

EMPIRICAL ASSESSMENT OF THE ESCABINATO JURY SYSTEM

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There are two practical applications of the jury system: the jury of lay people and the escabinato jury involving joint decision making by legal experts and lay people. Research undertaken in this field has been almost exclusively centered on the former. This work consists of an empirical study of the role of legal suggest that the loss of a jury of peers implies the dominance of the judge's opinion. The causes and consequences of this domination have been assessed.

Key words: decision making; escabinato; juror, judge; mixed jury, trial.

1. INTRODUCTION

Ever since Montesquieu proclaimed the division of the state into three powers the executive, legislative and judiciary, there has been continuous effort to democratise each of these institutions. The height of citizen involvement in the Administration was to be the jury, an institution that had a historical precedence, i.e., the trial by jury of Socrates, and Norman law of trial by Jury (Nemeth, 1986). The establishment and development of the jury was to mainly take place in the UK and the US. Though it is also true to say that there were considerable differences among and within each of these countries (i.e., in the US each state has its own specific type of jury system), the norm in most cases being a jury composed of twelve lay people, who had to reach a unanimous verdict.

In contrast, the legal system in continental Europe diverged to some extent from this method with the introduction of legal experts, who together with lay people of the jury reached a verdict and subsequently passed sentence. Legal terminology also underwent changes, lay people who sentenced together with judges were referred to as 'escabinoes' and the system 'escabinato'. In comparison, the term mixed jury, which has often been confused in Anglo-American literature with the escabinato system, is used to refer to a system where lay people alone reach a verdict and then both lay people and judge/s jointly pass sentence.

In Spain, a country with a tradition of lay people's juries, the first mention of a jury of 'escabinoes' appears in 1864, under this system requiring a simple majority, the voting procedure in case of a draw entitled the judge to vote in order to break the dead lock.

Though there is no doubt that the escabinato was first adopted in Germany, the maximum exponents were to be France and Italy where it became firmly established. We shall briefly

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examine the peculiarities in each of these countries since they are the most relevant in terms of the *escabinato* jury system.

Germany

The approval of the 'Schwurgericht' and 'Schoffengericht' law of 27 January 1877 led to the creation of the 'Lay People's Jury' and the '*escabinato*' respectively (Gisbert, 1990). The former dealt with major crimes whereas the latter with minor offences.

With the approval of the 'Emniguer's Reform' of 4 January 1924, the lay people's jury is abolished, and popular participation in the administration is reduced to the *escabinato*.

Two reasons for the reduction to a purely *escabinato* system have been suggested. Firstly, extra legal factors such as external political pressure. Secondly, the difficulty in applying the well developed and complex German law with non expert judges (Gómez Colomer, 1985).

The reform of the criminal code of 9 December 1974 reduced the number of *escabinos* from eight to two. This led to the *escabinato* being composed of the judge, acting as president, and two *escabinos*.

The post of *escabino* is for life and can only be held by German citizens. The *escabinos* or honorary judges, who exercise their powers during the trial have equal rights as the judge, and are empowered to take part in any resolutions that may arise during the trial.

France

In France, popular involvement in the administration of justice underwent major change in 1941, particularly with the law of 25 November 1941, that abolished the jury panel and led to the creation of the Jury of *Escabinos* (Soriano, 1985). It is most important to bear in mind the historical context of the period given that this law is passed during the Vichy Government, which can be classed as fascist, and governed a third of France between July 1940 and August 1944 (Gisbert, 1990). This law led to the approval of a series of measures designed to ensure maximum repression, and without doubt had implications in the administration of justice. As Gisbert states: "An autonomous jury may prove to be an obstacle or at least an inconvenience to political control." Other authors, among them De Cocq (1983), have suggested that political repression was not the root cause, but rather the Government adopted a measure that soon or later would have come about irrespective of the government's will. However, De Cocq also points out that the number of cases brought before a *escabinato* jury declined with the introduction of the *escabinato* system.

Italy

In 1931 the suppression of the pure lay people's jury in favour of the *escabinato* by the fascist regime marks the end of the first period of the lay jury. The panel of *escabinoes* is composed of five lay people and a magistrate who are jointly responsible for all resolutions concerning the sentence. The lay people were selected from members of the fascist party.

With the fall of fascism and the approval of the new Constitution (1951), popular participation in the administration of justice is reintroduced but still under the *escabinato* system, which was composed of two judges and six *escabinoes*.

Pro Escabinato Arguments

Those in favour of the escabino system have pointed out that a escabino jury would avoid: the division of facts—verdict—and law—sentence—by lay people and legal experts respectively, irrational resolutions as well as reducing the costs incurred with hung juries (Sendra, 1983; Serra, 1983). Furthermore, it is argued that lay people are unaware of legal norms that entail legal implications, therefore, they are unqualified to deal with certain cases, thus their role is limited if not superfluous (Sendra, 1983).

Opponents to the escabinato system not only reject these claims but argue that in the deliberation the role of the escabinos, in relation to professional judges, would be purely testimonial because they lack any authority or legal knowledge (Gutiérrez-Alviz and Moreno, 1987). Pro escabinos have counter argued that the role of legal experts is no greater than that of the foreperson in a lay people's jury (Fairén, 1979).

One of the most frequently expounded arguments against the lay people's jury has been the accusation of the jury's incompetence, ineptitude and lack of preparation to carry out the duties assigned to it as part of the judicial apparatus. The accusation of incompetence (for further reference see, Vega, 1983; Soriano, 1985; Martínez-Pereda et al., 1990), generally voiced by legal experts, is often used as a justification for suppressing the lay people's jury or at best, if there is no alternative, the escabinato. However, studies designed to evaluate jury performance (Kalven and Zeisel, 1966) do not lend support to this view. These authors classified, according to the modal opinion of judges, cases that had previously undergone trial by jury into: easy, difficult and very difficult. If the jury was incompetent, the divergence in terms of the verdict reached by judges and the jury would be greater in cases classed as difficult and even more so in the very difficult cases. The results, however, showed that the differences were the same in all three groups. Thus, it can not be concluded that the jury does not understand the evidence. Based on the work of Kalven and Zeisel, further studies (Baldwin and McConville, 1979) have reported that the judges believed that on some occasions the jury had applied what was 'just' rather than what was 'legal'. Similar results were obtained by Myres (1979) who, after examining 201 real criminal cases in Indiana, found that juries rarely deviated from the law, and if they did, this was not due to incompetence but rather because it was congruent with what they felt to be 'just' and 'right'. More recent studies with mock juries (Hastie, Penrod, and Pennington, 1983) have shown that though the recall of individual jurors was not always optimum, as a group they perfectly remembered 90% of the evidence (among this the central evidence) as well as 80% of very complex legal instructions, thus fulfilling efficiently the task assigned to them.

Decisions reached by a group composed of lay people and experts have been proposed as a possible solution to the supposed inefficiency of lay people in performing their judicial duties. Consequently, problems inherent in the division between questions of fact, as understood by lay people, and law by legal experts, would be avoided since it is the judge who is responsible for sentencing (for further reference see Soriano, 1985). Research undertaken in this field, however, has shown that group decisions taken in groups where there is a difference in status among its members, lead the lowest ranking members to a process of conformity (Torrance, 1955), which in extreme cases has been calculated to be in the order of 65%. In judgement making Kirchler and Davis (1986) found that the probability of a judgement being modified was closely connected to the status of the person holding an opposing view.

The higher the status of a member the greater the possibility of their judgement being accepted. Bearing in mind that the difference in status between a judge and a lay person at the time of legal decision making is much greater than that described by Kirchler and Davis, it is reasonable to believe that in judicial context judgement modification would be considerably influenced by the judge. Consequently, the results with *escabinato* juries seem to be pre-determined by the decisions of experts. Thus, both Palmer (1987) and Cajal (1994), using law students as legal experts, found that a much greater number of guilty verdicts were reached by *escabino* juries in comparison to juries composed of lay people. Thus, it may be argued that *escabinoes* are reduced to the role of mere accomplices.

Where there seems to be some validity in the accusation of jury incompetence is in the understanding of legal instructions (Hans and Vidmar, 1986). Quite simply, and as judge Frank has pointed (Skidmore v. Baltimore and Ohio) juries do not understand the law because not even many lawyers are capable of doing so. However, when these legal instructions were 'translated' the juries proved to be efficient (Elwork, Sales and Alfini, 1977; Charrow and Charrow, 1979).

Having determined the juries competence we shall now deal with other argument in favour of *escabinato*, i.e., the role of the judge in the *escabinato*. In order to determine whether judges are responsible for group decisions or simply provide new elements of judgement, we evaluated the following hypotheses:

- a) The opinion of the judge will determine the group verdict.
- b) The judge is conceived of as a high status member, consequently this leads to: 1) Juror obedience to the judge, i.e., to maintain a group verdict in accordance to the judge's opinion in spite of supporting a different individual post deliberation verdict; 2) Diffusion of responsibility from lay people to the judge.
- c) Verdict changes during the deliberation will tend to coincide with the judge's opinion.

2. METHOD

Material

A real case of rape, which was tried in the Court House of Santiago de Compostela was recorded on video. The recording of the case was condensed so as to avoid unnecessary pauses or other time consuming elements such as repetitions, etc. Total recording time was one hour and fifteen minutes.

Design

The main issue concerning the *escabinato* system is to determine the role of lay people during the deliberation. In order to evaluate the precise impact of the judge on a *escabinato* jury the most adverse situation was recreated, characterised by i) a unanimous post deliberation verdict, and ii) the verdict of the judge was in line with the minority pre-deliberation verdict, but the judge's verdict was not rigid, i.e., the verdict could be changed if the judge felt it appropriate after considering the arguments of *escabinoes*.

The laypeople were previously instructed that they were going to watch a video of a real trial of rape held in the court house of Santiago de Compostela, and that together with the judge they would have to reach a verdict. The procedure was the following:

- a) Complete a socio-demographic questionnaire.
- b) View the trial on video.
- c) Complete pre-deliberation questionnaire.
- d) Deliberate.
- e) Complete a post-deliberation questionnaire.

The socio-demographic questionnaire was designed to assess the socio-demographic data of each subject such as age, sex, cultural level, etc., in order to obtain heterogeneous juries.

The pre-deliberation questionnaire consisted of the subject's estimate of the verdict, a questionnaire designed to gauge the subject's perception of the evidence and testimonies, and an evaluation of the possible impact of the judge in the deliberation.

The post-deliberation questionnaire evaluated changes in the lay people's verdict, sentence, probability of guilt, etc. Moreover, leadership, interpersonal distance and group relations were assessed by using a sociogramme, e.g., according to preference, which two people within the group, including the judge, would you choose to join you in a future jury, and which two would you exclude (for further details see Arruga, 1983). This indices is most important because it serves as an indicator of the judge's status in the group, as well as the scope of rejection or social distance among the members of the group after the deliberation (see Apendix).

Subjects

The escabinato jury was composed of six people, five were laypeople and the judge as legal expert. The laypeople were chosen to represent a wide social background, education, ideology, religion and age (age ranged between 18 to 58). The gender variable was also controlled given that the trial was concerned with a case of rape and this could lead to bias due to the juror's sex (Arce et al., 1992). The ten escabinato juries were composed of a total of 25 women and 25 men.

3. RESULTS

The juror's self reports confirmed that they considered the situation to be real and so was the judge.

A chi square-analysis for change/no change in verdict in favour/against the judge was significant [chi-square (1) = 23.68; $p < .001$]. It is important to note that nobody changed their initial vote in order to oppose the judge, that in all the deliberations the judge won supporters (see Table 2), and most important of all is that with a two thirds decision rule, bearing in mind that under the escabino system a unanimous verdict is not required, the group verdict always coincided with judge's initial verdict.

Table 1

	<i>Pre-V</i>	<i>Group</i>	<i>Post-V</i>
Escabinato 1	5:0	0:5	1:4
Escabinato 2	2:3	5:0	5:0
Escabinato 3	4:1	2:3	2:3
Escabinato 4	3:2	0:5	0:5
Escabinato 5	1:4	3:2	3:2
Escabinato 6	5:0	2:3	2:3
Escabinato 7	4:1	2:3	2:3
Escabinato 8	3:2	0:5	0:5
Escabinato 9	1:4	5:0	1:4
Escabinato 10	3:2	0:5	0:5

Data = innocent:guilty. Pre-V = Individual predeliberation verdict; Group = Group verdict; Post-V = Individual postdeliberation verdict.

Table 2

	<i>CFJ</i>	<i>Obrdience</i>	<i>JSD</i>
Escabinato 1	5	1	9*
Escabinato 2	3	0	10*
Escabinato 3	2	1	6*
Escabinato 4	3	0	8*
Escabinato 5	2	0	4*
Escabinato 6	3	1	4*
Escabinato 7	2	1	6*
Escabinato 8	3	0	10*
Escabinato 9	4	1	1*
Escabinato 10	3	0	9*

CFJ = changes in the initial verdict toward judge's opinion; JSD = judge's status in the deliberation (raw data, see appendix for the computation). * = value significant with a $p < .05$.

Note: There were no changes in the initial verdict against the judge's opinion. Total obedience is 10%.

In most groups the status of the judge was perceived of as superior (see JSD in Table 2) and decisive in the group decision (compare predeliberation and group verdict in Table 1). Nevertheless, individually escabinoes do not behave in the same way; thus, a oneway analysis of the variable individual/group verdict (change of verdict towards the judge's verdict, no change in verdict, the initial verdict remaining unchanged and coincides with the judge's verdict) and the perceived status of the judge during the deliberation reveal differences between groups ($F(2,43)69.86$; $p < .001$). The posterior analysis of differences (Scheffe procedure) highlights the underlying problem that a escabinato system may entail since, the group

that did not give into pressure (both normative and informational) from the judge not only differs significantly ($P < .05$) from the other two groups but also the unchanged group rejects the judge (mean = -1.0).

In response to the question of whether the judge, as the expert, should be responsible for the final decision. An analysis between groups: i) change of verdict in favour of the judge, and ii) no change to pressure from the judge, indicates that the former agreed with the judge's right to the final decision [$t(33) = -2.19$; $p < .05$]. Thus, the changes in verdict are due to normative pressure more than informational influence.

It is also important to note that conformity (to reach a given verdict due to group pressure, but individually to maintain a different one in the post deliberation), which we calculate to be approximately 10% with laypeople's juries (Arce et al., 1992), is transformed in approximately 10% of obedience (to reach a given verdict due to judge's pressure, but individually to maintain a different one in the post deliberation) (see Table 2).

4. DISCUSSION

With reference to the jury, our results reveal that the opinion of the judge to a escabinato jury would render ineffective two of the maxims of a laypeople's jury: the asymmetry effect (MacCoun and Kerr, 1988) and the imposition of the majority in the deliberation (Kalven and Zeisel, 1966). The asymmetry effect implies that in the case of a draw in the predeliberation, an innocent verdict has greater chances of prevailing, that is to say, laypeople's juries tend to lead to a correction towards innocence. Our results suggest that the opinion of the judge would counter this effect. According to Kalven and Zeisel (1966) nine out of ten juries reach the same verdict as that of the initial majority (a principle based on the tendency of majorities to assimilate minorities rather than the other way round), but with escabinato juries, the opinion of the judge neutralises this principle.

Our results suggest that the loss of a jury of peers implies the dominance of the judge's opinion. But this is even more striking if we consider that a escabinato jury does not require, in order to favour the opinion of laypeople, a unanimous decision, instead a two thirds majority is regarded as sufficient. Bearing this in mind, in our cases, under extremely adverse conditions, the judges managed to obtain a two thirds majority in their favour. Under real life conditions, this would imply that the judge's opinion would always prevail in the group decision; hence, the juror would be reduced to the role of a mere accomplice. Nevertheless, the escabino system does offer the advantage of avoiding professional routine since the escabinoes expose them to new interpretations of the evidence.

Moreover, our findings lend support to the hypothesis that, besides informational pressure, obedience and diffusion of responsibility towards the judge are the underlying factors for verdict change.

Thus, proposals for a jury composed of laypeople and legal experts must be within the framework of what is known in continental European law as a mixed jury. That is to say, a laypeople's jury reaches a verdict, and both laypeople and experts jointly decide on the sentence. Moreover, this would avoid the tendency of jurors to apply leniency due to their inability to control the final decision, i.e., the sentence (Kaplan and Krupa, 1979; Arce, 1989).

This solution offers a point of convergence for those who advocate the escabinato system and those who favour the lay people's jury (González-Cuellar, 1993).

APPENDIX

Status = _ es

es = election status

d = maximum number of possible elections

M = mean. $M = p(N - 1)$

a = asymmetry of the curve. $a = p - q$

t = critical value in "t" of Salvosa's Table.

$$\sigma = \sqrt{(N - 1)pq}$$

d = 2; p = 0.5; M = 2; _ = 1; a = 0.0

critical value of "t" left with a = 0.0 is for P .05 = -1.64; critical value of "t" right with a = 0.0 for P .05 = 1.64.

$X = M \pm t \times$

lower limit $X_{05} = 2 - (1.64 \times 1) = 0.36$

upper limit $X_{05} = 2 + (1.64 \times 1) = 3.64$

Thus all values higher than 3.64 are significantly high, and all values below 0.36 are significantly low.

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