the judiciary branch, prosecution authorities and public defenders are disqualified to serve as jurors.<sup>375</sup> If the law of the province is rigorous in disqualifying those citizens with legal knowledge from serving on a jury, why should we care about the familiarity of jurors with the criminal justice system? The answer may be that this question can tell us a lot when contrasted with information about the performance of jurors in court.

As was documented in chapter III, most of the judges and litigants were favourably surprised by the commitment and performance of jurors in court. Trial judges, prosecutors and defenders agreed that, in general, jurors were able to properly understand the law applicable to the case and assess the evidence presented before them. In accordance with what legal professionals conveyed, the jury's questionnaire indicated that 90,48% did not have any specific difficulty during the development of the trial.<sup>376</sup> In addition, 68,78% stated that they had no problem in understanding the parties, and 8,99% revealed that, from all the evidence presented before them, the testimony of witnesses was the most difficult to understand.<sup>377</sup>

As observed in chapter III, questionnaires conducted among legal professionals show that the jury enjoys a good reputation among the judiciary. Apart from the comments made by judges in open ended questions and anonymous interviews, the high level of agreement between jurors and judges is another significant indicator. Even so, for the system to succeed, we also need to know whether judges also enjoy a good reputation among lay citizens. The questionnaire showed that an overwhelming 60,85% and 31,75% of surveyed jurors described the performance of the trial

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<sup>374</sup> Feres, *supra* note 42 at 2.

<sup>375</sup> Act 2784, s 44, *supra* note 166 (The law also establishes other disqualifications to serve as a juror).

<sup>376</sup> Feres, *supra* note 42 at 4.

<sup>377</sup> *Ibid* at 5.

judge as “very good” and “good” respectively, and only 0,53% of jurors described it as “bad.”<sup>378</sup> We can infer from the survey that the first year of implementation of the jury system in the province of Neuquén witnessed a harmonious relationship between triers of fact and professional judges. As suggested throughout this thesis, one of the main reasons to introduce a legal reform that includes lay participation in the administration of justice was to bridge the gap between society and the judiciary. The high ratings regarding the performance of judges indicate a positive perception on the part of jurors. Most likely, without the opportunity of serving in a jury, these people would not have been able to hold such an optimistic image. It is through jury duty that they were able to understand the role of the judge, beyond what they usually know from the media or third-party stories. Moreover, jurors were also asked about the overall experience of serving in a jury. The majority considered that the experience was either “very positive” (46,56%) or “positive” (41,8%) and only 1,59% described it as “bad.”<sup>379</sup> This vast rate of positive views towards jury trials is another indicator of how well received the institution was among the citizenry. Furthermore, in the research performed by the group of international researchers, we will see a similar positive response to the experience, reflected not only in numbers but also in the comments made by jurors, as well as in their reasons to consider jury duty as such a valuable experience.

In addition, serving on a jury also represented the opportunity to provide society with a first-hand, real life experience with the criminal justice system. Jurors were asked whether they believed trial by jury offers adequate rights and guarantees to the parties and 63,49% agreed it does, or partially does (13,23 %), while 5,29% think it does not.<sup>380</sup> The answer to that question is provided after jurors were able to have significant contact with the criminal justice system and only 17,49% decided not to answer the question. We can infer that, since one of the most important missions of jury trials is to educate the people on the law and the justice system,<sup>381</sup> the implementation of trial by jury helped lay people to have more accurate and comprehensive knowledge of what these rights and guarantees are about. They arrived at the court with a vague

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<sup>378</sup> *Ibid* at 7.

<sup>379</sup> Feres, *supra* note 42 at 5.

<sup>380</sup> *Ibid*.

<sup>381</sup> Lisa Dufraimont, “Evidence, Law and the Jury” (2008) 53 McGill L.J. 199 at 213 [Dufraimont].

understanding of criminal trials and most of them left the court with sufficient information so as to comprehend these rights and guarantees and to assess whether jury trials were able to offer those rights to the parties.

Finally, one part of the questionnaire was aimed at the 144 seated jurors. They were questioned about the deliberation process. In Neuquén, the law establishes that the verdict will respond to the following two questions: 1) Was the State able to prove the commission of the alleged crime? And 2) Is the defendant guilty or not guilty?<sup>382</sup> These two questions have the intention of finding out whether based on the evidence presented during the trial, the defendant committed the offence she is charged with. In addition, the law contemplates a low majority of 8/4 to convict and deadlocks are not possible. Failure to achieve eight votes would result in a “not guilty” verdict.<sup>383</sup>

As was thoroughly explained in chapter II, the enactment of a jury law that regulated the “8/4 decision rule” in lieu of unanimous verdicts has been the product of a specific political and socio-economic context in Argentina.<sup>384</sup> While we may not agree with a low majority to convict, we might assert that this adaptation of the decision rule may have been a way of seeking effectiveness on the part of reformers and politicians. Those who envisioned the reform introduced what they believed were the necessary changes to adapt the transplant to the initial context and the local conditions provided by this civil law country.<sup>385</sup>

The problem is that, while non-unanimous verdicts may have represented the most effective way to adapt the “classic” jury in accordance to the local conditions, the adoption of such decision rule inevitably has an impact in the deliberation process and the jury’s assessment about deliberations.<sup>386</sup>

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<sup>382</sup> Act 2784, s 207, *supra* note 166.

<sup>383</sup> *Ibid.*

<sup>384</sup> Ch 2 at 51-2.

<sup>385</sup> Berkowitz et al, *supra* note 73 at 179.

<sup>386</sup> See ch 3 at 73 for the benefits of unanimity and the impact of non-unanimous verdicts in the deliberation process.

In the survey, 88,89% of them said they were able to express their views, and 4,17% said they were able to do it partially. The remaining 4,17% didn't answer and 2,78% answered "no" to the question.<sup>387</sup> In addition, 77,78% felt they contributed to the resolution of the case, while 12,5% of the respondents said they partially contributed. Only 4,17% didn't answer and 5,56% answered "no" to the question.<sup>388</sup> The overwhelming 90,28% of the respondents agreed that they had no difficulty during deliberations until the moment of casting votes.<sup>389</sup> It is certainly encouraging to witness that jurors expressed an active involvement in the resolution of the case. However, in my view, these numbers are quite unexpected taking into account that non-unanimous verdicts tend to ignore hold-out jurors and therefore disregard the vision of the minority, simply because their voices do not need to be heard in order to reach a valid verdict.

#### **4.2.2 Survey by international group of researchers**

Another research project was conducted in Neuquén from May 2016 until July 2017. This time the research included questionnaires to judges as well as jurors.<sup>390</sup> In this case, the research was in the hands of a group of local and international researchers from different fields.<sup>391</sup> They issued a preliminary report on August 2017 which covered 10 jury trials from May 2016 until July 2017 and analyzed the responses to voluntary questionnaires, filled out by 116 jurors out of 120 jurors.<sup>392</sup> The intent of these questionnaires was to evaluate whether serving in a jury changed these jurors in any way and to determine what the jurors knew before jury service and what their impressions were during and after trial.

Survey results revealed that 89% of Neuquén's jurors knew nothing (62%) or almost nothing (27%) about jury trials before this experience.<sup>393</sup> The level of knowledge about jury trials

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<sup>387</sup> Feres, *supra* note 42 at 5.

<sup>388</sup> *Ibid.*

<sup>389</sup> *Ibid* at 6.

<sup>390</sup> In ch 3 I've analyzed this preliminary report focused only on the responses of judges from Neuquén.

<sup>391</sup> La Experiencia de ser Jurado, *supra* note 365.

<sup>392</sup> Hans et al, "Proyecto de Investigación", *supra* note 39.

<sup>393</sup> *Ibid* at 9.

resembles jurors' familiarity with the criminal justice system. Similar to the survey conducted a year earlier, 60,32% expressed to have no knowledge about it.

Nonetheless, within this uncertain scenario, 69% of the 116 jurors mentioned they did not feel annoyed when they were summoned.<sup>394</sup> This information cannot be contrasted with the answers given by jurors in the research from 2015 because the other group of researchers used other feelings (anxiety, concern, acceptance, satisfaction, and rejection) as parameters to describe their initial reaction to being summoned. What can be asserted is that this second investigation also shows a high level of commitment on the part of the citizenry. Almost two thirds of these jurors were not annoyed at learning that they would have to commit their personal time to fulfil a civic duty that was completely new and unfamiliar to them.

The research conducted by the Criminal Judicial Office in 2015 covered some important elements regarding the development of the jury trial, and this second research project deepened in aspects such as the performance of the parties and the judge, the ability of jurors to understand the evidence, and jurors' assessment of witness and expert testimony. In this sense, when asked about the level of complexity of their trials, 49% of them considered their trials as complex or very complex.<sup>395</sup> This contrasts with the answer of 8 out 10 magistrates that tried those cases, who considered these trials as "not complex."<sup>396</sup> Even so, only 20% of jurors expressed that they found it difficult to understand the evidence,<sup>397</sup> witnesses (15%) and expert testimony (12%) were reported to be the most difficult evidence to cope with.<sup>398</sup> If we contrast these numbers with those from the Criminal Judicial Office, we find similar rates in responding to related questions. In that survey, 70% of jurors expressed no difficulties in understanding the evidence and 8,99% mentioned the testimony of witnesses as the most difficult evidence.<sup>399</sup>

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<sup>394</sup> *Ibid* at 10.

<sup>395</sup> *Ibid* at 12.

<sup>396</sup> *Ibid* at 39.

<sup>397</sup> *Ibid* at 12.

<sup>398</sup> *Ibid* at 13.

<sup>399</sup> Feres, *supra* note 42at 5.

In the survey from 2016, researchers were also interested in the quantity and quality of the evidence as well as how that evidence was presented before the jury. They reported that 29% of jurors mentioned that the parties didn't present all the necessary evidence during the trial,<sup>400</sup> a number not so different from the judges responses (40%) to the same question.<sup>401</sup> In an open-ended question, jurors made many suggestions regarding the quantity and quality of the evidence presented during trial.<sup>402</sup> Moreover, they also made recommendations the way the evidence was presented, such as the use of better tools, for example better visual support.<sup>403</sup>

In addition, the jury's evaluation of the performance of the litigants was also tested. In 32% of the surveys, the performance of defence attorneys was considered as "poorly skilled" or "not skillful," while prosecutors registered a rate of 18% and private prosecutors one of 23%.<sup>404</sup> In the open-ended question, jurors recommended more dynamism, and less "performing" in order to enhance credibility.<sup>405</sup> One of the jurors wrote:

Make an improvement in making more efficient and important questions, that could help jurors to clarify our doubts.<sup>406</sup>

In chapter III, we learned about the performance of the litigants from the questionnaires submitted to judges. That information, combined with the responses given by lay citizens represent an excellent source to evaluate the ability of the parties in court. What can be appreciated from the answers and the comments made by citizens, is what was anticipated in the previous chapter, namely, that litigants need more training. While it may be the case that the majority of jurors reported no difficulties in understanding the evidence, there is still a clear message sent from lay citizens in terms of how that evidence should be presented.

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<sup>400</sup> Hans et al, "Proyecto de Investigación,"*supra* note 39 at 13.

<sup>401</sup> *Ibid* at 38.

<sup>402</sup> *Ibid* at 17.

<sup>403</sup> *Ibid* at 18.

<sup>404</sup> *Ibid* at 16.

<sup>405</sup> *Ibid* at 17.

<sup>406</sup> *Ibid* at 44.

What may be inferred is that there is still a strong inquisitorial presence in the way the parties present their cases. Lay people who are neither familiar with the inquisitorial nor the adversarial system of justice, seem to indicate a preference for features that we can generally identify as part of an adversarial system. They demand more clarity, dynamism, more visual tools, more efficiency, among other suggestions. While the adversarial justice system does not fully guarantee that all these demands will be fulfilled, it is more likely to find elements such as “dynamism” and “better visual tools” in an adversarial than in an inquisitorial criminal trial.

Ultimately, with the arrival of the jury system, litigants are now in the need of adjusting former practices to meet new requirements. In fact, some scholars’ understanding of how to properly measure the outcome of a legal transplant is by testing whether there has been an adequate “fit” between the imported rule and the local environment.<sup>407</sup> To use unduly technical legal vocabulary, to introduce many unnecessary witnesses, to take things for granted due to the presence of the *dossier*, all those features that belonged to former inquisitorial practices were neither advisable nor acceptable with the implementation of trial by jury.

At first glance, the reaction to the imported rule on the part of the local environment (jurors claiming for efficiency, dynamism, and clarity in court) seems to indicate a poor result for the legal transplant. However, a closer look at what happened in Neuquén may allow us to ask ourselves “what if societies have different ideas of what “fit” needs to be?”<sup>408</sup> The fact that the parties are showing some difficulties in transitioning from one system to the other does not necessarily mean that the transplant is not succeeding. I already suggested that it is reasonable to recognize that reforms take time.<sup>409</sup> Time and practice is the expected path that the parties should walk in order to embrace the imported jury system. As long as legal professionals continue to show interest and commitment to this new form of trial, that could be understood as our idea of proper “fit”. We would then need to accept that the recipient environment is not rejecting the imported rule, but rather it is only that litigants need more training.

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<sup>407</sup> Kanda & Milhaupt, *supra* note 215 at 891.

<sup>408</sup> Nelken, *supra* note 25 at 47.

<sup>409</sup> World Bank, *supra* note 312.

When it comes to evaluating the performance of trial judges, the data was much more promising. The research showed that 89% of jurors reported that they were satisfied with the way the judge conducted the trial,<sup>410</sup> while only 2% of jurors reported difficulties understanding the judge and 95% of them found her instructions to be helpful or very helpful.<sup>411</sup> These results match the 92,6% positive rate about the “very good” and “good” performance of the trial judge registered in the survey conducted a year earlier by the Criminal Judicial Office. As mentioned earlier,<sup>412</sup> the first year of implementation of the jury system showed a harmonious relationship between judges and jurors. Judges made great remarks about the performance of the jury in their questionnaires and those remarks coincided with the rates and comments identified in the questionnaires aimed for jurors.

The fact that, a year later, a second survey run by a different group of researchers is displaying similar rates is certainly reassuring for the development of the transplant. While ideally we would expect an adequate performance from professional judges, as pointed out by Kahn Freund, in Germany and France, it was the bench and the bar who undermined the success of the imported “classic” jury.<sup>413</sup> In reality, the bench represents an institutional elite that is deeply affected by the implementation of this reform, and as such, its performance and disposition to jury trials constitute a central element in the outcome of the transplant.

In the case of Argentina, interviews with judges who conducted jury trials may tell us a lot about their own positive reactions towards the new system. However, it is also vital to test if this positive reaction has also been reflected in the comments made by lay jurors. The results showed in both (judge and jury) surveys concur with the idea that the majority of judges are contributing to the success of the system.

In this survey, jurors were also asked about the deliberation process with the intention of learning how they felt during discussions with fellow jurors. The main difference with the survey

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<sup>410</sup> Hans et al, “Proyecto de Investigación,” *supra* note 39 at 14.

<sup>411</sup> *Ibid.*

<sup>412</sup> Ch 4 at 119.

<sup>413</sup> Kahn-Freund, *supra* note 251 at 17-8.

conducted by the Criminal Judicial Office in 2015 is that, this time, the focus of the questions was on diversity among members of the jury, a feature envisioned by Neuquén jury law. At the stage of the deliberation, there was an important factor to consider, Neuquén jury law requires that “the jury shall be integrated, including alternates, by men and women equally. It will be that at least half the jury belongs to the same social and cultural environment of the accused. It will also try, whenever possible, to have seniors, adults and youth in the panel of juries.”<sup>414</sup>

The issue is that, while the integration of the jury panel should formally comply with those requirements (formal diversity), aspects of true diversity might not necessarily be reflected during deliberations (substantive diversity). Regarding “formal” gender equality and “substantive” gender equality, the results showed no difference between the perception of men and women with regard to their participation during deliberations.<sup>415</sup> The majority of men and women (80%) reported having enough time to express their points of view.<sup>416</sup> The number matches the survey of 2015 that reported a rate of 88,89% to the question of whether they were able to express their views.<sup>417</sup>

Regarding the social and cultural background of the jury, in general, more educated jurors perceived they were able to have an extended participation in the deliberations, in contrast to what fellow jurors with a lower level of education felt.<sup>418</sup> This finding is no different from mock jury trials conducted in the United States, which showed that more educated jurors tend to participate more frequently in deliberation than less educated jurors.<sup>419</sup> The fact that less educated jurors tend to intervene less is certainly not reassuring. Notwithstanding, it still indicates that lay citizens from different legal cultures can show similar patterns of behaviour and the same factors that affect deliberations in an Anglo-American country are also present in Argentina. Argentina, as the receiver of the transplant, is importing a foreign institution as a

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<sup>414</sup> Act 2784, s 198, *supra* note 166; See also Andrés Harfuch et al, “El Jurado Indígena en Argentina” in Gustavo Letner & Luciana Piñeyro, eds, *Juicio por Jurados en el Procedimiento Penal*, (Buenos Aires: Jusbaire, 2017) 25.

<sup>415</sup> Hans et al, “Proyecto de Investigación,” *supra* note 39 at 19 [Harfuch et al., “El Jurado Indígena”].

<sup>416</sup> *Ibid.*

<sup>417</sup> Feres, *supra* note 42 at 5.

<sup>418</sup> Hans et al, “Proyecto de Investigación,” *supra* note 39 at 21 (chart N°9).

<sup>419</sup> Reid Hastie, Steven Penrod & Nancy Pennington, *Inside the Jury* (Massachusetts: HUP, 1983) at 135.

whole. The fact that we can see similar types of problems in both donor and receiver environments may actually indicate that the transplant is blossoming, by importing positive and negative features. In addition, even in a context of sociodemographic disparity, all of the members expressed a certain level of participation, with numbers that varied from “a lot” (around 55%) to “a little” (around 12%).<sup>420</sup>

The questionnaire also showed that, while 80% of respondents agreed that they had enough time to express their views, 45% reported that the jury, as a whole, did not make any effort to convince dissenting jurors to join the majority in the verdict.<sup>421</sup> Although the questionnaire run by the Criminal Judicial Office did not ask the same question, it did ask whether jurors felt they had contributed to the resolution of the case and reported a 77,78% of positive responses.<sup>422</sup> That rate would ultimately indicate a high level of involvement on the part of the jury. My analysis in previous pages about the 77,78% rate registered in 2015 was that the numbers were quite unexpected. Considering that the law is satisfied with non-unanimous verdicts, it makes it more likely to ignore the position of holdouts, since their opinions do not need to be heard to reach a valid verdict. On the contrary, what this second survey is revealing (that almost half of the interviewed jurors considered that the jury, as a whole, did not make any effort to convince dissenting jurors) represents a more expected result in view of the 8-4 majority rule in force in Neuquén.

Today, Neuquén is considering whether to review the law and amend the system of majorities. The home secretary, the Minister of Education, justices of the Supreme Court and the Attorney General of the province met at the end of 2018 to review the progress of the jury system in force. As a result of that meeting, the Legislature plans to discuss a reform to the current jury law, including the possibility of an amendment to the 8-4 majority rule.<sup>423</sup> For now, until the government decides to modify the law, we should not underestimate the fact that 80% of jurors felt that they were able to express their views during deliberations. This rate is already a positive

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<sup>420</sup> Hans et al, “Proyecto de Investigación,”*supra* note 39at 19.

<sup>421</sup> *Ibid* at 20.

<sup>422</sup> Feres, *supra* note 42at5.

<sup>423</sup> La Mañana, *supra* note 279.

sign of how jurors were able to seriously commit to their task, even in the context of a law that settles for such a flexible system of majorities.

In addition, 85% of the respondents stated that they were satisfied or very satisfied with the outcome of deliberations.<sup>424</sup> Survey data from the United States has shown that, jurors who were satisfied with the verdict they reached developed greater trust towards the judiciary.<sup>425</sup> In Argentina, one of the desired aims of implementing jury trials was to enhance the legitimacy and trust towards the judiciary and the local government. How jurors feel after deliberations is something decisive in this change towards lay participation. If jurors left the court without an improved image of the institutions that are carrying out the reform, then one of the primary reasons behind the reform was not fulfilling its purpose. The survey showed that after the experience, 87% of respondents viewed jury trials more favourably, and 73% expressed the same feeling regarding the local judiciary.<sup>426</sup> Around 65% of them also reported that they had more confidence in the judiciary after serving in a jury,<sup>427</sup> reinforcing the idea that there is a connection between verdict satisfaction and trust towards the judiciary.<sup>428</sup> While the transplant largely achieved its purpose with regards to the judiciary, the local government and the police force were not able reach such high rates. Only around 50% of jurors mentioned an improvement in the image of those two institutions<sup>429</sup> and the level of confidence scarcely reached the average of 40% in both cases.<sup>430</sup>

Finally, to assess the level of success of the jury system as a whole, it was also important to learn how jurors felt after jury duty. The surveys showed that 89% considered the experience as “positive” or “very positive”,<sup>431</sup> 84% felt proud after their service<sup>432</sup> and 78% agreed that they

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<sup>424</sup> Hans et al, “Proyecto de Investigación Empírica”, *supra* note 39 at 22.

<sup>425</sup> Katherine R. Knobloch & John Gastil, “Civic (Re)socialization: The Educative Effects of Deliberative Participation” (2014) 35:2 Politics 183 at 185 [Knobloch & Gastil], citing Gastil et al., *supra* note 34 at 19.

<sup>426</sup> Hans et al, “Proyecto de Investigación,” *supra* note 39 at 23.

<sup>427</sup> *Ibid* at 24.

<sup>428</sup> Knobloch & Gastil, *supra* note 425 at 185.

<sup>429</sup> Hans et al, “Proyecto de Investigación,” *supra* note 39 at 24.

<sup>430</sup> *Ibid*.

<sup>431</sup> *Ibid*.

<sup>432</sup> *Ibid*.

would recommend the experience to other citizens.<sup>433</sup> Some of the reasons expressed in the open-ended question of why would they recommend others citizens to serve in a jury were: the importance of participating in the administration of justice,<sup>434</sup> to participate in a fair and democratic process,<sup>435</sup> to improve the quality of institutions,<sup>436</sup> and to fulfil a civic duty,<sup>437</sup> among others.

Many of the comments made by jurors are closely related to some core benefits that the jury institution brings to a democratic society. In countries such as the United States, where voting is not mandatory, empirical research has shown that jury service has been responsible for improving political engagement and the democratic civic attitudes of those who served as jurors, to the point of increasing the turnout of voters in elections after jury duty.<sup>438</sup> There seems to be a strong connection between civic engagement and jury duty in countries with a long tradition in jury trials and the Argentine people are expressing similar reactions. The sentiment of pride after jury duty (84%) represents a powerful indicator of how jury service has already enhanced the democratic civic attitudes of the Argentine people.

In addition, many have viewed jury service as having an educative function, as it works as a training for the people about the law and the justice system.<sup>439</sup> In the opinion of Tocqueville, the greatest advantage of the jury is that “it contributes to increase the natural intelligence of a people.”<sup>440</sup> While the transplant in Argentina is too novel and further research is needed before reaching definitive conclusions, I contend that the educational function of the jury system<sup>441</sup> is already developing. One vivid reflection of the extent of the civic and educational impact of the jury in Argentina is the story of a 50-year old juror from Piedra del Aguila, a remote town of Neuquén. She never finished primary school, did not know how to read and was not familiar

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<sup>433</sup> *Ibid* at 25.

<sup>434</sup> *Ibid*.

<sup>435</sup> *Ibid* at 43.

<sup>436</sup> *Ibid* at 25.

<sup>437</sup> *Ibid* at 44.

<sup>438</sup> See generally Gastil et al., *supra* note 34.

<sup>439</sup> Dufraimont, *supra* note at 213.

<sup>440</sup> Alexis de Tocqueville, *American institutions and their influence* (New York: A. S. Barnes & Co, 1854) at 289.

<sup>441</sup> Dufraimont, *supra* note 381 at 213.

with government affairs prior to being summoned. After the experience of serving in a jury, she asked members of the court if she could serve in other trials and most significantly, she decided to return to school and finish her primary and secondary school degrees.<sup>442</sup>

As suggested at the beginning of this chapter, a second part of the report was presented in August 2018.<sup>443</sup> The total of surveyed jurors went from 116 to 200 and the reported numbers included the responses obtained during the first stage of the research (the preliminary report with the firsts 10 jury trials) and the following 7 jury trials, where jurors were also surveyed by the same international researchers. With more trials and almost double the number of surveyed jurors, the figures remained within the same ranges.

For instance, the positive opinion about the way judges conducted trials went slightly up from 89% to 92%, while the usefulness of the instructions went slightly down from 95% to 90%.<sup>444</sup> The average of jurors satisfied with the outcome of deliberations remained at in 85%<sup>445</sup> and the sense of pride after jury service went slightly up, from 84% to 85,2%.<sup>446</sup> In addition, jurors kept expressing similar reasons to recommend the experience to other citizens.<sup>447</sup>

The report also showed almost the same levels of increased confidence in the judiciary (around 66%). An average of 36,9 % reported enhanced confidence in the local government, but for the majority (60,3%) the experience did not have any impact in their confidence towards the local government. Finally, only 2,8% ended up trusting the government less than before jury service.<sup>448</sup> Even so, 74% of the 200 surveyed jurors expressed more willingness to participate in future public and civic issues after the experience.<sup>449</sup> These rates reinforce some of the remarks

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<sup>442</sup> Melisa Stopansky, “Asociación de Juicios por Jurado consideró ‘restrictivo’ el proyecto de Cornejo” *El Sol* (21 Abril 2018), online: <<https://www.elsol.com.ar/asociacion-de-juicios-por-jurado-considero-restrictivo-el-proyecto-de-cornejo>> [Stopansky].

<sup>443</sup> La Experiencia de ser Jurado, *supra* note 365.

<sup>444</sup> *Ibid.*

<sup>445</sup> *Ibid.*

<sup>446</sup> *Ibid.*

<sup>447</sup> *Ibid.*

<sup>448</sup> *Ibid.*

<sup>449</sup> *Ibid.*

that were reached *supra*. First, that the jury is aiding the judiciary to uplift its eroded image, fulfilling one of the main purposes of the transplant. Second, that the Argentine jury is also witnessing the connection that exists between jury duty and civic engagement, as has been observed in countries with a long tradition in trial by jury.

In the end, apart from the lessons and conclusions that can be drawn from the first stage of report, the second stage of the research also leaves us with some important conclusions. During the second stage, researchers doubled the number of surveyed jurors, reaching 200 respondents. Findings show that numbers remained within the same ranges for the period of two years or, in general, the positive opinions went slightly up. For a period of more than two years (May 2016 to July 2018) 200 jurors were consistent in their answers and comments, showing similar feelings, fears and reactions towards the jury system, the judiciary and the government. Moreover, the answers provided by jurors in this “two step” survey have also been consistent with what fellow jurors previously expressed in the questionnaires run by the Criminal Judicial Office in 2015.

With several issues to improve, such as the litigation techniques displayed by the parties, the transplant is replicating some of the good (and bad) characteristics of the jury that we are able to find in donor’s soil. Positive aspects include an enhanced view of the judiciary and the display of a willingness to participate in civic affairs. Negative aspects include the dominant participation of more educated jurors during deliberations. All in all, the overall findings of both investigations may allow us to infer that we are in the face of a robust, steady and consistent transplant.

### **4.3 Jurors in Buenos Aires**

In 2015, the Province of Buenos Aires conducted surveys in the judiciary departments of San Isidro, Bahía Blanca, Mar del Plata, San Martín, Pergamino, Azul, Necochea, and Junín.<sup>450</sup>

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<sup>450</sup> Informe y Encuestas, *supra* note 44.

Voluntary questionnaires were submitted before and after jury service and the identity of the surveyed jurors remained anonymous. The research covered 11 jury trials from May to September 2015, where 132 jurors served in criminal juries.

I'm aware of one important limitation regarding these surveys, namely, that the content that was made publicly available is not as rich as the one from Neuquén. Consequently, this section will not cover the same amount of data regarding jurors that served in Buenos Aires. Notwithstanding, even if the amount of collected material is not as much in quantity, its content is of high quality as well as reliable, as it has been collected first-hand by the Ministry of Justice of the province of Buenos Aires.

Another limitation is that the research covered 11 trials from the first year of implementation of the jury system. By the end of 2018, 278 jury trials had taken place in Buenos Aires<sup>451</sup> and my analysis will only cover the responses of those who served from May to September 2015. However, as explained in the introduction of this chapter, the content of the survey is not analyzed in isolation but in the context of the entire reform and comparing its figures with those from the province of Neuquén. In addition, the responses of 132 surveyed jurors may still allow us to draw some main conclusions and to evaluate the initial course of the transplant.

As in Neuquén, researchers in Buenos Aires were also interested in the initial reaction of lay citizens. Around 50% of respondents agreed that they had feelings of concern and rejection when summoned for jury duty.<sup>452</sup> The same question was asked in the questionnaires run by the Criminal judicial Office in Neuquén and consistent numbers can be identified. There too, 44,44% of jurors expressed anxiety and concern, and 10,58% rejection when they learned that they had been summoned.<sup>453</sup> Despite their initial reaction, in Buenos Aires, 83,16% of respondents mentioned that they never thought about excusing themselves from jury duty.<sup>454</sup> A slight difference is that jurors in Buenos Aires registered a higher rate than those from Neuquén who

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<sup>451</sup> In 2015, 38 jury trials, 59 trials in 2016, 77 trials in 2017 and 104 in 2018.

<sup>452</sup> Informe y Encuestas, *supra* note 44 at 15.

<sup>453</sup> Feres, *supra* note 42 at 3.

<sup>454</sup> Informe y Encuestas, *supra* note 44 at 16.

answered the same question. In that occasion, 70,9% of Neuquén jurors expressed that they never thought about excusing themselves.<sup>455</sup>

Jurors from both provinces responded at similar rates to the same type of questions. This may indicate that, as what happened in Neuquén, jury trials were a novelty for lay citizens in Buenos Aires and initial feelings of rejection and concern should not be seen as unexpected reactions. As in Neuquén, it is the early attitude of commitment portrayed by lay citizens in Buenos Aires that is remarkable. The great majority never considered excusing themselves from their civic duty and showed up in court.

In chapter III we analyzed an issue that arose in the city of Bahía Blanca, which constituted a problem for the implementation of trial by jury in Buenos Aires. During the early stage of implementation of the system, summoned jurors were not showing up in court.<sup>456</sup> Nevertheless, the optimistic results obtained from the questionnaires cannot be contrasted with the specific case of Bahía Blanca. First, because the survey was also conducted in the other seven jurisdictions, therefore the 83,16% rate corresponds to all eight jurisdictions. Second, because the issue in Bahía Blanca was not the lack of commitment on the part of lay citizens, but the uncooperative attitude of some members of the judiciary, combined with the use of inefficient methods to summon jurors and bring them to court.<sup>457</sup>

As part of the questionnaire, jurors were asked about their previous knowledge about criminal procedures and only 11,78% reported to have some.<sup>458</sup> This low rate, as happened in Neuquén is also influenced by the fact that those who are versed in the law, such as lawyers, magistrates and notaries are disqualified from serving on a jury.<sup>459</sup> Despite the lack of knowledge about criminal procedures, more than 97% indicated that they did not have any difficulty understanding the

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<sup>455</sup> Feres, *supra* note 42 at 3.

<sup>456</sup> Ch 3 at 86-91.

<sup>457</sup> *Ibid.*

<sup>458</sup> Informe y Encuestas, *supra* note 44 at 15.

<sup>459</sup> Buenos Aires Jury Law, section 338 *bis*.

judge's instructions.<sup>460</sup> Coincidentally, the survey run in Neuquén by the international group of researchers showed that only 2% of jurors reported problems understanding the judge.<sup>461</sup>

In the case of Buenos Aires, respondents reported no difficulties understanding the parties (97,31%),<sup>462</sup> a number far more optimistic than the rates registered in Neuquén for the same or similar questions. As seen *supra*, the survey run by the Criminal Judicial Office of Neuquén showed that 68,78% of jurors had no problems understanding the parties.<sup>463</sup> Moreover, the surveys conducted in Neuquén from 2016 to 2018 indicated that, in 32% of cases, the performance of defence attorneys was considered “poorly skilful” or “not skilful”, while prosecutors registered a rate of 18% and private prosecutors one of 23%.<sup>464</sup>

This disparity between Buenos Aires and Neuquén in terms of assessing the performance of the litigants requires further research to be clarified. While we may infer that the quality of training received by litigants in both provinces might have been different, therefore causing this disparity, in reality there is insufficient information to support this assumption. On the contrary, the high level of acquittals registered in the city of Bahía Blanca represents an example of the lack of training of prosecutors in that city.<sup>465</sup> This undermines the hypothesis that litigants in Buenos Aires may be better prepared for a jury trial than their colleagues in Neuquén. Perhaps, it may not be enough to ask jurors about their difficulties understanding the parties and more in-depth questions might need to be asked in future surveys so as to corroborate the reasons behind such variance between the two provinces.

Regarding the experience of serving in a jury in Buenos Aires, 95,5% of jurors rated it as positive.<sup>466</sup> As seen above, both of the surveys conducted in Neuquén also portrayed overwhelmingly positive responses. The survey that concluded in 2015 indicated that 88,36% of

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<sup>460</sup> Informe y Encuestas, *supra* note 44 at 15.

<sup>461</sup> Hans et al, “Proyecto de Investigación,” *supra* note 39 at 14.

<sup>462</sup> Informe y Encuestas, *supra* note 44 at 15.

<sup>463</sup> Feres *supra* note 42 at 5.

<sup>464</sup> Hans et al., “Proyecto de Investigación,” *supra* note 39 at 16.

<sup>465</sup> Ch 3 at 86-91.

<sup>466</sup> Informe y Encuestas, *supra* note 44 at 15 (66,3% as “very good,” 30,7% as good and only 1,76% rated it as “regular” and 0,38 % as “very bad”).

jurors rated the experience as positive or very positive,<sup>467</sup> and the same can be said with respect to 89% of the jurors surveyed after 2016.<sup>468</sup>

Finally, researchers in Buenos Aires asked jurors about any changes in their perception of the criminal justice system after jury duty. The report showed that the great majority of respondents (90,5%) ended up with a better image than the one they had before serving in a jury.<sup>469</sup> What is more, 71,91% responded affirmatively when asked if they would repeat the experience.<sup>470</sup> Similarly, surveys in Neuquén also showed optimistic rates about the changes experienced by jurors. In Neuquén, 73% expressed an enhanced view of the local judiciary<sup>471</sup> and 78% would recommend the experience.<sup>472</sup>

Buenos Aires is showing much greater positive rates than Neuquén with respect to the enhanced view of the justice system. While the sample is too small to reach definitive conclusions, I believe that there is an element that influences this overwhelming 90,5 % positive rate. Buenos Aires has the greatest concentration of population of the country (39%) and almost half of first-degree murders take place in that province (45%). In addition, five cities of Buenos Aires are among the ten Argentinian cities with the highest rates of first-degree murders.<sup>473</sup> Crime in Buenos Aires is a growing and noticeable issue, and within that context, people are distrustful of the criminal justice system, as they believe it is corrupt and inefficient. We may infer that, after a first-hand experience with the criminal justice system, the lessons learned about a fair procedure, the rights of defendants and the role of the judge and the parties, citizens are more prone to change their minds. In conclusion, crime is greater in Buenos Aires and so may be the reaction of citizens after a first-hand experience with the justice system through jury duty.

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<sup>467</sup> Feres, *supra* note 42 at 5.

<sup>468</sup> Hans et al, “Proyecto de Investigación,” *supra* note 39 at 24.

<sup>469</sup> Informe y Encuestas, *supra* note 44 at 14.

<sup>470</sup> *Ibid.*

<sup>471</sup> Hans et al, “Proyecto de Investigación,” *supra* note 39 at 23.

<sup>472</sup> *Ibid* at 25.

<sup>473</sup> See Laura Jaitman, “El delito en Argentina, según sus principales fuentes de datos” *Foco Económico* (23 July 2017), online: <<http://focoeconomico.org/2017/07/23/el-delito-en-argentina-segun-sus-principales-fuentes-de-datos/>>.

#### 4.4 Final remarks

As indicated in chapter III, the outcome of this transplant should be measured and defined in proportion to the perils and challenges it has managed to overcome. While the role of the bench and the bar during the transplant seems to be more connected to these perils and challenges, the analysis of its outcome from the perspective of society is also significant in the assessment of success.

Learning about jurors' reactions and opinions after jury duty carries multiple benefits. It represents the best way to identify that some of the main purposes of the reform are really happening. For example, it is through the analysis of jurors' responses that we may start to recognize that jury trials are helping the judiciary to enhance its image and bridge the existing gap between judges and society. What we learned after analyzing the questionnaires is that, in both provinces, results were compelling about the matter. The great majority of jurors agreed that the experience brought them closer to the judiciary branch. This confirms what has already been suggested in chapter III (in which the same goal was analyzed from the judges' perspective), namely, that judiciary and society ended up on much better terms after the implementation of trial by jury.

In terms of extending these results to an enhanced view of the rest of the government branches, results were not as reassuring. While the implementation of the jury is not undermining the image of the government, it is not contributing to a better image either. Perhaps, a change of perception about the local government after jury duty was too much to ask from this transplant at this stage.

However, what can indeed be asserted is that these legal reforms represent “an opportunity for society to re-interpret the principles it stands for”.<sup>474</sup> A shared feeling among Argentinians is the claim for more legitimacy and efficiency to fight crime. In general, this claim, combined with the lack of knowledge about the criminal justice system helps to develop feelings of resentment

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<sup>474</sup> Nelken, *supra* note 25 at 14.

against the judiciary, which are not healthy for a democratic society. After years of military regimes, the Argentine people need to continue to develop a strong belief in their democratic institutions and the path is to bring citizens closer to justice. In this sense, jurors, as part of society, are now in a better position to understand the complexity of the criminal justice system and re-interpret and change some of the views they had before they were summoned.

As indicated in chapter III, part of a successful transplant could be attributed to its capacity to also serve a larger purpose. In a time where the “classic” jury is in decrease in many common law jurisdictions,<sup>475</sup> its implementation in Argentina reclaims some of its core values and functions. I believe that a successful outcome of the transplant is also reflected in the possibility of contemplating how the core functions attributed to the “classic” jury are being replicated in Argentina. For example, both surveys showed an increase of interest in civic matters, reflected in the deep sense of pride expressed by the majority of jurors and the willingness to repeat the experience or recommend it to other citizens. While further research need to be conducted, some signs of the educational mission of the jury are also witnessed in Argentina. The story of the juror in Piedra del Aguila is an outstanding example of that.

What is more, although further research should be pursued, what jurors expressed in these questionnaires leaves room for some learned lessons. For example, five years after implementing jury trials, jurors in Neuquén kept expressing the same lack of knowledge about trial by jury (87%) when summoned.<sup>476</sup> Today, Neuquén is trying to deal with this issue, for example, by distributing a handbook about jury duty in all secondary schools,<sup>477</sup> but surveys show that more efforts should be made in order to educate the people about this new civic duty. In general, the positive outcomes of reforms rely on the cooperation of society to be effective. The more the people know about the content of the reform and how it affects them, the higher are the chances of a successful outcome.<sup>478</sup>

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<sup>475</sup> Hans, “Trial by Jury”, *supra* note 23 at 484.

<sup>476</sup> La Experiencia de ser Jurado, *supra* note 365.

<sup>477</sup> Manual, *supra* note 324.

<sup>478</sup> Markovits, *supra* note 32 at 99.

Finally, the overall opinion of jurors from Buenos Aires and Neuquén with regards to trial by jury is extremely positive for the spreading of the institution across the country. We may infer that among the many elements that provincial governments may consider when embarking in a reform, the opinion of society is a crucial component. While the perception of the government did not change so drastically after jury duty, the overall results of the surveys in both jurisdictions are still highly encouraging, so as to prompt legal change in many more provinces. To boost a “contagion effect” across the country is nothing but a positive and successful outcome for a transplant, something that will be analyzed next, in the conclusion of this thesis.

## Chapter 5: Conclusion

### 5.1 Review of the development of the transplant thus far

*Diffusion often involves a long drawn out process, which, even if there were some critical moments, cannot be understood without reference to events prior and subsequent to such moments.*<sup>479</sup>

The justice system in Argentina is an heir to the inquisitorial Continental European model of justice. The country shaped its legal system on the basis of a legal culture that mirrored that of its former colonizer. Apart from the features that characterize the inquisitorial criminal procedures, until 2005, the country had no mechanism for lay participation in legal decision-making. A defendant in a criminal trial could only be tried and sentenced by three professional justices, under majority rules.

While the legal culture of the country was embedded in inquisitorial procedures, its National Constitution from 1853 was inspired by the United States Constitution. Today, three different sections of the National Constitution establish the requirement of trial by jury.<sup>480</sup> However, the country still awaits a federal jury bill. Despite the fact that many bills have been submitted to the National Congress, none of these was ever passed. Instead, the implementation of lay participation started as a provincial phenomenon that is steadily spreading countrywide. Since 2005, seven provinces have adopted some form of lay participation for criminal cases. The possibility of adopting their local procedural codes and system of courts has been part of the autonomy granted by the National Constitution to the provinces.<sup>481</sup>

This research has traced the origins of this steady change towards the implementation of lay participation, especially regarding the diffusion and reception of the “classic” jury from the common law system, most relevantly in the United States. It identified some critical events and framed them as part of a larger economic and socio-political context that contributed to the

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<sup>479</sup> Twining, *supra* note 76 at 34.

<sup>480</sup> *National Constitution*, *supra* at 15.

<sup>481</sup> Langer, “From Legal Transplants,” *supra* note 8 at 54, n 260.

development of Argentine legal culture. The latest history that influenced the transplant of the jury may be traced to the 1970s when the country suffered a wave of military dictatorships that culminated in the 1980s. During that period, a part of the judiciary branch was aiding the military government through an active political involvement or simply by looking away. Even if democracy brought with it the appointment of new judiciary members, the reputation of judges was already sullied.

During the 1990s, Argentina embarked on a series of legal reforms with the intention of improving the image of the judiciary. The aim was to increase its legitimacy, transparency and efficiency. In addition, the commitment was to bridge the gap between society and the judiciary, so reformers were looking for new features that diverged from former inquisitorial procedures. In 1992, the Federal Code of Criminal Procedure was reformed and the “mixed” or “inquisitorial-adversarial” criminal justice system was implemented. In 1994, the country amended its National Constitution and international treaties of human rights were given constitutional supremacy. From the 1990s onwards, many provinces enacted their own Procedural Criminal Codes, implementing adversarial features. Oral and public trials, the division of tasks between prosecutors and judges, and the introduction of plea bargaining, were some of the imported features. All of these reforms were introduced to improve inefficient and outdated criminal procedures and to bridge the gap between society and the judicial branch.

In 2001, the country suffered a deep socio-economic and political crisis that led to the increase of poverty, violence and social unrest. In 2004, a 23-year-old man was kidnapped and murdered, an event that moved national public opinion and generated countrywide demonstrations. That same year, the National Congress introduced some amendments to the Criminal Code, for example, by increasing the penalties of some offenses. The craving for justice also resonated in the province of Córdoba. In 2005, the province enacted a jury law that implanted a “mixed court”, inspired by the Continental European form of lay participation, in which lay jurors and professional judges jointly decide the case.

During those times, foreign institutions and organizations, especially from the United States, intervened and offered help for the implementation of the “classic” model of trial by jury. The groups that were in contact with foreign organizations included members of the national and provincial governments, key actors pushing for reforms, as well as NGOs. Leading these NGOs was a group of young lawyers and law students, guided by more experienced reformers, who had participated in the first stage of reforms from the 1990s.

Finally, in 2011, the province of Neuquén implemented the first “classic” jury. The process was done through legal transplantation, but the law introduced some special features, such as equal gender composition and the use of majority rules in lieu of unanimity.

By 2012, another case shocked the country. In the province of Tucumán, a young woman was abducted for the purpose of human trafficking and prostitution. The 13 defendants that were facing a bench trial for the crime were all acquitted in a suspicious ruling. The gap between society and magistrates increased. Although the rage of society triggered the need for a profounder democratization of justice, the National Congress did not respond with a federal jury bill. Once more, the change came from the provinces.

In 2013, the Province of Buenos Aires enacted a provincial jury law following the common law model and the transplant started to develop province by province. In 2015, Chaco and Río Negro enacted jury laws, but today they have not yet been implemented. In 2018, Mendoza and San Juan also enacted jury laws. By the time this conclusion is being revisited, Mendoza had witnessed its first jury trial with no inconveniences,<sup>482</sup> and San Juan is expected to have jury trials in 2019. Other provinces, such as Entre Ríos, Chubut, Santa Fe, Jujuy, and Santa Cruz are currently debating jury bills in their local legislatures, all inspired by the “classic” jury.

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<sup>482</sup> Roxana Badaloni, “Un jurado popular condenó a prisión perpetua al guía de montaña que apuñaló a su mujer y mató a dos policías en su huida” *Diario Clarín* (3 May 2019), online: <[https://www.clarin.com/sociedad/jurado-popular-condeno-prision-perpetua-guia-montana-apunalo-mujer-mato-policias-huida\\_0\\_ekdxapsyU.html](https://www.clarin.com/sociedad/jurado-popular-condeno-prision-perpetua-guia-montana-apunalo-mujer-mato-policias-huida_0_ekdxapsyU.html)>.

## 5.2 The contagion effect: provincial laws and unique features

Despite the guarantee of juries in Argentina's national constitution, Argentina has failed to implement juries at a federal level. This apparent failure may now be yielding to steady progress towards the spreading of the "classic" jury across the country. Neuquén implemented trial by jury by importing the model from common law countries. However, the jury laws that were enacted across the country were the product of what could be deemed as a within country transplant.

This research suggested that due to the way the transplant was performed, province by province, we were in the face of a unique type of reform. Moreover, it suggested that this phenomenon enabled local legislatures and legal reformers to borrow laws from fellow provinces while introducing special features and improving aspects of the law. In this section of the conclusion we will evaluate two aspects of this within country transplant. First, we will take a look at some of the content of those enacted laws that await implementation, and to the time-frame of the development. Second, we will take a brief look at Chaco's Indigenous jury as the main example of innovation and adaptation of foreign rules to the local culture.

### 5.2.1 Provincial jury laws and time-frame of the reform

An important measurement of the success of this transplant is the contagion effect among provinces and the content of the jury laws. The province of Chaco enacted a jury law in 2015 and the commencement of jury trials was scheduled for 2016.<sup>483</sup> As of yet, the province is still postponing its implementation. However, an encouraging sign of a coming operationalization of the law was observed by the beginning of 2019. Members of Chaco's executive and judiciary branch met with the AAJJ and discussed the next steps for implementation.<sup>484</sup> This was later

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<sup>483</sup> *Act 7661*, s 4, *supra* note 35.

<sup>484</sup> Provinciales, "El Gobierno avanza en la implementación de la Ley de juicio por jurados en la provincia" *Diario Chaco* (29 January 2019), online: <<http://www.diariochaco.com/noticia/el-gobierno-avanza-en-la-implementacion-de-la-ley-de-juicio-por-jurados-en-la-provincia>>.

followed by the draw of the prospective jurors in August and the promise of a first jury trial in Chaco by October 2019.<sup>485</sup>

In the case of Río Negro, the reform proceeded in two stages. The implementation of jury trials was scheduled for January 2018, once the province completed a first stage of implementing a new adversarial criminal procedural code. Nonetheless, a subsequent law postponed the operationalization of the jury until March 2019.<sup>486</sup> A reassuring sign on the part of the government to comply with this belated date is that the list of prospective jurors for 2019 was already drawn from the provincial public lottery in October 2018.<sup>487</sup>

By the end of 2018, Mendoza<sup>488</sup> and San Juan<sup>489</sup> also enacted provincial jury laws and the first jury trials are expected to commence in 2019. In the case of Mendoza, the province just started to hold jury trials in May 2019. In these 4 provinces, as in Neuquén, the jury is reserved for the most serious crimes, in which case, that form of trial becomes mandatory.

During this within country transplant, most jury laws from 2011 to 2018 shared an interesting feature. While most laws resembled each other and provincial legislators borrowed from provincial laws already in force, in general, unanimous verdicts were resisted. This caused each jurisdiction to come up with its own system. Chaco and Mendoza required unanimous verdicts of twelve people to convict or acquit, while Río Negro adopted a variant of the English approach.<sup>490</sup> In San Juan, the law mandates a majority of 8-4 to convict for felony offenses and 10-2 when the crime contemplates a possible penalty of life in prison. The problem with the lack of a federal

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<sup>485</sup> Locales, “Juicio por jurados en el Chaco: 438 serán los primeros convocados” *Diario Norte* (7 August 2019), online: <<http://www.diarionorte.com/article/181992/juicio-por-jurados-en-el-chaco-438-seran-los-primeros-convocados>>.

<sup>486</sup> Law N° 5192, B.O.: 01/05/2017 (Postpones the implementation of jury trials in Río Negro)

<sup>487</sup> Poder Judicial de Río Negro, “Jurados Populares” (24 October 2018), online: <<http://servicios.jurionegro.gov.ar/inicio/web/servicios/jurados/jurados-populares.php>>.

<sup>488</sup> Act 9106, 2018, Ley de Juicio por Jurados de Mendoza (Arg) [Act 9106].

<sup>489</sup> Act 1851, 2018, Ley de Juicio por Jurados de San Juan (Arg) [Act 1851].

<sup>490</sup> Act 5020, 2014, Ley de Juicio por Jurados de Río Negro (Arg); amended 2019. Unanimity is requested to convict or acquit. Nevertheless, if after a reasonable time of deliberation members fail to reach a verdict, the judge will inform them that a majority verdict of 10 out of 12 is accepted (English variant: United Kingdom Juries Act, 1974).

jury law is that the way provincial laws developed in Argentina has caused a disparity among defendants within the different provinces. For the same crime one defendant may be acquitted in Mendoza while in San Juan, another defendant may be facing life in prison.

However, this disparity among laws also allow us to think about the development of the content of these laws with regard to their prospects for success. We may infer that the flexibility to adapt the imported law to the local needs is what might have helped the jury to spread across the country. That the jury reform was not presented as one-size-fits-all<sup>491</sup> may have actually improved the diffusion of the transplant. The “province by province” phenomenon and the distinctions among jurisdictions suggest a society that produces rules and legal systems through complex processes of reform that are limited by its legal culture.<sup>492</sup> It may be that, due to the leeway enjoyed by legislators in the design of local laws, many jury laws are being discussed and enacted across the country. What is more, all the enacted laws that followed Neuquén kept valuable features introduced by this pioneer province, such as the equal gender composition of the panel. In addition, most of these laws also made further improvements. Except for San Juan, subsequent laws require unanimous verdicts or – at least – contemplate an improved system of majorities.

Another indicator of the efficacy of this transplant may be analyzed from the perspective of its timeframe. I believe it is not by chance that today more provinces are joining the transplant and implementing trial by jury. The path walked by Buenos Aires and Neuquén has not been ignored by fellow provinces. Today, local governments feel more confident about embarking on legal change because they have witnessed the positive results obtained in those two jurisdictions. In that way, these provinces benefited not only from the ancient knowledge of common law countries but also from the novel experience of Buenos Aires and Neuquén.

As this conclusion is being written, there are valuable indicators about the spreading of the jury across the country. The implementation of jury trials in Buenos Aires represented a major

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<sup>491</sup> Trubek, *supra* note 313 at 92.

<sup>492</sup> Friedman, *supra* note 60 at 130.

milestone in the history of this reform, as the province represents the “heart and soul” of the country. Nonetheless, it was only after witnessing the early outcome of the reform that the transplant gained momentum among neighbor provinces.

It is very complex to analyze the current situation in Argentina in terms of the contagion effect across the country. We may agree that reforms are long-term projects,<sup>493</sup> and that the size and importance of the change in Argentina has been such that it required (and still does) an incremental process. However, one cannot overlook the fact that it is not enough to adopt a rule if that adoption is not followed by an actual implementation.<sup>494</sup> San Juan, Mendoza and Río Negro have committed themselves to implement the new system in 2019 and Mendoza has recently fulfilled its promise. Moreover, the law in Río Negro specified a date and the government has already drawn the list of prospective jurors for the entire year. In the case of Chaco, jurors have also been drawn. However, we learned in previous chapters that Argentina is a highly politized country threatened by constant socio-economic issues that affect the course of events.

In addition, in general, bills and reforms are not appreciated from a common weal perspective but from an individualistic interest. The delay in the implementation of the jury in Chaco represents a good example. Back in 2013, Mr. Jorge Capitanich was governor of Chaco. During his term the provincial legislature enacted the jury law that was the outcome of the coordinated work between the legislature and the AAJJ. The law was enacted in September 2015 but Capitanich term finished three months later, in December 2015. With a new governor in charge, the power equation changed and the law awaits implementation. The example of Chaco shows that there was an element that was neglected in the course of the transplant, the building of long-lasting connections between reformers and the local governments that transcend the leader in charge.

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<sup>493</sup> Trubek, *supra* note 313 at 92.

<sup>494</sup> Nelken, *supra* note 25 at 38.

Consequently, a thorough analysis of the actual implementation of the jury in Chaco, Río Negro and San Juan should not underestimate the fact that 2019 is a year of elections. The country will be electing new provincial governors and a new president between May and October. The real question is whether these 2 provinces will be able to implement the system prior to any change in the power equation. Yet, the fact that this is a year of elections for Argentina may not necessarily play against the future of the transplant. We learned that the development of the jury in Argentina has responded to the political arena in the past. In fact, we observed that the law in Buenos Aires was submitted by the then-governor during the time he was running for the presidency. Local governments may use the enactment and implementation of jury laws as means to enhance their image, even though the surveys from Buenos Aires and Neuquén showed that it was the judiciary -and not the executive branch-that registered a significant improvement of its image among surveyed jurors.

Bearing in mind that this thesis recognized the limits of studying an ongoing reform, what may still be asserted is that a contagion effect is observed across the country with more and more provinces joining the reform. I argue that this contagion effect reflects the efficiency and success of the transplant. The fact that Mendoza fulfilled the promise of having the first jury trials in 2019 while this conclusion is being written conveys the idea that this is a steady transplant in motion. However, my argument still presents a limitation, namely that the actual implementation of other enacted laws should happen sooner rather than later. A successful legal transplant should involve the passage from the “law on the books” to the “law in action.” Even if reforms are long-term projects, my assessment on the current success of the transplant may be undermined if local governments postpone the implementation of the system for too long as we witnessed in Chaco.

### **5.2.2 The Indigenous jury in Chaco**

The provincial jury laws in Argentina incorporated some level of innovation of the imported common law system, especially in terms of underrepresentation of minorities inside the jury room. All seven laws, including the “mixed jury” of Córdoba, reflect a concern for the likely underrepresentation of women in jury panels, which has been addressed by requiring that half of

the panel should be comprised of women. Córdoba, Neuquén and Buenos Aires have been strictly enforcing this legal requirement throughout these years without any major issues. The uniqueness of this innovation has been applauded by international experts on the jury. Moreover, in 2019, jury experts from the United States addressed this quota approach to gender representation in a paper presented at the Law and Society meeting in Washington, DC.<sup>495</sup>

Apart from the underrepresentation of women, due to the large size of Indigenous communities across the province, there was concern about the possible underrepresentation of Indigenous people. Lawmakers did not ignore the fact that, even if a great part of Chaco is populated with Indigenous people, the vast majority of the population is not Indigenous. Chances were that, without a specific devised solution, even if the Indigenous community is part of the general electoral list, only a small number were going to be drawn in the provincial annual lottery that draws prospective jurors.<sup>496</sup> As a result, an avant-garde law was developed, establishing that a twelve member jury shall be composed of six Indigenous jurors, if the case involves Indigenous people.<sup>497</sup>

With the innovation of the Indigenous jury, Argentina departed from the traditional Anglo-American conception of what is considered randomness<sup>498</sup> and representativeness<sup>499</sup> during the jury selection process. With this departure from its donors, it created a feature that foresaw a

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<sup>495</sup> Shari S. Diamond & Valerie P. Hans, “Gender on the Argentine Jury” (Paper delivered at the Law and Society Annual Meeting, Hyatt Regency, Washington, DC, 31 May 2019) [unpublished].

<sup>496</sup> Harfuch et al, “El Jurado Indígena” *supra* note 414.

<sup>497</sup> *Act 7661*, s 4, *supra* note 35 (The law provision states that when both the accused and the victim of a crime belong to the native tribes, Qom, Wichi or Mocoví, half the jury of twelve members must consist of men and women of the same Indigenous community)

<sup>498</sup> *R v Kokopenace* [2015] 28 SCC 402 [*Kokopenace*] In Canada, randomness implies that neither the jury roll nor the empaneled jury need to proportionately reflect the number of a community. To meet the standard of impartiality, all that is necessary is that both roll and panel are produced through a random selection process.

<sup>499</sup> *Ibid* at 399 [The majority of the Supreme Court of Canada stated that: Representativeness is an important feature of our jury system, but its meaning is circumscribed. What is required is a representative cross-section of society, honestly and fairly chosen. With respect to the jury roll, representativeness focuses on the process used to compile it, not its ultimate composition. To determine if the state has met its representativeness obligation, the question is whether the state provided a fair opportunity for a broad cross-section of society to participate in the jury process (...) to ensure that there is an opportunity for individuals with varied perspectives to be included on the jury, and it seeks to preclude systemic exclusion of segments of the population].

major issue of underrepresentation of Indigenous peoples, a minority that suffers the lashes of colonialism on a daily basis, and has been victim of abuse for centuries.<sup>500</sup>

While we may contend that the Chaco jury law would not be able to fix a history of mistreatment of Indigenous people or other minorities, it may still become part of a progressive healing process. In addition, while some may consider it too premature to talk about uniqueness, innovation, or adaptation when Chaco has yet not implemented the law, the enactment of a law that takes this minority into account matters, as its existence already serves a variety of purposes.

As happens in other countries with Indigenous populations, Indigenous peoples in Argentina have long rejected the country's criminal justice system, as it has failed them too many times in the past, and because it is at odds with their values and ideologies. Moreover, since their view of justice walks hand in hand with their claim to self-government inside communities, they frequently associate the justice system with the imposition of the Anglo and European form of prosecution. Nonetheless, against many odds, the Indigenous communities in Chaco have shown their support towards the implementation of a representative jury.<sup>501</sup> In a country where they feel invisible and marginalized, the promise of an Indigenous jury works as a tool to enhance their visibility. It is a way in which the state acknowledges and legitimizes their cause, by providing an answer at the level of the judiciary. Perhaps, this is why, during the legislative debates for the Chaco trial by jury law, the President of the Commission on Indigenous Affairs pronounced his open support for the introduction of a form of mixed jury, composed of both Indigenous and non-Indigenous people, in lieu of a jury solely composed of Indigenous peers.<sup>502</sup>

When compared to a bench trial, one of the most valuable features of the jury, is the collective approach achieved by a group of peers. Juries contribute to the outcome of the trial through their

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<sup>500</sup> See more about the situation of Indigenous peoples in Argentina at Comunidades Indigenas, CELS online: <<https://www.cels.org.ar/web/tag/comunidades-indigenas/>>.

<sup>501</sup> En los Medios, "The Jury Trial in Chaco: Leaders of Indigenous Peoples Assembled Group of NGOs" (25 September 2016), *AAJJ*, online: <<http://www.juicioporjurados.org/2016/09/the-jury-trial-in-chaco-leaders-of.html>> [Leaders].

<sup>502</sup> House of Deputies, Resistencia, Province of Chaco, Argentina. Meeting No 28, Sess No 23 (02 September 2015) at 189 (Hon Orlando Charone), online (pdf): *Chaco's Legislature* <[http://legislaturachaco.gob.ar/VersionesTaquiograficas/S\\_O\\_DEL\\_02\\_09\\_15.pdf](http://legislaturachaco.gob.ar/VersionesTaquiograficas/S_O_DEL_02_09_15.pdf)>.

multiple life experiences, the variety of standpoints, based on a wide-range of backgrounds that shaped the group before it sets foot inside the jury room. With a homogenous jury, those goals are hardly achievable, mainly in cases where Indigenous people are either victims or defendants. This is due to the fact that, either consciously or unconsciously, race and stereotyping<sup>503</sup> tend to get in the way during deliberations. Even in a progressive society, it is very unlikely that non-Indigenous jurors are going to be able to make Indigenous world views relevant during the fact-finding process.<sup>504</sup>

While it is real that an affirmative action, such as mandatory Indigenous representation, will not solve the problem for many other minorities, its design operates as a window to reassess the scope of possibilities available to include minorities on the jury panel. This does not mean that the Anglo-American donors never considered potential solutions to increase the numbers of minorities on the jury panel,<sup>505</sup> or that other scholars did not propose mandatory quotas for minorities before.<sup>506</sup> However, if they ever hesitated about its feasibility or wondered about its reasonable chances of success, the Indigenous jury holds the potential to become an experimental laboratory where we might be able to test how does this “affirmative action design” works out. While a successful legal transplant should involve the passage from the “law on the books” to the “law in action”, the study of this transplant should not disregard the innovation offered by Chaco’s law. Moreover, aside from its level of innovation, this non-operationalized law still

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<sup>503</sup> People incur in stereotyping when they make “statements about the group that are (at least tentatively) accepted as facts about every member.” Conf. Emma Cunliffe, “Judging, fast and slow: using decision-making theory to explore judicial fact determination” (2014) 18:2 Int’l J Evidence & Proof 139 at 150 citing Daniel Kahneman, *Thinking, Fast and Slow* (Toronto: Doubleday Canada, 2011) at 168.

<sup>504</sup> Christine Boyle & Marilyn MacCrimmon, “To Serve the Cause of Justice: Disciplining Fact Determination” (2001) 20 Windsor YB Access Just 55 at 81, citing D. Stack, “The Impact of RCAP on the Judiciary: Bringing Aboriginal Perspectives into the Courtroom” (1999) 62.

<sup>505</sup> For instance, in 1955, Justice Sissons from the Northwest Territories Territorial Court understood that, in a case where the accused was an Eskimo, a jury of his peers would have to necessarily include members of his community (see Mark Israel, “The Underrepresentation of Indigenous Peoples on Canadian Jury Panels” (2003) 25 Law and Policy 37 at 48); In the United States, the state of New York has made it possible for citizens to volunteer for jury duty, as a way of increasing the number of minorities serving in juries [see First Nations Representation on Ontario Juries, Independent Review by Order-In-Council 1388/2011 (February 2013) online: *Ministry of the Attorney General*: <[https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/First\\_Nations\\_Representation\\_Ontario\\_Juries.html](https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/First_Nations_Representation_Ontario_Juries.html)>].

<sup>506</sup> Marianne Constable, *The Law of the Other: The mixed jury and Changing Conceptions of Citizenship, Law, and Knowledge* 1<sup>st</sup> Ed (Chicago and London: University of Chicago Press, 1994) at 43. Constable explains the view of Sheri Lynn Johnson that proposed to introduce a mandatory inclusion of racial minorities on the jury panel.

displays a certain level of success in the way the law was designed. Reformers and legislators clearly heard the concerns of the Indigenous community, and as a result, the indigenous community today supports this implementation.<sup>507</sup> In addition, the success of the jury law in Chaco is also reflected on how it highlights the value of adapting the law of the donor to the legal culture of the recipient. Since Chaco's legal culture includes the Indigenous world views and beliefs, the fact that the framers of the law anticipated the role played by the legal culture of Indigenous people may be deemed as a sign of success. If part of the effectiveness of the law is related to the cooperation of the community,<sup>508</sup> then the involvement of Indigenous people in the making of the law represents a first step towards this cooperation.

### **5.3 Final remarks**

#### **5.3.1 Why now?**

When I describe the implementation of trial by jury in Argentina to foreign colleagues, most of them find it difficult to understand, why Argentina wants jurors today. Why not just stay loyal to the justice delivered by professional judges? It is only when I explain to them the socio-political history of the country, the impact of the inquisitorial heritage in the legal culture and the changes that the jury system brought with it, that they are able to comprehend the importance of this research and the magnitude of the transplant for the Argentine criminal justice system. So, while the analysis of a transplant in motion may leave us with many questions, we may agree that this research has been able to achieve several purposes.

It was able to track the history of a legal reform that was entangled in the course of military governments, economic crises, and socio-political events that affected its progress and outcome. Disruptive events and high-profile cases, such as the kidnaping and later murder of 23-year-old Blumberg, allowed us to find an explanation of how and why the jury is flourishing in Argentina, after 166 years of non-compliance with three constitutional mandates. This thesis has been able

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<sup>507</sup> Leaders, *supra* note 501.

<sup>508</sup> Markovits, *supra* note 32 at 99.

to connect the socio-political events that triggered the implementation of jury trials as the last stage of a series of reforms that started over three decades ago, in which other adversarial features were previously imported.

### **5.3.2 An extraordinary reform**

Since Argentina is not the only country undertaking legal reforms, this research has been able to establish why its study represents such a special and unique enterprise. On the one hand, we learned that the implementation of trial by jury escaped the usual way of performing a legal transplant, from one donor country to a recipient country. Instead, jury trials in Argentina developed thanks to the initiative of some of its provinces, a phenomenon that caused a multilayered transplant, which involved a set of complex and dynamic elements. In this sense, this research paid attention to the connection of the transplant to domestic politics, to the role of local governments, justices, legal reformers, and legislators, and to the scope of their power during the reform. The thesis observed the influence played by the different alliances that were built and dismantled, including the use of foreign resources and support from the donor country. This analysis also included the series of obstacles that got in the way in the quest for legal change, for example by examining the resistance posed by the city of Bahía Blanca, Province of Buenos Aires. Moreover, it paid attention to the perils of overlooking these intrusions, reflected for instance in the impossibility of operationalizing the transplant in Chaco, due to a change of the government in charge.

On the other hand, the research showed that the uniqueness of this transplant is revealed by the level of adaptation and innovation displayed by the Argentine jury laws. The country has been able to adapt a common law institution and to translate it into the local civil law context.<sup>509</sup> This translation included the design of innovative features, with the most outstanding example being the design of the Indigenous jury in the province of Chaco. In addition, adaptation has also been identified, as is seen, for example, in the various forms of decision rules implemented by the

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<sup>509</sup> Merry, *supra* note 71 at 52-3.

different provincial laws or in the decision of lawmakers to keep the role of the private prosecutor, a figure which resonates with Continental European procedures. While these adaptations are considered a departure from the “classic” jury, this research has been able to trace and propose some reasonable factors that may have influenced the minds of lawmakers to introduce these modifications. In order to succeed and prevent rejection, laws were manipulated and adaptations were introduced. However, this research showed that the essence of the jury system has not been denaturalized, neither by legislators, nor by legal professionals or members of the court. While the meaning of the imported law incorporated some changes, the Argentine jury was able to efficiently go through a process of adaptation that accompanied its development.

Finally, another element that made the study of this transplant so unique is the fact that the reform proves to be significant not only for the Argentine society. Today, the use of the classic jury is decreasing, and the tendency is to find courts composed of professional judges, or of “mixed courts”.<sup>510</sup> This transplant not only represents a counterexample of the decline of the use of the classic jury but, most importantly, it operates as a reminder of the benefits entailed in the use of jury trials.

The research showed that some of these benefits are now reproduced in Argentine soil. In one of the surveys, judges and litigants were asked: “If you or a family member were accused of a homicide, which system would you prefer?” and 67% of them expressed a preference for a jury trial.<sup>511</sup> In addition, 77% agreed that the jury who served in their trials was heterogeneous and a representative sample of their community.<sup>512</sup> One of the benefits attributed to the jury is its unique ability to reflect community standards.<sup>513</sup> These answers showed that most of the surveyed legal professionals agreed that jurors in Argentina are in the best position to reflect community standards.

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<sup>510</sup> Hans, “Trial by Jury”, *supra* note 23 at 484.

<sup>511</sup> Porterie & Romano, *supra* note 41 at 39.

<sup>512</sup> *Ibid* at 64.

<sup>513</sup> See Shari S. Diamond, “Convergence and Complementarity between Professional Judges and Lay Adjudicators” in Steven D. Penrod & Peter J. Van Koppen, eds, *Adversarial Versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems*, (New York: Kluwer Plenum, 2003) 328.

Moreover, it is also believed that a decision rendered by a jury represents a source of legitimacy for the justice system,<sup>514</sup> and contributes to the increase of credibility towards the judiciary.<sup>515</sup> This alleged benefit of the jury is consistent with the results observed in the surveys conducted in Argentina. The purposes of enhancing the legitimacy of the justice system and the judiciary have been driving forces of the reform. The comment of one surveyed judge who expressed that jurors' decisions are reassuring for the judiciary<sup>516</sup> seems to indicate that, notwithstanding its youth, the jury is already viewed as a source of legitimacy, not only from the standpoint of society but even from those within the judiciary.

In addition, international research has shown that, jury duty also helps to improve civic engagement.<sup>517</sup> Questionnaires from Buenos Aires and Neuquén, as well as the story of the juror from Piedra del Aguila<sup>518</sup> were worthy examples of how Argentine jurors are showing some of the same attitudes as their foreign peers from common law countries, which surpasses the boundaries of the couple of days jurors spend in court.

The fact that Argentina embraced the alleged benefits attributed to the jury, not only puts the jury back in a place of prominence. In view of the level of adaptation that this transplant went through, it operates as an example for other countries involved in institutional and regulatory reforms of domestic legal systems. It conveys the idea that changes to the transplanted law, system or institution are not necessarily detrimental. Instead, a proper look at the unique background of the recipient's environment can help the transplant grow stronger. Moreover, the novel features introduced by the Argentine jury, such as mandatory inclusion of women and Indigenous people, have the potential to become an example, not only for other recipient countries but also for the donor as it may trigger an interest in reevaluating the benefits offered by a modern jury.

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<sup>514</sup> *Ibid.*

<sup>515</sup> Valerie P. Hans, ¿Cuál es la diferencia que hace un jurado? In Valerie P. Hans & John Gastil, eds, *El Juicio Por Jurados, Investigaciones Sobre la Deliberación, el Veredicto y la Democracia* (Buenos Aires: Ad-Hoc, 2014) 21.

<sup>516</sup> Porterie & Romano, *supra* note 41 at 71.

<sup>517</sup> See Gastil et al, *supra* note 34.

<sup>518</sup> Stopansky, *supra* note at 442.

### **5.3.3 Is this a successful transplant?**

This research allowed us to make an assessment about the success of the transplant, and it provided a definition of a success by looking at the purposes pursued and achieved with this reform. It has done so within the specific context of the recipient provinces, in which the role played by the local legal culture was highlighted and given due importance.

What has been considered as one of the measurements for success was whether it has resulted in a more open legal system. This was connected to a need to bridge the existing gap between the judiciary and society. To see if this purpose was achieved the research analyzed the response of higher court magistrates, trial court judges, prosecutors, defense attorneys and lay people who served in jury trials. Surveys of legal professionals showed a vast level of support for the verdicts reached by lay people. In addition, surveys administered to jurors after jury duty revealed a marked increase of confidence towards the judiciary and the criminal justice system. Moreover, these surveys showed high rates of verdict agreement between lay jurors and professional judges, an important indicator of mutual support. However, when the surveys measured the success of the jury in bridging the gap between society and other branches of government, the jury was not very successful in its mission. Responses were not very optimistic with regards to an increased confidence in the executive branch or institutions such as the police forces.

Another indicator of success was whether the transplant has introduced a measure of citizen supervision of the work of State actors, including judges. One purpose pursued with this transplant was to increase the legitimacy of judicial decisions through the involvement of citizens in the decision-making process. In this sense, legal professionals, court members and lay jurors showed great levels of confidence towards the verdicts rendered by jurors. In most cases, members of the bench and the bar showed high rates of satisfaction with the jury's decision. What is more, aside from the reassuring opinions issued by judges in the open-ended questions, the collected data also showed high rates of verdict agreement between the jury and the judge. In most cases, the discrepancy with jurors involved matters such as the jury opting for a lesser included charge and not on matters of guilt or innocence of defendants.

When looking at the reaction of higher court judges to the transplant, the research showed that magistrates have also been contributing to an increase in the legitimacy of judicial decisions. For example, by upholding not guilty verdicts reached by jurors, higher courts have emphasized the supremacy of the jury's verdict over that of professional judges.

In addition, according to my definition of success, this transplant would only be considered successful as long as it has been able to disassemble malfunctional habits and to produce adaptation among the local legal culture (especially amongst judges and legal practitioners). This legal reform sought to transform the criminal justice system by modernizing laws and institutions, even if done through the implementation of an ancient system such as the jury. While former reforms introduced other adversarial features, this stage intended to finally disassemble malfunctioning inquisitorial habits that were rooted in the legal culture of the country. The analysis of the surveys of legal professionals who participated in jury trials portrayed a positive transition to a more robust and comprehensive adversarial system. Surveys were able to identify some of the main problems that litigators had in the process of adjusting to a new form of litigation, which included facing a new audience, comprised of lay people. In fact, this research showed that there were several intrusions that affected the operationalization of the transplant among litigants, for example, the resistance to trial by jury posed by prosecutors in the city of Bahía Blanca.

Yet, this research has been able to reveal that the intention to leave the inquisitorial justice system behind has already begun to bear fruit and, in general, legal professionals are doing a tremendous effort to cope with the changes it involves. Comments such as “*I tell you that we really have a trial when we have juries...*”<sup>519</sup> demonstrate that, notwithstanding the magnitude of the challenge, there is a recognition among the legal professionals about the benefits entailed by this transplant. They are willing to modify former habits in order to make a smooth transition to

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<sup>519</sup> Porterie & Romano, *supra* note 41 at 77.

fully adversarial procedures. Moreover, after the initial rocky road experienced in Bahía Blanca, the city has been showing positive changes and the transplant is positively developing.

What is more, during the course of these years, higher courts also displayed a remarkable support for the transplant and its aim of transforming the criminal justice system. Courts have been consistent in their rulings, adopting foreign jurisprudence and adapting it to the local culture without producing a distortion. Courts resisted the inquisitorial burden and, instead, their decisions have been aligned with the idea that jury trials are positively transforming local legal procedures. For example, magistrates supported the sections of jury laws that prevent the State, and private prosecutors, from appealing a “not guilty” verdict rendered by jurors.

Finally, the definition of success in terms of its ability to fulfil a purpose included the notion of the timeframe of the transplant. The research contemplated the complexity of the reform and therefore, the expectation of a long, drawn-out process. However, it also reached the conclusion that one should be careful about a permanent definition of success. As this is a case of an ongoing transplant, in the near future, success should also be about the operationalization of jury laws in those provinces that still await implementation.<sup>520</sup>

#### **5.3.4 Legal transplants as vehicles of reform**

Whether authors use a wide range of metaphors (e.g. transplant, translation, import, borrow) to explain the phenomenon, since the earliest recorded history, borrowing of law has been a primary instrument of legal development.<sup>521</sup>

At the introduction of this research I avoided making the promise of delivering a universally valid response to the question of whether legal transplants represent an efficient method of reform. Instead, I promised a thorough analysis of the implementation of jury trials in Argentina as an encouraging individual example of a successful transplant. Moreover, this analysis was promised with the acknowledgment that the travel of the jury system from one jurisdiction to the

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<sup>520</sup> Nelken, *supra* note 25 at 38.

<sup>521</sup> Watson, *supra* note 20 at 21.

other represented a major enterprise, bearing in mind the disparities between the legal cultures of donor and recipient.

After a thorough study of the transplant, this research has been able to fulfil its promise. With the restriction of its inability to provide a universally valid response, what can be asserted is that the thesis provided sufficient evidence to recognize that the implementation of trial by jury in Argentina has become a great example of a transplant that constitutes a successful method of reform.

The jury belonged to a different legal culture, it was not a modern institution and required a lot of work to be fruitfully implemented. However, the transplant was operationalized and it has been blossoming throughout the years. This thesis attempted to trace some valuable explanations behind this allegedly successful journey. Today it ends up confirming that the key for success was the balance between preserving the roots of the imported system and adapting it in accordance to the limits imposed by the local legal culture.<sup>522</sup>

This research considered long-standing discussions such as the role of legal culture, the indicia of success of legal transplants, and the travel of law across jurisdictions as a method of reforms. In addition, this thesis was able to build upon the lessons imparted by other authors but without overlooking its own definitions. One important contribution of this research is to be found in its ability to find its own definition of a successful transplant by explaining with concrete examples how the Argentine legal culture reacted to the implementation of this foreign system. Beyond the controversy around legal transplants, the research showed the plausible reasons behind a positive impact of the jury in Argentine soil. It helped to deepen the discussion about transplants as methods of reform by benefiting from the study of this specific case. Tracking the history and trajectory of transplants,<sup>523</sup> such as the one addressed in this thesis, is what would enable

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<sup>522</sup> Friedman, *supra* note 60 at 130.

<sup>523</sup> Kerry Rittich, "The future of law and development: second-generation reforms and the incorporation of the social" (2004) 26:1 Mich J Int'l L 199 at 215.

scholars, reformers, and governments to better anticipate adequate strategies to make this and other legal transplants a more reliable, stable and successful method of reform.

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