

# KAZAKHSTAN’S JURY EXPERIMENT AND BEYOND: LESSONS FROM EMERGENT SYSTEMS OF LAY PARTICIPATION

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## I. INTRODUCTION

For the first time in its young history, the Republic of Kazakhstan decided in 2007 to introduce the jury trial.<sup>1</sup> This introduction was based on its constitution, which states that “criminal procedure shall be carried out with participation of

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<sup>1</sup> Nikolai Kovalev, *New Kazakhstani Quasi-Jury System: Challenges, Trends, and Reforms*, 38 INT’L J. L., CRIME & JUST., 261, 261-78 (2010) (in his paper, Kovalev used the term “quasi-jury” or “mixed court” because the proposed jury model in Kazakhstan required the collaboration of citizen jurors and a professional judge).

juries.”<sup>2</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 November 1989, signaled by the collapse of the Berlin Wall, 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. Over the last three decades, the Asian Continent has become a major epicenter of this global transformative trend, such as in the former Soviet republics, such as Russia, Kazakhstan, Ukraine, Georgia, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan, as well as in their East Asian neighbors, such as Japan, the People’s Republic of China (PRC), South Korea, and Taiwan. Varied forms of experiments with lay participation in governmental affairs have been debated, and new models of jury trial have sprung up, giving citizens new opportunities to engage in democratic deliberation in their criminal justice systems. Such transformative trends have not been limited to the countries of the Global North. Many countries in the Global South, including Venezuela, Bolivia, Argentina, and others in the Americas have followed suit in deciding to allow ordinary citizens to participate in decision-making in the justice system.

Popular demands for the establishment of democratic systems of lay adjudication have arisen throughout the history of the Global North and South. After significant political upheaval, social turbulence and revolutionary changes have hit traditional monarchical or despotic governments, as well as military dictatorships and authoritarian regimes. There has routinely been a popular upsurge of the demand for the establishment of lay participatory institutions in the justice system as a symbol of popular democratic ideals.<sup>3</sup> The institution of the popular jury and its varied forms of lay participation has often been perceived as an important and effective political means of elevating ordinary citizens into a position of self-governance and has served the important function of enacting participatory democratic reforms of decision-making at local and national levels.<sup>4</sup>

While the great number of contemporary judicial reforms in Central Asia and the rest of the world could be attributed to the historic “emancipation” of those former republics from the political dictatorship of the Union of Soviet Socialist Republics (USSR or the Soviet Union), this current global trend in fact has an earlier historical precedent. 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 French Revolution. This popular “all-citizen” jury then became

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<sup>2</sup> *Id.*

<sup>3</sup> See generally NEIL VIDMAR, *WORLD JURY SYSTEMS* (Oxford University Press 2000); Nancy S. Marder, *An Introduction to Comparative Jury Systems*, 6 CHI.-KENT L. REV. 453 (2011); SETSUO MIYAZAWA ET AL., *EAST ASIA’S RENEWED RESPECT FOR THE RULE OF LAW IN THE 21<sup>ST</sup> CENTURY: THE FUTURE OF LEGAL AND JUDICIAL LANDSCAPES IN EAST ASIA*, 1-7 (Brill 2015).

<sup>4</sup> Valerie Hans, *Jury Systems Around the World*, 4 ANN. REV. OF L. & SOC. SCI. 275 (2008).

an important political vehicle 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, with Belgium and Greece introducing 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 19th century. It was only with the sudden emergence of fascism around the turn of the 20th century that the popular jury was displaced in Spain, Italy, Germany, and other nation-states, and was supplanted by autocratic mixed tribunal or magistrate court procedures. The all-citizen juries were effectively replaced and/or supplemented by a 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.<sup>5</sup>

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 20th 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 a comparable political shift in the balance of geopolitical power after the Cold War, which officially ended with the dissolution of the Soviet Union in 1991. While civic responses to foreign pressures and political controls over insurgent domestic populations have varied, many countries in East Asia,<sup>6</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 many parts of the world, such as South Africa and Ghana in Africa,<sup>7</sup> and

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<sup>5</sup> For the detailed history of jury's transformational changes in Europe, see John Jackson & Nikolai Kovalev, *Lay Adjudication and Human Rights in Europe*, 13 COLUM. J. OF EUR. L. 83 (2006).

<sup>6</sup> Hiroshi Fukurai et al., *The Future of Lay Adjudication and Theorizing Today's Resurgence of Civic, Legal Participatory Systems in East and Central Asia*, 38 INT'L J. OF L., CRIME, & JUST. 141, 141-48 (2010); Hiroshi Fukurai & 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 L. J. 1, 67 (2012).

<sup>7</sup> For South Africa, see Milton Seligson, *Lay Participation in South Africa from Apartheid to Majority Rule*, in *Lay Participation in the Criminal Trial in the XXIst Century*, 72 REVUE INTERNATIONALE DE DROIT PENAL 273, 273-84 (2001); for Ghana's jury trials, see Dennis D. Adjei, *Ghana's Jury System on Trial* (Mar., 23 2014)(unpublished thesis, Duke University), <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1013&context=mjs>.

Venezuela, Bolivia, and Argentina<sup>8</sup> in South America, also had 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 drastically transformed their courts and legal procedures by allowing varied degrees of citizen participation in the judgment of criminal and civil cases,<sup>9</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>10</sup>

There is a commonality of these transformative changes in the legal landscape: societies first gravitate toward popular, democratic participation in governmental decision-making, at least in part, as an antidote to the socio-political ills manifested by governmental corruption, political upheaval, and significant deprivation of civil rights and civil liberties. In response to the successful removal of a despotic regime and liberation from a hierarchy of political domination and authority, the general population turns to popular discussions related to embracing various sorts of democratic institutions. These discussions often encompass the consideration of direct citizen participation in governmental affairs, including establishment of classical all-citizen jury trials or other varied forms of civic involvement in government decision-making processes.

The following section examines recent experiments with democratic judicial reforms around the globe, critically investigating specific models of lay participation that have been adopted in these countries. Because lay participatory models introduced in these countries have been 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 in relation to the introduction of particular forms of lay participatory systems will also be analyzed, as will their connection to the varied forms of integration of citizen involvement into the justice system. Based on these analyses, this article provides suggestions for Kazakhstan's efforts to transform and improve its system of direct citizen involvement in the justice system.

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<sup>8</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. eds., 2002); for jury trials introduced in Argentina, see Valerie Hans & John Gastil, (Eds.) *El juicio por jurados: Investigaciones sobre la deliberación, el veredicto y la democracia*, BUENOS AIRES, ARGENTINA: AD HOC (Valeria Hans & John Gastil eds. 2014).

<sup>9</sup> For global jury systems in the past and present, including ones adopted for the resolution of civil disputes, see Matthew Wilson, et al., *Global Proliferation of Lay Participation in Justice Systems*, in JAPAN AND CIVIL JURY TRIALS 112-33 (2015).

<sup>10</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*, E. ASIAN L. REV. 6 (2011).

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

Following the momentous dissolution of the Soviet Union, which was then partitioned into, and replaced by, 15 independent republics in the early 1990s, many countries in East Asia, as well as in the emerging nation-states in Central and Western Asia, have engaged in extensive national discussions involving the possible introduction of different models of citizen involvement in governmental decision-making. These discussions have resulted in substantial changes in citizen involvement in various countries, and it is valuable to examine the underpinnings of lay participation systems and the reasoning underlying such systems.

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

In 1923, the Japanese government passed the Jury Act (*Baishin Ho*, Law No. 50 of 1923) and operated an Anglo-American-style jury trial system (*Baishin-in*) from 1928 to 1943, with the jury including a panel of 12 citizens randomly chosen from the community.<sup>11</sup> While jury eligibility was limited to male citizens over the age of 30 who had paid a high sum of national taxes (3 yen) over the previous two years, these highly privileged and “conservative” juries acquitted 17% of all criminal cases.<sup>12</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 of jury trial procedure in the midst of World War II.<sup>13</sup> After the civic experiment in the adjudication of criminal cases was suddenly suspended, the unfettered power of the Japanese prosecution in the post-war era led to a conviction rate of nearly 100% for all criminal cases.<sup>14</sup> Such a near perfect conviction rate in criminal trials was achieved through the abuse of prosecutorial power, including the use of detention centers as substitute prisons

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<sup>11</sup> BAISHIN HO [The Jury Act], Law no. 50 of 1923. Its application has been suspended by BAISHIN HO NO TEISHI NI KANSURU HORITSU [An Act to Suspend the Jury Act], Law no. 88 of 1943. For detailed accounts of Japan's jury trial suspension, see Jon P. McClanahan, *Citizen Participation in Japanese Criminal Trials: Reimagining the Right to Trial by Jury in the United States*, 37 N.C.J. INT'L L. & COM. REG. 725 (2012).

<sup>12</sup> See generally Hiroshi Fukurai, *The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems*, 22 CORNELL INT'L L. J. 315 (2007).

<sup>13</sup> *Id.*

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

to elicit forced confessions from criminal suspects.<sup>15</sup> In addition, the judge's uncritical evaluation of such confessions contributed to a large number of wrongful convictions in Japan.<sup>16</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* or a quasi-jury trial system). The recommended model of lay participation did not incorporate the panel of the pre-war style, all-citizen jurors. Rather, it called for a judicial panel of three professional and six lay judges 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 was suggested to adjudicate an uncontested criminal case where there is no dispute on facts and evidence identified during pre-trial investigative procedures.<sup>17</sup>

Based on the JSRC recommendation, the Japanese government 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.<sup>18</sup> On May 21, 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>19</sup> The participation of local citizens in criminal cases, however, failed to substantially reduce the conviction rate. Prior to the introduction of the *Saiban-in* trials, the conviction rate of all indicted cases was 99.9%.<sup>20</sup> After the introduction of the mixed court tribunal, it fell to 99.8%, i.e., reducing the previous non-conviction rate by only 0.1%.<sup>21</sup>

In May 2004, the Japanese government 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>22</sup> Japan's PRC revision is another major judicial reform, in addition to the creation of the *Saiban-in Seido*, which strengthened Japanese citizens' active participation in the grand jury system. Unlike the hybrid nature of the *Saiban-in* panel, the PRC is solely composed of 11 citizens randomly chosen from local

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<sup>15</sup> See generally Hiroshi Fukurai, *A Step in the Right Direction for Japan's Judicial Reform*, 36 HASTINGS INT'L COMP. L. REV. 517 (2013).

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

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

<sup>18</sup> *Id.*

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

<sup>20</sup> Fukurai, *supra* note 15.

<sup>21</sup> *Id.*

<sup>22</sup> Fukurai, *supra* note 15, at 527; see also Hiroshi Fukurai & Zhuoyu Wang, *People's Grand Jury Panels and the State's Inquisitorial Institutions: Prosecution Review Commissions in Japan and People's Supervisors in China*, 37 FORDHAM INT'L L. J. 929, 936 (2014).

communities serving a six-month term and 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 decisions concerning whether 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 even refused, in some politically sensitive cases, to indict prominent politicians, government bureaucrats, business elites, and members of law enforcement agencies closely tied to the centers of political power.<sup>23</sup> 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, and three top executives of Tokyo Electronic Power Company, which is Japan's largest and most powerful corporation, as well as a member of the then-ruling Democratic Party.<sup>24</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 corporations, and various key administrative agencies of the Japanese government, including the police agency.<sup>25</sup> 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 Anglo-American style, all-citizen jury trials, judicial panels that are exclusively composed of citizens, seem to function as an effective mechanism of "check-and-balance" in relation to the institutions of power and privilege in Japan.

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

In parallel with Japan's efforts to transform its criminal justice system, South Korea also decided to move forward with efforts to involve citizens in its administration of justice. South Korea had been known for its dictatorial military regime since the end of World War II. To quell internal political dissidents and subversive elements, Korea's National Intelligence Services was established in

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<sup>23</sup> See generally Hiroshi Fukurai, *Japan's Quasi-Jury and Grand Jury Systems as Deliberative Agents of Social Change: De-Colonial Strategies and Deliberative Participatory Democracy*, 86 CHIC.-KENT L. REV. 789, 800 (2012); Hiroshi Fukurai, *Lay Prosecution of U.S. Military Crimes in Japan by Prosecutorial Review Commissions and the Saiban-in Trial*, in JAPANESE LEGAL SYSTEM: AN ERA OF TRANSITION 131, 136-42 (Tom Ginsburg & Harry N. Scheiber eds., 2012).

<sup>24</sup> Fukurai et. al., *supra* note 6, at 72.

<sup>25</sup> *Id.* at 69.

1961, as the Korean Central Intelligence Agency (KCIA), during the dictatorial regime of President Park Chung-hee's military Supreme Council for National Reconstruction that successfully displaced the Second Republic of Korea. KCIA had the responsibility for domestic intelligence gathering concerning subversive elements of the general population, and South Korea's dictatorial regime held rigid control over the democratic aspirations of the citizenry.<sup>26</sup> The June Democratic Uprising dramatically transformed South Korea from dictatorship to democracy in 1987, bringing with it popular demands for democratizing governmental institutions, including the administration of justice.<sup>27</sup> Popular uprisings and the related fallout also forced the ruling government to hold elections, introduce democratic measures, and initiate judicial reforms. With the strong pro-democratic waves of 1987, the constitution bill was passed by the National Assembly on October 12, 1987 and was also approved by 93% in a national referendum on October 28, which took effect on February 25 the following year. The constitution guaranteed the independence of the judiciary from political interference.

Following the 1987 constitutional revision, the Constitutional Court was established in September 1988, determining the constitutionality of laws, handling disputes between governmental agencies, addressing constitutional complaints filed by individual citizens, and dissolving political parties, thereby creating much-needed transparency in the judicial decision-making mechanism.<sup>28</sup> A decade later, in 1999, the government also established the Judicial Reform Steering Committee to begin serious discussions on 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 Anglo-American, all-citizen jury system.<sup>29</sup> In January 2008, Korea finally instituted 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. Under the new criminal procedure, defendants had the option of choosing a jury trial over a bench trial. While jury verdicts and sentencing options rendered

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<sup>26</sup> Hiroshi Fukurai & 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 L. J.* 1, 67 (2012).

<sup>27</sup> See generally GEORGY KATSIAFICAS ET AL., *SOUTH KOREAN DEMOCRACY: LEGACY OF THE GWANGJU UPRISING* (Georgy Katsiaficas & Na Kahn-chaе, eds., 2006).

<sup>28</sup> Justine Guichard, *The Role of the Constitutional Court of Korea in the Transition from Authoritarian to Democratic Rule*, in *THE SPIRIT OF KOREAN LAW: KOREAN LEGAL HISTORY IN CONTEXT*, 202, 207-15 (Marie Kim ed., 2015).

<sup>29</sup> Jae-Hyup Lee, *Getting Citizens Involved: Civil Participation in Judicial Decision-Making in Korea*, 4 *E. ASIA L. REV.* 177, 185 (2009).



by a jury are not binding, judges are instructed to use the jury verdicts as an important tool to guide the final outcome of the trial.<sup>30</sup>

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. This is unlike previous inquisitorial trials that had centered on the judges' confirmation of pretrial testimony and prosecutorial evidence, and which largely secured the conviction of nearly all criminal defendants, including political suspects targeted by the government. The acquittal rate in criminal trials has risen significantly. For example, while the conviction rate of Japan's hybrid *Saiban-in* trials remains at nearly 100%, Korea's all-citizen jury has acquitted 8.8% of criminal defendants.<sup>31</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>32</sup> The dramatic transformation of South Korea's legal landscape has been remarkable, especially since South Korea, unlike Japan, had no history of popular participation in its judicial system. Many decades of the military dictatorship and of systematic suppression of political dissenters, due to the KCIA and its political suppression efforts, had led to the significant popular uprisings that ultimately led to sweeping measures of judicial reforms, including the introduction of direct citizen participation in criminal trials.

### **C. The Chinese Experience – Lay Assessor Courts and People's Supervisors System**

Until the end of the Qing Dynasty, China had no history of a jury or lay participation system. Soon after the People's Republic of China was founded in 1949, China's new constitution introduced a lay assessor system to adjudicate both civil and criminal cases in 1954. 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, led to the closure of many law schools and disallowed the lay judge system to function,

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<sup>30</sup> Jon Herskovitz, *South Korea to Try Jury System for First Time*, REUTERS (May 3, 2007, 4:36 AM), <https://www.reuters.com/article/us-korea-jury/south-korea-to-try-jury-system-for-first-time-idUSSEO16342120070503>.

<sup>31</sup> Jae-Hyup Lee, *Korean Jury Trial: Has the New System Brought About Changes?*, 12 ASIAN-PAC. L. & POL'Y J. 58, 64 (2010) ("In a majority of cases (91.2%), the jury found the defendants guilty.")

<sup>32</sup> Wilson et al., *supra* note 9, at 116.

because such a public-based and people-initiated legal institution was perceived as a “bastion of bourgeois justice.”<sup>33</sup> If the citizen input were allowed to continue, direct popular involvement in making decisions in their own communities could have prevented several disasters. Mao’s agricultural policy during the Great Leap Forward, for example, precipitated the Great Chinese Famine in the late 1950’s and early 1960’s that led to the deaths of nearly 30 million Chinese farmers.<sup>34</sup> The Chinese government also initiated the Great Proletarian Cultural Revolution, i.e., the Cultural Revolution, in 1966 that led to the persecution of millions of political dissenters, legal professionals, public intellectuals, academic scientists, progressive educators, and educators. After Mao’s passing in September 1976, new leader Deng Xiaoping began to institute the modern system of China’s legal structure and judicial procedures in the late 1980’s. He also adopted a series of civil laws, reopening law schools, and reforming criminal law.<sup>35</sup> In 1998, the Chinese Supreme People’s Court also began drafting regulations and provisions to improve lay assessor trials.<sup>36</sup>

Despite the formal commitment to institute popular legal participation, the lay assessor system, prior to the promulgation of the new lay judge act of 2004, failed to achieve its democratic objective in the judicial process and proved to be problematic in practice. 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>37</sup> The reported deficiencies included: (1) a total suspension or sporadic use of lay judges in some jurisdictions; (2) insufficient stipends for lay judges; (3) “professionalization” of lay judges; and (4) lay judges’ passive role in decision-making.<sup>38</sup> New amendments adopted by the Chinese government in 2005 and 2010 also strengthened the institutional foundation and secured financial support for China’s lay assessor system.<sup>39</sup>

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<sup>33</sup> Zou Keyuan, *Judicial Reform in China: Recent Developments and Future Prospects*,

36 INT’L LAW, 1039, 1045 (2002).

<sup>34</sup> See generally AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999).

<sup>35</sup> Carlos Wing-Hung Lo & Ed Snape, *Lawyers in the People’s Republic of China: A Study of Commitment and Professionalization*, 53 AM. J. COMP. L. 433, 441–42 (2005).

<sup>36</sup> Di. Jiang, *Judicial Reform in China: New Regulations for the Lay Assessor System*, 9 PAC. RIM L. & POL’Y J. 569, 570 (2000).

<sup>37</sup> Hiroshi Fukurai et al., *Introduction to the Special Issue: The Future of Lay Adjudication and Theorizing Today’s Resurgence of Civic, Legal Participatory Systems in East and Central Asia*, 38 INT’L J. L., CRIME & JUST. 141, 143 (2010).

<sup>38</sup> Zhuoyu Wang & Hiroshi Fukurai, *China’s Lay Participation in the Justice System: Surveys and Interviews of Contemporary Lay Judges in Chinese Courts*, in EAST ASIA’S RENEWED RESPECT FOR THE RULE OF LAW IN THE 21<sup>ST</sup> CENTURY: THE FUTURE OF LEGAL AND JUDICIAL LANDSCAPES IN EAST ASIA 113, 114 (Setsuo Miyazawa et al. eds., 2015).

<sup>39</sup> *Id.* at 119.

In addition to the lay assessor system, the Chinese government also tried to introduce its own quasi-grand jury system as the people's watchdog in order to eliminate governmental abuse of power in the prosecutorial process. The People's Congress had first introduced the People's Supervisors System (PSS) in 2003 as part of its judicial experiment in limited jurisdictions. The Chinese government decided in 2010 to adopt this system throughout the country. The original purpose of the PSS was to establish a system of external supervision over China's Procuratorates or prosecutors in the investigation of criminal cases in their jurisdictions. Article 3 of the Criminal Procedural Law provides that police organs shall be responsible for criminal investigation, detention, execution of arrests, and preliminary inquiry in criminal cases, while the People's Procuratorates shall be responsible for such prosecutorial work as authorizing approval of arrests and conducting criminal investigation of cases directly accepted by the Procuratorates.<sup>40</sup> People's Supervisors may then 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>41</sup> The PSS may also examine other occupational crimes such as the extortion of confessions through torture, extraction of evidence through violent means, and other such illegal or undisciplined practices.

Despite the introduction of a new lay assessor and the new system of People's Supervisors to provide oversight of powerful Chinese prosecutors, their effectiveness in providing such oversight of the justice system has been questioned. For example, China continued to have one of the highest conviction rates in the world. In 2009, one year prior to the nationwide introduction of the People's Supervisors system, China had a conviction rate of 99.9%.<sup>42</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, a 99.7% conviction rate.<sup>43</sup> Both Japanese and Chinese examples of mixed and hybrid tribunals substantiate that the participation of professional judges in the adjudication of criminal matters

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<sup>40</sup> Ignazio Castellucci, *Rule of Law with Chinese Characteristics*, 13 ANN. SURV. INT'L & COMP. L. 35, 54 (2007); see also Fukurai & Wang, *supra* note 22.

<sup>41</sup> UN Committee Against Torture (CAT), *Consideration of reports submitted by States parties under article 19 of the Convention : Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment : 4th periodic reports of States parties due in 2004 : addendum : China*, 11-12 (Jun. 27, 2007).

<sup>42</sup> Patrick Boehler, *Supreme People's Court Judge Urges End to Wrongful Convictions*, South China Morning Post (May 7, 2013).

<sup>43</sup> *Concerns Over 98% Chinese Conviction Rate*, SCOTSMAN (Mar. 13, 2006), <http://www.scotsman.com/news/world/concerns-over-98-chinese-conviction-rate-1-485728>.

contributes to the nearly identical high conviction rates. The new hybrid lay assessor trials and the introduction of the People's Supervisors System did not seem to inject the much-needed democratic ideals of lay participation into the administration of justice in China.

#### **D. Citizen Involvement in the Judicial System in Taiwan – All Citizen Jury Trial**

Following the introduction of new adjudication systems in its neighboring countries, Taiwan began to debate the possible introduction of citizen participation in the justice system. The lay participation system was first proposed in 1994 by the Judicial Yuan, Taiwan's highest judicial organ, as part of a larger political reform. The proposal failed, however, due to the difficulty of adopting such a significant democratic reform in the justice system. The independent committee created by the Judicial Yuan again proposed examining the feasibility of adopting the lay adjudication system in Taiwan in January 2011.<sup>44</sup> This was largely due to the fact that unpopular decisions by the court had led to widespread demonstrations, including the reversal of the guilty verdict of a defendant charged with a sexual assault of a three-year-old girl. The court determined that there was no evidence demonstrating that the defendant had penetrated the victim against the victim's will.<sup>45</sup> The court's decision prompted huge public anger, leading to a "white rose" demonstration, in which thousands of mothers demanded the immediate removal of so called "dinosaur judges" who had lost touch with the realities of common people.<sup>46</sup>

The independent committee submitted a draft of the Provisional Act Governing Lay Participation in Criminal Trials to the Executive Yuan in January 2012 and requested the creation of the "observer jury" program in order to promote "interaction and understanding between laypersons and the judiciary."<sup>47</sup> The pilot program created a panel of five members of the observer jury who would sit on the same bench as judges to examine cases involving serious crimes punishable by the death penalty or a prison term of seven years or more. The jurors had to be citizens, at least 23 years of age with a high school education, and had to have resided in the

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<sup>44</sup> Mong-Hwa Chin, *A Social Psychological Perspective on the Decision-Making Processes of Trial Judges in Taiwan* (Dec. 8, 2014) (unpublished S.J.D. dissertation, on file with Duke University School of Law).

<sup>45</sup> MATTHEW WILSON, ET. AL., *JAPAN AND THE CIVIL JURY TRIALS: THE CONVERGENCE OF FORCES*, 118-19 (2015).

<sup>46</sup> Audrey Wang, *The People's Court*, TAIWAN TODAY (Sept. 1, 2012), <http://taiwanreview.nat.gov.tw/ct.asp?xItem=194416&CtNode=1349>.

<sup>47</sup> Mong-Hwa Chin, *Lay Participation in Taiwan: Observations from Mock Trials*, 6 *ASIAN J. L. & SOC'Y* 181, 187 (2019); see also Judicial Yuan of Taiwan, Provisional Act Governing Lay Participation in Criminal Trials to the Executive Yuan, <http://www.judicial.gov.tw/revolution/judReform03.asp>.

court's jurisdiction continually for four months.<sup>48</sup> The jurors were allowed to question the suspect, victims, and witnesses and discuss court proceedings with judges.<sup>49</sup> While the jury was instructed to render a decision on the verdict and appropriate punishment, that decision was considered advisory. The judges would still retain their authority over the final verdict and punishment, and if the judges' decision deviated from the jury's opinion, judges were required to provide verbal and written explanations.<sup>50</sup>

In 2016, President Tsai Ing-wen was elected, and she and her party decided to introduce the 12-member, all-citizen jury system. They argued that the verdict should require a unanimous decision, just as in the U.S. jury system. While the debates around the introduction of two systems of lay participation continued, 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>51</sup> The Judicial Yuan also proposed a new lay participation system in 2016, called the "Lay Judge System," which consists of three professional judges and six lay judges, whose collegial structure was modeled after the *Saiban-in Seido* adopted in Japan.<sup>52</sup>

In February 2017, in protest against former justice Hsu Yu-hsiu, who supported the lay assessor type of mixed tribunal adopted in Japan, 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 pushing for the implementation of the all-citizen jury trial, which they advocated as the only democratic institution that could clean up a justice system that had been fraught with "personal bias, corruption, and influence peddling."<sup>53</sup> It is not surprising that legal scholars and civic 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-100% conviction rates in the adjudication of criminal cases. In March 2019, the Taiwan Jury Association opposed a plan by the Judicial Yuan to introduce the new lay judge system that combined both the jury and mixed tribunal systems. The Judicial Yuan decided to replace its original proposal to introduce a mixed tribunal system similar to Japan's,

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<sup>48</sup> Chin, *supra* note 47, at 188.

<sup>49</sup> Wang, *supra* note 46.

<sup>50</sup> *Id.*

<sup>51</sup> Sun Hsin Hsuan, *Judicial Yuan Nominee Urged to Support Full Jury System*, China Post (October 13, 2016).

<sup>52</sup> Qing-Xin You & Zhen-Hua Yu, *Judicial Yuan's Polls on Lay Participation*, (July 3, 2018), <http://social.judicial.gov.tw/LayJudgeAttach/02C0/pdf>.

<sup>53</sup> Jason Pan, *Campaigners Advocating Jury Trial System Protest at Presidential Office*, Taipei Times, (Feb. 25, 2017).

in which a serious criminal case would be tried by the adjutory panel of three professional and six lay judges.<sup>54</sup> The new proposal requires a tripartite system of adjutory proceedings. The first phase would be presided by eight lay judges who must unanimously vote to secure the guilty verdict. The second phase would then be presided by three professional judges, who decide whether to second the guilty verdict. The third phase would involve the determination of penalty by the judges, if at least one of three judges agrees with the guilty verdict rendered by the lay judges. If no professional judges agree, the defendant would not be found guilty. Additionally, in death penalty cases, all lay and professional judges would have to agree to the verdict.<sup>55</sup> The Taiwan Jury Association warned that the Judicial Yuan copied pieces of the lay participation systems in Germany, Japan, and the U.S. to create its own system using “pure imagination.”<sup>56</sup> 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 or the combined system of both jury and lay judge proceedings, will continue to remain very strong in Taiwan.

### **E. The Introduction of Lay Adjudication Systems in Other Asian Countries**

Countries in other regions of Asia have also engaged in serious discussions concerning the possible introduction of the lay participation system in their respective systems of justice. In the Philippines, for example, the allegation of corruption within the judiciary has led to the loss of public confidence on the system of criminal justice procedures. One form of public response is the lobbying by a number of non-profit organizations for the introduction of lay participation in the criminal justice system.

To introduce transparency into the criminal justice proceeding, the right to a jury trial has been proposed by progressive political reformers and civil rights activists in the Philippines.<sup>57</sup> The first serious attempt to introduce the jury trial in the Philippines was made through a lawsuit filed nearly 100 years ago. When the Philippines was placed under American military rule from 1898 to 1946, the U.S. Supreme Court was asked to review three cases on appeal from the Supreme Court of the Philippine Islands, regarding whether the right to trial by jury should be

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<sup>54</sup> Ann Maxon, *Association Plans Planned Combined Judicial System*, Taipei Times, Mar. 20, 2019.

<sup>55</sup> *Id.*

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

<sup>57</sup> Patrick Camara Ropeta, *UK-Based Group Hold Forum on Trial-By-Jury in PH*, ABS-CBN NEWS (Mar. 1, 2011), <http://www.philippinejury.com/> (The NPO organization called Philippine Jury International also began their campaign called “Worldwide Philippine Jury Initiative”).

extended to the Philippines.<sup>58</sup> Although the jury system was not adopted, popular discussions on the introduction of jury trial in the Philippines continue today. For example, the Philippine Jury International, a non-profit organization based in the U.K., has begun the Worldwide Philippine Jury Initiative to educate the public about the socio-political significance of jury trials and the democratic impact of civic participation in the criminal process, as well as the impact on civil society in general.<sup>59</sup> 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, however, has been resistant to these efforts.

Prior to a 2006 military coup, the Thai national government led a major discussion and debate over the possible introduction of a lay justice system. Thailand had a long history of military dictatorship, and in 1992, the Black May popular uprising against the autocratic government finally led to many legal and political reforms, including the promulgation of the 1997 constitution that called for the introduction of democratic governance, the rule of law, and direct citizen participation at many levels and in many forms.<sup>60</sup> Three special courts had already incorporated lay judges in their proceedings, including: (1) the Intellectual Property and World Trade Court, (2) Labor Courts, and (3) Juvenile and Family Courts. Lay judges were asked to collaborate with professional judges in these courts.<sup>61</sup> Lay judges were experts appointed for a year, and at least in family courts, one of the lay judges had to be a woman.<sup>62</sup> The new constitution was widely accepted as signifying the end to extra-constitutional military rule.<sup>63</sup> However, the discussion and debate about democratic reforms, including lay participation, abruptly ended in 2006 when the Thai military seized power and repealed its constitution.<sup>64</sup>

Other countries in Southeast Asia have also experienced democratic movements and popular discussions concerning the democratization of the justice system, only to be eventually met by the counter-efforts of the judiciary or the government to either suppress popular movements for the introduction of jury trials or to eliminate existent lay participation systems altogether. For example, India

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<sup>58</sup> See generally Lebbeus R. Wilfley, *Trial by Jury and 'Double Jeopardy' in the Philippines*, 13 YALE L. J. 421 (1904).

<sup>59</sup> Ropeta, *supra* note 57.

<sup>60</sup> See generally Frank Munger, *Constitutional Reform, Legal Consciousness, and Citizen Participation in Thailand*, 40 CORNELL INT'L L. J. 455 (2007).

<sup>61</sup> *Id.* at 464.

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

<sup>63</sup> *Id.* at 456.

<sup>64</sup> *Id.*

decided to abolish its all-citizen jury trial system in 1960,<sup>65</sup> and other former British colonies such as Singapore ended the jury trial experiment in 1970, with Malaysia doing the same in 1995.<sup>66</sup> 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>67</sup> In the transition from oppressive regimes to more democratic institutional arrangements, many Asian countries have begun to initiate national debates about the possible introduction of varied models of lay participation in the administration of criminal justice procedures.

### III. THE INTRODUCTION OF LAY ADJUDICATION SYSTEMS IN THE FORMER SOVIET REPUBLICS IN ASIA AND WESTERN EUROPE

After the collapse of the Berlin Wall in 1989 that ultimately led to the deconstruction of the Soviet Union in 1991, many of its former fifteen republics began to seek the introduction of the institution of lay adjudication in order to transform their autocratic criminal justice system. Russia became the first former Soviet-republic to introduce the all-citizen jury trial in criminal cases.<sup>68</sup> On July 16, 1993, Russia amended the Soviet Law on Court Structure and introduced American-style, all-citizen jury trials. There were four major objectives involved in the introduction of the jury system in Russia.<sup>69</sup> The first objective was to ensure the independence of the justice system and its freedom from former Soviet commissars and their political control and influence on judicial decision-making. The second was to introduce an adversarial system which was expected to replace the Soviet-style, autocratic, inquisitorial criminal justice system with more transparent trial

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<sup>65</sup> Samuel William Bettwy, *A Survey of Comparative Criminal Procedure Through Foreign Films*, *Opinio Juris in Comparatione: Studies in Comparative and National Law* 78 (2014) file:///Users/fukuraihiroshi/Downloads/79-203-1-PB.pdf (“In 1960, India abolished the jury system because of the perceived susceptibility of juries to the media and public influence”).

<sup>66</sup> A Phang, “Jury Trial in Singapore and Malaysia: The Unmasking of a Legal Institution” 25 *MALAYA L. R.* 50, 51 (1983).

<sup>67</sup> Neil Vidmar, *WORLD JURY SYSTEMS* 427-28 (Keith Hawkins et al. eds. 2001); see also Sajithra Nithi, *Malaysia Considers Reviving Jury System*, ABC Radio Australia (Dec. 15, 2010).

<sup>68</sup> See generally Nikolai Kovalev, *Jury Trial for Violent Hate Crimes in Russia: Is Russian Justice Only for Ethnic Russians?* 86 *CHIC-KENT L. REV.* 669 (2016).

<sup>69</sup> See generally, Nikolai Kovalev, *Criminal Justice Reform in Russia, Ukraine, and the Former Republics of the Soviet Union* (2010); Nikolai Kovalev & Alexander Smirnov, *The Nature of the Russian Trial by Jury*, 22 *EUR. J. OF CRIME, CRIM. L. AND CRIM. JUST.* 115, 115-33 (2014); Ekaterina Mishina, *Trial by Jury in Russia: Revival and Survival*, *INSTITUTE OF MODERN RUSSIA* (Jan. 25, 2012), <http://imrussia.org/en/rule-of-law/186-trial-by-jury-in-russia-revival-and-survival>.



proceedings, including the full disclosure of evidence and witness presentation. The third was the desire of legal reformers to eliminate the overwhelming prosecutorial bias which was typical of the Soviet inquisitorial system prior to its dissolution. The fourth objective was to bridge the division between legal institutions and the citizenry through the introduction of 12-member, all-citizen jury trials. The first jury trials were introduced in nine regions in Russia, including Moscow, Saratov, Ryazan, Ivanovo, Ulyanovsk, Rostov, Altai, Krasnodar, and Stavropol, and were adopted in nearly all Russian regions by 2003.<sup>70</sup> The Chechen Republic, which is Russia's Muslim-majority federal subject, was the only region without the benefit of jury trial, but Russian lawmakers finally approved it in 2006, with the court opening the first jury trial in Chechnya in April 2010.<sup>71</sup> It has been reported that approximately 20% of all accused have been found not-guilty by Chechnyan juries.<sup>72</sup>

Among the former Soviet republics, the most significant and dramatic efforts to overhaul the inquisitorial criminal justice system took place in the Baltic states of Estonia, Lithuania and Latvia. These three newly-emerged independent states in Western Europe began to assert their right to transform their system of justice, lay participation, and trial process. Their efforts to create a system of self-governance constitute a reflective response to the history of their subjugation, persecution, and occupation by the Soviet Union and other powerful states in Europe.<sup>73</sup>

In the early 20th century, Germany, Russia, and other European powers had occupied and controlled the Baltic region.<sup>74</sup> In 1918, soon after the 1917 Bolshevik revolution in Russia, which led to the creation of the Soviet Union, the three Baltic States declared their independence.<sup>75</sup> In 1920, the Baltic states signed a peace treaty with the Soviet Union that renounced past and future claims over the

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<sup>70</sup> Ekaterina Mishina, *Trial by Jury in Russia: Revival and Survival*, INSTITUTE OF MODERN RUSSIA (Jan. 25, 2012), <http://imrussia.org/en/rule-of-law/186-trial-by-jury-in-russia-revival-and-survival>.

<sup>71</sup> Alexandra Odynova, *First-Ever Jury Trial for Chechnya*, Moscow Times (Apr. 27, 2010).

<sup>72</sup> Danish Immigration Service, *Security and Human Rights in Chechnya and the Situation of Chechens in the Russian Federation: Residence Registration, Racism and False Accusations: Report from the Danish Immigration Service's Fact Finding Mission to Moscow, Grozny and Volgograd, the Russian Federation* (2014) [https://www.ecoi.net/en/file/local/1215362/90\\_1423480989\\_2015-01-dis-chechnya-fact-finding-mission-report.pdf](https://www.ecoi.net/en/file/local/1215362/90_1423480989_2015-01-dis-chechnya-fact-finding-mission-report.pdf).

<sup>73</sup> *Id.*

<sup>74</sup> See generally Andrea J. Hanneman, *Independence and Group Rights in the Baltics: A Double Minority Problem*, 35 VA. J. OF INT'L L. 485 (1995).

<sup>75</sup> ROMUALD J. MISIUNAS & REIN TAAGEPERA, *THE BALTIC STATES: YEARS OF DEPENDENCE, 1940-1980*, 9 (1983).

entire Baltic region and territory.<sup>76</sup> The three Baltic states joined the League of Nations in 1921 and remained independent for two decades, but the secret 1939 Molotov-Ribbentrop Pact signed by Adolf Hitler of Nazi Germany and Joseph Stalin of the Soviet Union led to the division of Europe into German and Soviet spheres of influence. The three Baltic States were thus forcefully annexed into the Soviet regional republics.<sup>77</sup> Stalin then began to institute repressive policies to eliminate national resistance and potential independent nationalist movements in the Baltic region. First, a large relocation settlement of ethnic Russians occurred in multiple Baltic cities in order to “pacify” the local population, as well as to construct the military bases and a Soviet-style military industrial complex in the region.<sup>78</sup> Second, mass deportations of Baltic government elites, politicians, and local leaders took place in order to facilitate the installment of new Soviet-led communist governments in the Baltic states. Third, cultural assimilation policies were imposed on the Baltic regions in order to promote so-called “Russification” or “Sovietization,” in which Baltic people were forced to give up their own culture and language.<sup>79</sup> Such forceful assimilation programs and policies eventually backfired, leading to even stronger nationalist resistance and independent movements to attain the right to self-determination in the Baltic region.<sup>80</sup>

The first nationalist movement emerged in Latvia in 1986, led by a progressive anti-Communist group called Helsinki-86,<sup>81</sup> who had organized a massive anti-Soviet demonstration on the anniversary of the Molotov-Ribbentrop Pact on the anniversary of the 1941 deportation of political dissenters in the Baltic States.<sup>82</sup> Helsinki-86 organized another demonstration in 1988. These actions led to the “Singing Revolution,” i.e., emancipatory events that lasted until Latvia’s independence in 1991.<sup>83</sup> Both Estonia and Lithuania also experienced their own pro-independence and democratic movements to gain independence.<sup>84</sup> Two million people in both regions demonstrated on the fiftieth anniversary of the Molotov-Ribbentrop Pact in 1989 and linked their hands to form a 300-mile human chain

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

<sup>77</sup> Romuald Misiunas & Rein Taagepera, *The Baltic States: Years of Dependence, 1940-1990*, 272 (1992) (“In 1940, the Soviet Union annexed three [Baltic] nations”).

<sup>78</sup> *Id.* at 20 (The Soviet military bases were created in the Baltic states, as the “Soviets obviously realized. . . they could not depend on the Baltic states as allies. . . . whereby Soviet bases had been forced upon them”).

<sup>79</sup> For the Russification of the Baltic States, see Sonia Bychkov Green, *Language of Lullabies: The Russification and De-Russification of the Baltic States*, 19 MICH. J. OF INT’L L. 219 (1997).

<sup>80</sup> *Id.*

<sup>81</sup> ANDREJS PLAKANS, *THE LATVIANS: A SHORT HISTORY*, 170-72 (1995).

<sup>82</sup> *Id.* at 170.

<sup>83</sup> *THE BALTIC STATES: THE NATIONAL SELF-DETERMINATION OF ESTONIA, LATVIA AND LITHUANIA* 128-35 (Graham Smith ed., 1996).

<sup>84</sup> *Id.*

from the Estonian capital of Tallinn to the Lithuanian city of Vilnius.<sup>85</sup> The Estonian Soviet Socialist Republic (SSR) Supreme Soviet passed a law in December 1988 to condemn the mass deportations of Estonians in the 1940s and 1950s and to classify such actions as crimes against humanity.<sup>86</sup> “The Certificate of Rehabilitation” was also issued by the supreme courts of Latvia and Lithuania to signify the automatic political rehabilitation of many political elites, government officials, and progressive activists whom the Soviet had purged and convicted.<sup>87</sup>

Soon after the 1989 collapse of the Berlin Wall, Lithuania declared its independence on March 11, 1990, followed by Estonia and Latvia on August 20 and August 21, 1991, respectively.<sup>88</sup> Many countries recognized the independence and national sovereignty of the Baltic states, including Uruguay and Chile in Latin America, Ukraine, and other countries, such as the U.S., France, Sweden, Spain, Poland, Iceland and Israel among many others.<sup>89</sup> On September 6, 1991, the Soviet Union announced that it recognized and accepted the formal independence of the Baltic states from the Soviet jurisdiction.<sup>90</sup>

Estonia and Lithuania moved to join the Council of Europe (CoE) in 1993, followed by Latvia in 1995. Since the CoE has the European Court of Human Rights that enforces the European Convention on Human Rights,<sup>91</sup> the Baltic states began to examine the possible introduction of citizen participation in the justice system.<sup>92</sup> Estonia first decided to introduce a mixed court tribunal, in which one professional and two lay judges adjudicate serious and violent criminal cases.<sup>93</sup> Estonian citizens who are less than 70 years of age with the possession of “suitable moral character” are eligible to serve.<sup>94</sup> Lay judges are paid hourly for their service.<sup>95</sup> In

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<sup>85</sup> *Id.* at 132-33.

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

<sup>87</sup> Ray Moseley, *Lithuanian: No Nazis Exonerated*, CHI. TRIB. (Sept. 12, 1991); *Law 'On the Rehabilitation of Unlawful Repressed Persons'* (Aug. 3, 1990) (Lat.) [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).

<sup>88</sup> Rein Taagepera, *ESTONIA RETURN TO INDEPENDENCE* 178, 201 (1993).

<sup>89</sup> RICHARD C.M. MOLE, *THE BALTIC STATES FROM THE SOVIET UNION TO THE EUROPEAN UNION: IDENTITY, DISCOURSE AND POWER IN THE POST-COMMUNIST TRANSITION OF ESTONIA, LATVIA AND LITHUANIA*, 79-80 (2012).

<sup>90</sup> *Id.*

<sup>91</sup> Council of Europe, <http://www.coe.int/en/web/portal/home>.

<sup>92</sup> See generally John D. Jackson & Nikolai P. Kovalev, *Lay Adjudication and Human Rights in Europe*, 13 COLUM. J. EUR. L. 83 (2006-2007).

<sup>93</sup> *Id.* at 97.

<sup>94</sup> *Id.* at 101.

<sup>95</sup> *Id.* at 101-02; Janar Fillippov, *How Do the Neighbors?* [English translation], *The Civil War Courthouse* (Mar. 22, 2013), <http://ekspress.delfi.ee/news/paevauudised/kodusoda-kohtumajas?id=65851272>.

contrast to the discovery and the transparent law of evidence in the U.S., the Estonian law allowed the trial judge discretion to use the written statement as evidence during the trial instead of relying solely upon oral testimony.<sup>96</sup> After joining the European Union (EU) in 2004, Estonia established the Estonian Union of Lay Judges (EULJ) in 2012 in order to promote the cooperation and exchange of knowledge and information regarding the role of lay judges in the justice system.<sup>97</sup> Estonia also participated in the drafting of the European Charter of Lay Judges at the European Parliament in Brussels and accepted it on the first European Day of Lay Judges.<sup>98</sup> As a result, Estonian lay judges were entitled to receive financial protection from government taxes on compensation received for jury duties.<sup>99</sup>

After its declaration of independence in 1992, Latvia drafted a constitution that guaranteed the right to a trial by jury in criminal cases.<sup>100</sup> Similarly to Estonia, Latvia adopted a mixed tribunal system requiring that lay and professional judges together adjudicate serious criminal cases.<sup>101</sup> Nonetheless, reforms were introduced to limit the jurisdiction of lay trials in favor of bench trials,<sup>102</sup> and Latvia abolished the institution of lay participation in criminal cases in 2009.<sup>103</sup>

Lithuania failed to introduce the lay adjudication system. Due to allegations of governmental corruption and public criticism of the judiciary, the government has been forced to consider the judicial reform in order to introduce the transparency and accountability into its criminal justice proceedings. Law-makers and legal practitioners also suggested the introduction of a public trial by an impartial jury, instead of professional judges.<sup>104</sup> Lithuania recently detained 26 people, including eight justices with Lithuania's Court of Appeal and the Supreme

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<sup>96</sup> Jackson & Kovalev, *supra* note 92, at 109.

<sup>97</sup> *European Day of Lay Judges: Documentary of the Elaboration of the European Charter of Lay Judges* (2012), [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>98</sup> *Id.* at 25.

<sup>99</sup> *See A Judge of the People's Fee and the Payment Procedure* (adopted on Dec. 19, 2006) (Est.), <https://www.riigiteataja.ee/akt/12766432>.

<sup>100</sup> Latvijas Republikas Satversme [Constitution], art. 85 (Lat.) (“Juries exist in Latvia on the basis of a special law”). However, the provision to establish the all-citizen jury trial was never implemented. *See* the Constitutional Court of the Republic of Latvia, Constitutional Status of Constitutional Court of the Republic of Latvia, (Dec. 15, 2012), available at <http://www.satv.tiesa.gov.lv/en/articles/constitutional-status-of-the-constitutional-court-of-the-republic-of-latvia/>.

<sup>101</sup> Jackson & Kovalev, *supra* note 92, at 97.

<sup>102</sup> *Id.* at 119.

<sup>103</sup> Fillippov, *supra* note 95.

<sup>104</sup> Nathan Greenhalgh, *Lithuania Considers Introducing Jury Trials*, *Baltic Courts* (July 8, 2010).

Court for “large-scale bribery, trading in influence and abuse of powers in the court system.”<sup>105</sup>

In responding to the wide-spread corruption in the judiciary, Lithuanian President Dalia Grybauskaitė and Prime Minister Andrius Kubilius suggested that they would support the introduction of jury trials for certain cases.<sup>106</sup> Miklos Marschall, CEO of Transparency International Europe and Central Asia, stated that “we are living in a culture, where the government has never been a servant or a partner—it has always been alien to us. Such environment is largely favorable for corruption.”<sup>107</sup> The draft resolution for the lay participation system, “On the Framework of the Reform of the Legal System and Their Implementation,” was signed by more than 40 politicians in the Lithuanian parliament.<sup>108</sup> However, the Lithuanian government still has not yet adopted the lay adjudication system, and the popular struggle to introduce trials by jury in Lithuania continues today.

During the sudden dissolution of the Soviet Union, Kazakhstan declared its territorial sovereignty as a republic in 1990 and its national independence on December 16, 1991, becoming the last former Soviet Republic to achieve independence. In 2005, Kazakhstan passed a “Jury Trial Law” which came into force in January 2007. Under this legal provision, serious criminal cases such as rape and murder were decided by nine lay judges sitting in joint deliberation with two professional judges.<sup>109</sup> The 2010 reform led to the creation of the collegial panel of one professional judge and ten lay assessors.<sup>110</sup> However, a close observer of Kazakhstan’s criminal court argued that the criminal justice system has largely failed to emancipate itself from the Soviet legacy of a state-centered inquisitorial system that nearly assured the conviction of criminal suspects brought by public prosecutors, and that the judicial reform has only allowed the participation of

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<sup>105</sup> Andrius Sytas, *Lithuania Arrests Eight Top Judges in Anti-Corruption Crackdown*, *Reuters*, Feb. 20, 2019; see also Lithuania Detains 26, Including Judges, in Corruption Probe, AP (Feb. 20, 2019), <https://www.apnews.com/8b5e08770dac402c92850776f4e065>.

<sup>106</sup> Lithuania Culture “Favorable to Corruption,” *BALTIC TIMES* (July 9, 2010) [https://www.baltictimes.com/news/articles/26548/#.VFQCNPTR\\_Rw](https://www.baltictimes.com/news/articles/26548/#.VFQCNPTR_Rw).

<sup>107</sup> *Id.*

<sup>108</sup> Vaida Jutchon, *Lithuania’s Sworn Court in Poverty*, *Lithuanian News*, (Nov. 12, 2009), <http://www.ve.lt/naujienos/lietuva/lietuvos-naujienos/prisiekusiuju-teismams-lietuva-per-skurdi/>.

<sup>109</sup> Nikolai P. Kovalev, *Lay Adjudication of Crimes in the Commonwealth of Independent States: An Independent or Impartial Jury or a “Court of Noddors”?* 11 *COLUM. J.E. EUR. L.* 123, 136-49 (2006).

<sup>110</sup> Nikolai Kovalev, *Selection of Jurors and Lay Assessors in Comparative Perspective: Eurasian Context*, 2 *RUSSIAN L. J.* 9, 11 (2014).

citizens to the extent that it did not disrupt the existing amicable relations among the police, state prosecutors, and judges.<sup>111</sup>

Nonetheless, the impact of newly introduced mixed tribunals remains very significant. It is still extremely rare for professional judges to acquit defendants in criminal trials, similar to the behavior of Soviet-era judges in the 1980s, when only about 1% of defendants, were acquitted, while maintaining a 100% conviction rate in political cases.<sup>112</sup> But the hybrid trials have been responsible for approximately one-third of acquittals in all criminal cases of public prosecution since their introduction in 2007, and the acquittal rate of mixed trials has remained high, including 12.9% in 2009 and 12.0% in 2016, respectively.<sup>113</sup> However, the jury law did allow the prosecutors to appeal the jury's acquittal verdict. In politically-charged cases, multiple trials were ordered, despite the jury's original acquittal verdict, in the state's effort to secure the conviction of politically targeted suspects.<sup>114</sup> For example, in the highly publicized trial of Zaurbek Botabayev, who was accused of mass murder in the Ili-Alatau National Park, the mixed court found the defendant not guilty in September 2011 and he was released.<sup>115</sup> After the prosecution appealed the jury's verdict, the Board of Appeals at the Astana Court revoked the not guilty verdict and the case was sent to court for retrial by a different judge and jurors.<sup>116</sup> Prosecutor General Daulbayev asked the Kazakhstan president to intervene and order the conviction of Botabayev, and the president ordered the Supreme Court Chief Justice to hold a highly publicized trial.<sup>117</sup> The judge also ordered a retrial by another jury, which finally found Botabayev guilty in absentia.<sup>118</sup>

Among former Soviet republics, Russia has also 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, since the overwhelming power and privilege in the adjudication of criminal cases still remains in the hands of state prosecutors and professional judges with respect to the decision to "challenge" jury candidates and such preventive measures as bail and detention on remand.<sup>119</sup> Similarly, the privilege of citizens to adjudicate socially sensitive and contested cases in so-called political trials has been forcefully

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<sup>111</sup> Alexel Trochev, *Between Convictions and Reconciliations: Processing Criminal Cases in Kazakhstani Courts*, 50 CORNELL INT'L L. J. 107, 129 (2017).

<sup>112</sup> Peter H. Juviler, *REVOLUTIONARY LAW AND ORDER: POLITICS AND SOCIAL CHANGE IN THE USSR*, 119 (1976); MARK BEISSINGER & STEPHEN KOTKIN, *HISTORICAL LEGACIES OF COMMUNISM IN RUSSIA AND EASTERN EUROPE*, 172 (2014).

<sup>113</sup> Trochev, *supra* note 110, at 129 (see Table 6).

<sup>114</sup> *Id.* at 130.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Trochev, *supra* note 110, at 130.

<sup>119</sup> See generally John Jacksonand & Nikolai Kovalev, *Lay Adjudication in Europe: The Rise and the Fall of the Traditional Jury*, Onati Socio-Legal Series, n.2 (2016).

removed from Russia's all-citizen jury and transferred to the collegial panel of three state-appointed, professional judges.<sup>120</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 re-energized to improve the political role and the function of "checks and balances" in the system of lay participation in post-Soviet republics.

#### IV. THE INTRODUCTION OF TRIAL BY JURY IN LATIN AMERICA

For many decades, Latin American countries have gone through a number of brutal military dictatorships and experienced systemic suppression and persecution of political dissidents, labor leaders, progressive politicians, and peasant activists in their respective countries. Many Latin American countries have also continued to suffer serious economic and financial setbacks and widespread poverty among a large segment of the general population. Latin America has often been referred to America's "backyard." Secretary of War Henry Stimson once referred to it as "our little region over here which never has bothered anyone," explaining America's legitimacy in maintaining and extending its control over the entire Western Hemisphere.<sup>121</sup> Neo-liberal policies and structural adjustments imposed in Latin American countries by such international organizations as the World Bank (WB) and the International Monetary Fund (IMF) also led to pervasive poverty and a shrinking national economy in the 1980s and 1990s, further exacerbating the need for new politicization and democratization of the judicial and administrative systems.<sup>122</sup> Similar to recent socio-political transformations in relation to long traditions of autocratic regimes known for brutal military domination of economic and socio-political systems in Southeast and Central Asia and other regions of the world, a number of Latin American states have successfully removed despotic governments, such as Venezuela, Bolivia, Ecuador, and Argentina, among others. These countries also began to initiate redistributive socialist programs in order to lessen, if not eliminate, the extreme polarity of economic wealth within their countries, as well as introducing judicial reforms and proposals to make their criminal justice proceedings more accountable and

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<sup>120</sup> *Id.*

<sup>121</sup> NOAM CHOMSKY, ON POWER AND IDEOLOGY: THE MANAGUA LECTURES 72 (1987).

<sup>122</sup> *Id.*

transparent.<sup>123</sup> Such proposals included the introduction of lay participation in the trial of criminal cases.

Venezuela became the first country in South America to introduce two varied systems of lay adjudication in 1999. Such a “revolutionary” decision to insert popular voices into the adjudication of serious and violent crimes reflected Venezuela’s history of military dictatorship and their long struggles to institute democratic control of the government and to ensure equitable distributions of the country’s wealth among its much-impoverished population. Venezuela, meaning “Little Venice,” was first named in 1499 by Italian explorer Amerigo Vespucci, and the region was soon colonized by Spain. It finally attained independence and state sovereignty after Simon Bolivar led the successful Venezuelan War of Independence in 1811 and emerged victorious at the Battle of Carabobo in 1821.<sup>124</sup> More recently, however, in the 1980s and 1990s, Venezuela suffered political turmoil, economic crises, and financial chaos, leading to two coup attempts in 1992 led by military officer Hugo Chavez and his Revolutionary Bolivarian Movement-200 (*Movimiento Bolivariano Revolucionario 200*). Although the revolutionary coups were unsuccessful, they brought Chavez into national prominence and he ultimately won the presidency in 1998.<sup>125</sup> Under Chavez’s charismatic leadership, his new government passed the Constitution of the Bolivarian Republic of Venezuela, which changed the name of the country from the Republic of Venezuela (*Republica de Venezuela*) to the Bolivarian Republic of Venezuela (*Republica Bolivariana de Venezuela*), signifying the historical impact of Simon Bolivar’s revolutionary efforts on the independence of Venezuela.

The government led by President Hugo Chavez passed the *Codigo Organico Procesal Penal* (the Organic Criminal Procedure Code)(COPP) in 1999,<sup>126</sup> and introduced two different systems of lay participation: (1) an American-style, all-citizen jury; and (2) a mixed or hybrid tribunal composed of both professional and lay judges.<sup>127</sup> According to the new criminal procedure, an all-citizen jury trial consisting of nine jurors with one presiding judge would adjudicate alleged crimes punishable by more than 16 years. A mixed court comprised of one professional and two citizen judges would adjudicate alleged crimes punishable from 4 to 16 years. The courts had to reply on voter registration

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<sup>123</sup> Jennifer McNulty, *Juries Bring Transparency and Accountability to Trials in Argentina*, UCSC NEWSCENTER (June 7, 2019), <https://news.ucsc.edu/2019/06/fukurai-argentina.html>.

<sup>124</sup> Desmond Gregory, *Brute New World: The Rediscovery of Latin America in Early 19<sup>th</sup> Century* 89 (1992).

<sup>125</sup> See RICHARD GOTT, *HUGO CHAVEZ AND THE BOLIVARIAN REVOLUTION* 280 (2011).

<sup>126</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>127</sup> Edmundo Hender, *Lay Participation in Argentina: Old History, Recent Experience*, 15 SW J. OF L. & TRADE IN THE AMERICAS 7 (2008).



rolls as a source list to choose potential jury candidates.<sup>128</sup> Lay judges must be citizens and at least 25 years of age who possess a “sound mind and body.” They also must be residents of the jurisdiction in which the criminal case is to be tried.<sup>129</sup> Potential jurors who are 70 years or older can recuse themselves from jury service.<sup>130</sup> Law enforcement personnel, military servicemen, politicians, and government officials are ineligible to serve as lay judges.<sup>131</sup>

Although Chavez's government ultimately decided in 2001 to suspend all-citizen jury trials, the use of hybrid mixed tribunals still continues today.<sup>132</sup> It is interesting to note that the not-guilty verdicts were rendered at a higher rate in the mixed tribunal than in the American-style, all citizen jury trials.<sup>133</sup> Many newly appointed, aspiring young judges were recruited for the mixed tribunals, thereby reflecting more pro-democratic sentiments in the application of adversarial legal principles, such as a higher standard of burden of proof for the conviction of criminal defendants brought by public prosecutors.

Soon after Venezuela introduced two systems of lay adjudication in 1999, Bolivia also passed the Criminal Procedure Code in 1999 in an effort to replace the long tradition of inquisitorial prosecutorial practice with a mixed tribunal system. The hybrid panel consisted of two professionals and three citizen judges and adjudicated crimes punishable by imprisonment of more than four years.<sup>134</sup> The mixed tribunal system was implemented in 2001. 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, i.e., non-conviction.<sup>135</sup>

After many years of efforts by progressive politicians, legal reformers, and grassroots activists to encourage transparency in its inquisitorial, criminal justice proceedings, Argentina finally decided to introduce both all-citizen jury and mixed-tribunal systems in its jurisdiction.<sup>136</sup> Argentina has long suffered from a despotic dictatorial regime, including a brutal military dictatorship during the period of the “dirty war” from 1976 to 1983, in which tens of thousands of political activists and

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<sup>128</sup> Thaman, *supra* note 126, at 767.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 768.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 779.

<sup>133</sup> Thaman, *supra* note 126, at 777.

<sup>134</sup> Hendler, *supra* note 127.

<sup>135</sup> *Id.*

<sup>136</sup> Caitlyn Scherr, *Chasing Democracy: The Development and Acceptance of Jury Trials in Argentina*, 47 UNIV. OF MIAMI INTER-AMER. L. REV. 316 (2016).

supporters “disappeared” or were executed by the government.<sup>137</sup> Seeking to move away from its traditional inquisitorial system with heavy reliance on the role of state prosecutors and judges, the new democratic government initiated criminal justice reforms aimed at introducing an adversarial model for trial proceedings that would include active citizen participation.<sup>138</sup> Among 23 Argentinean provinces, Cordoba became the first jurisdiction to introduce a mixed tribunal system composed of eight lay and three professional judges.<sup>139</sup> The first trial was conducted in 2005.<sup>140</sup>

Other Argentinean provinces also began to discuss the possible introduction of an all-citizen jury trial.<sup>141</sup> Originally, the Constitution of 1853 had specified the provision of the right to trial by jury in three separate sections. While the constitution was amended multiple times, the current constitution adopted in 1994 still retains these original three sections.<sup>142</sup> However, the efforts to actualize the constitutional mandate have not been successful until recently. The Province of Neuquén became the first Argentinian province to introduce an American-style jury system, with a law to establish an all-citizen jury trial in 2011.<sup>143</sup> Unlike the mixed court tribunal introduced in Cordoba Province, the jury includes 12 citizens and adjudicates serious offenses involving potential sentences of longer than 15 years. A total of eight votes are required to convict. As Neuquén has many indigenous communities, including the Mapuche nation and peoples, the composition of the jury panel is also innovative, since when the defendant comes from the indigenous nation of Mapuche, six members of the jury must be from the Mapuche community and the remaining six members from non-indigenous communities.<sup>144</sup> The split jury is called the “*Jurado indígena*,” whose historical origin may be traced back to the 11th century English jury called the “*Jury de Medietate Linguae*,” in which six members of the jury came from the Jewish community and the remaining six jurors from non-Jewish communities.<sup>145</sup> The Province of Chaco decided to adopt a similar “*Jurado indígena*” system, in

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<sup>137</sup> PAUL R. BARTROP & STEVEN LEONARD JACOBS, *MODERN GENOCIDE: THE DEFINITIVE RESOURCE AND DOCUMENT COLLECTION 1858* (2015).

<sup>138</sup> Scherr, *supra* note 136.

<sup>139</sup> Hendler, *supra* note 127, at 13-15.

<sup>140</sup> Gisela Monge Roffarello et al., *Update: A Research Guide to the Argentine Legal System*, GlobalLex (Feb. 2014), [http://www.nyulawglobal.org/globalex/argentina1.htm#\\_Trial\\_by\\_Jury](http://www.nyulawglobal.org/globalex/argentina1.htm#_Trial_by_Jury).

<sup>141</sup> Hendler, *supra* note 127, at 15-16.

<sup>142</sup> Valerie P. Hans, *Trial by Jury: Story of a Legal Transplant*, 51 L. AND SOC'Y REV. 471 (2017).

<sup>143</sup> *A System Already Operating in Cordoba and Neuquen Provinces*, BUENOS AIRES HERALD (May 21, 2014).

<sup>144</sup> Hans, *supra* note 142, at 477.

<sup>145</sup> Hiroshi Fukurai & Daryl Davies, *Affirmative Action in Jury Selection: Racially Representative Juries, Racial Quotas, and Affirmative Juries of the Hennepin Model and the Jury de Medietate Linguae*, 4 VIRGINIA J. SOC. POL'Y & L. 645 (1997).

which the composition of the jury is split between indigenous and non-indigenous members when the defendant is a member of an aboriginal community.<sup>146</sup>

The capital and Autonomous City of Buenos Aires decided to introduce all-citizen juries in 2013.<sup>147</sup> The panel of 12 selected citizens was asked to adjudicate offenses punishable by at least 15 years of imprisonment.<sup>148</sup> The Buenos Aires jury consists of 12 citizens and is equally split between male and female jurors. Six additional citizens are appointed as alternate jurors. Unlike the Neuquén jury, the jury has to gather at least ten votes to convict, although a unanimous verdict is required when the case involves life imprisonment.<sup>149</sup> In April 2019, Argentina's Supreme Court of Justice announced that it would soon make a decision regarding whether all provincial and federal courts should adopt jury trials.<sup>150</sup> Civil movements to adopt all-citizen juries and related judicial reforms are now active in other Argentinean provinces, including Santa Fe, Entre Rios, Chubut, and Santa Cruz.<sup>151</sup>

## V. POPULAR PARTICIPATION IN AFRICA AND BEYOND

After the dissolution of the apartheid government, South Africa established its new government in 1991 under the leadership of Nelson Mandela. As a British colony, South Africa had once adopted an all-citizen jury system, holding its first jury trial in 1828 in the Cape.<sup>152</sup> But civil jury trials were eliminated in 1926, and criminal jury trials were abolished in 1969.<sup>153</sup> Despite the prior abolition of the lay participatory system, the new South African government

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<sup>146</sup> Denise C. Bakrokar & Natali D. Chizik, *The Historical Development of the Jury in Argentina*, INECIP, 9, <http://inecip.org/wp-content/uploads/Paper-The-historical-development-of-the-Jury-in-Argentina-Bakrokar-and-Chizik-1.pdf> (last visited Apr. 5, 2019).

<sup>147</sup> Law No. 14.543, BA, Sept. 12, 2013, 27187 B.O. Sup. (Arg.).

<sup>148</sup> Luciana Bertola, *Trial by Jury Up and Running in BA Province*, BUENOS AIRES HERALD (September 27, 2013).

<sup>149</sup> *Id.*

<sup>150</sup> *For the First Time in History, Argentina's Supreme Court of Justice Will Issue a Ruling on the Right to Trial by Jury*, ASOCIACION ARGENTINA DE JUICIO POR JURADOS (Argentine Association of Jury Trial), Apr. 10, 2019, <http://www.juicioporjurados.org/2019/04/for-first-time-in-history-argentinas.html>.

<sup>151</sup> Andres Harfuch, *Using the Jury to Spread Democratic Reform in Argentina and Beyond* (on file with author).

<sup>152</sup> Marshall S. Huebner, *Who Decides? Restructuring Criminal Justice for a Democratic South Africa*, 102 YALE L. J. 961, 971 (1993).

<sup>153</sup> *South African Reform Commission*, ISSUE PAPER 26, PROJECT 126, 8 (2008), <http://www.justice.gov.za/salrc/ipapers/ip26.pdf>.

decided to once again adopt lay participation in criminal trials by considering the possible introduction of a hybrid mixed tribunal in both civil and criminal trials.<sup>154</sup> One or two lay judges may be appointed if the participation of lay judges are deemed important for the administration of justice.<sup>155</sup> Two citizen judges would also join a professional judge to adjudicate murder charges, unless the accused specifically requested a trial without citizen participants.<sup>156</sup>

In Europe, following the civil war in the Balkan regions in the 1990s which led to the dissolution of Yugoslavia into six independent republics, many republics also debated the possible introduction of citizen participation in the justice system. After the end of the second world war, Josip Broz Tito became the political leader of the Balkan regions and established the Socialist Federal Republic of Yugoslavia by integrating the six ethnically distinct, independent regions into a single nation-state, including Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia.<sup>157</sup> Tito's death in 1980 weakened the central government's authority over republics.<sup>158</sup> The structural adjustment programs imposed by the World Bank and International Monetary Fund in the 1980s also led to the further deterioration of the socio-economic condition of the republics.<sup>159</sup> In 1991, the civil war finally broke out, and Croatia and Slovenia became the first republics to declare independence from Yugoslavia.<sup>160</sup> The civil war that finally ended in 2001 led to the creation of six independent republics, plus Kosovo which declared independence in 2008. In 1996, the Republic of Croatia became the first former Yugoslav republic to introduce a mixed tribunal system.<sup>161</sup> Jury scholars criticized the subservient role of citizen judges and their inability to influence trial outcomes in this mixed tribunal system. For example, one observer of a mixed court tribunal indicated that lay judges were often called "two heads of cabbage behind ... the professional judges."<sup>162</sup> However, a survey of both professional and lay judges in Croatia found more varied views on the contribution of citizen voices in the adjudication of criminal cases.<sup>163</sup> Both professional and lay judges who served at

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<sup>154</sup> *Id.*

<sup>155</sup> Huebner, *supra* note 152, at 977.

<sup>156</sup> *Id.*

<sup>157</sup> For the history of Yugoslavia, *see generally* Sabrina Ramet, *The Three Yugoslavias: State-Building and Legitimation, 1918-2005* (2006). For the lay participation system adopted in Croatia, *See generally* Sanja Kutnjak Ivkovich, *MIXED TRIBUNALS IN CROATIA* (2001/1-2).

<sup>158</sup> *Id.*

<sup>159</sup> *See generally*, Michael Parenti, *TO KILL A NATION: THE ATTACK ON YUGOSLAVIA* (2002).

<sup>160</sup> *Id.*

<sup>161</sup> Kutnjak Ivković, *supra* note 157.

<sup>162</sup> Kutnjak Ivković, *Exploring lay participation in legal decision-making: Lessons from mixed tribunals*, 40 *CORNELL INT'L L. J.* 430 (2007).

<sup>163</sup> Kutnjak Ivkovic, *An Inside view: Professional Judges' and Lay Judges' Support for Mixed Tribunals*, 25 *L. & POL'Y* 93, 108-09 (2003).

Croatian regional courts, where cases are more serious and tribunals differ in size and composition, voiced a high degree of support for the mixed court tribunals and more active participation of lay judges in the adjudication of criminal cases.<sup>164</sup>

## VI. CONCLUSION

Following the collapse of the Berlin Wall in 1989 and the subsequent disintegration of the Soviet Union in 1991, many of its former fifteen republics, including Kazakhstan, declared independence, and moved to transform the Soviet-style inquisitorial criminal proceedings into the more democratic, adversarial style of criminal justice process, open-court proceedings, and the full discovery of evidence. Kazakhstan finally introduced the hybrid, mixed tribunal system in 2007 and called for the close collaboration of both professional and citizen judges in the adjudication of criminal cases. While citizen participation was originally confined to the consideration of crimes punishable by death or life imprisonment, recent reforms have extended the jurisdiction of mixed tribunals to all grave crimes, or crimes punishable by more than 12 years of imprisonment, with the exception of political offenses.<sup>165</sup> At the same time, Kazakhstan's hybrid courts faced the same fate that confronted lay assessor courts in other former Soviet republics, former Yugoslavian republics in Europe, and several countries in East Asia and Southeast Asia. The movement to push back democratic advances began to emerge in order to lessen, if not eliminate, the impact of citizen participation in criminal trials. Latvia, for instance, decided to eliminate its own lay adjudication system due to the significant pressure from government officials, including those from the judiciary. In some countries, including Russia, Kazakhstan, and others, the government prosecutors' ability to appeal the jury's acquittal verdict has also contributed to the high conviction rate of defendants "politically targeted" by the government.

Our research showed that varied forms of lay participation have been adopted in many countries across the globe. However, no country has yet made a serious proposal to explore the introduction of active citizen participation in the adjudication of civil or administrative disputes. In China, recent reforms of the lay assessor trial system involved the adjudication of civil and administrative disputes, but the collegial body still relies on the participation of a professional judge. The possible lay adoption of civil and administrative 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, such as

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<sup>164</sup> *Id.* at 111.

<sup>165</sup> Kovalev, *supra* note 1, at 264.

economic and political elites in powerful corporations and governmental institutions. Active citizen participation in civil and administrative cases could extend the possible examination of unethical commercial practices and financial transactions, abuse of governmental authority, and even industrial accidents and disasters. The adoption of all-citizen jury trials in criminal cases, and their extension to civil cases in Kazakhstan and beyond, could potentially serve as an important political force enabling the general population to review and evaluate cases involving alleged abuses by influential government agencies, commercial interests, political elites, and business oligarchs.

