

Beyond a broad appeal

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Introduction

Since the introduction of trial by jury in some provinces of Argentina and after many jury trials, we now have empirical information on the Argentine experience. This information has allowed us to evaluate whether the fears and prejudices that a jury system deprives defendants of a broad appeal have been realized, or, on the contrary, that the jury institution has protected the rights of defendants and the jury system is consistent with international treaties of human rights.

Moreover, this experience allows us to reflect on the way in which the courts of appeal have responded to the institution of trial by jury, the obstacles to overcome and the challenges for the future.

We will develop these topics in our presentation.

Are trial by jury and the right to a broad appeal concilliable?

The stage of appeal in Argentina has historically played an essential role. That is the reason why the parties traditionally have focused on this stage instead of giving primary importance to the preliminary hearings and the trial itself. This distribution of attention is consistent with the traditional use of files and written records throughout the process, which arose from the inquisitorial system and is still in use in our judicial culture.

This vertical method was used as a means to return the power to the king that he king had provisionally delegated to his subordinates. This hierarchical organization still remains and as a consequence, the courts of appeal decisions at the top of the pyramid are considered to have more value than the ruling of the lower courts. As time passed, the appeal became a defendant's essential right in any criminal process.

The Supreme Court and International Courts of Human Rights have contributed to broadening the right to have the convictions reviewed. As a result, Courts of Appeal have been called upon to make a profound control of the convictions under appeal¹.

¹ Inter-American Court of Human Rights "Herrera Ulloa v. Costa Rica" (decision of 2/7/04), Inter-American Court of Human Rights "Mohamed vs. Argentina" (decision of 23/11/12), Argentina's Supreme Court of Justice "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" case n°1681 (decision of 20/9/05)

Therefore, one of the strongest and modern arguments against trial by jury in Argentina has been the alleged incompatibility of this institution with the right to a broad appeal of convictions that the international treaties of human rights require². The argument is that the lack of explicit “motivation” or providing of reasons as part of the jury’s verdict, prevents the defendants from knowing the reasons for the decision and, consequently, interferes with the defendant’s ability to fully object to it in appeal.

This new argument as a reason for opposition to trial by jury had some attraction. Unlike the previous authoritarian criticisms of the jury system, such as the jurors not knowing about law or the people not being prepared to judge without prejudice and passion, this new criticism was based on humanitarian reasons³.

Some judges and well-respected experts in our country embraced this criticism. As a consequence it spread widely, provoking a strong resistance to the classic jury. Moreover, the jury’s constitutionality has been questioned, in spite of being explicitly guaranteed three times in our National Constitution.

One of the arguments expressed by the opponents to the system was that the right of appeal in the trial by jury is extremely limited and incompatible with the precedents of the Supreme Court since the Courts of Appeal could now only “guess” the reasons of the jury’s verdict because they are secret⁴.

A related argument is that the lack of explicit reasons of the jury’s verdict does not allow the defendants to know whether their claims were taken into consideration⁵.

To address concerns about lack of reasons, the ex-minister of the Supreme Court Eugenio Raul Zaffaroni has argued that the mixed system of trial by jury is the most suitable for our country⁶.

² American Convention of Human Rights, Section 8.2h., International Covenant on Civil and Political Rights, Section 14.5

³ SCHIAVO, Nicolás; “La admisibilidad de recurrir el veredicto del jurado clásico. A propósito del fallo «Cavazos»” in BINDER, Alberto M. y HARFUCH, Andrés (Directores); *El juicio por jurados en la jurisprudencia nacional e internacional. Sentencias comentadas y opiniones académicas del common law, del civil law y de la Corte Europea de Derechos Humanos*, Ad Hoc, Buenos Aires, 2016, ps. 365/6

⁴ GULLCO, Hernán Victor; “El juicio por jurados y el derecho al recurso” publicado en *Latin American Journal of International Law*, nro. 3, 14/12/2015, available at <http://www.revistaladi.com.ar/numero3-gullco/>

⁵ HERBEL, Gustavo A.; “La motivación de la condena y su revisión amplia como garantías del imputado (¿Puede el juicio por jurados restringirlas?)” published in *Revista Pensamiento Penal*, 3/6/13, available at <http://www.pensamientopenal.com.ar/system/files/2013/06/doctrina36173.pdf>

⁶ Available at <http://www.letrap.com.ar/nota/2012-12-10-zaffaroni-contra-el-proyecto-de-juicios-por-jurados> y <http://www.pagina12.com.ar/diario/elpais/1-211819-2013-01-14.html>

To sum up, this apparent impossibility to appeal the jury's convictions due to the lack of explicit reasons has been the newest argument against trial by jury offered by judges and expert supporters of constitutional rights⁷.

The battle for the defense of classic trial by jury

The supporters of trial by jury have responded to this criticism with a variety of arguments.

First of all, the demands for reasons from judges and jurors cannot be the same since the two institutions are structurally different. The professional judges must give reasons for their decisions to society because they are public servants. However, the lay jury need not explain the reasons for their verdict because the process of decision-making itself makes the result more legitimate, that is, the jurors are themselves twelve representatives of the people. They do not belong to the state and they deliberate robustly to fulfill the unanimity requirement⁸.

In addition, it was pointed out that criticism was based on lack of knowledge about how the system works in practice⁹, since in the countries of the common law there is a broad appeal of convictions¹⁰.

Furthermore, jury decisions are based on reasons although the reasons might not be written. According to Professor Edmundo Hendler, the relation between the judge instructions and the jury's verdict is the same as a premise and conclusion. Consequently, the motivation of the jury is based on the judge instructions to the jury¹¹. This is what the European Court of Human Rights said in "Taxquet v. Belgium"¹².

Andres Harfuch pointed out that, even when the jury does not provide reasons, the standard of evidence requiring guilt beyond a reasonable doubt is completely and

⁷ SCHIAVO, Nicolás; "La admisibilidad de recurrir el veredicto del jurado clásico. A propósito del fallo «Cavazos»", *Ob. cit.*, p. 366

⁸ HARFUCH, Andrés; "Inmotivación, secreto y recurso amplio en el juicio por jurados clásico" published in *Infojus, Derecho Penal, Participación ciudadana en la justicia, Ministerio de Justicia y Derechos Humanos*, Año 1 nro. 3, Buenos Aires, 2012, p. 122, available at http://www.infojus.gov.ar/revistas/revista_derecho_penal/rvdpe003-derecho_penal_nro_3.htm;jsessionid=safv66vsh3da1m0ja3rksvdq6?0

⁹ *Idem*, ps. 114/5

¹⁰ SCHIAVO, Nicolás; "La admisibilidad de recurrir el veredicto del jurado clásico. A propósito del fallo «Cavazos»", *Ob. cit.*, ps. 366/7

¹¹ HENDLER, Edmundo S.; "Jueces y Jurados: ¿una relación conflictiva?" en *Juicio por jurados en el proceso penal*, Ad-Hoc, 2000, available at http://www.catedrahendler.org/doctrina_in.php?id=59

¹² Taxquet v Belgium (CEDH, 2010)

permanently under the defendant's control during the whole trial, so that he can eventually question the conviction at the appeal stage for injustice without difficulty¹³.

Consequently, the two aspects of a system of trial by jury which allow for a broad appeal of a conviction about facts and right, are the judge's instructions and the required proof of guilt beyond reasonable doubt. Both of them are objectives and broadly controllable by all parties during trial¹⁴.

Finally, it was also claimed that all this criticism could not counteract the fact that it is the National Constitution, which explicitly imposes the implementation of trial by jury¹⁵.

This discussion remains open and many of the critics of trial by jury stick to it in order to avoid its implementation at a national level.

The real experience

The ability of the defendants to question jury decisions

Over the past three years of the implementation of trial by juries in Neuquén and over two in Buenos Aires, we collected empirical data in order to determine whether the right of the defendants to have a broad review of their convictions has been diminished or fully preserved.

Since the first trial by jury in Neuquén on April 2014 through December 2016, there have been 30 trials¹⁶. 24 of the trials ended with at least one conviction and 6 of the trials ended in acquittals¹⁷. The defendants appealed 22 of those convictions and in 17 of them the defendants argued that the jury convicted without enough evidence.

In the province of Buenos Aires, between the first trial, which occurred on March 2015, and December 2016, there have been 93 jury trials¹⁸. 60 of them ended in guilty verdicts, and 33 in not guilty verdicts¹⁹. The defendants appealed 54 of the convictions, and the Court of Appeal has reviewed 9 of them so far. In 6 of those cases, the defendants questioned the jury verdicts because of the lack of evidence to convict.

¹³ HARFUCH, Andrés; "Inmotivación, secreto y recurso amplio en el juicio por jurados clásico", *Ob. cit.*, p. 132

¹⁴ HARFUCH, Andrés: *El juicio por jurados en la provincia de Buenos Aires*, Ad Hoc, Buenos Aires, 2013, ps. 308/9

¹⁵ HENDLER, Edmundo S. "Experiencia, prejuicios y fundamentación en el juicio por jurados" in LETNER, Gustavo y PIÑEYRO, Luciana (Coordinadores); *II Congreso Internacional de Juicio por Jurados*, del Consejo de la Magistratura del Poder Judicial de la Ciudad de Buenos Aires, Jusbaire, 2015, p. 55

¹⁶ Available at <http://prensampfn.wixsite.com/jxjnequen>

¹⁷ It was considered one verdict for each trial for the main crime, and regardless the number of defendants

¹⁸ Available at <http://www.scba.gov.ar/juiciosporjurados/archivos/JuiciosRealizados.pdf>

¹⁹ It was considered one verdict for each trial for the main crime, and regardless the number of defendants

These early results from the new system show us that the defendants have been able to successfully question the convictions on grounds of facts and evidence²⁰. They found the problems in their evidence, and that formed the basis for their appeal; they did not have to guess the reasons in order to successfully appeal.

In fact, even though the defendants did not know the reasons for the juries' guilty verdicts, they were able to attack them, pointing out the prejudicial pieces of evidence presented to the jurors, and the pieces of evidence that were set aside because of the lack of credibility²¹. In summary, the defendants were able to find the reasons for the juries' verdicts in order to question them on appeal. And it is due to the adversarial trials' own dynamic: the evidence presented to the jury is submitted to wide control by the parties. The defendants did not have to guess: they really knew why the jury found the accused guilty.

The broad revision of sentences by the Court of appeal

After reading the sentences of the courts of appeal, we noticed that the judges did not have difficulty reviewing the juries' decision despite the lack of verdicts' written reasons.

Judges from Neuquén and from Buenos Aires were able to review the facts and evidence of the trials, as well as other issues, according to the grievance brought up by the defendants. And they were able to review the convictions extensively, so the lack of expressed reasons of the verdicts of the jury was not an obstacle at all.

In this way, the decisions of the courts of appeal show that the trial by jury system is fully compatible with the precedents "Herrera Ulloa" of the International Court of Human Rights, and "Casal" of the Argentinian Supreme Court of Justice, and also with the American Convention of Human Rights, Section 8.2h. and the International Covenant on Civil and Political Rights, Section 14.5, pointing out that the trial by jury system allows a wide review of the facts and the law regarding to the judge instructions and the verdicts²².

²⁰ They also questioned another issues, like jury's composition, judge instructions, raises of the parties against the law, amount of penalty, among others.

²¹ The law of the province of Buenos Aires expressly provides for an appeal in cases where "... the conviction ... would manifestly separate from the evidence produced in the debate" (article 448 bis, d). In the regulations of the province of Neuquén there is no equivalent provision but to appeal the verdicts considered contrary to evidence it is used the generic cause provided in art. 236.

²² Court of appeal of Neuquén "Posse, Carlos Bruno s/homicidio simple", (decisión of 4/9/14); "González, José Sebastián", (decisión of 10/12/14); "Ramírez, Leopoldo s/Abuso sexual agravado",

The courts of appeal recognized that the National Constitution and the International Human Rights Treaties express no preference for convictions issued by professional judges over convictions issued by juries, because the stress should be put on the defendant's right to have a broad and integral appeal of the facts, the law and the evidence. Thus, the judges of the courts of appeal explained that the sentences emanating from trials by juries are able to be widely controlled, and the fact that the jurors do not express the reasons for their decisions does not excuse the judges from verifying the objective reasons that justified a guilty verdict in a bench trial²³.

Finally, the judges on the courts of appeal remarked that the appeals in the trials by jury do not differ from appeals in trials with professional judges, and that the only difference is on the litigation techniques and in its interposition²⁴.

Apart from that and in order to respect the trial by jury and the right of a broad appeal, the courts of appeal adopted the precedents of countries from common law, especially in the principle set by "Yebe" and "Binaris" and other international precedents, stating that in order for a guilty verdict to be valid, the court must determine on the whole of the evidence "whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered", which implies that the guilt of the defendant has been proved beyond reasonable doubt²⁵.

This is a clear example of "legal transplant", as our courts of appeal have adopted the review standards of the Anglo-Saxon countries, taking their wide experience to use it in our cases.

Also taken from the countries of common law²⁶, the courts of appeal were clear to set that the relevant point of view should be that of the jury and not the court of appeal, because otherwise they would be interfering with the jury's function²⁷.

In response, the opponents to trial by jury now have re-directed and changed their criticism to the impossibility of the court of appeal to review the facts and evidence because they are limited to decide only if the jury was reasonable or not. They

(decisión of 31/8/16). It was pointed out that the International Treaties do not require the verdicts to be motivated

²³ Court of appeal of Neuquén, "Carvajal, Daniel Alberto y otros s/homicidio doblemente calificado" (decision of 22/7/15); "Comisaría Quinta s/investigación homicidio" (decision of 29/7/15).

²⁴ Court of appeal of Neuquén, "Posse, Carlos Bruno s/homicidio simple" (decision of 4/9/14).

²⁵ Court of appeal of Buenos Aires, "Castillo, Rodolfo Marcelo s/ recurso de casación" (decision of 11/8/16); Court of appeal of Neuquén, "Valdéz, Roberto Marcelo s/homicidio doloso agravado" (decision of 6/10/16).

²⁶ "Jackson v. Virginia (443 U.S.307 -1979-) y "Cavazos v. Smith" (565 U.S. -2011-)

²⁷ Court of appeal of Buenos Aires "Castillo, Rodolfo Marcelo s/ recurso de casación" (decision of 11/8/16)

have also pointed out that the standards of review of the American Courts of Appeal are less demanding than those elaborated by our Supreme Court since the courts of appeal are more limited when it comes to reviewing convictions²⁸.

However, what these criticisms do not contemplate is that in order to see if the jury was reasonable, the courts of appeal have and must analyze the evidence linked to the grievances of the defendants. This is what the precedent “Yebes” sets: “*While the court of appeal must not merely substitute its view for that of the jury, in order to apply the test [of reasonable doubt] the court must re-examine and to some extent reweigh and consider the effect of the evidence*”²⁹. In fact, without re-examining the evidence of the trial in the controversial points, it is not possible to judge the reasonableness of the jury’s decisions.

This is just the path that our courts of appeal have begun to walk when they review the convictions rendered after guilty verdicts in trials by jury.

To do this, they first look at the grievances brought by the defendants, and based on them, they evaluate the available evidence through the videos of the trial, and also assess the accuracy of the instructions given to the jurors.

Thus, the Buenos Aires’ courts of appeal marked out that the review task does not imply the realization of a new trial, but to evaluate if the presented evidence was able to endorse a guilty verdict beyond a reasonable doubt. To sum up, the courts of appeal should evaluate the correction of the instructions, verify that due process was not affected, and review the evidence of the trial with the film records, in order to decide if there was sufficient evidence to justify the conviction³⁰.

In the same way, Neuquen’s judges of the courts of appeal have held that “*the trial by jury institution goes straight to the heart of the system of proof, since it allows an integral review of the evidence in the cases that the defendants bring in their grievances in a proper way*”³¹. Thereby, they explain that in order to verify if the

²⁸ GULLCO, Hernán Victor; “El juicio por jurados y el derecho al recurso”, *ob. cit.*

²⁹ “R. vs. Yebes” (1987, 2 SCR 168)

³⁰ Court of Appeal of Buenos Aires, “Mazzon, Marcos Ezequiel s/recurso de casación” (sentence of 27/10/15); “Aref, Vanesa Anahí; Bertolano Brian Nicolás y Morales Ives Nicolás s/recurso de casación”, (sentence of 22/12/16); “Zuleta, Marcelo del Valle s/recurso de casación” (sentence of 27/10/16); “Ganduglia, César Nahuel” (sentence of 14/7/16).

³¹ Court of appeal of Neuquén, “Carvajal, Daniel Alberto y otros s/homicidio doblemente calificado” (sentence of 22/7/15)

verdict was based on evidence, the appellant must explain the reasons why the evidence does not satisfy the standard “beyond a reasonable doubt”³².

The court of appeal also pointed out that in the review task, the evidence must be widely re-examined in order to decide if it was sufficient or not to justify the guilty verdict, and explained that to do this, they should focus on the instructions of the judge and in the standard of reasonable doubt that the jury must overcome, which have been set out in “Taxquet”³³.

Regarding the way in which the control should be done, the judges asserted that to satisfy the broad review of the convictions, the court of appeal is not supposed to watch all the videos of the trial to render a second decision. They have to verify based on the grievance of the defendant, if the conviction is fair.

Because of this, they claim that there should be “a trial of the trial” and not a second trial with a second verdict rendered by the professional judges³⁴.

In this way, to verify if the verdict is not based on the evidence, the courts of appeal, considering the grievances of the defendants, re-examine and reweigh the evidence by watching the video records, evaluating it integrally, to conclude in every case if the standard “beyond a reasonable doubt” was respected³⁵.

The courts of appeal in most cases reviewed to this point concluded that the jury’s verdicts were fair, and that the guilt of the defendant has been proved beyond reasonable doubt, so they affirmed jury’s decisions.

Thus, we can say based on the experience of these first years of trial by jury, that the defendants, effectively, were able to have a broad appeal of the convictions on the most diverse grounds, including those of facts and evidence. And also the courts of appeal were able to thoroughly review them, despite the fact that they did not have stated reasons for the juries’ verdicts; by verifying the fulfillment of the required standard of evidence. In conclusion, the criticisms were made from lack of knowledge of the jury system performance.

³² Court of appeal of Neuquén, “Morales, Damián Isaac s/homicidio calificado” (sentence of 16/4/15); “Ruiz Valdebenito, Emilio; Ruiz Herrera, Héctor Hernán s/homicidio calificado”, (sentence of 28/9/15).

³³ Court of appeal of Neuquén, “Salinas, Ceferino; Landaeta, Héctor Daniel; Cardozo, Denis Iván; Maringuin Valenzuela, Iván Marcelo s/robo agravado, delito contra la vida” (sentence of 14/10/15).

³⁴ Court of appeal of Neuquén, “Troncoso, Luis Alberto s/homicidio calificado”, (sentence of 2/12/15), “Ruiz Valdebenito, Emilio; Ruiz Herrera, Héctor Hernán s/homicidio calificado” (sentence of 28/9/15).

³⁵ In all cases, the judges of appeal concluded that the juries had been reasonable, notwithstanding that on some occasions they modified their decisions for errors in the instructions.

The cultural remains of *civil law* in the appeal stage

We have noted that the lack of stated reasons for jury verdicts has not been an obstacle to broad appeal of convictions and that, therefore, jury trial is fully compatible with the principles of the International Human Rights Treaties.

Nevertheless, the analysis of the jurisprudence of the court of appeal in the first years of jury trial implementation also shows us some deficit practices that still persist in our country as a result of the remains of the old inquisitorial tradition.

These defects should not go unnoticed because they represent a thermometer that allows us to know how we are doing and what we must do from now on to continue strengthening the institution of the jury and to definitively eradicate all practices that are opposed to an adversarial system.

Some of the problems observed through the examination of the decisions were:

a. The resistance of the prosecutors to lose the right to appeal a not guilty verdict.

Another issue that arose in the province of Buenos Aires was resistance from prosecutors to the loss of the possibility to appeal acquittals.

In our country, prosecutors have always had many opportunities to reach conviction of the accused after an acquittal through the process of appeal. The law in the province of Buenos Aires -like the rest of the provincial laws- put an end to this and clearly established that the prosecution cannot appeal a not guilty verdict³⁶.

However, the prosecutors in this province have complained about this loss, claiming that is unconstitutional because it affected the equality principle. The BA Court of Appeal, however, rejected that claim, refusing prosecutors the right to appeal acquittals and assigning the verdict of not guilty of the jury a definitive and final character³⁷.

These decisions of the Court of Appeals constitute significant support for the jury institution and put an end to efforts to appeal acquittals.

b. The lack of strategy of the litigants to point out their grievances at proper times.

³⁶ Act 14.543 of the province of Buenos Aires. Ar. 452 "... In the jury trial, the Public Prosecutor's Office has no standing to appeal."

³⁷ Court of appeal of Buenos Aires, "López, Mauro Gabriel s/ recurso de queja interpuesto por agente fiscal" (sentence of 4/2/16). The second pronouncement was "Antonacci, Kevin Gustavo s/ recurso de queja interpuesto por agente fiscal" (sentence of 11/5/16).

The appeal has long been conceived as the best opportunity to raise the objections that may have arisen throughout the process. Lawyers often file lengthy writings with a multitude of grievances to be reviewed one by one by the appeal judges. That is, they throw a web of problems, hoping to get a positive appellate response to at least one of them³⁸. Consequently, there is no strategic work by the litigant to identify the fundamental grievances undermine the fairness of this trial and to raise them at the moment that they originate, with the intention of discussing them eventually in the appeal stage.

In adversarial systems, litigants begin to construct the basis for a possible appeal well before the verdict. They object whenever they believe that the judge has inappropriately ruled against their interests and theories of the case. This allows them to leave a mark of the problem to be presented later in the stage of appeal and to point out the relevance of the issue and the time it was raised.

In the precedents of our courts of appeal, we have observed that the defense raised a number of grievances on appeal that were not proposed or pointed out in due course. The appeal judges, who on many occasions decided not to deal with the treatment of the grievances because they were not indicated in a timely manner, noticed this circumstance.

In one of the observed cases, the defense questioned the composition of the jury because the requirement of belonging to the social and cultural environment of the accused was not respected. The appeal judges argued that the defense had the possibility to raise the issue at the appropriate procedural time, that is, at the jury selection hearing, but did not do it³⁹. In another case, the defense objected at the stage of appeal that the judge failed to give an instruction to the jury important to his case. However, the appeal judges warned that he did not request it at the instructional hearing⁴⁰.

The decision not to enter into the treatment of the question because it was not raised at the right time means an acknowledgment of the leading role of the parties in an adversarial process, in which they must be consistently attentive to the issues that could

³⁸ In the recursive stage the defenders raise procedural nullities, problems of the investigation stage, problems of legitimacy of evidence, unconstitutionality of norms, formal defects, etc.

³⁹ Court of appeal of Neuquén, “Cayulef, vicente s/homicidio” (sentence of 27/7/15).

⁴⁰ Court of appeal of Buenos Aires “Ganduglia, César Nahuel” (sentence of 14/7/16); Court of appeal of Neuquén “Morales Damian Isaac s/ homicidio calificado” (sentence of 16/4/15); Carvajal, Daniel Alberto y otros s/homicidio doblemente calificado” (sentence of 22/7/15); “Barria, Francisco Rodolfo s/dcia. Pto Delito contra las personas (sentence of 1/4/15); “Salcedo, Gabriel Darío y otros s/homicidio” (sentence of 8/4/15);” Ruiz Valdebenito, Emilio y otro s/homicidio calificado” (sentence of 28/9/15).

damage their case to be able to question them at the appropriate time⁴¹. This shows in our opinion a true commitment on the part of the judges to eliminate the defects typical of old work practices.⁴²

c. The generality of the statements and the lack of specification of the judicial error.

Inquisitorial systems with professional judges are still closed, hierarchical, written, bureaucratic, secretive, and give the judges absolute powers to make discretionary decisions. In order to try to reverse the procedural flaws, the defense resorts to a stage of appeal with many issues.

The trial by jury, on the other hand, has a series of internal and external controls that transform it into a much more legitimate process (the number of 12 members, its separation from the state, the power to raise peremptory challenges without, the unanimity in decision-making and the richness of deliberations, among others). This circumstance reduces the possibility of error. Therefore, the litigants must be highly persuasive that a system (with so many guarantees of legitimacy) has failed.

This means that lawyers must not only identify all those issues that caused them grievance by stating them as they used to do in the inquisitive system, but also have to explain how those extremes misled the jury to error. To do this, they must be able to identify the error, point it out to the court, and show the impact that this had on the decision of the jury. Let us not forget that in a system with these characteristics, the evidence that enters the trial is the result of very deep discussion between the parties, the litigants can participate in the selection of the jury, the parties control all the evidence during the trial, they can participate in the preparation of the final instructions, and there is a judge who is responsible for assuring that the law and constitutional principles are followed.

Thus, this task is very complex and depends on having lawyers who are adequately trained in both trial and appellate skills.

In the judgments analyzed, on several occasions the appellants made general statements, but did not explain how the alleged situation could have affected the final

⁴¹ Court of appeal of Neuquén “Carvajal, Daniel Alberto y otros s/homicidio doblemente calificado” (sentence of 22/7/15). There the judges pointed out that "The new accusatory system requires a completely different task from the parties with respect to the previous procedural system".

⁴² In the United States, for example, there are some cases which, some errors are so fundamental, that the right to base a successful appeal on them is not lost by a failure to object during the trial. But in the analyzed cases in Argentina, we noted that the errors are not fundamental, because of that the judges overruled these claims.

verdict of the jury. This shows a lack of understanding of how the error needs to be explained. Fortunately, the challenging judges emphasized this defect and pointed out that the statement of the problem is not enough, but that it is necessary for the defendants to show how the situation they described could have a substantial bearing on the verdict by conditioning the jury's decision⁴³. This is another circumstance in which the judges marked the need for a new view of the appeal, forcing the attorneys to become skilled in these areas, in order to strengthen the institution of the jury, including the process of appeal.

d. The lack of use of a hearing in the stage of appeal and the absence of litigation techniques

The hearing appeal is the essential moment for the defenders to be able to explain to the judges what the error was, where it came from and how it affected the jury's decision.

In addition, the hearing is used so that the judges can question the parties about the questions that cause doubts in order to understand the grievances and to refine the reasoning⁴⁴.

Both prosecutors and defenders should be well prepared for these hearings and optimize time with the most important issues.

However, experience shows that in most of the cases in the province of Buenos Aires, the defenders and prosecutors have withdrawn from the hearing and replaced it by submitting their arguments in writing⁴⁵. This shows that the system has not yet been possible to internalize the importance and usefulness of this procedural moment to maximize the standards for reviewing resources.

In the province of Neuquén, however, there have been a large number of appeal hearings. Yet, this space must be further developed to the point of being a central part of the review process, which implies that lawyers and judges must be trained in specific

⁴³ Court of appeal of Buenos Aires, "Aref, Vanesa Anahí; Bertolano Brian Nicolás y Morales Ives Nicolás s/recurso de casación" (sentence of 22/12/16); "Ganduglia, César Nahuel" (sentence of 14/7/16); Court of appeal of Neuquén, "Cayulef, vicente s/homicidio" (sentence of 27/7/15); "Valdez, Roberto Marcelo s/ homicidio doloso agravado" (sentence of 6/10/16).

⁴⁴ The Revised Handbook on Appellate Advocacy in the Supreme Court of Appeals of Virginia, Virginia State Bar, 2011 edition, United State, p 27

⁴⁵ Court of appeal of Buenos Aires, "Castillo, Rodolfo Marcelo s/ recurso de casación" (sentence of 11/8/16); "Ganduglia, César Nahuel" (sentence of 14/7/16); "Antonacci, Kevin Gustavo s/ recurso de queja interpuesto por agente fiscal" (sentence of 11/5/16); "Zuleta, Marcelo del Valle s/recurso de casación" (sentence of 27/10/16); "Guerendiain, Nestor Marcelo s/ recurso de casación" (sentence of 27/9/2016); "Verryt, José Gerardo s/ recurso de casación" (sentence of 6/12/16).

litigation skills. Thus the former will know how to present the grievances strategically and persuasively and judges will be able to identify what information they need and how to obtain it from the disagreement between the parties.

This is one of the areas we must focus on because if these hearings are conducted with the depth they deserve, judges will be able to carry out a broad review of the facts and the evidence, thus generating a final product of Best Quality.

The new role of the appeal stage

As can be seen, the courts of appeal were consistent in their resolutions, confirming the essential aspects of the classic jury and strengthening this institution in our country. This outcome has been different in other countries also belonging to the continental model, in which the courts took decisions against the jury, greatly distorting its main features⁴⁶.

Although this task was very significant in the first years of implementation, the truth is that there are still some defects coming from old practices of the inquisitorial tradition that must be corrected so as not to distort the system.

In this cultural context that we can call the "duel of practices"⁴⁷, where the new methodologies of the adversarial system are in combat with the old ones of the inquisitorial system, it is necessary for the courts of appeals to take a pedagogical role in establishing new rules and teaching new practices to litigants to consolidate the culture of litigation.

Thus, they must insist on the need to raise the grievances at the right time, on the importance of making substantial proposals, on establishing the error and on improving the technical accuracy of the litigants⁴⁸.

With the new logic of resources brought by trials by jury and unmotivated verdicts, the stage of appeal is redefined, giving greater value to all the moments prior to the sentence⁴⁹.

⁴⁶ Some problems were the requirement that jurors give reasons for their verdict, as happened in Spain or, the possibility that the prosecutors appeal by nullity for not guilty verdict, as happened in Russia (Cfr. THAMAN, STEPHEN: "Europe's New Jury Systems: The cases of Spain and Russia" 62 Law and Contemporary Problems 233-260, primavera 1999).

⁴⁷ BINDER, ALBERTO, *Contra la inquisición. Notas y Ensayos Breves sobre la Justicia Penal*, Ad Hoc, Buenos Aires, 2015, p 37.

⁴⁸ LORENZO, LETICIA, "Impugnación y juicio por jurados. Un camino a recorrer", 19/1/2015, available on line at <http://www.pensamientopenal.com.ar/doctrina/40560-impugnacion-y-juicio-jurados-camino-recorrer>, p 31.

⁴⁹ SCHIAVO, NICOLAS, "El juicio por jurados". Análisis doctrinal y jurisprudencial, Hammurabi, Buenos Aires, 2016, p. 667.

The issues related to the evidence and the actions of the parties are beginning to have a fundamental importance in the revision of the decisions. Therefore it is indispensable that clear rules be established that will provide predictability to the lawyers on how to act before and during trial.

In our country we do not have codes of evidence or updated ethical rules, so it would be very useful for the cameras to begin to develop some rules of this nature, typical of this new work scenario.

This will give litigants solid tools to better deal with the case and to properly address their grievances at the hearing of appeal. It will also lay the foundation for developing a code containing such rules in the future.

In this way, the ex-post controls, more linked with an inquisitive system, will be able to be reduced, making possible the transition towards a system of prevention of the ex-ante errors, typical of the adversarial models⁵⁰.

On the other hand, it would be advisable for the judges of the court of appeal to begin to develop positive acts to enhance the review hearing, for example by generating questions that test the attorneys' arguments to determine whether they effectively demonstrate the judicial error of the decision they question. This will produce a healthy filter of the issues that lead to appeal, raising the standard of litigation and technique of lawyers in such a way to begin to function as a real court of appeal and not as an alternate to the badly worded complaints of the parties.

In this way, the system will be perfected to the point of reaching the true depth with which the common law countries review decisions in the stage of appeal.

Conclusion

The first years of the trial by jury in our country show that this institution, so resisted from the beginning, turned out to be fully compatible with the right of the defendant to have a broad appeal.

The courts of appeal, using the experience of countries with a long trial by jury tradition have been able to broadly review their decisions based on video records, the judge's instructions and the defender's statements.

The first step has been crucial in order to strengthen the main features of classic juries. The courts of appeal have developed this task successfully.

⁵⁰ LORENZO, LETICIA, "Impugnación y juicio por jurados. Un camino a recorrer", *ob. cit.*

Now there are new challenges to perfect the appeal system, which imply completely changes the practices from inquisitorial systems and adopt typical techniques from adversarial systems. On this path, the judges of appeal who have shown a strong commitment to the institution will be able to set new game rules to perfect litigation and improve the quality of decisions made.

The trial by jury has worked as a genuine Trojan horse during the appeal stage as well as the trial stage. It has broken the historical way of control and has brought in a new and more modern litigation technique.