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Book Review: *Juries, Lay Judges, and Mixed Courts*

BOOK REVIEW

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ABSTRACT

This book, Juries, Lay Judges, and Mixed Courts, is an edited anthology of articles describing the historical development of various models of citizen participation in adjudicative processes in a variety of countries. They include Argentina, Japan, South Korea, Spain, England/Wales, Germany, Canada, Norway, France, Belgium, Russia, and Georgia. Some reference experimentation with varying ratios of law and lay judges and how public opinion affected political decisions on how to structure civic participation.

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In early 1992, ABA-CEELI /USAID dispatched me and a colleague to Sophia, Bulgaria to assess the country's judiciary and rule of law. Just three years earlier, on 10 November 1989, one day after courageous Berliners took sledgehammers to the infamous wall, Bulgarians deposed communist party chairman Todor Zhivkov after 45 years of autocracy. We spent several weeks traveling throughout the country, still in transition from communist to fledgling democratic rule, observing judicial proceedings and interviewing judges and court officials. It was my first exposure to an alternative model, widely in use in civil law systems, of how everyday citizens have opportunity to directly participate in administering justice. We learned that in Bulgaria's justice system, court *assessors* or *lay judges* as they are known, were citizens, often retirees, nominated by municipal councils and publicly elected to serve four-year terms that called for ten days of service per year for which they were modestly compensated. Neither legal training nor experience were qualifications for service.

Unlike citizen-participation models that rely on various sized panels of jurors segregated from spectators in the courtroom during proceedings, assessors are seated at the judicial bench with the professional judges and may or may not be robed. In Bulgaria, they participated in select categories of original-jurisdiction proceedings at the regional and district courts in criminal cases, divorce proceedings and labor disputes. In the lower courts, the bench comprises two assessors and one professional judge for most cases. Serious cases where sentencing ranges surpass 15 years' incarceration rely on panels of three law judges and four assessors. Assessors are selected by court administrative secretaries, roughly equivalent to clerks of court, from lists of elected candidates. On rare occasions, where the interim Supreme Court adjudicated an original jurisdiction case, the four assessors were designated by the National Assembly. In all proceedings, once the hearings were concluded, the assessors and law judge(s) retired in private to discuss and reach a verdict; decisions were taken based on majority rule. Only rarely did the assessors disagree with the law judge(s) on disposition of the case. In the cases that we observed, oral interaction between the bench and the parties/counsel was conducted by the law judge(s).

Two years later in 1994, I conducted a similar assessment of the Croatian court system during the latter stages of the Yugoslav War. There, the selection of candidates for assessor or lay judge positions was reserved to local, regional, or national legislative bodies, depending on the level of court, for four-year, non-renewable terms. Significantly, lay judges in the Croatian system tended to be prominent and highly regarded citizens held in esteem in their respective communities. During proceedings, they were authorized to query witnesses as well as the accused. As in Bulgaria, assessors or lay judges almost always cast their votes to conform with those of the law judges. In my interview with then-Supreme Court President Milan Vukovich, he could recall only one case in which the three assessors, ethnic Croats, and the two professional ethnic Serb law judges disagreed in an original jurisdiction Supreme Court case outcome involving alleged war crimes by Serb soldiers against Croat civilians in the city of Gospic. In neither Bulgaria nor Croatia did lay judges or assessors participate in intermediate or final appellate proceedings.

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In 1997, I traveled with a small team to the Republic of Macedonia[1] to conduct a similar court-system assessment. The legal provisions regarding the use of assessors or lay judges were similar to those of Bulgaria and Croatia with one significant difference. Observing trial court proceedings in the city of Veles, I noticed that the two lay judges seated on either side of the law judge appeared very young, possibly in their late adolescence or early twenties, unlike those in the Bulgarian and Croatian courts who were older adults. When we inquired of the chief judge about their youth, she noted it was a function of high unemployment among youth at the time anxious for the security of government employment even though the corresponding salaries were modest at best. It occurred to us that the Macedonian courts, law judges and ultimately the citizenry were disadvantaged by these lay judges of limited real-world experience and narrow exposure to life's challenges and complexities. Of course, similar concern extends to law judges who, in jurisdictions as highly developed and sophisticated as the United States judiciary, are increasingly valued by those empowered to appoint them for life for their relative youth and the political value their extended tenure portends.

My assessments of numerous court systems in other Central and East European states, all of which were based on the Soviet-era civil law model, yielded similar avenues for public participation in the administration of justice. I recall the difficulty I encountered in locating relevant academic research in English in this area that would help inform my analyses and recommendations. Now, some two decades later, Cambridge University Press has published a timely compilation of recent scholarly research edited by four U.S. based law and criminology professors under the title *Juries, Lay Judges, and Mixed Courts – A Global Perspective*. The range of countries the articles collectively cover, although limited, illuminates similarities and differences in how governments approach enabling, valuing and legitimizing direct citizen participation in the adjudicative process. Predictably, most of the individual country accounts in the book's collection were prepared by university-affiliated academics in a variety of legal specialties, particularly procedural law and the sociology of law. Others are political scientists, sociologists, criminologists. A minority of the contributors are practitioners in public prosecution and defender services, court administration, and trial and appellate advocacy. They even include a presiding high court judge. This diversity of authors is reflected in the values and concerns that emerge as the reader proceeds through the collection. Although most of the articles feature one or two authors, all four editors collaborated on the useful 20-page introduction. Interestingly, the article tracking the history of experimentation with juries in Argentina has nine coauthors.

The editors organized the collection of articles into five major categories. In the first, the coauthors review the lengthy history of official government attention focused on juries, beginning with Argentina's 1853 Constitution, in which juries are thrice referenced, most recently amended in 1994. Notwithstanding the national attention, actual experimentation did not occur for 150 years; even then, in 2004 provincial-level officials in Córdoba rather than the national government tasked lay citizens to participate in court proceedings, then deliberate with law judges to whom the case was assigned to reach majority verdicts. Subsequently, five other provinces on their own adopted the Anglo-American common-law model of empaneling 12-person juries to attend and assess trial proceedings, then engage in cloistered deliberations and render their verdicts to the presiding judge(s) in open court. Still, in the ongoing absence of action on the national level, other provinces are currently working on their own draft jury laws.

1 Rechristened as North Macedonia in February 2019.

The authors track these developments, drawing on the stakeholders – judges, attorneys, and jurors — in the historical context of a national government that never moved beyond formally endorsing the concept in successive iterations of the country's constitution. Even as federal officials continue to ruminate, word of the provincial experiments is generating interest among Argentina's neighbors. From an institutional perspective, adoption of the Anglo-American model has entailed fundamental procedural changes in what the authors characterize as the infiltration of a "Trojan horse" into the "civil-law fortress" of Argentine case processing, portending the gradual transition from inquisitorial- to adversarial-based justice. Included is a table laying out the basic features of each provincial system so the reader can compare similarities and differences.

A second article reviews and analyzes in greater detail the impact in Córdoba of the modified jury model on the administration of justice in the province, including the results of a citizen survey and how the new model of public participation affected citizen perceptions of legitimacy, trust, impartiality and other institutional elements in the administration of justice.

From Argentina, the discussion traverses the globe in an 18,000 mile transition to Nippon where the reader is introduced to Japan's efforts to structure mechanisms of lay participation in the adjudication of criminal cases. Unlike Argentina, Japanese experimentation began in the 20th century. In 1928, its penal courts began mimicking the Anglo-American model of 12 empaneled citizens hearing criminal cases, an effort that persisted for 15 years; it was reintroduced in Okinawa's courts from 1963 and continued until 1972 for both civil and criminal cases. In 1948, the Japanese also introduced a grand jury model known as the *Kensatsu Shinsakai* in which 11 citizens were empaneled to review prosecutorial evidence and determine whether to issue indictments. That model has endured and remains in use today; Okinawa introduced a similar grand jury model with nine members in 1963 and utilized it until 1972. In 2009, the government adopted a *Saiban'in* tribunal model in which panels comprising lay and law judges collegially hear criminal matters and issue verdicts on as to guilt and sentence. All other lay-based government courts restrict law judge participation in deliberations. Legislative intent authorizing creation of the *Saiban'in* courts in May 2009 included an education emphasis; participating in the deliberative process would facilitate public understanding of and empathy for the administration of justice and increase confidence in judicial institutions and the rule of law.

Passage of the relevant law was driven in part by widespread discontent in the 1980s, fueled in the national media, about lapses and mediocrity in prosecutorial investigations and conduct. Because law judges either glossed over or failed to challenge such incompetence with sufficient rigor, wrongful convictions ensued. When new evidence subsequently surfaced, including in high-profile cases whose defendants were sentenced to death and executed, public trust in the competence of the professional judiciary plummeted and spawned widespread demands for judicial reforms. The article concludes by reviewing the performance of the *Saiban'in* tribunals over the past decade.

Next, the reader steams to the South Korean judicial system where the outcome of the first criminal trial ever heard by a jury was issued in the Daegu District Courthouse on 12 February 2008. A Judicial Reform Committee created by the government had recommended implementation of criminal juries comprising citizens who, after following the trial proceedings, would convene to independently deliberate the

factual evidence and agree on a verdict, a process in which judicial intervention was precluded unless the jurors were unable to reach unanimity. Being tried by a jury was a right to be exercised by criminal defendants. Where the verdict convicted the defendant, the jury would also recommend an appropriate sentence. Jury size would range from five to seven to nine, depending on the gravity of the alleged crime. The primary diversion of the South Korean model from the common-law model is that the jury verdict is advisory rather than binding. The presiding law judge in the case has the discretion to accept, reject or modify the jury verdict.

In the ensuing decade, more than 2,000 jury verdicts have been issued by citizen panels reflecting successful implementation of an important element of the democratization process for this relatively young country. During that decade, various procedural adjustments were recommended, three of which were to (i) eliminate the five-person jury; (ii) modify the level of jury panel agreement required from a simple majority to a super majority – seventy-five percent; and (iii) mandate acceptance of the verdict absent a showing that it is unconstitutional, violates subordinate acts, laws or regulations, or otherwise raises reasonable doubt that the deliberative procedures or their results were valid. None were accepted or codified. The authors include a variety of analyses and other information relevant to the conduct of jury trials including duration, convictions/acquittals, appeals, incidence of agreement/disagreement between judges and jurors on verdicts and, where made, sentencing recommendations.

Moving on from South Korea, the juridical review conveys the reader to Spain for a review of its efforts to implement direct citizen participation in the administration of justice. I leave to the reader the pleasure of reviewing the narrative.

The Section II articles highlight features of lay participation mechanisms and protocols in well-established systems whose structural frameworks have withstood the perils of statehood over centuries and whose best practices serve as models for younger systems to emulate. England's and Wales' systems include magistrate courts whose pedigrees of utilizing lay magistrates sitting individually, in pairs, or in trios to adjudicate criminal matters extend back into the 14th century. Their traditions rely on adversarial representation with the magistrate contingent functioning as referee and justice provocateur to ensure the integrity of the process and the observation by contending parties of procedural and other rules. Although not technically qualified as trained barristers, they have within their call the expertise of legally certified advisors who can be summoned as necessary. The positive image and trust they curated over decades with the citizenry derive from their ability to explain legal process in layperson terms, thereby providing a key link to the professional legal and government courts' communities. As nonlegal adjudicators, they import into their judicial roles the respective values of their communities to complement and enrich the rule of law.

In Germany, a different approach partners lay judges with law judges in mixed tribunals that merge the legal and nonlegal worlds, a popular tradition that dates to 1869 when a national judiciary code was implemented. With traditional German priority on technical accuracy and given the extensive vetting and comprehensive education and experience qualifications professional judicial candidates must complete, only law judges have access to the case dossier and engage with the parties in pretrial proceedings. Unlike jurors in the common-law model, lay and law judges in German court proceedings jointly consider matters of fact and law in civil, criminal and other more specialized courts. When deliberating case outcomes, the mixed tribunals convene in judicial chambers and follow an informal tradition of seeking to reach consensus as an

alternative to casting votes. Presiding judges typically go out of their way to encourage the active participation of lay judges; a primary benefit of their participation is that the preservation of traditional community values is brought into the discussions.

The third piece in Section II focuses on the use of instructions that common-law court judges jointly prepare with counsel to guide jury deliberations once the trial segment of the case concludes. The author summarizes existing research on how well empaneled jurors in North America understand those instructions, including those prepared for death penalty cases. She then narrows her focus to jurors and their comprehension of difficult categories of model instructions utilized in the Canadian courts. Because jury instructions often address the technical legal elements of cases, elements with which most jurors are unacquainted, their ability to understand the oral instructions they receive is challenged. The author explores how multisensory supplemental learning tools provided to jurors have the potential to illuminate what the instructions require of them. Such learning tools include providing jurors with copies of the written instructions they refer to while deliberating, decision tree diagrams with sequential questions that outline the process for reaching appropriate conclusions, and questions whose technical complexities are converted as much as possible into plain language statements and queries that lay persons find easier to comprehend. The article summarizes the latest research in these areas and the findings that follow from it.

The articles in Section III review discrete lay participation challenges with which courts in select European and Asian jurisdictions have wrestled and continue to wrestle. In Norway, historical reliance on lay-person juries dates to 1887, but their use was increasingly questioned both by the judiciary and the bar in criminal case trials and appeals as the 20th century progressed. In 1981, that reliance was abandoned and succeeded by mixed panels of lay and law judges in criminal trials. More recently in 2017, the mixed panels replaced layperson juries in criminal intermediate appellate proceedings. Another concern raised by the bench and bar proposed requiring that the legal and factual considerations underlying verdicts rendered by the mixed panels be reduced to writing to better inform both the assigned fact-finder to whom the case was assigned and the sentencing judge.

Crossing borders into France and Belgium reveals a more tenuous relationship in the respective judicial families because the institutional frameworks were politicized. Prior to the French Revolution, authority to administer justice was the exclusive province of kings who, in later centuries, appointed and delegated judicial power to magistrates charged with administering justice in their name. An informal two-tiered justice framework evolved in which litigants of means made direct payments to the king's jurists in proceedings conducted in private with confidential outcomes, fostering corruption and abuses aggravated by judgments in equity based on custom, local rules and corporative laws. The common poor were dealt with more brusquely. The result was a judicial system with largely unpredictable outcomes yielding jurisprudential mishmash. A new system for the administration of justice emerged in the aftermath of the revolution based on the separation of powers. It institutionalized lay-person juries to guarantee the voice of the people.

Overtime, the combination of occasionally overzealous lenience by jurors unsympathetic to government prosecutors and juror inability to understand and weigh evidence in thorny criminal cases gave rise to general perceptions of unfounded jury acquittals that, in turn, prompted calls for reform. In 1941, during the World War II reign of the Vichy government over southeastern France, which engaged in close collaboration with Nazi

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officials in German-occupied France, the lay person jury was abandoned in favor of the German model of the collaborative mixed panel comprising lay and law judges. At the turn of the 21st century, during the 2007–2012 reign of President Nicholas Sarkozy who viewed France's professional judge ranks as excessively liberal and indulgent vis-a-vis criminal defendants, previous lay-judge jury authority and jurisdiction were restored, only to be reined in again by the successor government in 2012.

Prior to 2016, Belgian juries comprised exclusively lay-person juries. That year, lawmakers transformed the institution by establishing blended panels, each comprising trios of lay and law judges. But the Belgians went further, dramatically curtailing what categories of cases the new balanced panels were authorized to hear. Under this new judicial reform framework, most case types fell within the adjudicative authority of judicial panels exclusively comprised of law judges. Although the public response to the reforms was tepid at best, the professional bar, justice ministry and judges' unions all embraced them on grounds of greater efficiencies, improved assessment of complex evidentiary materials, and overall improvement in the judicial system's jurisprudence.

From narratives of embedded lay panels operative for centuries in Western European justice systems, the book transitions geographically into contemporary northeastern Eurasia to examine their development in the Republics of Russia and Georgia. The involvement of lay persons in the adjudicative process in Russia first commenced during the era of the Great Reforms of the 1860s largely as an experiment purposed to improve lagging public confidence and trust in Tsarist-era judges and courts. During the succeeding Soviet era, the jury model transitioned into a mixed-court model that enabled greater regime control over outcomes through manipulation of law judges and prosecutors. Under Vladimir Putin, in 1990 the system reverted to the use of lay- person panels subject to three regime-imposed constraints.[2] First, by eliminating jury trials in the adjudication of charges alleging crimes against the state. Second, by restricting the ability of defense counsel to participate in juror selection, introduce trial evidence, and present submissions to jury panels, revised procedural rules and protocols that impaired defendants from presenting a rigorous and spirited defense, thereby advantaging government prosecutors. Third, by compromising what should be a random process for the summoning of prospective jurors, giving preference to individuals loyal to and supportive of the regime and its prosecutors. The article includes a fascinating historical summary of the sometimes tortured evolution of juries and mixed panels in Russia from the era of the Tsars to the Bolsheviks to Republican Russia.

Reliance on various iterations of lay participation in the administration of justice in today's Republic of Georgia date back to the 15th century when kings' councils of elders conducted legal proceedings in the mountainous terrain and heard from *compurgators* or co-swearers who testified on behalf of the accuser and defendant. In the early 18th century, the kingdom was occupied by the Russian Empire which established formal

2 In 1993 I worked on the ABA-CEELI Russian Jury Trial Project team. We were scheduled to travel to Moscow for consultations with the Russian judiciary when President Boris Yeltsin dissolved the Russian state legislature. When its members refused to abdicate and barricaded themselves inside the Moscow White House or parliament building, Yeltsin ordered his defense minister to have Russian troops lay siege to the building. They did so, and all legislators were arrested. Our travel plans were cancelled. NCSC's Tom Munsterman, a great colleague and team member, had arrived early and was caught in the melee with President Yeltsin perched on a tank targeting the parliament. When Tom finally managed to board a flight back to the U.S. and landed in Washington, he confided that on disembarking the aircraft, he kneeled and kissed the American tarmac. Our team subsequently published a *Benchbook for Judges* on conducting jury trials which was translated into Russian.

courts of law in which justice was dispensed by a Russian judge and two lay assessors from the Georgian nobility. Where the defendant was a prince or noble, a chief judge would preside accompanied by four Georgian lay persons. By the late 18th century, the Tsar had implemented judicial reforms that separated the judicial power from the executive power, introduced oral proceedings, created justice of the peace positions and a professional bar, and publicized plans to implement jury trials. Completion of the reform agenda proceeded slowly, eclipsed by the 1917 Bolshevik revolution whose resulting chaos, exacerbated by the horror of World War I, not only halted democratic institution building but essentially torpedoed it. The tiny kingdom enjoyed a brief period of independence but in 1921 was occupied by the fledgling Soviet Union. Circa 70 years later, as the Soviet empire imploded, Georgia renewed its independence aspirations but became engulfed in war and conflict that left its Soviet-era institutional framework weakened and riddled with both private and public corruption, including a thoroughly compromised justice system controlled from the top down by the Soviet version of telephone justice adjudication. The 2003 Rose Revolution spawned the drafting of a new constitution adopted in 2005 and triggered a variety of democratic institutional reforms that included the judicial system. Presidents Shevardnadze and his successor, Mikheil Saakashvili, drafted successive versions of a new criminal procedure code designed to replace the Soviet-inspired version that championed inquisitorial justice. The new code embraced the adversarial model and implemented jury trials populated by citizens; passed by the National Legislature in 2009, it established a criminal jury-trial framework modeled on the Anglo-American system. That same year, the U.S. Departments of State and Justice dispatched me to Tbilisi for several weeks to assess how prepared the Georgian Ministry of Justice was to implement criminal jury trials.

The book concludes with Section IV, Global Perspectives on Lay Participation.

The editors' compilation of articles largely follows a historical narrative model of how diverse countries at various stages of institutional development have sought to provide in their justice frameworks a role for lay participation in the adjudication process. The historical contexts and the authors' accompanying analyses are both useful and informative from several perspectives. The book could usefully serve as a textbook for a law school or political science seminar or colloquium on lay participation in the adjudication of civil disputes and criminal charges. It also would be a useful reference for legislators and government officials in developing countries whose judicial systems do not provide for lay participation, whose constitutions do not reference jury trials, and whose criminal and civil procedure codes task professional judges with exclusive responsibility for assessing all factual, testimonial, and other types of evidence introduced into the trial process. It also could be used as the text in civil society courses by political science and law faculties in developing countries ruled by autocratic governments. Finally, it is a valuable contribution to the comparatively small body of published research and analysis on this important institutional component of the rule of law and the administration of justice.

The various articles largely focus on the importance of lay participation in criminal proceedings. It also would have been helpful to have greater emphasis on the value of lay participation in civil disputes. Moreover, in complex civil and criminal litigation, parties often introduce evidence whose technical intricacies and sophistication exceed the capacity of most lay persons to reasonably comprehend, leaving them confused and uncertain, states of mind that do not result in well-analyzed, reasoned, and informed verdicts. The technical challenges inherent in examining and evaluating evidence in complex electronic and world-traversing financial transactions for criminal

intent and in cybercrime, for example, far exceed the competence of most citizen jurors, yet some avenue needs to be established to enable public participation in their review and adjudication. Then too, the book is largely silent on how juries in emotionally laced trials occasionally render verdicts that confer enormous financial judgments on litigants perceived to have been unjustly exploited by deep-pocketed corporations, prompting judges to intervene and corporate counsel to resolve to opt for bench trials whenever possible. Such factors work to undermine the value, benefit and incidence of lay participation as demonstrated in statistical data indicating a gradual but protracted decline in jury demands in civil case filings throughout the federal courts of the U.S.

COMPETING INTERESTS

The author has no competing interests to declare.

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