

Civil Jurisdiction And Jury Court:

Proposals For Improvement In Spain From Comparative Law

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ABSTRACT

The Jury court is a fairly common institution in any of the existing legal systems in the world. There is an important difference between the continental and Anglo-Saxon models, highlighting the main difference the existence of the Jury court in civil litigation, unusual situation in the continental system with exceptions, and in particular in Spain. We will also analyze a hypothetical reform of the Jury in Spain by doing a legal analysis with other States. For this purpose, a comparative study is carried out between the instructions given in Spain and in other countries such as the United States, given that it was the North American model in which, mainly, the Spanish legislator was inspired when he developed the article 125 Spanish Constitution, which provides for the participation of citizens in the Administration of Justice.

We will continue with the analysis of the Scandinavian jury and the mixed jury. We will deepen our analysis of the jury in Spain, its structure, the characteristics of this figure and the areas in which the jury can be used, highlighting that this figure is established in the Spanish Constitution.

We will continue analyzing the jury in other countries such as the United States, Canada and Austria, highlighting its form of regulation, its legal framework, the regulatory procedure, the requirements for its selection and its application in practice, analyzing examples and application data in practice.

In the last section we will analyze a hypothetical reform of the Jury in Spain through a legal analysis according to how the Jury is instructed in the United States, in order to improve the functioning of the Jury in Spain.

Keywords: court, Jury, reform, continental, Anglo-Saxon.

I. INTRODUCTION

The Court of the Jury is an organ integrated in the criminal order of the ordinary jurisdiction (articles 26 and 83 of the Organic Law of the Judiciary), in charge of the prosecution of certain causes for crimes: in particular, those listed in Article 1 of the Organic Law 5/1995, of the Jury Court.

The most visible feature of the Jury Court is, without a doubt, the presence in it, with jurisdictional functions of citizens who do not require knowledge or legal qualification. It is, therefore, a channel of citizen participation in the administration of Justice. The citizen participation in the administration of Justice through the institution of the jury supposes that the criminal case will be known in court and decided by a court of citizens, lay judges or non-jurists, to whom it is entrusted, in the criminal field, the function traditionally attributed to professional magistrates in courtrooms.

The number of cases treated annually by the Jury Law has been halved since the late 1990s, when the period of implementation of this institution, reintroduced into the Spanish legal system twenty years ago, with the publication of the Law Organic 5. / 1995, on the jury, ended. From 1996 to 2014, a total of 10,407 jury trials were presented before the Courts of Investigation and Courts of First Instance and Investigation (Courts of First Instance and First Instance and Instruction), and since 2005 also in the Courts of Violence against Women. (Courts of Violence against women).

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Only in the first three years of the Law -1996, 1997 and 1998, there was an increase in this type of procedure - 531 in the first year, 710 in the second and 785 in the third year, and from 1999 onwards. There was a significant decrease until reaching 364 procedures last year.

When adding the data of these twenty years, the national average of procedures admitted under the Jury Act is 23.5 per 100,000 inhabitants.

Seven autonomous communities exceed this average, particularly those of the Canary Islands (32.7 procedures per 100,000 inhabitants) and Galicia (31.9). They are followed by Asturias (27.3), Catalonia (26) and the Balearic Islands (25.9). At the other extreme are Aragón (14.8), Extremadura (15.1) and the Basque Country (17.4).

In 2015, 331 cases were published before the investigative courts and the courts of first instance and investigation (First Instance and First Instance Courts and Instruction) in the Jury Act, 10 were reopened and 336 were resolved.

In all those years, the decisions of the Court of Juries have been condemned in 89.2% of the cases. This percentage has remained stable over time, since 1998 it has not fallen below 86% nor has it exceeded 91.6%.

The report is also in the last 20 years, the Superior Courts of Justice have been confirmed 28.3% of the appeals against the judgments of the Jury Court.

In addition, between 1999 and 2014, a total of 1,340 appeals of cases in the Jury Act are filed with the Supreme Court. Although the Judicial Statistics does not give details of the resolutions that resolve these resources, an analysis of the last years indicates that there were 23.4% of revocations, 71.6% of claims and 4.3% of cancellations. Most of the reversals were partial and does not mean that the meaning of the decision has changed.

These data give us a perspective of the form of application of this figure, and the deficiencies that can be improved if we consider the application of the jury in other States.

II. TYPES OF JURY

I. PURE OR ANGLO-SAXON JURY

It is also called classic, pure, or *de facto* and is the first known Jury court system. Its origin is English and is based on the composition of a court of lay citizens (without any knowledge of Law) of a variable number, chosen by lot, and directed by a judge who gives them formal instructions. Citizens value the existence of the facts and determine the verdict of guilt or innocence (or not guilty). And in which, on the basis of the verdict, the professional judge determines the legal criteria of the judgment. The Anglo-Saxon model is found in countries such as England, Scotland, Wales, the United States, Canada, Norway, Australia and Spain, although always with its procedural specialties, as it is never a model cloned among them.

The Jury is an institution oriented both to the decision and to the control of the judicial process¹.

II. ESCABINADO JURY

It can be considered a more technical evolution of the pure Jury. In this system, both lay judges (= citizens without any knowledge of the law and who are also called *judges*: after all, they judge) and technical magistrates (judges with knowledge of the law: *professional judges*) concur and they form a judging panel where legal and factual assessments are not separated. There is no a separate panel of laymen and specialists, but they all solve

¹ Vid. CASANOVAS, P. "Curso Sobre la Comunicación ante el Jurado", in Estudios Jurídicos-2006, Centro de Estudios Jurídicos del Ministerio de Justicia, Madrid, 2007, pp. 2-3.

the case as a whole, voting and drafting the judgement, as it is a judging panel. The number of judges of one type and the other varies, and there are models with preeminence of specialized judges and others with preeminence of lay ones, always within a total number of judges also variable. This model of joint decision-making favours the fact of deliberation, through which a dialectical process takes place, which ensures that the final decision will be the set of diverse social assessments and specialized considerations.

Nonetheless, not everything is positive. The influence of specialized judges on the lay ones is common, since, as they do not know the law, they can be left in the background when drafting and evaluating the judgment and, therefore, be more influenced. This model exists in France, Italy, Germany, Switzerland and Portugal.

III. MIXED JURY

It can be considered a variant of the *escabinado* model, or an autonomous model² with the difference that there are several panels in the Jury: the lay judges assess the facts and decide the verdict, so that, during this phase, it becomes a pure system Jury. The change may come depending on the verdict: if the defendant is found not guilty, the *scabino* is not created; in contrast, if the defendant is found guilty, the specialized judges decide the legal questions concerning the applicable penalty. The model is applied in Austria and Belgium.

The only country that does not have Jury Trial is the Netherlands.

III. THE JURY IN SPAIN

1. CONSTITUCIONAL RECOGNITION

We must start from the constitutional recognition established by art. 125 CE (Spanish Constitution), which recognizes that citizens may take part in the Administration through the Institution of the Jury, in the manner and with respect to those criminal proceedings as the Law may determine, as well as in Customary and Traditional Courts, and this is stated in Art. 19.2 and 3 LOPJ (*Ley Orgánica del Poder Judicial* – Organic Law on the Judiciary). Currently, the Trial by Jury is regulated by LJ 5/1995 (*Ley Orgánica del Tribunal del Jurado* - Organic Law on the Jury), after several reforms.

Analyzing the provision, we observe that the CE restricts the participation of the Jury to criminal proceedings.

The legislative history is found in the Statute of Bayonne, and in the Constitutions of 1812, 1837, 1869 and 1931.

In those texts the Jury was legally recognized, but it was not implemented until the Printing Act of 1820, with the subsequent recognition for serious political and common crimes in 1870; nonetheless, it was not until the 20 April 1888 Act that the Jury was definitively established.

This Court was composed of 12 lay judges and 3 professional judges, whose sentence was handed down by the latter according to the verdict of the former, which was reached by an absolute majority of the laymen. Where there was a tie, the defendant was found not guilty.

The lists of candidates were drawn up by the Municipal Judges and City Councils among the main authorities and taxpayers who were heads of households and over 30 years of age. This system was not based on the principles of equality, but on a system of "good citizens" in which the authorities were involved in that list. On the contrary, it was possible to lodge an appeal for reform of the verdict, for review by a new Jury and in Cassation before the Supreme Court, thus providing a guarantee to the citizen on trial.

² Vid. LUIS AGUIRRE, E., "Democratizador de la justicia penal: el juicio por Jurados", *Derecho a Réplica*, 30 de noviembre de 2001. Available at: <http://www.derechoareplica.org/index.php/derecho/284-democratizacion-de-la-justicia-penal-e>

The Jury by Trial was suspended by Decrees of February 4, 1907 and September 21, 1923, until its restoration after the proclamation of the Second Republic. The Decree of 27 April 1931 admitted women for the first time as Jury candidates and the candidates were elected by the Institute of Statistics, reducing their number to 8.

2. GUIDING PRINCIPLES AND PROCEDURE

The Spanish Jury Court has opted for the pure Anglo-Saxon model, since it has been considered to be more progressive³; but this system does not establish the obligation to argue acquittals, while the motivation of any criminal judgement is compulsory (24.2 CE). This is the major difference between the standard Anglo-Saxon model and the Spanish one, generating in our system a hybrid model with all the disadvantages of the Anglo-Saxon model and without enjoying the advantages of the *escabinado* model; in addition, it gives the judicial body much greater powers than those held by the *escabinos*.

It is also noteworthy to note the exaggeration on the principles of orality and concentration; although they are essential in the oral phase of the trial, they should not be so in the investigation which, by its nature, and by its written nature in the other types of proceedings, secures evidence to be taken in the trial. The enhancement of these principles is shown in:

- The various hearings (Arts. 25 and 28).
- The obligation that the acts of investigation must be carried out in an oral and concentrated act, to which end the indictments are sent prior to the practice of the acts of investigation (Arts. 27, 29 and 31).

The principle of the taking of evidence in oral proceedings is also overemphasized, according to the analysis of Arts. 34 and 46, as the legislator disregards the existence of irreproducible evidence at the hearing, also creating situations that generate social lack of protection and conversion of the rules on the guarantee of evidence into mere formalities.

As a general rule, the Trial by Jury is held in the *Audiencia Provincial* (Provincial Court) (Art. 1.3) although for reasons of parliamentary immunity or special rules of jurisdiction, the Jury may be constituted in the *Tribunales Superiores de Justicia* (High Courts of Justice), and in the *Tribunal Supremo* (Supreme Court). The Jury may not be established at the *Audiencia Nacional* (National High Court) as the crimes it deals with are excluded from the jurisdiction of the Jury.

With regard to material jurisdiction, it is limited according to the same and not by seriousness:

- Offences against persons.
- Offences committed by public officials in the performance of their duties.
- Offences against honour.
- Offences against freedom and security.

3. LEGAL STATUS OF THE JURY

Jurors are considered as Judges and therefore they exercise jurisdictional functions, constituting for them a right and a duty (Art. 6) and for this reason they are legally protected, receive remuneration and can be sanctioned.

³ Vid. ASENCIO MELLADO, J. M^a, *Derecho Procesal Penal* (7^a Edición), Tirant lo Blanch, Valencia, 2015, pp. 356.

For this reason, they are subject to the requirements, capacity, causes of incompatibility, prohibitions and excuses in accordance with the Law on the Jury.

A) Requirements:

1. Be a Spanish citizen of legal age; 2. Be in full possession of his/her political rights; 3. Know how to read and write; 4. Reside, at the time of appointment, in any of the municipalities in the province in which the offence was committed (Art. 8.4); and 5. Have no disqualifying condition preventing him/her from serving as a Juror.

B) Incapacity to serve as a Juror:

1. Those convicted of an intentional crime who have not obtained rehabilitation.
2. Defendants, defendants for whom a trial has been decreed and those in detention, remanded in custody or serving a sentence for a criminal offence.
3. Those suspended in criminal proceedings from their public office or duty, for the duration of the suspension.

C) Grounds for exclusion from duty

1. Incompatibilities: relating to the performance of certain functions of a political or judicial nature that cannot be combined with that of the Jury for reasons of independence, such as Senior Estate Officers and Senior Officers of the Autonomous Communities, members of the Administration of Justice, members of the Military Jurisdiction, practicing Barristers, Lawyers and Solicitors, university lecturers of legal disciplines or forensic medicine, active members of the Security Forces and Services, prison officials and Heads of Diplomatic Missions abroad (as opposed to what happened in the 19th century court).
2. Prohibitions: These are the same as the subjection of jurors due to procedural positions incompatible with impartiality as those of the parties to the proceedings: the Presiding Judge, the Prosecutor or the Barrister for the Administration of justice, Lawyers or Solicitors with a direct or indirect interest in the case.
3. Excuses:
 - a. Those over 65 years of age.
 - b. Those who have actually served as jurors within the 4 years preceding the date of reappointment.
 - c. Those who suffer from serious disorders due to family responsibilities.
 - d. Those who carry out work of relevant general interest, the replacement of which would cause significant damage thereto.
 - e. Those who reside abroad.
 - f. Active professional military personnel, for operational reasons.

4. JURY SELECTION

It is based on a system of drawing lots based on the electoral register (Art. 13) that avoids any kind of manipulation in the constitution of the body or the creation of a Jury dominated by reasons other than equality, such as the predominance of different sectors of society. All capable citizens of legal age may be called to serve on a Jury by means of an objective system.

Drawing up of the list: The Provincial Delegations of the Electoral Register Office will carry out a draw for each Province, in the premises assigned by the President of the Provincial Court and with the assistance of the Legal Counsel of the Administration of Justice, within the last 15 days of September in even-numbered years, to establish the biennial list of candidates for juries. The number of candidates will be calculated by multiplying by

50 the number of cases expected to be heard by the Jury in the following two years. This avoids holding a draw every time there is a Jury Trial.

Draw and selection: At least 30 days prior to the first hearing of the oral trial, the Clerk of the Court will carry out, in public hearing, a draw of 36 jurors for each case from among the candidates for jurors on the biennial list of the corresponding province. The parties may challenge them for any of the grounds of incapacity, incompatibility or prohibition (Art. 21). If the list is made up of fewer than 20 jurors, a new draw will have to be made until that number is reached (Art. 23).

Constitution of the Jury Court: Once constituted with 20 jurors, the parties may challenge them again on the same grounds (Art. 38), with the repetition of the same process if there were not 20 members after this challenge.

Another draw will be held again among the 20 members to appoint the 9 full jurors and 2 substitutes who will make up the Jury (Art. 40). The substitution of the two jurors means that attendance at the "Jury Trial" of the two substitutes is not only strictly organic, but also functional⁴.

The 9-Jury option is a legislative option halfway between the 12 of the 1888 Act or the 7 sought by the Jury Bill. The 12-Jury system creates a more representative social projection, but at a higher cost. With a panel of seven jurors, the society would be less represented although with a lower cost and less complexity in its constitution.

The system chosen is a valid legislative option as any other, but what is decisive is the choice of an odd system that favours the majorities and does not create indecision within them.

In the doctrine, the integration of the Presiding Judge has been questioned. Some sectors of doctrine have described it as "an atypical one-person court"⁵, when the one-person court is not an atypical one, but an integral part of the organic concept of Court.

Verdict: Once the oral trial is over, after the oral arguments of the parties, the President Judge will submit to the Jury the object of the verdict so that they can motivate their decision. This demonstrates the influence of the technical judge on the decision. Its wording can be extremely complicated and difficult in practice, as many issues may arise.

According to Art. 52 the object of the verdict will contain the following rules:

1st. It will narrate in separate, enumerated paragraphs the facts alleged by the parties, which the Jury must declare proven or not proven, differentiating between those that are to the detriment to the accused and those that are in favour.

2nd. It will set out the alleged facts that may determine the cause of exemption from liability.

3rd. It will include the narration of the act that determines the degree of execution, participation and modification of the responsibility.

4th. It will specify the criminal act for which the accused shall be found guilty or not guilty.

⁴ Vid. LORCA NAVARRETE, A. M^a., "La conceptualización del Tribunal del Jurado como Tribunal de Justicia. La preterición del Tribunal del Jurado como tribunal popular o jurado popular en la doctrina y en la reciente jurisprudencia", *Diario La Ley*, n.º 5762, 2003, pp. 1-8.

⁵ Vid. GABRIELI LLOBREGAT, J. y GIMENO SENDRA, V., *Ley Orgánica del Tribunal del Jurado comentada*, Colex, Madrid, 1996, pp. 56.

5th. It will, where appropriate, seek the Jury's opinion on the application of the benefits of a suspended sentence and the petition for pardon or not in the judgement itself.

The parties will be heard on this matter with a view to requesting any appropriate changes (Article 53).

The deliberations will take place in camera, without any communication with any person until the verdict is issued, except with the Court Clerk Secretary to ask for additional instructions or to assist them in drawing up the minutes. 7 votes are required for the unfavourable facts to be declared proven, while the number is 5 if they are favourable.

If the required majority in the voting on the facts is obtained, the guilt or innocence of each of the accused for each criminal act charged will be put to vote, and seven votes shall be required to establish guilt and five for innocence. Only 5 votes in favour are required to request a suspended sentence or the pardon.

The number of cases dealt with annually by the Jury Law has been reduced by half since the end of the 1990s, when the period of implementation of this institution, reintroduced into the Spanish legal system twenty years ago now, with the publication of Organic Act 5/1995, on the Jury, ended. From 1996 to 2014, a total of 10,407 Jury proceedings have been brought before the Courts of Investigation and Courts of first Instance and Investigation (*Juzgados de Primera Instancia y de Primera Instancia e Instrucción*)- and since 2005 also in the Courts for Violence against Women (*Juzgados de Violencia sobre la Mujer*).

Only in the first three years of force of the Act -1996, 1997 and 1998- there was an increase in this type of proceedings -531 in the first year, 710 in the second and 785 in the third-, and from 1999 onwards there was a significant decrease until reaching 364 proceedings last year.

Adding up the data for these twenty years, the national average of proceedings entered under the Jury Act is 23.5 per 100,000 inhabitants.

Seven Autonomous Communities overtake this average, notably those of the Canary Islands (32.7 proceedings per 100,000 inhabitants) and Galicia (31.9). They are followed by Asturias (27.3), Catalonia (26) and the Balearic Islands (25.9). At the other extreme are Aragon (14.8), Extremadura (15.1) and the Basque Country (17.4).

In 2015, 331 cases were filed in before the Courts of investigation and Courts of first instance and investigation (*Juzgados de Primera Instancia y de Primera Instancia e Instrucción*) under the Jury Act, 10 were reopened and 336 were resolved.

In all those years, the rulings of the Jury Court have been convictions in 89.2% of the cases. This percentage has remained stable over time as since 1998 it has neither fallen below 86 % nor gone above 91,6 %.

The report also reveals that, over the last 20 years, the High Courts of Justice (*Tribunales Superiores de Justicia*) have upheld 28.3% of the appeals lodged against the rulings of the Jury Court.

In addition, between 1999 and 2014, a total of 1,340 appeals for cassation under the Jury Act were filed with the Supreme Court (*Tribunal Supremo*). Although the Judicial Statistics does not give details of the rulings that resolved these appeals, an analysis of those of the last three years indicates that there were 23.4% reversals, 71.6% affirmances and 4.3% annulments. Most reversals were partial and it does not mean that the sense of the ruling changed.

IV. JURY COURTS IN OTHER COUNTRIES

1. UNITED STATES OF AMERICA

A) CONSTITUTIONAL INTERPRETATION

The U.S. Jury Trial is based on the Anglo-Saxon or pure system, obviously derived from British colonization.

We must start from the 1787 Constitution, in Art. 3, Section 2, where trials of all crimes, except impeachment cases, will be by Jury⁶.

It also appears in several amendments to the Constitution promoted by the US Bill of Rights of 1789. We see this in the Fifth Amendment, which prevents any person from being convicted for a capital or other infamous crime unless that person is presented before or indicted by a Grand Jury⁷. The right to be tried by an impartial Jury also appears⁸.

But one of the most relevant Amendments for our study is the 7th Amendment⁹, which institutionalizes the Trial by Jury in civil law cases where the value exceeds \$20. Its express wording is the following: *In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by Jury shall be preserved, and no fact tried by a Jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.*

But the implementation of this amendment must meet a number of requirements for its raising.

1. The case must be about civil claims, such as contracts or damages for an accident.
2. The claim must be brought before a federal court. This amendment is one of the few which is not implemented in state courts through the application of the 14th Amendment Section I. Therefore, the Seventh Amendment does not apply in state courts, even when a litigant is enforcing a right created by federal law. The Supreme Court held in *Walker v. Sauvinet* (1875), *Minneapolis and St. Louis, Minnesota. Louis Railroad v. Bombolis* (1916) and *Hardware Dealers `Mut. Fire Ins. Co. of Wisconsin v. Glidden Co.* (1931) that States were not required to provide Trials by Jury in civil cases; nonetheless, States often promote this institution.
3. The amount must exceed \$20, which at the time was a large sum. The U.S.A. Constitution framers was immobile in stipulating a figure, when it is well known that a society is dynamic, and even more so the value of money. Congress has never extended the *Federal Diversity Jurisdiction* (the ability of a federal court to hear a civil case where people who are parties are "diverse" in citizenship) to such small amounts. According to federal law (28 U.S.C. §1332), the amount in dispute must exceed \$75,000 for a case to be heard in a federal court based on the diversity of the parties' citizenship (the parties are from different states or different countries). However, civil actions which are not diversity cases may

⁶ **Article III; Section 2:** *The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.*

⁷ **Amendment the fifth:** *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

⁸ **Amendment the sixth:** *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.*

⁹ **Amendment the seventh:** *In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.*

arise in federal courts (for example, in places which are federal jurisdictions as the District of Columbia), a circumstance in which this clause may apply.

4. A claim that would have triggered the right to a Jury Trial under English Common Law in 1791 must be asserted: *Parsons v. Bedford* (1830) and *Dimick v. Schiedt* (1935). Governed again by the immobility of which the constitutional system of the United States is the guarantor, if it is not shown in an action litigation that the case is analogous to any that existed in the 1791 British law, the Trial by Jury will not be granted.

To determine whether the case in which a Trial by Jury is sought meets the conditions of the British Common Law of 1791, Judge Joseph Story established the historical test in *United States v. Wonson* (1812). For example, the application of historical evidence in *Parsons v. Bedford* (1830), the Supreme Court found that Jury Trials were not constitutionally guaranteed for cases under maritime law, an area in which English Common Law did not require juries. The Court clarified this rule as a "fixed historical test" in *Thompson v. Utah* (1898).

The Court has held that modern court procedures are unconstitutional only in cases where the Court used the historical test and it was shown that it did not exist under English common law in 1791: *Slocum v. New York Life Insurance Co.* (1913), *Dimick v. Schiedt* (1935). But we also find cases in which a procedure not covered by the British Common Law of 1791 has been declared constitutional. At *Gasoline Products Co. v. Champlin Refining Co.* (1931), the Supreme Court declared constitutional a modern procedure that did not exist under English Common Law. Under this law, a court ordered a new trial on all issues, not just some of the issues. In deciding that a partial retrial was constitutional.

When we refer to Common Law, we must refer to Tort law, aimed at obtaining compensation for breach of contract or non-contractual damages. We must not confuse it with Equity, different to the rules inherent to Common Law, which seek to re-establish legal situations. For example, the search for a declaratory judgment, demanding a right belonging to the claiming party, would be an example of Equity¹⁰. Such cases must be tried by a professional judge. In 1938, "Law" and "Equity" were united in the same civil jurisdiction by the adoption of the Federal Rules of Civil Procedure.

In *Beacon Theatres v. Westover* (1959), the Court assessed whether to proceed with the declaratory action in conjunction with the claim for damages (the declaration would be *Equity*, and the claim would be *Law*). The Court stated that it did not matter that the equitable claims had been filed first and the law counterclaims involved allegations common to the equitable claims: "only under the most imperative circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a Jury trial of legal issues be lost through prior determination of equitable claims¹¹".

In the case of *Dairy Queen v. Wood* (1962), in which the plaintiff sought various types of "remedies", including an injunctive relief and monetary damages, the Court held that, although the judicial claim was incidental to the equitable relief sought, the 7th Amendment required that the issues relating to that legal remedy be tried before a Jury, because the primary rights that were awarded were of a legal

¹⁰ *Vid.* HUTTONER C., "Unfit for Jury Determination: Complex Civil Litigation and the Seventh Amendment Right of Trial by Jury", 20 *B.C.L. Rev.* 511, Boston, 1979, pp. 522-524

¹¹ *Vid.* DAVIDSON, Kathy, The Right to Trial by Jury in Complex Litigation, 20 *Wm. & Mary L. Rev.* 329, Washington, 1978, pp. 335-337; y YORIO, E. y THEL, S., *Contract Enforcement. Specific Performance and Injunctions* (2^a ed.), Wolters Kluwer, Nueva York, 2017, section 21-21.

character. Therefore, the rule that emerged was that legal claims should be tried prior to the equitable ones and before a Jury if the litigant so wished¹².

The Court reinterpreted and broadened the scope of the right to a Jury Trial in *Curtis v. Loether* (1974). "The Seventh Amendment does apply to actions enforcing statutory rights [civil rights of legal form], and requires a Jury Trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law"¹³.

In *Chauffeurs, Teamsters, and Helpers Local No. 391 v. Terry* (1990), Justice Marshall stated that the right to a Jury Trial provided by the Seventh Amendment covers not only the forms of common law suits recognized in 1791 (when the Bill of Rights was ratified), but any suit concerning the legal rights of the parties, unlike claims that involve only *equitable rights and remedies*¹⁴. Lawsuits against the federal government itself do not receive the protections of the Seventh Amendment because of the doctrine of sovereign immunity.

Over time, the Court has stopped comparing cases under English common law. In *Gasperini v. Center for Humanities, Inc.* (1996), the Supreme Court found constitutional the examination on appeal of a denial of a motion for a retrial for excessiveness, another remedy that did not exist under English Common Law.

This case was the first not to be anchored in English Common Law. The procedure was declared constitutional on the basis that at some point a Jury verdict was so excessive so as to become a question of law that was reviewable "as a control necessary and proper to the fair administration of justice"¹⁵, although there was a *conservative* dissenting vote.

In *Markman v. Westview Instruments, Inc.* (1996), the Court considered whether in a patent infringement case the Seventh Amendment requires the Jury to decide the scope of a patentee's rights. Previously, the Court had stated that if the issue depended on the Jury, it depended on whether a Jury determination on the issue was necessary to preserve the "substance of the common-law right of trial by Jury". A unanimous Court recognized that the phrase "substance of the common-law right" was "however, a pretty blunt instrument for drawing distinctions". The Court ruled that many parts of the patent claims are questions of law rather than fact, and that the 7th Amendment Jury's guarantee is not necessarily applicable. In the end, the Court ruled that the judge should interpret the lawsuit. He further stated that "even if history and precedent did not answer the question, the judges were better able than the jurors to interpret documents and thus interpret the claim"¹⁶.

¹² Vid. "Dairy Queen, Inc. v. Wood 369 U.S. 469 (1962)" *Encyclopedia of the American Constitution*. *Encyclopedia.com*, disponible en: <http://www.encyclopedia.com>.

¹³ Vid. HOUSING., "–The Seventh Amendment– A Return to Fundamentals", 10 *Urb. L. Ann.* 313, Washington D.C 1975, pp. 319.

¹⁴ Equitable remedies are Court-ordered actions that direct parties to do or not to do something; such remedies include injunctive relief and Specific Performance. Alternatively, a non-monetary remedy, such as an Injunction or specific performance, is obtained when a legal remedy such as money damages cannot adequately redress the injury. "Equitable Remedy." *West's Encyclopedia of American Law*, 2^a ed., The Gale Group, Detroit, 2008, (Consultado el 11 de enero de 2017). Available at: <http://legal-dictionary.thefreedictionary.com/Equitable+Remedy>. Concerning its historical origins, Vid. MAITLAND, F. W., *The Constitutional History of England*, Cambridge University Press, Cambridge, 1908, pp. 221–226 y DENNING, L., *The Discipline of Law*, Butterworths. Londres 1979, p. 197.

¹⁵ Vid. THOMAS, S., "The Seventh Amendment, Modern Procedure, and the English Common Law", 82 *Wash. U. L. Q.* 687, Washington D.C, 2004, pp. 700

¹⁶ SEASE, E., "Markman Misses The Mark, Miserably", *Journal Of Law, Technology & Policy*, Vol. 2004, n° 1, 2004, pp. 100-104; y HIGBEE JR, P., "The Jury's Role in Patent Cases: Markman v. Westview Instruments, Inc", 3 *J. Intell. Prop. L.* 407, 1996, p. 428.

The size of the Jury has also been discussed, being stated in *Colgrove v. Battin* (1973) that a 6-member Jury maintains constitutional guarantees, while in *Ballew v. Georgia* (1978) a 5-member Jury was held to violate them.

B) LEGAL REGULATORY FRAMEWORK AND PROCEDURE

a) US Federal Code

After the Constitution, Trial by Jury is regulated in the US Federal Code, Chapter 121, in a generic manner, leaving civil and criminal areas to their respective provisions. §1861 declares the right of all litigants in federal courts to be tried by Grand Juries or Petit Juries selected at random from a cross-Sectional system in the division in which the court is located¹⁷. Any discrimination is prohibited (28. U.S.C. §1862).

Each district in the United States must develop a random selection system which must:

1. Establish a Jury commission, or authorize the court clerk, to manage the Jury selection process.
2. Specify whether the names of prospective jurors will be selected from the voter registration lists or the lists of the actual voters of the political subdivisions within the district or division. The plan will prescribe some other source or sources of names in addition to voter lists where necessary to further the policy and protect the rights guaranteed by Sections 1861 and 1862 of this title.
3. Specify the detailed procedures to be followed by the Jury commission or the clerk in selecting names of the sources specified in the paragraph.
4. Provide for a master Jury wheel (or similar device in purpose and function) in which the names of those randomly selected will be placed. The plan will fix a minimum number of names to be initially placed in the master Jury wheel, which will be at least half of 1 % of the total number of persons on the lists used as a source of names for the district or division.
5. Specify those groups of persons or occupations, whose members, at their individual request, will be excused from Jury service. Such groups or classes will be excused only if the district court determines that Jury service for such a class or group would involve excessive hardship or extreme inconvenience to the members thereof and the excuse of its members would not be inconsistent with Sections 1861 and 1862 of this title.
6. It is specified that the following persons are excluded from Jury service for being exempt: (a) members in active service in the Armed Forces of the United States; (b) members of the fire or police departments of any State, the District of Columbia, any territory or possession of the United States, or any subdivision of a State, the District of Columbia, or such territory or possession; (c) public officers of the executive, legislative, or judicial branches of the government of the United States, or of any State, the District of Columbia, any territory or possession of the United States, or any subdivision of a State, the District of Columbia, or any territory or possession of the United States.
7. Fix the time at which the names drawn from the qualified Jury wheel will be disclosed to the parties and to the public.
8. Specify the procedures to be followed by the clerk or Jury commission to assign the persons whose names have been drawn from the qualified Jury wheel to the panels of the Grand and Petit juries.

§1865 regulates the exceptions to Jury duty when the person:

(1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;

¹⁷ **§1861. Declaration of policy:** It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

(2) cannot read, write, and understand English to a sufficient degree of proficiency to satisfactorily fill out the Jury qualification form;

(3) cannot speak the English language;

(4) is incapable, due to mental or physical illness, to render satisfactory Jury service; or

(5) has a charge pending against him/her for the commission of, or has been convicted by a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his/her civil rights have not been restored.

§1870 governs challenges. Each party will have three challenges and they will be determined by the court, which may decide to allow additional challenges.

§1871 regulates the remuneration of members of the Jury. At the Grand Juries, they will be paid \$40 per day of service, and \$10 at the Petit Juries.

§1872¹⁸ regulates the trial of factual issues in the Court, which will be tried by a Jury, because of the prohibition on those issues being considered by a professional Court.

It is important to note the provision for the judging of the facts on civil matters in the maritime jurisdiction in §1873¹⁹, since we must not forget that it was dismissed that these cases could be tried in Trials by Jury. §1874 regulates the Trial by Jury on uncertain sums of bonds or other specialties²⁰.

§1875 prohibits intimidation of a juror by his/her employer and the employer:

(1) will be liable for damages for any loss of wages or other benefits suffered by an employee as a result of such violation;

(2) may be enjoined from further violations of this Section and ordered to provide other appropriate relief, including but not limited to the reinstatement of any employee discharged by reason of his/her Jury service; and

(3) will be subject to a civil penalty of not more than \$5,000 for each violation as to each employee, and may be ordered to perform community service.

Trial by Jury is permitted in the Court of International Trade at §1875, referring on selection, challenge and compensation issues for the Sections mentioned above.

¹⁸ **§1872. Issues of fact in Supreme Court:** *In all original actions at law in the Supreme Court against citizens of the United States, issues of fact shall be tried by a jury.*

¹⁹ **§1873. Admiralty and maritime cases:** In any case of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons or upward, enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between places in different states upon the lakes and navigable waters connecting said lakes, the trial of all issues of fact shall be by jury if either party demands it.

²⁰ **§1874. Actions on bonds and specialties:** all actions to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, wherein the forfeiture, breach, or nonperformance appears by default or confession of the defendant, the court shall render judgment for the plaintiff for such amount as is due. If the sum is uncertain, it shall, upon request of either party, be assessed by a jury.

§1877²¹ provides for the protection of the status of a juror, in terms of its remuneration and the consideration of time attributed to his/her status.

b) Federal Rules of Civil Procedure

The specific norm that regulates the civil Jury is the Federal Rules of Civil Procedure, in Title VI. The right to a Jury Trial is enshrined in rule 38 as inviolable to the parties.

Either party may require it by serving the other parties with a written demand which may be included in a pleading, or by filing the demand in accordance with Rule 5(d). In its demand, a party must specify the issues that it wishes to be tried by the Jury; otherwise, it is considered to have demanded a Jury Trial on all the issues.

It is possible to withdraw a Jury Trial as long as it is not served. If the case occurs, it may be withdrawn if the other parties consent.

With regard to maritime claims, it sets out some limitations.

Rule 39 regulates situations when a Jury is demanded and when it is not:

1. When the Jury is demanded, all issues presented will be tried, except where:

- (1) the parties or their attorneys file a stipulation to a non-Jury trial or so stipulate in the record; or
- (2) the Court, on motion or on its own, finds that on some or all of those issues there is no federal right to a Jury Trial.

2. If the Jury has not been properly demanded, a professional Court will try the case, but the Court may, on motion, order a Jury Trial on any issue for which a Jury might have been demanded.

3. In an action not triable of right by a Jury, the court, on motion or on its own:

- (1) may try any issue with an advisory Jury; or
- (2) may, with the parties' consent, try any issue by a Jury whose verdict has the same effect as if a Jury Trial had been a matter of right, unless the action is against the United States and a federal statute provides for a non-Jury Trial.

It is necessary to highlight Rule 44.1, which allows to rely on a foreign country's law to the specific case by means of a written request. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law, not of fact, so it is for the judge and not the Jury to determine. One type of evidence is the use of *Expert Witness*, recognized in rule 702 of the Federal Rules of Evidence, but this witness is not required to prove foreign law, and the court may reject his/her opinion and decide on the basis of other evidence or on its knowledge. Nonetheless, there is reluctance to consider these

²¹ **§1877. Protection of jurors:** (a) Subject to the provisions of this section and title 5 of the United States Code, subchapter 1 of chapter 81, title 5, United States Code, applies to a Federal grand or petit juror, except that entitlement to disability compensation payments does not commence until the day after the date of termination of service as a juror.

(b) In administering this section with respect to a juror covered by this section-

(1) a juror is deemed to receive monthly pay at the minimum rate for grade GS-2 of the General Schedule unless his actual pay as a Government employee while serving on court leave is higher, in which case monthly pay is determined in accordance with section 8114 of title 5, United States Code, and

(2) performance of duty as a juror includes that time when a juror is (A) in attendance at court pursuant to a summons, (B) in deliberation, (C) sequestered by order of a judge, or (D) at a site, by order of the court, for the taking of a view.

means of evidence because of the impartiality with which it operates as a means carried by the parties, and so the judge is urged to seek the means by himself²². *Bodum, USA, Inc. v. La Cafeitere, Inc.* 621 F.3D 624 (7th Cir. 2010).

Rule 47 permit the parties to examine jurors as to their suitability. They are allowed to make the three challenges provided by the U.S. Federal Code. This is known as *voir dire*, in which the parties are allowed to examine the members of the Jury on their impartiality and suitability in the specific case, with the aim of creating an impartial panel. It has also been defined as "the process of questioning prospective jurors about their qualifications to serve on the Jury panel to decide the case"²³.

Rule 48 stipulates that the Jury must be composed of between 6 and 12 members. The verdict must be unanimous and must be returned by a Jury of at least 6 jurors.

Once the verdict has been returned, a party or the judge himself may poll the members individually. If the poll reveals a lack of unanimity or lack of assent by the number of jurors that the parties stipulated to, the court may direct the Jury to deliberate further or may order a new trial.

Rule 50 governs the trial on points of law (directed verdict) and the motion for a new trial.

In General. If a party has been fully heard on an issue during a Jury Trial and the court finds that a reasonable Jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law (the laws of the State on which it will rely for the resolution of disputes), can be maintained or defeated only with a favourable finding on that issue.

If the court does not grant a motion for judgment as a matter of law, the court is considered to have submitted the action to the Jury subject to the court's later deciding the legal questions raised by the motion or if the motion addresses a Jury issue not decided by a verdict.

The party may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the Jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

Specialties in the evidentiary process are regulated in the Federal Rules of Evidence. The Jury will determine any issue relating (Rule 1008) about whether:

(A) an asserted writing, recording, or photograph ever existed;

(B) other produced at the trial or hearing; or

²² *Vid.* THOMPSON, R., "Determining Foreign Law Under Federal Rule of Civil Procedure 44.1", *Hawkins Parnell Thackston & Young LLP*, Atlanta, 2011, pp. 2-5.

²³ *Vid.* BENNETT M., "Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions", *HARV. L. & POL'Y REV*, n° 149, 2010, pp. 158.

(C) other evidence of content accurately reflects the content.

The Federal Rules of Bankruptcy Procedure provide for a Jury Trial in bankruptcy proceedings when the parties consent (Rule 9015), with the provision of using the rules of civil procedure.

2. CANADA

The right to Trial by Jury in civil proceedings is less institutionalized than in the U.S., with a strong focus on criminal proceedings. Only about 15 percent of all Jury Trials in Canada occur in civil cases²⁴.

The right to Trial by Jury was provided for by the Criminal Code of 1892, although it existed prior to the formation of Canada as a federation²⁵. Nowadays it is found in Chapter XX of the current code²⁶.

The right to be tried by a judge and Jury is a right constitutionally provided by Subsection 11(f) of the Canadian Charter of Rights and Freedoms when the accused is charged with a crime punishable by 5 years imprisonment or more²⁷.

Turning to the civil sphere, the Jury is regulated independently by each Canadian province²⁸, although in the province of Quebec, a territory governed by Civil Law, this institution is not regulated in its Code of Civil Procedure.

The procedure for Jury duty in Canada is set out in the *Juries Acts* of each province²⁹. In most Canadian provinces and territories, a person must be 18 years of age and a Canadian citizen to serve on a Jury.

As we have said, it is also up to each territory to decide whether it has a Jury for civil cases. All provinces, except Quebec, have a civil Jury, being regulated the matters which may be tried by a Jury.

Specifically in the province of Alberta, Section 17 of the Jury Act establishes the right to a Jury trial in:

- A. an action for defamation, false imprisonment, malicious prosecution, seduction or breach of promise for marriage,
- B. an action founded on any tort or contract in which the amount claimed exceeds an amount prescribed by regulation, or
- C. an action for the recovery of property the value of which exceeds an amount prescribed by regulation.
- D. The formal rules of the Jury are found in the Rules of Court.

In Ontario, in *Legroulx v. Pitre*, 2008 CanLII 4308 it was stated that there is no absolute right to a civil Trial by Jury, as this provision is neither included in the Constitution nor in the English Magna Carta, apart from criticising the use of juries in motor vehicle cases in relation to compensations.

²⁴ “Canada’s System of Justice: The Role of the Public”, online: Department of Justice <http://www.justice.gc.ca/eng/dept-min/pub/just/09.html>.

²⁵ Chapter C-25.01

²⁶ Criminal Code (R.S.C., 1985, c. C-46)

²⁷ (f) *except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.*

²⁸ *Vid.* SKOLNIL, Terry, “The Jury System in Canada”, *Sistemas Judiciales*, n° 17, 2013, pp. 16.

²⁹ As examples: Ontario R.S.O. 1990, CHAPTER J.3; British Columbia [RSBC 1996] CHAPTER 242; Nova Scotia *Juries Act*. 1998, c. 16, s. 1; Quebec *Juros Act* Chapter J-2; Alberta JURY ACT Chapter J-3; St. John, Newfoundland and Labrador SNL1991 CHAPTER 16 JURY ACT, 1991; Manitoba C.C.S.M. c. J30, The Jury Act; *Saskatchewan The Jury Act*, 1998 Chapter J-4.2 of the *Statutes of Saskatchewan*; New Brunswick Jury Act, SNB 1980, c J-3.1.

In contrast to Alberta, the rules of the Rules of Civil Procedure (Rule 47.01) regulate the cases in which a Jury Trial is held of the facts that caused the damage³⁰.

In British Columbia, the Jury Act regulates the manner in which the Jury is to be called upon in a civil suit, which it is to be invoked by the party with reference to Section 14 of the Act. It also regulates fees, time limits and challenges. If the verdict is not reached by unanimity within 3 hours, a reinforced majority of 75% will be required.

With respect to the content, the Jury may not, in accordance with Rule 12-6(2) of the Supreme Court Civil Rules, be invoked if the trial relates to:

- A. the administration of the estate of a deceased person,
- B. the dissolution of a partnership or the taking of partnership or other accounts,
- C. the redemption or foreclosure of a mortgage;
- D. the sale and distribution of the proceeds of property subject to any lien or charge;
- E. the execution of trusts;
- F. the rectification, setting aside or cancellation of a deed or other written instrument;
- G. the specific performance of a contract;
- H. the partition or sale of real estate;
- I. the custody or guardianship of an infant or the care of an infant's estate; or
- J. a procedure referred to in Rule 2-1(2) (claim for damages).

In Manitoba, the regulation made in its *Jury Act* is formalistic. It regulates a Jury of 6 members, although 5 votes are required but unanimity is not required (art. 33 (2)). It also regulates a 5-member Jury when the verdict requires unanimity (art. 32 (2)). It also regulates challenges and time limits. The Court of Queen's Bench Rules regulate the hearing, and dissatisfaction with the verdict. Directed verdict is provided for in Rule 52.10(b).

In Newfoundland and Labrador, juries are prohibited in divorce proceedings under Section 43.8 of the Jury Act. The Rules of the Supreme Court under the Judicature Act of Newfoundland and Labrador refer much of the proceedings to the Jury Act, specify the selection process and regulate the verdict and the costs.

In Saskatchewan, its Jury Act permits a civil Jury trial under Section 18 (1) where the action relates to:

- A. for libel, slander, malicious arrest, malicious prosecution or false imprisonment; or
- B. where the amount claimed exceeds \$10,000.

The Jury consists of 6 members, but the verdict of 5 jurors is valid and will have the same effect as one by 6 jurors, according to Section 16.

The Queen's Bench Rules of Saskatchewan regulate matters of form such as time limits and the application of this type of procedure.

The New Brunswick Jury Act bears a close resemblance to the other rules, although it is remarkable that its Jury is composed of seven members.

The Rules of Court provide that the subjects for trial by Jury are (Rule 46.1):

- a) libel,
- b) slander,

³⁰ 47.01 A party to an action may require that the issues of fact be tried or the damages be assessed, or both, by a jury, by delivering a jury notice (Form 47A) at any time before the close of pleadings, unless section 108 of the *Courts of Justice Act* or another statute requires that the action be tried without a jury. R.R.O. 1990, Reg. 194, r. 47.01.

- c) breach of promise of marriage,
- d) malicious arrest,
- e) malicious prosecution, or
- f) false imprisonment.

Its Jurisdiction Act also regulates the duties of the Jury and, above all, the form of the verdict (Rules 43 and 44).

We can draw a list of advantages in terms of the Canadian system³¹:

a) Advantages

- a. Citizens' appreciation of the justice system.
- b. The Jury system contributes to the openness and transparency of civil and criminal proceedings.
- c. On very rare occasions, the Jury serves as a safeguard against irrational and inhumane laws.

3. AUSTRALIA

Similar to previous models, the right to a Jury Trial is developed in Section 80 of the Australian Constitution with reference to criminal procedure only³².

The civil Trial by Jury is regulated individually by each State, so each of them has its own Jury Act, which regulates the criteria of selection, the selection procedure and the specialties of each procedure (civil and criminal).

In Western Australia, its Jury Act³³ regulates all civil and criminal Jury proceedings:

If there is an assessment of damages in the case submitted to the Jury, the selection of the Jury will be made with specialties (Section 29).

The Jury in civil proceedings will consist of 6 members (Section 19). If a party applies for an order for a civil Jury Trial, that party must pay an amount (Section 44). Challenges are also permitted against the entire Jury panel (Section 45). A juror's discharge process is regulated where that juror is not impartial, without affecting the integrity of the Jury (Section 46). If the Jury is reduced suddenly, its composition will be valid as long as its number does not fall below 4 (Section 47). As a general rule, the vote is unanimous. If it takes more than 3 hours to deliberate, a vote of 5 out of 6 members will suffice; of 4 if the Jury is composed of 5 members, and of 4 if it is composed only of that number (Section 48). If there is further disagreement, the judge will discharge the Jury and another trial will be held (Section 50).

If a party so requests, it may have 2 or more members of the Jury inspect and appraise a place or property in question, provided that that party will bear the costs (Section 51).

In the Northern Territory, the Jury Act³⁴ regulates a general framework of selection, procedure, and liability, giving specialties to each process.

³¹ Vid. CORRICK, K. y ROSENBERG, M., "Trial by Jury: The Canadian experience", en *Sistemas Judiciales*, n° 17, 2013, pp. 12-14.

³² **COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - SECT 80:** *The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.*

³³ *Juries Act 1957 WA.*

³⁴ *Juries Act. NT.*

In cases of defamation, the Jury is prohibited (Section 6).

As a general rule, the trial will be without a Jury, except (Section 7):

1. When a party requests a Jury's assessment of an issue, or
2. The Court so decides *ex officio*.

The Jury will consist of 4 members.

The party requesting the Jury must pay a fee prior to the commencement of the trial (Section 8).

Part VII, division 2, regulates the selection process for civil juries (Sections 39-41).

Regarding the verdict (Section 49).

- If more than 6 hours have passed, there is no unanimity, and 3 of the 4 jurors have given their verdict, it will be valid.
- If more than 12 hours have passed without agreement, the Jury will be discharged and the case can be retried without the need for a new process.

In South Australia, civil juries are prohibited under the Jury Act (Section 5)³⁵.

In Queensland almost all of its regulation in its Jury Act³⁶ is generic. It only regulates the number of jurors, which will be 4 (Section 35); the consequence of not reaching unanimity, if unanimity is not reached within 6 hours, is that the Jury will be discharged; although, if the parties agree, the verdict of 3 of the jurors will be taken as the verdict of the Jury (Section 58), and the need to pay a fee for the application (Section 65).

In New South Wales, the Jury is regulated in a manner similar to the former State in the Jury Act³⁷: it will consist of at least 4 jurors, but which may be increased to 12 at the request of the parties (Section 20). The parties may challenge any member with a limit of half of the members of the body (Section 42A). The balloting procedure of the Jury in civil proceedings is regulated (Section 49).

If the verdict is not reached after 4 hours, the court may discharge the Jury and the proceedings may be set down without the need for a new process (Section 58).

In Victoria, it is more specifically regulated. Its Jury Act³⁸ regulates a separate procedure for selection (Section 33), challenge (Sections 34 and 35) and verdict procedure (Section 47):

If unanimity is not reached, the result of all but 1 member is valid. This procedure will be used after 3 deliberations. If after 6 hours a majority verdict is not reached, the Jury may be discharged.

Jury trials represent a very small proportion of court cases in Victoria. There were a total of 584 Supreme and County Jury trials in 2012-13. Of these, 501 were criminal and 83 were civil. 448 Jury trials were held in Melbourne and 136 were held in regional Victoria³⁹.

³⁵ Juries Act 1927. SA

³⁶ Jury Act 1995. QL

³⁷ JURY ACT 1977. NSW.

³⁸ Juries Act 2000. VT

³⁹ "Jury trials in Victoria" *Victorian Law Reform Commission*, disponible en: <http://www.lawreform.vic.gov.au/content/2-jury-trials-victoria-0>.

Tasmania has a system that is virtually the same as Victoria's, so we will not look at it in detail.

Jury Trial in Federal Court is also regulated, being a unique procedure due to its federal jurisdiction through the Federal Court of Australia Act 1976. Section 39 regulates that the general rule is the trial without a Jury, and refers to state law the minimum requirements that must be legislated.

V. Concluding thoughts

1. JURY TRIALS IN THE CIVIL JURISDICTION

Once having made the comparisons, we observe that the countries that hold civil Jury Trials are directly influenced by English Common Law, since this practice has its origin in England. But we also observe that this institution is losing strength in civil matters and is being eliminated in the territories of countries influenced by common law⁴⁰, and being reduced in application in as many provinces or States⁴¹.

We find it relevant that the constitutions of Australia and Canada do not recognize the right to a Jury Trial in civil matters, and instead give their lower administrative bodies the freedom to recognize such a formula. The Spanish Constitution recognizes the Jury Trial in similar terms to the previous countries, although its definition leaves the possibility more restricted than the previous ones.

It is truly remarkable how U.S. law protects the right to this figure in civil proceedings, taking it even to specialized courts such as the bankruptcy courts and the international trade court.

As is normal, countries influenced by Common Law allow many delegations of competences in those States or provinces, governed by a minimum law, and developed between various forms of implementation such as the coexistence of a specific law for the selection of members and minimum procedural standards, to be developed later in their procedural laws; or only one law for the appointment of members, delegating the procedural development in procedural laws; or regulating the entire process in a single norm. All of these forms are intended to regulate the Jury's regime in a common way, and then to develop specialties in criminal or civil proceedings.

In order to summarize these differences between juries in civil and criminal proceedings, we would like to point out that the Jury in civil proceedings is characterized by the following characteristics

- A more lenient regime in terms of liability;
- A Jury made up of a smaller number, even under 6 members.
- A regime of short deliberation, in which if the decision is not reached within a few hours, the majority decision wins, and if after a few more hours the discrepancy continues, the Jury can be discharged.
- Lesser intervention of the Jury in the proceedings.
- The consideration of the Jury as a "service" for which you must pay when requesting it before the beginning of the proceedings.

2. IMPROVEMENT PROPOSALS IN THE SPANISH JURY ACT

⁴⁰ As in the cases of New South Wales and Quebec, although the latter is governed by civil law.

⁴¹ In virtually all provinces of Canada and the States of Australia, it is being reduced. Even in England, jury trials in civil matters are reduced to defamation cases.

Although juries have been the object of study in the civil process, it is possible to extrapolate their flexible conception in the criminal process.

Once we have all the above information and assessments, we believe it is appropriate to make the following recommendations in the Spanish Law:

To begin with, Article 1 should consist in a closed list of offences, instead of being formulated by subject matter in Article 1.1, and then move on to the offences contemplated under the LJ, in which offences against the honour, as semi-public offences, would be excluded.

Composition of the Jury: in order to promote an optimization of the economic resources, and in view of the disparity of crimes that can be prosecuted under the Jury Law, not all of them should be tried by a large Jury: the *Grand Jury* and the *Petit Jury* models could be formed, with an 8-member Petit Jury for crimes with less punishment, and a 14-member Grand Jury for crimes with more severe punishment.

The Jury's challenge procedure is practically based on the prohibition, incapacity and incompatibility assumptions, but this does not guarantee that the members of the Jury will not be influenced by some kind of experience, such as being the subject of a crime similar to the one they are going to judge, so it would be positive to introduce a system of *voir dire* by which the parties, before the opening of the oral trial, can ask questions aimed at finding the suitability of the jurors based on grounds other than those above mentioned and with the possibility for the parties and the Presiding Judge to question and challenge the jurors on a limited number of grounds.

Another element to be reformed would be the excessive orality of the process, derived from an erroneous conception of innovation in the process. Although orality is positive, it is necessary that the principle of writing prevails in such fundamental elements as the taking of evidence.

However, if the wish is to opt for a more transgressive and inclusive model of citizenship in the administration of justice, such as the *escabinado* model, followed in Germany and other European countries, where the vast majority of crimes are tried jointly in a small court involving lay judges and professional judges; in which less serious crimes are tried through a specific composition, and for serious crimes another where both elements are expanded.

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