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Commentary on Valerie P. Hans's Presidential Address

The Dissemination of Jury Trials: A Reading from Argentina

María Inés Bergoglio

In 2008, Valerie Hans wrote an article that provided a research agenda for jury scholars, highlighting the importance of comparative work, to understand how citizen participation interacts with the cultural, political, economic, and legal traditions in different countries. She emphasized the importance of studying newly emerging systems to observe whether legal consciousness and the public legitimacy of the legal system are affected when citizens participate as decision makers. This issue has been difficult to study with stable existing systems (Hans 2008: 292).

Living in Cordoba, the Argentine province where lay participation had just started after a century and a half of constitutional disobedience, I found her remarks especially inspiring for my own work. The quick expansion of international research cooperation, by means of CRNs and IRCs gave me the forum for a rich exchange of research methodologies and findings with scholars coming from many other recently democratized countries, like Korea, Croatia, or Spain. Nevertheless, looking backwards I must admit, as she does, that lessons have been learned about how lay participation systems work in different countries but that comparative information is still scarce.

Her presidential address is oriented to develop a *comprehensive account of the global dissemination of institutions of lay participation in law* (Hans 2017: 2). In line with this goal, I would like to reflect on the process of adoption of this institution in Argentina, trying to understand how our long history of failed attempts has finally resulted in a successful transplant. This experience could be useful to clarify the conditions under which a new legal institution is *translated* to the local legal culture (Langer 2007), and to discuss the contribution of socio-legal scholars to transplants.

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An Old Story of Transplants

Legal transplants have had an extended record in Argentina. The variety of sources that have inspired the Argentine legal culture and the contradictions found therein have been summarized by the legal philosopher (Ciuro Caldani 2006: 56) "*Materially speaking, having our Constitution based on the American model, our Civil Law referring to the French paradigm speaking, our Procedural Law of Spanish influence, our Administrative Law with French references, and our Labor Law following the Italian model, and in turn, having a predominantly Italo-Hispanic population, obliges us to seek an adaptation, a synthesis, as yet unattained*."

The description made by Hans of the recent Argentinean experiences in lay participation in judicial decisions is thorough and complete. Therefore, I will focus in providing further details, which may be useful to understand how a century-long rejection to this initiative was finally abandoned.

The roots of lay participation in judicial decision making are quite deep in Argentina, as the French liberal tradition that inspired the 1810 Revolution. Mariano Moreno, the secretary of the first independent government, proposed it for press crimes, in 1811. Understood as a guarantee against the abuse of state power, trial by jury can also be found in drafts proposed during the first Constitutional Assembly, held in 1813. These initial proposals took place in a context marked by liberal ideas and lack of confidence in judicial authorities.

Other Latin American countries such as Venezuela and Mexico have shown a similar evolution,[1] including lay participation in judicial making in their first Constitutional attempts, but with little or no presence in legal practices. Only Brazil, where lay participation started during the Portuguese rule, incorporated effectively the institution.[2]

Trial by jury was also prescribed by the Argentine Constitutions of 1819 and 1826,[3] as well as in the 1853 Constitution, the

[1] In Venezuela, the 1811 Constitution incorporated the jury for all criminal trials, following the US model. The institution was present in different constitutional drafts during the nineteenth century, but it was not incorporated to judicial practice (Han, Párraga, and Morales 2006). Lay participation was included in the 1827 Constitution of the state of Mexico, and discussed, but not adopted, in the debates preceding the 1856 national Constitution. (González Oropeza 2000).

[2] The *Tribunal do Júri* has been used since the Independence in 1822, and was kept during the imperial and republican rule, with a brief exception between 1937 and 1946. It is still in practice today, and a jury of seven members deals with crimes against life (Gomes and Zomer 2001).

[3] See (Cavallero & Hendler 1988).

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legal text that presided the national organization after many decades of civil war. The process of organizing political institutions was quite slow—the first Supreme Court Justices took their oath in 1863—and for some time courts continued to work as they used to during colonial times.

The first draft of a jury law was written in 1873, by Florentino González and Victorino de la Plaza, who had been commissioned by President Sarmiento, a democrat committed to popular education and interested in obeying the Constitution. After an intense debate, the Congress rejected the initiative, arguing that educational levels were insufficient for lay participation in judicial decision making.

Several bills proposing trial by jury were submitted to the federal legislature during the twentieth century; some of them were not even debated, and generally the objections pointed to inability of lay citizens to carry out these tasks (Cavallero and Hendler 1988; Viqueira, 2016). These were top down initiatives, proposed by members of the government, without popular demand to support them. Under these conditions, the resistance of judges and lawyers, educated in the inquisitorial model, was difficult to overcome. As (Langer 2004: 4) has pointed out, the adversarial and the inquisitorial system can be understood not only as different ways to distribute responsibilities and power among legal actors, but as two different sets of shared understandings about how criminal cases should be tried.

In spite of not being implemented, the obligation to decide all ordinary criminal cases by jury was kept in the constitutional text during the reforms of 1957 and 1994. This longstanding presence of trial by jury is a clear indicator of Argentina's profound democratic aspirations, along with its ample tolerance of the gap between written law and social practices.

The essay expressively entitled *Un país al margen de la ley* (Nino 1992) described the wide gap existing in Argentina between norms and practice. The fact that between 1930 and 1983 only one constitutional president could end his term, is a clear proof of this gap. Nino adds further proof, such as the high level of tax evasion and habitual violation of city traffic rules. Straying from the law has also become State behavior: State terrorism—systematic use of State force against political opposition, disregarding the legal limits—is a dramatic example. But this tendency not to follow laws as guides to action, deeply rooted in Argentine legal culture, may also be found under its democratic governments. To overcome this anomic behavior, Nino, who believed that ethics and politics must be connected through deliberative democracy, proposed to stimulate public discussion of legislative topics.

Finally, Some Successful Experiences

In recent years, the deepening of democracy has changed how citizens experience the legal world, and attitudes towards the law have slowly started to change. Longitudinal surveys have showed that support for the universal nature of the law, an essential element of social adhesion to the rule of law, has grown significantly (Bergoglio 2016), as well as critical views on the way these institutions are working. Analyzing changes in institutional legitimacy levels between 1984 and 2006 (Turner and Carballo 2009) pointed out the precipitate drop in the prestige of the judiciary since the restoration of democracy.

The first implementation of lay participation took place in this context in Córdoba, in 2005. This was a bottom-up process, fueled by a social movement led by Blumberg, as Hans has correctly stated in her presidential address. I would also like to add that the new institution has been adapted significantly to the cultural and political environment. The first bill presented by the provincial Executive, following social demand, proposed the creation of a classic Anglo-Saxon jury. A group of criminal judges objected the constitutionality of this model, arguing that it did not ensure reasoned judgements and an effective right to appeal, therefore a mixed tribunal model was finally chosen by the Legislature. This adaptation showed the significant influence of the Civil Law tradition in the internal legal culture (Bergoglio 2008).

Cordoba's model in terms of lay participation was also considered by the National Supreme Court. In a *dictum* dated September 20, 2005[4] the Court pointed out that the aim of the Argentine Constitution is to establish public, oral proceedings in an adversarial style. They also indicated that it is possible to make a "progressive construction" of the constitution clauses about juries, since there are different ways of lay participation. This comment has been interpreted in the sense that the Anglo-Saxon model is better adjusted to the Constitution, but that it is also possible to establish mixed courts following the European style (D'Alessio 2008; Hendler 2006).

The Cordoba lay participation experience was quite limited, since the competency of the new mixed courts was restricted to cases of aberrant crimes and corruption.[5] However, it helped to

[4] C. 1757. XL. Recurso de Hecho ·Casal, Matías Eugenio y otro s/ robo simple

[5] According to official statistics, lay citizens participated in less than 5% of the total cases handled by the criminal courts in the period 2005–2014. See "Informe Estadístico-Jurados Populares en la Provincia de Córdoba (2005–2014)", *Pensamiento Penal* (Aug. 6, 2015), http://www.pensamientopenal.com.ar/doctrina/41646-informe-estadistico-jurados-populares-provinciacordoba-2005-2014.

increase the acceptance of the institution among judicial circles, and soon other provinces, as Neuquén and Buenos Aires advanced in this path as well, this time following an Anglo-Saxon model. In both cases, several modifications were introduced to take into account the Argentine political, social, and legal environment. To the possibility of using an intercultural jury depicted in detail by Hans, we should add two other features present both in Neuquén and Buenos Aires systems: the balanced gender composition of the jury and rules concerning the instructions of the judge to the jury, designed to meet the constitutional requirement of reasoned judgments and to ensure an effective right to appeal.

Comparing these projects with those registered during the previous centuries, we can observe that the three recent experiences meet some of the conditions of successful transplants pointed out by (Berkowitz, Pistor, and Richard 2003). They took place in a society where the general population was somewhat familiar to the new institution, frequently presented in mass media products of American origin. These initiatives are the result of bottom up processes, where social movements and NGOs demanded lay participation in judicial decision making. In the three provinces, significant adaptation to local circumstances was obtained through public debate. In short, the adoption of the new rules may be understood not only as transplants, but as legal translations.

Questions can be raised about the role played by scholars in these successful initiatives. The presence of distinguished lawyers is not exclusive of successful projects, since we may also find them in failed previous attempts. The key factor seems to be the social support, in the form of demands by social movements, in the case of Cordoba, where no socio-legal scholars intervened. The presence of socio-legal researchers in the non-governmental organizations promoting the initiative in Neuquén and Buenos Aires was very limited.

From a more optimistic perspective, it can be said that socio legal research on these experiences was useful to undermine one of the main obstacles and arguments against lay participation: the fear to increased punitivism. Moreover, it also showed a positive effect on the legitimacy of the judiciary, trying to convince reluctant judges to support the project. These arguments were frequently mentioned by the NGOs in their lay participation advocacy campaigns. From my perspective, this was a modest contribution to the adoption of the new systems.

When discussing the role of scholars in the transplant process, the debate between Friedman and Cotterrell comes again to my mind. While Cotterrell emphasized the weight of the views of

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professional lawmakers, Friedman argued that the importance of the 'internal legal culture', the attitudes and values of law practitioners, as a factor in explaining socio-legal change tends to be exaggerated.[6]

The detailed account made by Hans of the journey of trial by jury in newly democratized countries, grounded in her own comparative work, shows that the adoption of the new institution has followed different paths and that different social actors have contributed to the spread of lay participation in judicial decision making. However, talking about the Argentina case, I would like to avoid overestimating the role played by socio-legal scholars in these changes, and side with Friedman in this matter.

As Hans adequately states, introducing lay participation may be understood as part of the process of building democratic institutions. And this task is undoubtedly a collective effort, where socio-legal scholars are proud to participate.

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[6] See Cotterrell (1997), Friedman (1997), Friedman (2001), Cotterrell (2001).

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