

## **KAZAKHSTAN'S JURY EXPERIMENT AND VARIED MODELS OF LAY PARTICIPATION: LESSONS FROM EMERGENT SYSTEMS OF LAY PARTICIPATION IN KAZAKHSTAN AND BEYOND<sup>1</sup>**

For the first time in its young history, the Republic of Kazakhstan, in 2007, decided to introduce the jury trial.<sup>2</sup> This introduction was based on the new Constitution, which stated, "Criminal procedure shall be carried out with participation of juries."<sup>3</sup> A similar establishment of new systems of lay adjudication has been observed not only in other post-Soviet republics in Central Asia, but also in the Third World, as well as in highly industrialized democracies in the West. Indeed, ever since the end of the Cold War in 1989, many countries in the Global North and South have moved to experiment with and introduce varied models of the popular jury in their respective systems of justice. In the last three decades, Central and East Asia has become the site of this global trend. In the former Soviet republics, such as Russia, Ukraine, Georgia, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan in Central Asia, as well as in their Asian neighbors such as Japan, the Peoples of Republic of China (PRC), South Korea, and Taiwan, varied experiments of lay participation have been debated and new models of jury trial have sprung up, giving citizens brand new opportunities to engage in democratic deliberation in their criminal justice system.

Public demands for the establishment of popular and democratic systems of lay adjudication have risen throughout the history of the Global North and South. For example, after a significant political upheaval or social turbulence has hit any traditional monarchical or dictatorial regime, there has routinely been a demand for the establishment of lay participatory institutions in the justice system as a symbol of popular democratic ideals. The institution of the popular jury and its varied forms has often been perceived as an important and effective political means of elevating ordinary citizens into a position of self-governance

---

1



British Embassy  
Astana

The material was prepared by the Legal Policy Research Center with assistance of Hiroshi Fukurai, Ph.D., Professor of Sociology and Legal Studies, University of California (Santa Cruz, USA), with the technical support of the British Embassy in Astana. The opinions of the experts do not reflect the official point of view of the Embassy.

<sup>1</sup> Nikolai Kovalev, "New Kazakhstani Quasi-Jury System: Challenges, Trends, and Reforms," *International Journal of Law, Crime and Justice* Vol 38, 2010, 261-278. In his paper, Kovalev used the term, a "quasi-jury" or "mixed court" because the proposed jury model in Kazakhstan required the collaboration of citizen jurors and a professional judge.

<sup>2</sup> Id.

<sup>3</sup> Valerie Hans, "Jury Systems Around the World, Cornell Law Faculty Publications," Paper 305 (2008).

and has served the important function of enacting participatory democratic reforms at local and national levels.<sup>4</sup>

While the current tsunami of judicial reforms in Central Asia and the rest of the world could be attributed to the historic “emancipation” of former republics that had been long placed under the political mantle of the Union of Soviet Socialist Republics (U.S.S.R., aka the Soviet Union), this current global trend has historical precedent of earlier origin. The first “global” wave of judicial reforms began as early as the late 18th century, when French citizens decided to introduce trial by jury within the first months of the 1789 French Revolution. This popular “all-citizen” jury then served to become an important political instrument in the hands of the insurgent bourgeoisie for fighting against the oppression of the French aristocracy. What began in France quickly spread to neighboring countries and regions, and Belgium and Greece introduced the popular jury in 1837 and 1844 respectively, followed by Germany in 1848, Russia in 1864, Spain in 1872, Italy in 1873, and Austria in 1874, as well as nearly every other European nation-state by the end of the 19<sup>th</sup> century. It was only with the sudden emergence of Fascism around the turn of the twentieth century that the popular jury was displaced in Spain, Italy, Germany, and other nation-states, and was supplanted by autocratic mixed or magistrate court procedures. These all-citizen juries were effectively replaced and/or supplemented by the system of criminal procedures that required active participation of professional judges or a special class of political members as “jurors” or “assessors” who were closely tied to dominant political regimes in the states.

After the defeat of Fascism during World War II and the dissolution of State Socialism in the Soviet Union and Eastern Europe in the late twentieth century, the world began to witness another major political shift in attitudes towards citizen participation in government. The current second wave of global judicial reform follows the comparable political shift in the balance of geopolitical power after the Cold War, which officially ended with the dissolution of the Soviet Union. While civic responses to foreign pressures and political controls over insurgent domestic populations have varied, many countries in East Asia,<sup>5</sup> as well as in emerging democracies of Central Asia, have begun to engage in extensive national discussions of ideal models of citizen participation in their respective justice systems. Countries that had long suffered from rigid autocratic and dictatorial regimes in other parts of the world, such as South Africa and Congo in Africa<sup>6</sup>, and Venezuela, Bolivia and Argentina<sup>7</sup> in South America, also went through similar popular discussions of the possible introduction of lay participation systems and their potential impacts on the administration of criminal procedures. In the end, many of them have drastically transformed their courts and legal procedures by allowing varied degrees of participation of a group of

---

<sup>5</sup> Hiroshi Fukurai, Kay-Wah Chan and Setsuo Miyazawa, “The Future of Lay Adjudication and Theorizing Today’s Resurgence of Civic, Legal Participatory Systems in East and Central Asia,” 38 *International Journal of Law, Crime, and Justice*, 141-148 (2010); Hiroshi Fukurai and Sunsul Park, “Korea’s Two Key Legal Reforms of Lay Adjudication: The Possible Introduction of the Grand Jury (Japan’s Prosecutorial Review Commission) System and the Possible Elimination of Consent Requirement to Allow Lay Adjudication of American Military Felons in South Korea,” 3 *Yonsei Law Journal* 1 67 (2012).

<sup>6</sup> For global jury systems recently adopted, including ones in Africa, See Matthew Wilson, Hiroshi Fukurai, and Takeshi Maruta, “Global Proliferation of Lay Participation in Justice Systems,” in *Japan and Civil Jury Trials* 112-133 (Matthew Wilson, Hiroshi Fukurai, and Takeshi Maruta, 2015)

<sup>7</sup> For both mixed courts and jury trial introduced in Venezuela, see Stephen Thaman, “Latin America’s First Modern System of Lay Participation,” in *Strafrecht Strafprozessrecht und Menschenrechte* 765-79 (Andreas Donatsch et al. ed., 2002); for jury trials introduced in Argentina, see Valerie Hans and John Gastil, (Eds.) “El juicio por jurados: Investigaciones sobre la deliberación, el veredicto y la democracia,” Buenos Aires, Argentina: Ad Hoc (2014).

citizens in the judgment of criminal and civil cases,<sup>8</sup> by creating new criminal procedures to bring accusations of anti-government activities, as well as by raising compensatory issues involving egregious corporate and business practices and decisions.<sup>9</sup>

One common currency in both of these waves of transformative change in the legal landscape has been that societies turn toward participatory democracy, at least in part, as an antidote to the ills created by governmental corruption, political upheaval, or military dictatorship. In response to a governmental scandal, loss of rights, or the successful removal of a despotic regime and liberation from a government system of domination and hierarchy, the general population has seemed to turn to popular discussions related to embracing democratic institutions of various sorts. These discussions often included consideration of classical all-citizen jury trials or other varied forms of direct citizen involvement in the justice system.

The following section examines recent experiments with judicial reforms around the globe and critically investigates specific models of lay participation that have been adopted in these countries. Since lay participatory models introduced in these countries were closely tied to the nature and extent of legal transformation and political reforms advocated in the formative years preceding their adoption, governmental and civic efforts undertaken for the introduction of particular forms of lay participatory systems will also be analyzed in relation to the varied forms of integration of citizen involvement into the justice system. Based on these analyses, this report provides suggestions for Kazakhstan's efforts to transform and improve its system of direct citizen involvement in the justice system.

## **A. THE POPULAR JURY IN ASIA FROM ALL-CITIZEN JURY TO MIXED COURT TRIBUNALS**

For the last two decades, many countries in East Asia, as well as in emerging democracies of Central and Western Asia, have engaged in extensive national discussions involving different models of citizen involvement in their justice systems. These discussions have resulted in substantial changes in citizen involvement in various countries. In addition to exploring the Japanese experience, it is valuable to examine the underpinnings of lay participation systems and the reasoning underlying such systems.

### **1. The Japanese experience, from the All-Citizen Jury (*Baishin-in*) to Mixed-Court *Saiban-in* Tribunal**

Japan once had a jury trial system (*Baishin-in*), from 1928 to 1943, with the jury including a panel of twelve citizens randomly chosen from the community. While only men with affluent backgrounds were eligible to serve as jurors, highly privileged and “conservative” juries acquitted seventeen percent of all criminal cases.<sup>10</sup> This all-citizen jury trial came to a sudden halt in 1943 due to the lack of candidates to fill the role of jurors as well as the scarcity of governmental resources necessary for the functioning

---

<sup>8</sup> PRC transformed its lay assessor system, including a mixed court proceeding of civil cases as well as criminal matters.

<sup>9</sup> The prosecution decisions by Japan's prosecution review commissions could possibly prompt discussions on potential compensatory issues involving impacts of environmental damages and pollutions. See, generally, Hiroshi Fukurai, “Japan's Prosecutorial Review Commissions: Lay Oversight of the Government Discretion of Prosecution,” *East Asian Law Review*, 2011, 6, 1-42.

<sup>10</sup> See, generally, Hiroshi Fukurai, “The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems,” 22 *Cornell International Law Journal* 315 (2007).

of jury trial procedure in the midst of World War II.<sup>11</sup> After the civic experiment in the adjudication of criminal cases was suspended, the unfettered power of the Japanese prosecution led to a conviction rate of nearly 100 percent for all criminal cases.<sup>12</sup> Such a near perfect conviction rate in criminal trials was achieved through the abuse of prosecutorial power, including the use of substitute prison to concoct forced confessions from criminal defendants. In addition, the judge's uncritical evaluation of such confessions contributed to a large number of wrongful convictions in Japan.<sup>13</sup>

In responding to calls for judicial reform from the public sector as well as from professional legal circles, the Japanese government finally agreed, in 1999, to create the Justice System Reform Council (JSRC) to review and reformulate policies and programs in criminal justice procedures. The JSRC recommended, in its 2001 final report, the introduction of new lay adjudication systems called *Saiban-in Seido* (or *the Saiban-in System*). The recommended model of lay participation did not include the pre-war style, all-citizen jury system. Rather, it called for a judicial panel of three professional and six lay judges in order to make a decision in both conviction and penalty phases of a contested criminal case, and another panel of one professional and three lay judges were expected to adjudicate an uncontested criminal case where there is no dispute on facts and evidence identified during pre-trial procedures.<sup>14</sup>

The Japanese government soon promulgated the Lay Assessor Law in May 2004 and announced that the first lay assessor trial was to begin in 2009, after a five-year preparatory period. On May 21<sup>st</sup> 2009, the law finally went into effect, and six ordinary citizens selected at random from local electoral rolls began to make decisions in serious criminal cases, along with three professional judges.<sup>15</sup> The participation of local citizens in criminal cases, however, failed to reduce the conviction rate. Prior to the introduction of the *Saiban-in* trials, the conviction rate of all indicted cases remained 99.9%.<sup>16</sup> After the introduction of the mixed court tribunal, it fell to 99.8%, i.e., doubling the previous non-conviction rate of 0.1%.<sup>17</sup>

In May 2004, the Japanese government also revised another lay participatory law, the Act to Revise the Code of Criminal Procedure, and improved the all-citizen, grand jury system called the Prosecutorial Review Commission (PRC or *Kensatsu Shinsakai*).<sup>18</sup> Japan's PRC revision is another major judicial reform in re-energizing citizens' active participation in the grand jury system. Unlike the hybrid nature of the *Saiban-in* panel, the PRC is solely composed of eleven citizens randomly chosen from local communities, serving a six-month term, examining the propriety of non-indictment decisions rendered by the Japanese prosecutors. The PRC's main objective is thus to provide direct civic oversight of the government and its institutions and their decisions concerning whether or not to move forward with the formal prosecution of suspected criminals. The new 2009 PRC law also gave the PRC's indictment decision legally binding status. Until 2009, Japanese prosecutors had been known to exercise their indictment decisions very selectively and remained extremely reluctant, or in some politically sensitive cases, even refused, to indict prominent politicians, government bureaucrats, business elites, and

---

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See, generally, Hiroshi Fukurai, "A Step in the Right Direction for Japan's Judicial Reform," 36 *Hastings International Comparative Law Review* 517 (2013).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Fukurai, *supra* note 8.

members of law enforcement agencies closely tied to the centers of political power. After the implementation of the new system in 2009, the PRC panel overturned Japanese prosecutors' non-indictment decisions on numerous occasions, and have thus far forcefully indicted a former deputy police chief, three past presidents of Japan Railway West (JR West), three top executives of Tokyo Electric Power Company (TEPCO), which is Japan's largest and most powerful corporation, as well as a member of the then-ruling Democratic Party.<sup>19</sup> Unlike the hybrid *Saiban-in* trial, the PRC is now seen as providing powerful civic oversight of power elites in major political organizations, large multinational corporations, and various key administrative agencies of the Japanese government, including the police agency. It is important to emphasize that the PRC is solely composed of ordinary citizens randomly chosen from local registered voter rolls. Similar to pre-war Japan's all-citizen jury trials, judicial panels that are exclusively composed of citizens seem to function as an effective mechanism of "check-and-balance" against the institutions of power and privilege in Japan.

## **2. The South Korean experiment – All-Citizen Jury Trial**

Shortly after the turn of the century, South Korea moved forward with efforts to involve citizens in its justice system. Since the end of World War II, South Korea had been known for its dictatorial military regime. With the use of its secret police, including the Korean Central Intelligence Agency (KCIA), South Korea's dictatorial regime held rigid control over the democratic aspirations of the citizenry.<sup>20</sup>

In 1987, the June Democratic Uprising dramatically transformed South Korea from dictatorship to democracy, bringing with it strong demands for democratizing the administration of justice. The Uprising and related fallout finally forced the ruling government to hold elections, introduce democratic measures, and initiate judicial reforms. The sweeping measures included revisions to the South Korean Constitution in 1987 that guaranteed the independence of the judiciary without political interference, as well as the establishment of the Constitutional Court in 1988. For the first time, the South Korean government had an active and independent institution to conduct constitutional review. About a decade later, in 1999, the government also established the Judicial Reform Steering Committee to discuss a long-term plan for citizen involvement in the justice system with active participation in criminal justice procedures. Among the potential forms of lay participation to be discussed was an all-citizen jury system.<sup>21</sup>

In 2008, the South Korean government finally decided to introduce an all-citizen jury trial on a five-year experimental basis. After reviewing the results of this jury experiment, the government decided to make it part of a more permanent system in the criminal justice procedure. During the first experimental phase of the system, the courts commissioned a panel of ordinary citizens to adjudicate serious criminal cases. While the jury's decisions do not bind the courts, judges are instructed to use the jury verdicts as an integral and important tool to guide the final outcome of the trial.<sup>22</sup>

South Korea's legal transformation has been quite remarkable because, unlike Japan, South Korea has absolutely no history of direct citizen participation in its judicial system. Supporters of lay participation aimed to enhance public confidence in the legitimacy and credibility of courts that were traditionally

---

<sup>19</sup> *Id.*

<sup>20</sup> Fukurai and Park, *supra* note 4.

<sup>21</sup> Jae-Hyup Lee, "Getting Citizens Involved: Civil Participation in Judicial Decision-Making in Korea," 4 *East Asia Law Review* 177, 183 (2009).

<sup>22</sup> Jon Herskovitz, "South Korea to Try Jury System for First Time," *Reuters* (May 3, 2007).

considered to be autocratic, secretive, frequently corrupt, and always under the influence of governmental bureaucrats, elected officers, and business elites from oligarchic corporate circles. Supporters also envisaged citizen participation as bolstering broader reforms in the justice system that would temper South Korea's inquisitorial "paper trials," that had largely centered on the court's confirmation of pre-trial testimony and prosecutorial evidence, with little or no opportunity for the presentation of a meaningful defense. Jury trial advocates hoped to create open and adversarial hearings consisting of live, in-court, and public testimony subject to cross-examination before professional and lay adjudicators. Ideally, the defense would be on equal footing with the prosecution at trial.

The all-citizen Korean jury has begun to change the way criminal trials are processed, moving away from previous undemocratic procedures that had been installed under dictatorial rule. For example, while the conviction rate of Japan's hybrid *Saiban-in* trials remain nearly 100%, Korea's all-citizen jury acquitted 8.8% of criminal defendants.<sup>23</sup> In addition to the popular jury system involving serious criminal cases, South Korea took the movement for lay involvement one step further. In 2005, the Ministry of Defense announced that it would adopt a jury system in which officers, noncommissioned officers, and rank-and-file soldiers participate as jurors in an effort to increase public trust in military tribunals.<sup>24</sup> This is a substantial step beyond that taken in many other countries.

### **3. The Chinese experience – Lay Assessor Courts and People's Supervisors System**

Given China's long Communist history and the power vested in the hands of the key officials of the Communist Party for many years, the uninformed observer might assume that China does not have experience with direct citizen involvement in its judicial system. Yet, in 1954, China's new constitution introduced a lay assessor system to adjudicate both civil and criminal cases. Similar to Japan's *Saiban-in* system, China's lay assessor system relied on the collegial collaboration of both professional and lay judges. Mao Zedong's control over the Communist regime, however, did not allow the lay participation system to function, because such a public-based and people-initiated legal institution was perceived as "a Bastion of bourgeois justice."<sup>25</sup> If allowed to continue, direct citizen involvement in China could have staved off several disasters. Mao's agricultural policy during the Great Leap Forward precipitated the great Chinese famine in the late 1950s and early 1960s that led to the demise of nearly thirty million Chinese farmers.<sup>26</sup> In 1966, the government also initiated the Cultural Revolution that led to the persecution of millions of Chinese, including political dissenters, public intellectuals, academic scientists, progressive educators and academicians. It was only after Mao's passing that Deng Xiaoping began to reconstruct China's legal system and judicial procedures in the late 1980s by reopening law schools

---

<sup>23</sup> Jae-Hyup Lee, "Korean Jury Trial: Has the New System Brought About Changes?" 12 *Asian-Pacific Law & Policy Journal* 58 64 (2010) ("In a majority of cases (91.2%), the jury found the defendants guilty").

<sup>24</sup> Joo Sang-min, "Military Seeks to Revise Martial Laws," *Korea Herald* (July 20, 2005).

<sup>25</sup> Zou Keyuan, "Judicial Reform in China: Recent Developments and Future Prospects," 36 *International Lawyer* 1039 (2002).

<sup>26</sup> See, Amartya Sen, *Development as Freedom* (First Anchor Books 2000)



and reforming criminal law and proceedings.<sup>27</sup> In 1998, the Supreme Court drafted regulations and provisions to improve and enable the functioning of a mixed tribunal system of lay assessor trials.<sup>28</sup>

In 2004, China promulgated a new legal document to strengthen its traditional lay assessor system and the people's courts. Specifically, on August 28, 2004, the Standing Committee of the National People's Congress adopted the "Decision Concerning the Perfection of People's Assessor Institution" in an effort to improve China's judicial system, which had been continuously criticized by Western observers for judicial corruption and lack of judicial independence.<sup>29</sup> The institutional and financial foundation for China's lay assessor system was further strengthened by additional amendments passed by the Chinese government in 2005 and 2010.<sup>30</sup>

In April 2003, the People's Congress also introduced a quasi-grand jury system called the People's Supervisors System as part of its judicial experiment. In 2010, China decided to implement this system throughout the country. This system allowed a select group of Chinese citizens to make advisory recommendations and assessments in relation to the investigation of criminal matters.<sup>31</sup> People's supervisors may raise objections to a public prosecutor office's handling of occupational crimes as well as its "apparent" failure to proceed with investigations, including extended and "unnecessary" detention, illegal searches, withholding and freezing of property, no decisions on criminal compensation, and prosecutors' fraudulent practices for personal gain, such as taking bribes and bending the law.<sup>32</sup> The people's supervisors may also question other misconduct, including the extortion of confessions through torture, extraction of evidence through violent means, and other such illegal or undisciplined practices. In essence, people's supervisors function as a public watchdog institution seeking to eliminate governmental abuse of power in the prosecutorial process.

Despite the introduction of new lay assessor, mixed tribunals and the new system of People's Supervisors as the oversight of powerful Chinese prosecutors, China continued to have one of the highest conviction rates in the world. For example, in 2009, one year prior to the nationwide introduction of the People's Supervisors system, China had a conviction rate of 99.9%.<sup>33</sup> In 2013, after the introduction of the new grand jury system, China convicted more than 840,000 defendants and found 2,162 defendants not guilty, i.e., a 99.8% conviction rate.<sup>34</sup> Both Japanese and Chinese examples of mixed and hybrid tribunals substantiate that the participation of professional judges in the adjudication of criminal matters contributes to the nearly identical high conviction rate. The new "improved" hybrid

---

<sup>27</sup> W. H. Lo and E. Snape, "Lawyers in the People's Republic of China: A Study of Commitment and Professionalization," 53 *American Journal of Comparative Law* 433 (2005).

<sup>28</sup> D. Jiang, "Judicial Reform in China: New Regulations for the Lay Assessor System," 9 *Pacific Rim Law & Policy Journal* 569 (2000).

<sup>29</sup> "China to introduce jury trials," *Agence France Presse* (Dec. 20, 2004).

<sup>30</sup> Zhuoyu Wang and Hiroshi Fukurai, "China's Lay Assessor System," in *EAST ASIA'S RENEWED RESPECT FOR THE RULE OF LAW IN THE 21<sup>ST</sup> CENTURY: THE FUTURE OF LEGAL AND JUDICIAL LANDSCAPE IN EAST ASIA* by Setsuo Miyazawa, et al. (Brill 2015).

<sup>31</sup> Ignazio Castellucci, "Rule of Law with Chinese Characteristics," 13 *Ann. Surv. Int'l & Comp. L.* 35, 54 (2007).

<sup>32</sup> United Nations, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention. Committee Against Torture*, 11-12 (Feb. 14, 2006), available at [http://www.univie.ac.at/bimtor/dateien/china\\_cat\\_2007\\_report.pdf](http://www.univie.ac.at/bimtor/dateien/china_cat_2007_report.pdf)

<sup>33</sup> Patrick Boehler, "Supreme People's Court Judge Urges End to Wrongful Convictions," *South China Morning Post* (Aug. 29, 2013).

<sup>34</sup> "Concerns Over 98% Chinese Conviction Rate," *Scotsman* (Jan. 25, 2014), available at <http://www.scotsman.com/news/world/concerns-over-98-chinese-conviction-rate-1-485728>.

lay assessor trials and the introduction of the People's Supervisors System did not seem to inject the democratic ideals of lay participation into the administration of justice in China.

#### **4. Citizen involvement in the judicial system in Taiwan – All Citizen Jury Trial**

In 2012, the Taiwanese government introduced citizen participation into its criminal justice system. The Judicial Yuan, Taiwan's highest judicial organ, first created an independent committee in January 2011 to study the desirability and feasibility of lay participation.<sup>35</sup> Its decision to create the new committee came largely as a judicial response to the unpopular Taiwanese Supreme Court decision reversing the guilty judgment of a defendant charged with a sexual assault of a minor girl. The decision immediately prompted a massive "white rose" movement in September 2010, led by thousands of mothers who demanded the removal of "dinosaur judges," a term often used to represent bureaucratic jurists who have purportedly lost sight of the real world outside of the courtroom.<sup>36</sup> In January 2012, based on the committee's decision, the judicial branch submitted to the Executive Yuan a draft of the Provisional Act Governing Lay Participation in Criminal Trials, calling for the creation of an "observer jury" pilot program.<sup>37</sup> Under the Provisional Act, serious offenses involving the death penalty or a prison term of seven years or more would trigger a lay judge trial. The tribunal would consist of a judicial panel of five lay judges randomly selected from citizens over the age of 23, who have at least a high school education and have resided within the court's territorial jurisdiction for more than 4 years.<sup>38</sup> In the first phase of the judicial reform, the lay judge panel's decision would be considered advisory. A panel of three professional judges would render the final judgment.<sup>39</sup>

The Legislative Yuan has yet to pass the bill to actualize the introduction of mixed tribunal with panels of lay and professional judges. Meanwhile, President Tsai Ing-wen was elected in 2016 and she and her party decided to introduce the twelve member, all-citizen jury system. Just as in the U.S. jury system, the verdict required a unanimous decision. While the debates around the introduction of two systems of lay participation continue, in October 2016, legal experts including Democratic Progressive Party Legislator Tsai Yi-yu advocated the introduction of all-citizen jury trials and denounced the participation of professional judges in the adjudication of criminal cases.<sup>40</sup>

In February 2017, in protest against former justice Hsu Yu-hsiu, who supported the lay assessor type of mixed tribunal being introduced in Taiwan, many professional and civic organizations, such as the Taiwan Jury Association, Citizen Congress Watch, the Northern Taiwan Society, the Taiwan Citizen Participation Association, Taiwan Forever, and other grassroots organizations, participated in a large scale public demonstration and pushed for the implementation of the all-citizen jury trial, which they advocated as the only democratic institution to clean up a justice system that had been fraught with "personal bias, corruption, and influence peddling."<sup>41</sup> It is not surprising that legal scholars and civic

---

<sup>35</sup> Mong-Hwa Chin, *A Social Psychological Perspective on the Decision-Making Processes of Trial Judges in Taiwan*, Duke University School of Law (SJD dissertation 2014).

<sup>36</sup> Audrey Wang, "The People's Court," *Taiwan Review* (Sept. 1, 2012), available at <http://taiwanreview.nat.gov.tw/ct.asp?xItem=194416&CtNode=1349>.

<sup>37</sup> Judicial Yuan of Taiwan, *Provisional Act Governing Lay Participation in Criminal Trials to the Executive Yuan* available at <http://www.judicial.gov.tw/revolution/judReform03.asp>.

<sup>38</sup> Wang, *supra* note 35.

<sup>39</sup> *Id.*

<sup>40</sup> Sun Hsin Hsuan, "Judicial Yuan Nominee Urged to Support Full Jury System," *China Post* (October 13, 2016).

<sup>41</sup> "Campaigners Advocating Jury Trial System Protest at Presidential Office," *Taipei Times* (February 25, 2017).



activists were familiar with the lack of oversight functions of lay assessor's trials in China, as well as Japan's *Saiban-in* tribunals' failure to reduce the near perfect conviction rates in the adjudication of criminal cases. While the central government has yet to make a final decision on the specific model of lay participation, it is most likely that the popular demands for all-citizen jury trials, rather than for the hybrid lay assessor model, will continue to remain very strong in Taiwan.

## **5. Lay participation in other parts of Asia**

In other parts of Asia, the reaction to the concept of lay participation in the justice process has varied, with suggestions for specific models of lay participation differing across different nation-states and independent jurisdictions. In the Philippines, professional judges have exclusively handled criminal and civil cases. As Asia has turned towards involving citizens in the judicial system, several non-profit organizations in the country have been fervently lobbying for lay participation. The Philippine Bar Association has even dispatched delegates to Japan to study the possible establishment of its own citizen judge system, including *Saiban-in* mixed tribunals. The government has been resistant to these efforts, however.

In Thailand, before a 2006 military coup, the national government had led the discussion and debate over the possible introduction of a lay justice system. In 1992, the Black May popular uprising against the dictatorial government led to many legal and political reforms, including the promulgation of the 1997 Constitution that emphasized democracy, the rule of law, and direct citizen participation at many levels and in many forms.<sup>42</sup> Three special courts had already incorporated lay judges in their court proceedings, including: (1) the Intellectual Property and World Trade Court, (2) Labor Courts, and (3) Juvenile and Family Courts, in which lay judges were asked to collaborate with professional judges.<sup>43</sup> Lay judges were experts appointed for an year, and at least in family courts, one of the lay judges must be a woman.<sup>44</sup> The new Constitution was widely accepted to signify the end to extra-constitutional military rule.<sup>45</sup> However, the discussion and debate about democratic reforms, including lay participation, abruptly ended in 2006 when the Thai military seized power and repealed the Constitution.<sup>46</sup>

In other parts of Asia, similar democratic movements have arisen, only to be eventually met by the counter-efforts by the judiciary or the government to either suppress popular movements for the introduction of jury trial or to eliminate lay participation systems altogether. India, for example, abandoned its all-citizen jury trial system in 1960, and other former British colonies such as Singapore ended the jury trial experiment in 1969, with Malaysia doing the same in 1995. At the same time, there have been popular movements to bring back the system of direct citizen participation in criminal cases. For instance, recent scandals of government corruption in Malaysia have reinvigorated the national debate on re-introducing a seven-person all-citizen jury trial into the justice system.<sup>47</sup> In the transition from oppressive regimes to more democratic institutional arrangements, many countries in Asia have

---

<sup>42</sup> Frank Munger, "Constitutional Reform, Legal Consciousness, and Citizen Participation in Thailand," 40 *Cornell International Law Journal* 455 (2007).

<sup>43</sup> *Id.* at 464.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 456.

<sup>46</sup> *Id.*

<sup>47</sup> Neil Vidmar, *World Jury Systems* 427-428 (2001); see also Sajithra Nithi, "Malaysia Considers Reviving Jury System," *ABC Radio Australia* (Dec. 15, 2010).

begun to initiate national debates about the possible introduction of varied models of lay participation in the administration of criminal justice procedures.

## **B. THE POPULAR JURY IN THE FORMER SOVIET REPUBLICS IN CENTRAL ASIA AND EUROPE**

The most recent wave of lay participation in the justice system swept over Central Asia after the collapse of the Soviet Union. Soon after the collapse of the U.S.S.R. in 1991, Russia introduced an all-citizen popular jury system. Regarded by many as a cornerstone of participatory democracy and judicial reform, the introduction of trial by jury occurred even before the Russian Criminal Code of Procedure was adopted. On July 16, 1993, Russia amended the Soviet Law on Court Structure to adopt jury trials. The objectives underlying the jury system were fourfold.<sup>48</sup> First, reformers wanted to ensure the independence of the justice system and free it from political control. Second, they wanted to promote an adversarial system that encouraged the full presentation of evidence. Third, reformers sought to eliminate the overwhelming bias in favor of prosecutors that was typical of the Soviet neo-inquisitorial system. Finally, they aimed to bridge the divide between legal institutions and the citizenry as a whole. All-citizen jury trials were introduced in nine regions in Russia as a pilot project. Despite governmental opposition and complaints regarding budgetary constraints, jury trials had been introduced across all of Russia by 2003.<sup>49</sup> The country values lay participation in the justice system. In fact, Chechnya, one of Russia's federal subjects and its most ethnically-repressed region, received final approval from Russian lawmakers to conduct jury trials in 2006. In April 2010, the courts conducted the first jury trial in Chechnya.<sup>50</sup>

Another major movement for the establishment of varied models of lay participation in former Soviet republics occurred in the three Baltic States of Estonia, Lithuania, and Latvia. Having struggled for more than a half-century against Communist rule, these three former Soviet republics were relieved to restore national independence and engineer a radical democratic transformation of their justice systems. In the minds of the ethnic Baltic citizenry, the desire to establish an independent system of government remained quite strong, primarily due to their distinct customs, language, and religious identity. The region's unique history and indigenous memories of culture contributed to these feeling as well.

Before the Soviet Union's occupation in the early twentieth century, Germany and other European countries had occupied and controlled the Baltic nations.<sup>51</sup> After World War I and the defeat of Germany, the three Baltic States finally declared their national sovereignty in 1918.<sup>52</sup> Two years later, they signed a peace treaty with the Soviet Union that renounced past and future claims over the entire Baltic region and territory.<sup>53</sup> For two decades, these three Baltic States remained independent, but then faced the sudden stationing of 25,000 Soviet troops in Estonia in September 1939. The secret protocols in the

---

<sup>48</sup> See, generally, Nikokai Kovalev, *Criminal Justice Reform in Russia, Ukraine, and the Former Republics of the Soviet Union* (2010); Nikokai Kovalev and Alexander Smirnov, "The Nature of the Russian Trial by Jury," *European Journal of Crime, Criminal Law and Criminal Justice* 22 (2014) 115-133; Ekaterina Mishina, *Trial by Jury in Russia: Revival and Survival*, Institute of Modern Russia (Jan. 25, 2012), available at <http://imrussia.org/en/rule-of-law/186-trial-by-jury-in-russia-revival-and-survival>.

<sup>49</sup> *Id.*

<sup>50</sup> Alexandra Odynova, "First-Ever Jury Trial for Chechnya," *Moscow Times* (Apr. 27, 2010).

<sup>51</sup> See, generally, Andrea J. Hanneman, "Independence and Group Rights in the Baltics: A Double Minority Problem," 35 *Virginia Journal of International Law* 485 (1995).

<sup>52</sup> Romuald J. Misiunas & Rein Taagepera, *THE BALTIC STATES: YEARS OF DEPENDENCE* 9 (1983).

<sup>53</sup> *Id.*

1940 Molotov-Ribbentrop Pact agreed to by Adolf Hitler and Joseph Stalin forcefully integrated the three Baltic States into the Soviet Union's regional republics.<sup>54</sup> To quash national resistance and eradicate any potential for a popular national independence movement, Stalin engaged in repressive maneuvers such as forcing the exportation of tens of thousands of Baltic "political dissidents" for purposes of political "rehabilitation" in the Gulag, and also relocating large settlements of ethnic Russians in the Baltic cities to build up the Soviet-style military industrial complex in the region.<sup>55</sup> These policies also promoted so-called "civilizing missions" and "Russification" of the Baltic population.<sup>56</sup> Ironically, these repressive social policies and pro-Russia programs achieved the opposite results, creating even stronger nationalist underground movements to seek liberation and independence from Soviet control.<sup>57</sup>

Latvia first undertook popular action to initiate a widespread political movement for liberation and independence in 1986, when a group of progressive citizens founded an anti-Communist group called Helsinki-86.<sup>58</sup> The following year, Helsinki-86 organized a massive and public anti-Soviet demonstration on the anniversary of the Molotov-Ribbentrop Pact and the anniversary of the 1941 deportation of political dissenters of the Baltic States. In 1988, Helsinki-86 organized another massive protest demonstration, openly carrying the Latvian national flag. In sum, it became an important instigator during the "Singing Revolution," a commonly used name for emancipatory events between 1987 and 1991.<sup>59</sup>

The group's actions and popular movement blazed a path for Estonia and Lithuania in their own pro-independence and democratic movements.<sup>60</sup> In 1989, on the fiftieth anniversary of the Molotov-Ribbentrop Pact, two million Estonians demonstrated their political unity and popular opposition to the Soviet occupation by linking their hands to form a three-hundred mile human chain reaching from the Estonian capital of Tallinn to the Lithuanian city of Vilnius.<sup>61</sup> Around that same time, Estonia also passed laws resisting the control of the centralist Soviet government. In fact, in December 1988, the Estonian Soviet Socialist Republic (SSR) Supreme Soviet formally passed the law denouncing Soviet repressions as crimes against humanity and proclaiming the automatic rehabilitation of Estonians who were deported in the 1940s and 1950s.<sup>62</sup> This enabled the Lithuanian and Latvian supreme courts to issue tens of thousands of rehabilitation certificates to those who had been convicted and deported by the Soviet Union.<sup>63</sup>

---

<sup>54</sup> Anatol Lieven, *THE BALTIC REVOLUTIONS: ESTONIA, LATVIA, LITHUANIA AND THE PATH TO INDEPENDENCE* (1993); Hanneman, *supra* note 49, at 491; Vello Fillippov, "The Fate of Victims of Political Repression: The Right to Rehabilitation and Remembrance," (Oct. 12, 2014), available at [http://www.academia.edu/7970832/The\\_Fate\\_of\\_Victims\\_of\\_Political\\_Repression\\_in\\_Estonia\\_Conference\\_paper\\_for\\_Memorial](http://www.academia.edu/7970832/The_Fate_of_Victims_of_Political_Repression_in_Estonia_Conference_paper_for_Memorial).

<sup>55</sup> David M. Crowe, *THE BALTIC STATES AND THE GREAT POWERS: FOREIGN RELATIONS, 1938-1940* (1993).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Andrejs Plakans, *THE LATVIANS: A SHORT HISTORY* 170-72 (1995)

<sup>59</sup> Graham Smith, *THE RESURGENCE OF NATIONALISM, IN THE BALTIC STATES* 128-35 (Graham Smith, ed. 1994).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Ray Moseley, "Lithuanian: No Nazis Exonerated," *Chicago Tribune* (Sept. 12, 1991); "Law 'On the Rehabilitation of Unlawful Repressed Persons'" (Aug. 3, 1990), available at [http://www.proyectos.cchs.csic.es/transitionaljustice/sites/default/files/maps/info/personal-rehabilitation/latvia\\_rehabilitation\\_1990.pdf](http://www.proyectos.cchs.csic.es/transitionaljustice/sites/default/files/maps/info/personal-rehabilitation/latvia_rehabilitation_1990.pdf).

On March 11, 1990, Lithuania finally declared the restoration of their independence from the Soviet Union. The following year, on August 20, 1991, Estonia declared its independence.<sup>64</sup> Latvia declared its independence one day later. These three declarations of national independence, combined with subsequent recognition of Baltic independence by Ukraine and the West, forced the Soviet Union to finally recognize their formal independence and national sovereignty on September 6, 1991.

The secession of the Baltic States from the U.S.S.R. and their decision to join the Council of Europe (CoE) led to the critical review of the role of direct citizen involvement in the government and lay adjudication in their criminal justice systems. The countries were intent on complying with the legal standards, human rights principles, and democratic developments required by the Council of Europe.<sup>65</sup> Unlike the European Union (EU), the CoE does not make binding laws. Nonetheless, it has the European Court of Human Rights that enforces the European Convention on Human Rights.<sup>66</sup>

Estonia quickly moved in the direction of citizen involvement in the judicial system after its declaration of independence, introducing a system involving a mixed court panel, rather than all-citizen jury trials, requiring that one professional judge and two lay judges adjudicate serious criminal cases.<sup>67</sup> Estonian adults who are less than seventy years old and who possess “suitable moral character” are eligible to serve as lay judges. Citizens with criminal records and active soldiers may not serve on the hybrid jury panels. Lay judges are paid hourly for their service.<sup>68</sup> As part of Estonia’s revamped rules of evidence, the law allows the trial judge discretion to use the written statement as evidence during the trial instead of relying solely upon oral testimony.<sup>69</sup>

Estonia has also endeavored to enhance the diffusion of knowledge related to lay service. In 2012, Estonia established the Estonian Union of Lay Judges (EULJ) to facilitate the cooperation and exchange of knowledge and information regarding the role of lay judges in the justice system and law-making process.<sup>70</sup> Estonia also accepted the European Charter of Lay Judges on May 11, 2012, on the occasion of the first European Day of Lay Judges at the European Parliament in Brussels.<sup>71</sup> The EULJ also participated in the drafting of the European Charter of Lay Judges. As a result, lay judges serving in Estonia received financial protection from government taxes that might otherwise arise due to compensation received for lay judge service or reimbursement of related expenses.<sup>72</sup>

Latvia, another former Soviet and Balkan republic, enshrined in its constitution its own lay participation in the justice system. Soon after its declaration of independence in 1992, Latvia drafted a constitution guaranteeing the right to a trial by jury in criminal cases.<sup>73</sup> Similarly to Estonia, Latvia adopted a mixed tribunal system requiring that citizens and professional judges join together to adjudicate serious

---

<sup>64</sup> Rein Taagepera, *ESTONIA RETURN TO INDEPENDENCE* 201-02 (1993).

<sup>65</sup> John D. Jackson and Nikolai P. Kovalev, “Lay Adjudication and Human Rights in Europe,” 13 *Columbia Journal of European Law* 83 (2006-2007).

<sup>66</sup> Council of Europe, <http://www.coe.int/en/web/portal/home>.

<sup>67</sup> Jackson & Kovalev, *supra* note 64, at 97.

<sup>68</sup> *Id.* at 101-02; Janar Fillippov, *How Do the Neighbors? [English translation]*, The Civil War Courthouse (Mar. 22, 2013), available at <http://ekspress.delfi.ee/news/paevauudised/kodusoda-kohtumajas?id=65851272>.

<sup>69</sup> Jackson & Kovalev, *supra* note 64, at 109.

<sup>70</sup> “European Day of Lay Judges: Documentary of the Elaboration of the European Charter of Lay Judges” (2012), available at [http://www.eab-berlin.de/fileadmin/downloads/European\\_Day\\_of\\_Lay\\_Judges.pdf](http://www.eab-berlin.de/fileadmin/downloads/European_Day_of_Lay_Judges.pdf).

<sup>71</sup> *Id.* at 25.

<sup>72</sup> “A Judge of the People’s Fee and the Payment Procedure,” Section 4, No. 37 (adopted on Dec. 19, 2006), available at <https://www.riigiteataja.ee/akt/12766432>.

<sup>73</sup> Latvia Constitution, Article 85, available at [http://www.servat.unibe.ch/icl/lg00000\\_.html](http://www.servat.unibe.ch/icl/lg00000_.html).

criminal cases.<sup>74</sup> The difference in the Estonian lay judge system is that citizens who collaborated with the former Soviet Communist regime may not serve as lay judges.<sup>75</sup> This includes former staff members of the KGB and Soviet military personnel.<sup>76</sup> However, in recent years, reforms were introduced to limit the jurisdiction of lay trials in favor of bench trials.<sup>77</sup> Latvia finally abolished the institution of citizen judges in 2009.<sup>78</sup>

Lithuania, another Balkan independent state, remained the only Baltic country without the lay judge system following its independence. However, pervasive government corruption and strong public criticism about the judiciary forced the government to consider introducing jury trials primarily to serve as a governmental watchdog institution.<sup>79</sup> In its attempt to shed the Soviet legacy of political domination as well as Lithuania's ideological culture that had tended to be "favorable to corruption,"<sup>80</sup> the Lithuanian president and prime minister both suggested in 2010 that the country introduce a jury trial or mixed judge system. Miklos Marschall, CEO of Transparency International Europe and Central Asia, summed up the climate in Lithuania when he declared that "the government has never been a servant or a partner – it has always been alien to us."<sup>81</sup> Using continuous popular pressure to introduce trials by jury in Lithuania in order to combat governmental corruption and autocratic rule, the citizenry demanded change. Finally, in 2014, the Lithuanian government drafted a law to implement a lay judge system. This law and citizen involvement in the justice system is founded on the principles of voluntarism, transparency, impartiality, and independence.

Among former Soviet republics, Russia has introduced the all-citizen jury trial, while other republics have introduced mixed tribunals. Jury scholars have been uniformly critical of the hybrid mixed courts in post-Soviet republics because the overwhelming power and privilege in the adjudication of criminal cases still remains in the hands of professional judges with respect to the decision to "challenge" jury candidates and preventive measures such as bail and detention on remand.<sup>82</sup> Similarly, the privilege of citizens to adjudicate socially sensitive and contested cases in so-called political trials has been forcefully removed from Russia's all-citizen jury and has been transferred to the collegial panel of three state-appointed, professional judges.<sup>83</sup> Various models of lay participation adopted in post-Soviet republics have gradually diminished the political role that has been part of the traditional heritage of lay participation. The hope is that public debates and national discussions can be energized in order to improve the political role and the function of "checks and balances" in the system of lay participation in post-Soviet republics.

---

<sup>74</sup> Jackson & Kovalev, *supra* note 64.

<sup>75</sup> *Id.* at 102.

<sup>76</sup> *Id.* at 103.

<sup>77</sup> *Id.* at 119.

<sup>78</sup> Fillippov, *supra* note 53.

<sup>79</sup> Nathan Greenhalgh, "Lithuania Considers Introducing Jury Trials," *Baltic Courts* (July 8, 2010).

<sup>80</sup> Lithuania Culture "Favorable to Corruption," *Baltic Times* (July 9, 2010).

<sup>81</sup> *Id.*

<sup>82</sup> Generally see John Fillippov and Nikolai Kovalev, "Lay Adjudication in Europe: The Rise and the Fall of the Traditional Jury," *Onati Socio-Legal Series*, vol.6, n.2 (2016), 368-395.

<sup>83</sup> *Id.*

#### D. THE POPULAR JURY IN LATIN AMERICA

For over a century and half, Latin America experienced military dictatorships, civil wars, political turmoil, economic collapse, and dire poverty among a large segment of the general population. Particularly, pervasive poverty and a shrinking national economy in the 1980s exacerbated the need for new politicization in the judicial and administrative systems. Similar to situations in other regions with long traditions of autocratic regimes known for brutal military domination of economic and political systems, several Latin American countries successfully removed despotic governments and introduced nationalist economic and political agendas with options to introduce democratic institutions. This included various models of direct citizen involvement in the adjudication of criminal matters.

In the post-Cold War era, the Bolivarian Republic of Venezuela became the first modern state in Latin America to introduce two systems of lay adjudication: all-citizen and mixed court tribunals. In 1999, the Venezuelan government passed perhaps the boldest legal reform of the *Codigo Organico Procesal Penal* (the Organic Criminal Procedure Code, or COPP). In the process, it introduced twin systems of civic participation in criminal justice proceedings: an all-citizen jury and a hybrid mixed court involving both lay and professional judges.<sup>84</sup> Ironically, the administration of nationalist and pro-reformist President Hugo Chavez did not draft the COPP. Rather, Venezuelan legislator Luis Enrique Oberto oversaw its drafting.

In 1995, Oberto commenced efforts to reform the inquisitorial criminal justice system, which operated on written documents in its entirety.<sup>85</sup> The new system established under the COPP provided for three different types of trial court proceedings, including the bench trial system with legal proceedings involving the singular participation of professional judges. Depending on the crime, varying degrees of professional and citizen judge participation would be allowed in the criminal trials, which required adjudication in the following manner: (1) a single professional judge would handle the trial of alleged crimes punishable up to four years of imprisonment; (2) a mixed court comprised of one professional and two lay judges would adjudicate alleged crimes punishable from four to sixteen years; and (3) an all-citizen jury trial consisting of nine jurors with one presiding judge would handle alleged crimes punishable by more than sixteen years. In selecting lay judges, the courts used voter registration rolls to create a preliminary list of potential candidates. All potential jurors must be citizens of Venezuela, age 25 or over with a “sound mind and body,” and more specifically, residents of the jurisdiction in which the case is to be heard.<sup>86</sup> Prospective jurors who are 70 years or older have the option of recusing themselves. Law enforcement officers, military servicemen, and politicians are ineligible for lay participation.<sup>87</sup>

Due to a long period of dictatorial regime, the government of new president Hugo Chavez decided to support the inclusion of citizen voices and common sense in the adjudication of serious and violent crimes. Although President Chavez ultimately suspended all-citizen jury trials in 2001, Venezuela is still using mixed tribunals.<sup>88</sup> Interestingly, in the first year of full operation in 2000, the acquittal rate in hybrid

---

<sup>84</sup> Edmundo Hendler, “Lay Participation in Argentina: Old History, Recent Experience,” 15 *S.W. J. of Law & Trade in the Americas* 7 (2008).

<sup>85</sup> Stephen Thaman, “Latin America’s First Modern System of Lay Participation,” in *Festschrift Fur Stefan Trechsel Zum 65 Geburtstag*, 765-79 (Andreas Donatsch 2002).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 768.



mixed court trials was higher (41%) than the rate in all-citizen jury trials (33%).<sup>89</sup> Recently appointed and young judges were recruited for the mixed tribunals, potentially reflecting more pro-democratic attitudes and perspectives in the collaboration with citizen judges.

Other Latin American countries have also pursued citizen involvement in the justice system. In 1999, the Plurinational State of Bolivia passed the Criminal Procedure Code in an effort to alter the long tradition of inquisitorial prosecutorial practice and introduce a mixed tribunal system. In this system, a panel consisting of two professionals and three lay judges would adjudicate crimes punishable by imprisonment of more than four years.<sup>90</sup> Implemented in 2001, the mixed tribunal, rather than all-citizen jury trials, became the first experiment in Bolivia's legal history with lay adjudication. Jury verdicts are determined by the majority vote, and if the number of votes to acquit and to convict happens to be equal, the verdict must be the one most favorable to the defendant.

In Argentina, a similar impetus led to the transformation of its criminal justice system. Seeking to move away from its traditional inquisitorial system and heavy reliance on prosecutors, the government initiated criminal justice reforms aimed at introducing an adversarial model for trial proceedings that would include lay participation. Cordoba, one of 23 Argentinian provinces, first introduced a mixed tribunal system composed of eight lay and three professional judges.<sup>91</sup> The first mixed court trial took place in August 2005 in the city of San Francisco in the Province of Cordoba, where the hybrid court found first lay trial defendant Victor Fernando Luna guilty, and sentenced him on charges of aggravated murder and death caused with possession of a weapon.<sup>92</sup>

The federal government of Argentina also made numerous attempts to introduce an all-citizen jury trial.<sup>93</sup> Trial by jury was first authorized under the Constitution of 1853 for criminal offenses, but efforts to enact enabling legislation were not successful for a long time. In November 2011, however, the southern Province of Neuquen adopted a law to establish an all-citizen jury trial for the first time in Argentina's history, unlike the mixed court tribunal introduced in Cordoba Province in the north.<sup>94</sup> Juries consist of 12 citizens, and they can adjudicate serious offenses involving potential sentences higher than 15 years. Unlike the unanimity requirement of U.S. criminal jury trials, only eight votes are required to convict.

Building upon this success, Buenos Aires, the most populous and urban province in Argentina, introduced all-citizen juries shortly thereafter. On September 26, 2013, Governor Daniel Scioli signed a law establishing a jury system in the Province of Buenos Aires. Citizen judges were asked to adjudicate offenses punishable with at least 15 years of imprisonment, including aggravated murder, kidnapping with extortion, murder with torture, murder with robbery, and sexual harassment crimes.<sup>95</sup> Like the Neuquen jury model, the Buenos Aires jury consists of 12 citizens. Additional six citizens are appointed as alternates. Unlike the Neuquen jury trials, however, the jury has to gather at least 10 votes to convict, although a unanimous verdict is required when the case involves life imprisonment.<sup>96</sup> As of

---

<sup>89</sup> *Id.* at 777.

<sup>90</sup> Hendler, *supra* note 83.

<sup>91</sup> *Id.* at 13-15.

<sup>92</sup> Gisela Monge Roffarello et al., "Update: A Research Guide to the Argentine Legal System," *GlobaLex* (Feb. 2014), available at [http://www.nyulawglobal.org/globalex/argentina1.htm#\\_Trial\\_by\\_Jury](http://www.nyulawglobal.org/globalex/argentina1.htm#_Trial_by_Jury).

<sup>93</sup> Hendler, *supra* note 83, at 15-16.

<sup>94</sup> "A System Already Operating in Cordoba and Neuquen Provinces," *Buenos Aires Herald* (May 21, 2014).

<sup>95</sup> Luciana Bertola, "Trial by Jury Up and Running in BA Province," *Buenos Aires Herald* (September 27, 2013).

<sup>96</sup> *Id.*

today, civil movements to adopt all-citizen juries and related judicial reforms are prevalent in other Argentinian provinces.

Just as with Venezuela and Bolivia, which had long suffered a brutal military dictatorship before the popular movement began to transform their political landscape by overthrowing the despotic regime to restore their democratic governments, Argentina also went through a brutal history of military dictatorship before gaining its democracy. The 1976 military coup overthrew democratically-elected president Isabel Peron, and a military junta that was soon installed replaced her government and imposed state terrorism throughout the provinces. During a so-called “Dirty War” period of seven years, tens of thousands of people from various provinces were captured, tortured, and killed in secret. After the final restoration of democracy in Argentina in 1983, the criminal trials of former leaders of juntas commenced, magnifying people’s interests in the fairness and equitable trial proceedings of the former dictators and their mercenary troop members.

Serious debate and discussion of the possible adoption of varied models of lay adjudication soon appeared in the Province of Cordoba, which finally decided to introduce a hybrid mixed trial in its regional courts. Similar discussions of the adoption of lay adjudication systems also emerged in other Argentinian provinces and have materialized in the establishment of all-citizen jury trials in two large metropolitan regions. These movements in Argentina were indicative of the people’s deep interest in democratic institutions, in which the adjudicative power rests in the hand of people, not politicians or professional judges appointed by the government. The adoption of all-citizen jury trials, not hybrid mixed tribunals, in Argentina’s largest province of Buenos Aires, where the capital city is also located, shows the greater popularity of the citizen-only adjudication system. Today, the adoption of all-citizen jury trial in the capital city continues to influence similar discussions in other Argentinian provinces.

## **E. THE POPULAR JURY IN AFRICA AND OTHER PARTS OF THE WORLD**

With the demise of the apartheid era several decades ago, South Africa re-entered the realm of citizen participation in both the civil and criminal justice systems. In the early nineteenth century, as a British colony, South Africa adopted an all-citizen jury system and held its first jury trial in 1827 in the Cape. Eventually, support for lay participation in the justice system waned. In 1926, jury trials in civil cases were first to be abolished, and in 1969, criminal jury trials were also abolished pursuant to the Abolition of Juries Act 34.<sup>97</sup>

After the dissolution of the apartheid government, South Africa established its new government in 1991 under the leadership of Nelson Mandela. Despite the demise of the previous lay participatory system, the South African government decided to experiment with citizen participation in criminal proceedings by considering the introduction of a hybrid mixed tribunal. One or two citizens, depending upon necessity, were to be appointed by a presiding magistrate during any trial as a citizen judge or lay assessor. Lay assessors were also allowed to participate in civil trials.<sup>98</sup> The court would appoint a citizen judge or two only if deemed expedient for the administration of justice.<sup>99</sup> The appointment needed to be made before the presentation of any evidence. In addition, two citizen judges would join

---

<sup>97</sup> Marshall S. Huebner, “Who Decides? Restructuring Criminal Justice for a Democratic South Africa,” 102 *Yale Law Journal* 961, 971 (1993); “South African Reform Commission,” Issue Paper 26, Project 126, 8 (2008), available at <http://www.justice.gov.za/salrc/ipapers/ip26.pdf>.

<sup>98</sup> South African Reform Commission, *supra* note 96, at 8.

<sup>99</sup> Huebner, *supra* note 96.

a professional judge to adjudicate murder charges, unless the accused specifically requested a trial without assessors.

The former Yugoslavia republics actively pursued lay participation in the legal system, due to lingering concerns regarding governmental oppression and a strong desire to integrate citizen involvement into societal governance. Beginning immediately after the end of the World War II, in 1947, dictator Josip Broz Tito controlled the central government of the Socialist Federal Republic of Yugoslavia until his death in 1980. During this period, Yugoslavia presided over six ethnically distinct, independent republics in the southeastern region of Europe. To suppress internal conflicts and control political dissenters, Tito established a highly efficient secret police and purged many dissident elements. Tito's death in 1980 somewhat weakened the central government's power and political control. At the same time, it also exacerbated ethnic tensions within the republics. Yugoslavia's wars finally broke out in 1991, which in turn, led to the emergence of six independent nation-states.

The Republic of Croatia declared its independence in 1991, and to increase lay participation in the administration of justice, introduced in 1996 a mixed court system, rather than all-citizen jury trials. As part of this new system, two lay judges would join with one professional judge on a tribunal to adjudicate criminal charges involving a potential maximum sentence ranging from one to fifteen years.<sup>100</sup> Observers of lay participation in Europe criticized the subservient role of citizen judges and their inability to influence trial outcomes in this hybrid, mixed tribunal system. For example, one observer of a mixed court tribunal in Europe indicated that lay judges were often called puppets with strings in the hands of judicial authority. In Croatia, for example, lay judges were often called "two heads of cabbage behind ... the professional judges."<sup>101</sup> While the newly recognized former Yugoslavia republics unquestionably recognized the merit of citizen participation in government and actively promoted the participation of ordinary citizens in the administration of the criminal justice system, the effectiveness of the legal participation of citizen judges in criminal courts was largely compromised by the pre-eminent judicial role played by professional judges in the adjudication of criminal disputes.

## F. CONCLUSIONS

Jury systems and mixed tribunals stand as two symbols of democratic ideals, encouraging civic participation in the administration of justice. The analysis of recent historical developments reveals that lay adjudicatory systems have repeatedly emerged across the world as a result of significant social change and political transformation. For the most part, these have emerged as popular responses to the overthrow of despotic and brutal military regimes that had long suppressed and often acted as predators in relation to the general population. Both socio-political transformation arising from the removal of such authoritarian and dictatorial regimes and the subsequent liberation of the general population from governmental domination have facilitated the popular call for the establishment of greater citizen involvement in the administration of equitable and fair systems in the criminal justice process.

The mixed tribunal system adopted in Kazakhstan in 2007 called for the collaboration of both professional and citizen judges in the adjudication of criminal cases. While citizen participation was originally confined to consideration of crimes punishable by death or life imprisonment, recent reform

---

<sup>100</sup> See Sanja Kutnjak Ivković, *MIXED TRIBUNALS IN CROATIA* (2001/1-2)

<sup>101</sup> Kutnjak Ivković, "Exploring lay participation in legal decision-making: Lessons from mixed tribunals," *Cornell International Law Journal*, 40, 430, 2007.

has extended the jurisdiction of mixed tribunals to all grave crimes or crimes punishable by more than twelve years of imprisonment, with the exception of political offenses.<sup>102</sup> At the same time, the Kazakhstan hybrid courts also faced the same fate that other lay assessor courts have endured, i.e., lack of independence from state influence, the consequences of which have manifested in the nearly 100% conviction rate of indicted criminal suspects, as observed in many countries with newly adopted mixed tribunal systems, perhaps with the exception of Venezuela.

The history of jury trials also instructs jury researchers in the fact that the enthusiasm for democratic rule can wane over time, especially as forces seeking political domination begin to re-emerge and to counter people's direct participatory movements. A prime past illustration is the rise of Fascism in early 20<sup>th</sup> century Europe and elsewhere, which successfully reduced or even abolished the democratic role of lay participation in the justice system. Historical analysis also reveals that lay participation systems are primarily implemented in the adjudication of criminal offenses, rather than civil cases or disputes. Active lay participation in criminal trials serves as a useful tool of the citizenry to review and check the appropriate action of state judicial actors, including prosecutors, professional judges, police, and attorneys. Nonetheless, many civil societies could benefit significantly from an expansion of lay participation into the civil realm.

Jury trials and lay participation systems can enhance society's ability to check and assess the appropriate conduct of state institutions, powerful business enterprises, their commercial practices, and the actions of political organizations. Often times, the government does not adequately address civil wrongs committed by the agencies of their own government. The professional judges still remain an integral part of a judicial bureaucratic apparatus of the national government. It may be undeniable that judges' decisions are more likely than those of ordinary citizens to reflect the interests of the government and powerful political sectors in the society. Professional judges' punitive decisions against powerful interests can negatively impact their bureaucratic career in the judiciary, while average citizens sitting for a single trial or limited period will not face such pressures.

Varied models of lay participation have been introduced in Central Asia and elsewhere for the last several decades. As stated earlier, no nation-states have made proposals to explore active citizen participation in the adjudication of civil disputes. In China, recent reforms of its lay assessor trial system involved the adjudication of civil disputes, but the collegial body still relies on the participation of a professional judge. The possible lay adoption of civil trials in Kazakhstan, for example, would revolutionize the judicial process and allow ordinary citizens to adjudicate civil disputes that involve alleged wrongdoings of powerful entities, economic elites in large corporations, and governmental institutions. This could extend to unethical commercial practices and financial transactions, abuse of institutional authority, and even industrial accidents and disasters. The adoption of all-citizen jury trials and its extension to civil cases in Kazakhstan could potentially function as an important political institution of the general population in reviewing and evaluating the potential abuse of influential government agencies, commercial interests, political elites, and business oligarchs.

**February, 2017**

---

<sup>102</sup> Kovalev, *supra* note 1 at 272.