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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

Ever since the collapse of the Soviet Union in 1991, many nations around the world have moved to introduce a contemporary version of popular jury in their administrative system of justice. In the last two decades, East, Central, and Western Asia have become the focus of this global trend. Debates and proposals have also made headway in nations from Central and Eastern Europe to Central and South America, Southeast Asia, and Africa.

We can trace the origins of these recent trends over the last five hundred years, as the system of lay adjudication has appeared at least twice before.

Some argue that the current sweep of judicial reforms in Asia is similar to the 19th century wave of reform triggered by the 1789 French Revolution. Political unrest in Europe strengthened the petit jury in England, and trial by jury became an integral part of emerging democracies on the European Continent as well as in the U.S.¹

The common elements in transformative time and space during periods of significant social change and political upheaval may be found in lay participatory systems that emerged as a symbol of democratic ideals around the world. The institution of the popular jury was perceived to effectively elevate ordinary citizens into the position of self-governance, and in fact became an avenue to secure direct, participatory democratic reforms.

In the first global wave of judicial reforms, France introduced trial by jury in 1789, and this popular jury became an important political tool in the hands of the insurgent bourgeoisie against absolute French monarchy. Greece then moved to introduce the popular jury in 1844, followed by Germany in 1848, Russia in 1864, Spain in 1872, and Italy in 1873, as well as nearly all other European nations by the end of the 19th century.²

The current, second wave of the global judicial reform also follows the comparable political shift in the balance of power and order after the sudden collapse of the Soviet Union in 1991. Since then, the U.S. emerged as the lone global power and began to exert her military muscle, influence in global politics, and a renewal of the practice of extraterritoriality.

Soon after 9/11, the U.S. declared the world leadership against terrorism and began to engage in legally questionable political activities and clandestine military operations in the U.S.

¹Stephen Thaman, 2001–2002. "Japan's new system of mixed courts: Some suggestions regarding their future form and procedures," *Saint Louis-Warsaw Trans Atlantic Law Journal*, 89–90.

²Id.

and around the world. Those included warrantless surveillance, extra-ordinary rendition, lengthy detention of terrorism suspects in Guantanamo, and maintenance and creation of secret interrogatory prisons and detention centers around the world. The U.S. government financed, sanctioned, and promoted legally questionable uses of “enhanced interrogation” techniques to extract information from suspected terrorists, including foreign nationals, and facilitated the use of military commissions to streamline prosecutorial disposition of criminal cases involving “illegal enemy combatants.”

The blowback of U.S. global policies and intelligence activities became the backdrop for the sudden emergence of the global wave of judicial reforms. With the signing of nearly one-hundred treaties of the status of forces agreements (SOFA), visiting forces agreements (VFA) and other military arrangement with foreign governments, today the U.S. government has successfully placed its military personnel in more than one-hundred fifty countries in the world.³ Many foreign governments began to follow America’s footsteps in declaring a war on terrorism, practicing systematic detention, interrogation, and prosecution of suspected terrorists, including their own citizens. In those nations and neighboring regions, the establishment of democratic institutions, including the system of the popular jury, was largely perceived to be the path to secure liberty by fair-minded citizens. These included progressive legal scholars, insurgent intellectuals, civic activists, and a minority of political actors — who warned of potential danger of governmental oppression and abuse of power, thereby weakening political and social sovereignty of nation states that could lead to intergovernmental struggles, conflicts, and wars.

The Russian revolutionary, Leon Trotsky, once declared, “War is utilized by the imperialists, first and foremost, to crush internal enemies.”⁴ Today we need not rely on such past dicta. For in our time many political dissenters and anti-government activists have been arrested, interrogated, and prosecuted by their own governments.⁵ Thus, in part, this world-wide trend in the establishment of the lay justice system may reflect the progressive and popular counter-imperial strategies, in which citizens and conscientious political actors in affected nations are preparing to equip themselves with the legal apparatus and judicial strategies to resist the possibility of future oppression from their own governments. They reason that their respective governmental institutions may or have already become vulnerable to economic pressure, political interference, and extraterritorial military intervention by the U.S. and European powers.

1. The popular jury in East Asia

Civic responses to foreign pressures and controls have varied. Many nations in East Asia, as well as emerging democracies of Central and Western Asia have engaged in extensive national discussions covering citizen participation in their justice systems. Except several East Asian nations, it is important to note that many Asian countries that recently decided to adopt the system of the popular jury have also signed the treaty of the status of forces agreement (SOFA) with the United States government. And many of them have also transformed their legal

³Chalmers Johnson, 2006. *Nemesis: The Last Days of the American Empire*. NY: Holt.

⁴See the Manifesto of the Fourth International on Imperialist War, available at <http://www.marxists.org/history/etol/document/fi/1938-1949/emergconf/fi-emerg02.htm>.

⁵See generally Hiroshi Fukurai, 2008, “Transcommunal Projects to Establish the System of Civic Oversight of the Government: People’s Legal Participation and Power to check the Government and Its Authority,” *Transcommunal Cooperation News*, available at <http://mail.google.com/mail/?ui=2&ik=3591636a87&view=pt&q=denver%20san%20jose&search=query&th=12058ba2abbe6816>.

109 systems by allowing the intervention of a group of citizens in the judgment of criminal cases,
110 including the accusations of anti-government activities.

111 In Hong Kong, for instance, after China reclaimed sovereignty from Britain in 1997, the
112 Hong Kong government introduced a bill in 2003 to ensure that people charged with treason,
113 secession, subversion or any other crimes committed against the Chinese government must be
114 tried by an all-citizen jury of Hong Kong residents, and that future defendants who are charged
115 with sedition or unlawful disclosure may opt for jury trial if they so desire.⁶

116 In South Korea, after a long history of dictatorial military regimes since the end of World War
117 II, in 2008 the government finally introduced the jury system and begun a 5 year experiment in
118 allowing a panel of ordinary citizens to adjudicate serious criminal cases. While jury decisions are
119 not binding, judges are instructed to use jury verdicts as an important guidance for determining
120 final trial outcomes.⁷ South Korea's legal transformation has been quite remarkable because,
121 unlike Japan, South Korea never had a history of citizen participation in the judicial system.

122 The introduction of the popular jury also impacted another branch of the South Korean
123 government. In 2005, the Ministry of Defense announced that it would adopt a jury system in
124 which officers, noncommissioned officers, and rank-and-file soldiers would participate as jurors
125 in an effort to increase public trust in military tribunals.⁸

126 In 2004, China has promulgated a new legal document to strengthen its traditional lay
127 assessor system and the people's courts. On August 28th 2004, the Standing Committee of the
128 National People's Congress adopted the Decision Concerning the Perfection of People's
129 Assessor Institution in order to improve China's judicial system, which has been criticized for
130 judicial corruption and lack of judicial independence by Western observers.⁹ China's lay
131 assessor system was further strengthened by the additional amendment passed by the Chinese
132 government in 2005 and 2010.

133 Prior to a 2006 military coup, the Thai government also discussed and debated the possible
134 introduction of a lay justice system, and so did the Taiwanese government. The bar association
135 of Philippine has sent the legal delegates to Japan to study the possible establishment of their
136 own citizen judge system. While India abandoned its jury trial in 1960, Sri Lanka, despite its
137 deadly civil war being waged in the island, continues to rely on a jury trial to adjudicate
138 criminal cases.

139 The Japanese government promulgated the Lay Assessor Law in May 2004 and announced
140 that the first lay assessor trial was to begin in 2009, after five years of a preparatory period. On
141 May 21st 2009, the law finally went into effect, and ordinary citizens selected at random from
142 local electoral rolls are now expected to make decisions in serious criminal cases. A judicial
143 panel of three professional and six lay judges is required to make a decision in both conviction
144 and penalty phases of a contested criminal case; and another panel of one professional and three
145 lay judges is expected to adjudicate an uncontested criminal case where there is no dispute on
146 facts and evidence identified during pre-trial procedures.

157 ⁶Frank Ching, "The jury is in," *South China Morning Post*, February 28, 2003. This bill was, however, not approved
158 by the government.

159 ⁷Jon Herskovitz. 2007. "South Korea to Try Jury System for First Time," *Reuters*, May 3.

160 ⁸Joo Sang-min. 2005. "Military Seeks to Revise Martial Laws," *Korea Herald*, July 20. In 2012, the South Korean jury
161 system will be reviewed and permanently implemented with or without major changes.

162 ⁹"China to introduce jury trials," *Agence France Presse*, December 20, 2004.

163 In May 2004, the Japanese government also revised another lay participatory law, the Act to
164 Revise the Code of Criminal Procedure, and improved the grand jury system called the
165 Prosecutorial Review Commission (PRC).
166

167 Japan's PRC revision is another major judicial reform in re-energizing citizens' active
168 participation in the grand jury system. The PRC's main objective is to provide direct civic
169 oversight of the government and its institutions. The new PRC law also gave the PRC's
170 indictment decision the legally binding status. Until 2009, Japanese prosecutors were
171 extremely reluctant to indict prominent politicians, government bureaucrats, and members of
172 law enforcement and the judiciary. After the implementation of the new system in 2009, the
173 PRC's decisions so far has forcefully indicted a former deputy police chief, three past
174 presidents of Japan Railway West (JR West) which is one of the most powerful Japanese
175 private corporations, and a member of the ruling Democratic Party. The PRC is now seen as
176 providing powerful civic oversight of political organizations and administrative agencies of
177 the Japanese government.
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182 2. The popular jury in former Soviet Republics in Central and Western Asia

183

184 Another significant development has been taking place in Central Asia after the collapse of
185 the Soviet Union in 1991. Many former Soviet republics, such as Kyrgyzstan, Kazakhstan,
186 Ukraine, Georgia, and Latvia have introduced their own system of the popular jury in their
187 judicial system. Russia also introduced the popular jury in 1993.¹⁰
188

189 In Kyrgyzstan, the parliament passed the law in April 2009, introducing a jury trial in
190 regional courts. A juror must be a citizen between the age of 25 and 65. The law also estab-
191 lished a time frame for the pilot project for the jury trial; in the cities of Bishkek and Osh, the
192 jury experiment will begin from January 1, 2012; and in Jalal-Abad, Chui and Isyk-Kul regions
193 in 2013; and in Batken, Naryn, and Talas regions in 2014.¹¹
194

195 Kazakhstan began a jury trial on January 1, 2007, though only in criminal cases involving
196 capital offenses.¹² The jury consists of eleven people, selected by a computer program from
197 a list of people's surnames, suggested by regional Akimat. Excluded from the jury candidacy
198 are public servants, police officers, military personnel, lawyers, those with criminal history,
199 people without legal residency, and those who know the accused personally or are younger than
200 25 years old.¹³ The jury pay is set to be a half of daily salary of a judge in a regional court.¹⁴ In
201 its first jury trial, more than 4000 candidates were chosen from all voters in northern
202 Kazakhstan. Then a computer program selected a group of 40 jury candidates, in which 37
203 appeared in court.¹⁵
204
205
206

207 ¹⁰Latvia is located in Western Europe, not in Central Asia.

208 ¹¹"Deputies Approves the Introduction of Jury Trial in Kyrgyzstan," 2009, *HTC*, April 24, also available at <http://www.nts.kg/?action=news&na=read&topic=5611>.

209 ¹²John H. Wright, 2008, "Jury Trials Start in Kazakhstan," *Central Asia Business*, Volume 1, No 1, 70–71.

210 ¹³Id.

211 ¹⁴Id.

212 ¹⁵Id. Satybaldy Nurushev, who worried about leaving his stock room un-attended became the first juror chosen to serve
213 in the jury trial in Kazakhstan.
214
215
216

217 The Ukraine government also adopted a new constitution on June 28, 1996 and passed the
218 amendment on December 8, 2004. The new constitution now provides for trials by jury. This
219 has not yet been implemented in practice, however.¹⁶

220 The government in the Republic of Georgia also decided to implement a trial by jury in
221 2009. The new code of criminal procedure was passed by the Georgia Parliament in 2007,
222 which effectively introduced a trial by jury.¹⁷

223 The Republic of Latvia passed a new constitution in 1992 and its Article 85 has a provision
224 for jury trial in criminal cases.¹⁸ In 2006, the introduction of jury trials in Chechnya was finally
225 approved by Russian lawmakers and the first Chechnya jury trial began in April, 2010.¹⁹

226 227 228 229 230 **3. The 2010 inaugural East Asian law and society conference in Hong Kong**

231 In the midst of significant political changes and judicial reforms sweeping across East and
232 Central Asia, the Inaugural East Asian Law and Society Conference was held on February 5th
233 and 6th, 2010, in the vibrant city of Hong Kong.²⁰ More than 150 delegates came together from
234 the U.S., Japan, Korea, China, Taiwan, Malaysia, Iran, the U.K., Sweden, Australia, France,
235 Canada, Hong Kong, Singapore, and other countries in the world. Conference papers and
236 presentations all revealed the depth of deep concern, academic energy, and scholarly research
237 recognizing recent transformative changes and legal development in Asia. The presentations
238 also provided fertile grounds for future socio-legal research and collaboration in the region.

239 A total of 24 concurrent sessions covered many important topics, including lay participation
240 in legal institutions, legal education and professional practice, constitutional reforms, colonial
241 policing and legacies, changing legal consciousness, legal impacts on the environment, gender
242 in law, and the development of alternative dispute resolution techniques adopted in East Asia,
243 among many others.²¹ The largest number of panels focused on the analysis of newly emerged
244 systems of lay adjudication in Asia.²² Since Japan and South Korea most recently introduced
245 their own systems of lay adjudication, many papers and in-depth discussions focused on the
246 analysis of their citizen-based participatory institutions. The analyses were presented by
247 lawyers, legal scholars, and jury researchers from many countries including Japan, South
248 Korea, Taiwan, Australia, and the U.S.

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255 ¹⁶Judge Bohdan A. Futey, 2004, "Rule of Law in Ukraine: Forward or Backward?" Ukraine Report-2004, January 13,
256 available at <http://www.artukraine.com/buildukraine/futey4.htm>.

257 ¹⁷Ghia Nodia, 2008, "Georgia: Executive Summary," Nations in Transit 2008, p. 248, available at http://www.freedomhouse.hu/images/fdh_galleries/NIT2008/NT-Georgia-final.pdf.

258 ¹⁸Latvia Constitution available at http://www.servat.unibe.ch/icl/lg00000_.html (last visited May 19, 2009).

259 ¹⁹Alexandra Odynova, "First-Ever Jury Trial for Chechnya," *Moscow Times*, April 27, 2010.

260 ²⁰The Hong Kong Government Tourism Board and the University of Hong Kong provided the institutional and
261 logistical support to the inaugural conference.

262 ²¹There were also an Opening Session with three keynote speakers and four distinct panelists participated in
263 a Concluding Session, "The Recursivity of Law as a New Paradigm for Socio-legal Theory and Research in East Asia."
264 The conference program is available at http://www.crn33-eals.org/hkconference2010_program.pdf.

265 ²²A total of five panels focused on the topic of lay participation in legal decision-making. The panels included: (1)
266 Comparative Lay Participatory Systems in Law; (2) the Introduction of the Lay Justice System in Japan: Early
267 Evidence; (3) Comparing and Assessing Judicial System and Administrative Reform in Japan: Criminal Justice and
268 Beyond; (4) Lay Participation, Other Forms of Democratic Justice, and Legal Consciousness; and (5) Judicial System
269 Reform & Popular Participation in Japanese Criminal Justice. Some papers on lay participation were also presented in
270 other sessions with related topics and agendas.

271 It is also important to recognize that, so far as covering the international conference on the
272 specific topic of lay participation, the Hong Kong Conference has had two predecessors. The
273 first international conference on lay participation was held in 1999 in Sicily, Italy, and it was
274 organized by St. Louis University Professor Stephen Thaman.²³ Another conference was held at
275 Cornell Law School in 2006, sponsored by the Clarke Program in East Asian Law and Culture
276 under the leadership of Professor Valerie Hans. At this conference, many Asian scholars were
277 invited to present the analysis of the changing role of popular participation in East Asia.²⁴
278 Many excellent papers were then published in the Special Issue of the *Cornell International*
279 *Law Journal* in 2007.

281 The seven articles in this Special Issue of the *International Journal of Law, Crime, and*
282 *Justice* provide a sampling of key issues and questions raised at the first East Asian Law and
283 Society Conference in Hong Kong.

284 The article by Masahiko Saeki examines the impact of victim participation systems on
285 sentencing in Japan's lay justice court. His research specifically addresses the effect of the new
286 systems on trial outcomes and victim satisfaction. Min Kim and Steve Penrod attempted to
287 compare the legal decision-making of Korean legal professionals and lay people, when
288 controversial confession evidence and expert testimony are introduced in adversarial and
289 inquisitorial trials – also making systematic comparisons with those of the United States. Their
290 research found that both legal professionals and lay participants evaluate and weigh evidence
291 differently.
292

293 Professor Kwangbai Park and his colleagues examined the effect of a dual system of
294 judgments on public confidence in jury verdicts in South Korea. The Jury Act mandates that
295 jury verdicts are only considered to be advisory in nature; and the judge may enter a contrary
296 finding to a jury verdict, thereby producing incongruent verdicts in the same jury trial. Using
297 a representative nation-wide survey, Park and his colleagues found that public confidence in the
298 jury system still remains very high, even in the case of incongruent verdicts, thereby suggesting
299 that the jury verdict, not the judge's decision, may be accepted as the final trial outcome, when
300 the South Korean government reviews its jury law in 2013.
301

302 Fujita and Hotta examine the effect of information gap between professional judges and lay
303 participants on the trial outcome in Japan's lay assessor trial. In the past, professional judges
304 have been pre-disposed to information through pre-trial conference procedures. Since not all
305 evidence will be introduced at the trial, knowledge of inadmissible evidence and testimony
306 necessarily creates the gap in evidentiary knowledge between professional and lay judges.
307 Using mock-jury trials, Fujita and Hotta examined the impact of knowledge gap at both
308 conviction and penalty phases of the trial and suggested the way to correct for knowledge
309 imbalances.
310

311 Wang and Fukurai provide comparative analyses of new systems of lay adjudication in
312 China in Japan. China's lay assessor system has gone through significant transformations in
313 2004, 2005 and 2010, strengthening popular commitments to lay adjudication by select groups
314 of Chinese citizens. Japan also introduced its own version of lay assessor trials in 2004, which
315 then came into effect in 2009. The analysis reveals that the recent change in lay assessor
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321 ²³Richard O. Lempert, "The Internationalization of Lay Legal Decision-Making: Jury Resurgence and Jury Research,"
322 40 *Cornell Int'l J.L.* J. 303, 488 (2007).

323 ²⁴Valerie P. Hans, Introduction: Citizens as Legal Decision Makers: An International Perspective, 40 *Cornell Int'l L.J.*
324 303, 309–10 (2007).

325 requirements in China has restricted the participatory eligibility to only those with college
326 education, which significantly reduces the pool of eligible citizens for legal participation.
327 Japan's lay assessor trial, on the other hand, has expanded the participatory opportunities to
328 much larger pools of citizens, while the prosecutors' selective decision of criminal cases for lay
329 adjudication has resulted near one-hundred convictions of criminal defendants in Japanese
330 courts. Further analyses are needed to examine the democratic effect of lay participation in
331 legal decision-making in these two influential countries in East Asia.
332

333 Fukurai and Krooth explore the political use of lay adjudication as a method of civic
334 oversight of the Japanese government and U.S. military establishments in Japan. They
335 specifically focus on the new grand jury system and its investigative power to examine a variety
336 of white collar crimes committed by Japanese political and industrial elites, as well as
337 American military personnel in Japan. They suggest that Japan's grand jury system may exert
338 more democratic influence than Japan's lay assessor system in the transparency of trial
339 proceedings and prosecutorial processes.
340

341 The article by Kavalev and Suleymenova examines the recent, sudden emergence of lay
342 adjudication systems in former Soviet republics. Among those newly declared republics, both
343 scholars focus on the establishment of the lay adjudicatory trial in Kazakhstan and report
344 relative successes of the recent implementation of a mixed court system. Nonetheless, both
345 scholars suggest the possibility of incorporating an all-citizen jury system in further democ-
346 ratizing the Kazakhstani judicial system.
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350 4. Conclusion

351
352 Historical analyses revealed that the lay adjudicatory system has emerged repeatedly as
353 a symbol of democratic ideals in times of significant social change and political transformation
354 in the world. After the sudden collapse of the Soviet Union in 1991, many former Soviet
355 republics and neighboring countries, including Japan, Korea, and China have also moved to
356 introduce and improve their systems of lay adjudication.
357

358 All articles included in this Special Issue provide exciting research opportunities for the
359 cross-national studies of juries and other forms of relying on citizen legal participation in
360 equitable bodies or institutions. While past jury research has been an almost entirely U.S.
361 and British endeavor, the advent of new citizen adjudicatory systems in East and Central
362 Asia allows a cross-national and comparative perspective that can shed new and critical
363 light on the socio-political role of legal decision-making in many countries throughout the
364 world.
365

366 We are now at an early, yet very exciting stage in answering fascinating research questions
367 on the socio-political role of lay participation in legal decision-making. The articles in this
368 Special Issue provide an excellent introduction to the ways in which cross-national and
369 comparative research can raise our understanding of democratic movements and the policy
370 process now taking place in Asia and the rest of the world.
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375
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382 Hiroshi Fukurai*

383 *University of California, Santa Cruz, CA, USA*

384 *corresponding author.

385 *E-mail address: hfukurai@ucsc.edu.*

386 Kay-Wah Chan

387 *Department of Accounting and Corporate Governance,*

388 *Macquarie University, Sydney, Australia*

389 Setsuo Miyazawa

390 *Aoyama Gakuin University, Tokyo, Japan*
391
392
393
394