

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

Hiroshi Fukurai
Professor of Sociology
University of California, Santa Cruz
hfukura@ucsc.edu

This paper proposes the establishment of the transcommunal alliance among cross-national grassroots organizations that promote the system of civic legal participation and the establishment of popular oversight of our governments. French legal philosopher Alexis de Tocqueville once said that people's responsibility places jury service in a special role of ensuring popular oversight of the judicial and governmental process. "The institution of the jury raises the people itself or at least a class of citizens, to the bench of judicial authority [and] invests the people ... with the direction of society," his critical work on the American democracy in 1831 once declared.¹

The historic political reason for insisting on lay participation is that it offers an important popular check on judicial and political power of the government. The jury's role as popular oversight of the government becomes especially important when a group of citizens were accused of committing serious crimes against their own government. After 9/11 and the passages of the 2001 Patriot Act in the U.S. and similar anti-terrorism measures in other nations in the world, serious terrorism charges have been brought against their citizens, political dissidents, and civic activists. In Australia, for instance, after the passage of the Anti-Terrorism Act in 2002, two separate juries examined charges of terrorism. In Australia's first ever terrorism trial in 2005, the all-citizen jury acquitted Zeky Mallah, 21 year old supermarket worker, of terrorist charges of preparing to storm government offices and shoot officers in a supposed suicide mission.² In the second highly controversial trial, in which the only government's evidence was defendant's confession extracted at a Pakistani military prison, the jury found Joseph Thomas guilty of charges for intentionally receiving funds from al-Qaeda. However, soon after the verdict, the appeal's court reversed all of his convictions because it determined his coerced confession at a foreign prison to be inadmissible.³

In Russia, after the passage of the anti-terrorism act in 2004 following the Beslan school attack in which more than 330 child hostages died, the all-citizen jury acquitted three suspected terrorists of the charges of a gas pipeline explosion in the Republic of Tatarstan in September 2005.⁴ Two of the defendants, who were among seven Russians released from the Guantanamo Bay prison in 2004, claimed that they were tortured while transferred and detained in Russia. They criticized the government of false charges of extremism without evidence.⁵ Another jury acquitted four men of terrorist charges for the murder of the minister for national policy, in which only evidence used to implicate defendants consisted solely of confessions extracted under torture.⁶ In other high profile "terrorism" cases of the 2001 bombing of the Astrakhan city

¹ de Tocqueville, Alexis. 1862. Democracy in America, (London: Longman, Green, Langman, & Roberts, pp.334-37.

² R v. Mallah [2005] NSWSC 317 (21 April 2005).

³ "What is the Justice for Jack Campaign," at <http://www.justice4jack.com/> (last visited on October 20, 2007).

⁴ Peter Finn, "Russian homeland no haven for ex-detainees, activists say," Washington Post, September 3, 2006, A14

⁵ Finn, Peter. 2006. "Russian homeland no haven for ex-detainees, activists say," Washington Post, September 3, A14.

⁶ Abdullaev, Nabi. 2006. "A jury is a better bet than a judge," Moscow Times, June 1.

market and the December 2004 attack on the headquarters of the anti-drug enforcement agency in Kabardino-Balkaria, the all-citizen jury also acquitted all defendants of the terrorist charges.⁷

In New Zealand, after the passage of the Suppression of Terrorism Act in 2002, the government also brought terrorism charges against their citizens. In one of celebrated trials in 2006, the all-citizen jury acquitted a freelance journalist and political activist Timonhy Selwyn of a seditious conspiracy. The government evidence included a political pamphlet, in which the defendant called for “like minded New Zealanders to [commit] their own acts of civil disobedience [against governmental oppression].”⁸ The jurors did not accept the governmental arguments and returned the verdict of not-guilty.

In the United States, all-citizen juries also tried suspected terrorists. In December 2005, a Florida jury acquitted former University of South Florida Professor Sami Al-Arian of providing political and economic support to terrorists and the conspiracy to commit murder abroad, money laundering, and obstruction of justice.⁹ In this highly celebrated trial, the government produced over 100 witnesses and 400 transcripts of phone conversations obtained through 10 years of investigation. In the post-verdict interviews, jurors expressed that “there was absolutely no evidence of any wrongdoing on the part of Al-Arian.”¹⁰ Similar views were also expressed by the defense counsel that concluded that the prosecution’s case was so weak that there was no need to call defense evidence in the trial.¹¹ In February 2007, a grocer and university professor was also acquitted by the Chicago jury of a terrorist conspiracy to finance Palestinian political organization of Hamas.¹² In October 2007, another jury acquitted five defendants of nearly 200 combined terrorist charges in Dallas, Texas.¹³ Five defendants were former officials of the Islamic charity and philanthropic organization that provided financial assistance to the poor in occupied Palestinian territories.¹⁴

Political Needs for Lay Participation Around the Globe

Trial of jury provides the citizen the important legal shield from governmental oppression and unreasonable prosecution. Trial by jury also acts as a catalyst in promoting the importance of lay participation in the community and strengthening the perception of trial fairness and verdict legitimacy. Jury proceedings also promote the principle of orality, presumption of innocence, burden of proof, and higher evidentiary standard.

Today, it is thus no wonder that many citizens around the world are embracing the introduction of the jury or lay judges in democratizing their own jurisprudence and legal systems. Not since the nineteenth century in the wake of the French Revolution, when most European nations adopted the trial by jury system, so many countries around the world have recently rushed

⁷ “Russia’s New Counter-Terrorism Law

⁸ Braddock, John. 2006. “An attack on democratic rights: New Zealand man jailed for sedition,” World Socialist Web Site, July 25, available at <http://www.wsws.org/articles/2006/jul2006/sedi-j25.shtml> (last visited on October 22, 2007).

⁹ Abboud, A. 2005. “Group accused of aiding terrorists acquitted in U.S. court,” <http://usinfo.state.gov/dhr/Archive/2005/Dec/08-249862.html> (last visited on October 22, 2007).

¹⁰ Kay, Joe. 2005. “Palestinian activist Sami Al-Arian acquitted on charges in Florida,” World Socialist Web Site, December 8, available at <http://www.wsws.org/articles/2005/dec2005/aria-d08.shtml> (last visited on October 26, 2007).

¹¹ Vidmar, Neil. 2006. “Trial by jury involving persons accused of terrorism,” *Duke Law School Working Paper Series*, p.20. The jury, however, could not reach consensus on other lesser charges.

¹² “U.S. jury acquits two men of Hamas conspiracy,” 2007, Reuters AlertNet, available at <http://www.alertnet.org/thenews/newsdesk/N01356156.htm> (last visited October 22, 2007)

¹³ Trahan, Jason and Michael Grabell. 2007. “Judge declares mistrial in Holy Land Foundation Case,” *Dallas Morning News*, October 22.

¹⁴ Krikorian, Greg. 2007. “Mistrial in Holy Land terrorism financing case,” *Los Angeles Times*, October 23, available at <http://www.latimes.com/news/local/la-na-holyland23oct23,0,1540715.story?coll=la-home-center> (last visited on October 26, 2007).

to incorporate jury trials into their legal systems. Those nations include Japan, South Korea, China, and Taiwan¹⁵ in East Asia; Mexico, Venezuela,¹⁶ Bolivia, and Argentina in Central and South America; Uzbekistan, Kazakhstan, Russia, and many former Soviet republics in Central Asia; and Spain in Western Europe. In Thailand with no history of jury trial, prior to the September 2006 coup, the Thai government was also considering the introduction of the system of lay judges in their legal system.¹⁷ In 1993, Russia also successfully reinstated jury trials after a break of more than seven decades. Recent studies showed that the acquittal rate by the jury became much higher (18%) than by judges (3.6%).¹⁸ The 2006 Russian national survey also showed that 44% of citizens would encourage friends and relatives to opt for a jury trial in criminal cases including the allegation of terrorism.¹⁹ The higher acquittal rate of Russian juries is partly due to the fact that the bulk of evidence against defendants in Russia has mainly consisted of their confessions extracted under torture, and all-citizen juries showed higher evidentiary standards in evaluating the legal validity and reliability of confessions.²⁰

The current wave of judicial reforms in the world communities is similar to a kind of reform waves in the 19th century, triggered by the 1789 French Revolution and political unrest in Europe, which strengthened the petit trial jury in England, and soon the trial by jury became the integral part of the emerging democratic society in the U.S. and other nations in the European Continent.²¹ France, for example, introduced trial by jury in 1789 and it became an important political tool in the hands of the insurgent bourgeoisie against absolute French monarchy. German introduced trial by jury in 1848, Russia in 1864, Spain in 1872, Italian by the end of the 19th century, as well as in almost all other European nations.²²

The recent institution and re-introduction of trial by jury in many countries in the world also follows the comparable dramatic shift in the balance of political power and order -- the collapse of the Soviet Union in the late 1980s. Since then, the U.S emerged as the lone global power and started to exert her military muscle and greater political influence. After 9/11, the U.S. assumed the world leadership against terrorism and began to engage in legally questionable intelligence activities, including warrantless surveillance, extra-ordinary renditions, lengthy detention of suspects in secret prisons, and torture of alleged terrorists including foreign nationals. As other foreign governments began to follow America's footsteps in the prosecution of suspected terrorists, trial by jury was largely perceived to be the palladium of liberty in the hands of progressive citizens and insurgent intellectuals against the government's abuse of power and authority. This world-wide trend in the establishment of popular legal participation thus reflects the fact that citizens in those nations are arming themselves with the legal apparatus to resist oppression from their own government, which became increasingly vulnerable to outside influence including the United States.

Civil Grand Juries and Their Oversight Functions

¹⁵ The Taiwanese government has been debating the possible introduction of the Japanese style mixed court system.

¹⁶ On November 12, 2001, the Venezuelan legislature stopped the jury courts.

¹⁷ Munger, Frank. 2006. "The formation of legal consciousness among Thai citizens," a paper presented at the symposium, "Citizen Participation in East Asian Legal Systems," at Cornell University School of Law in September 23.

¹⁸ Trochev, Alexei. 2006. "Fabricated evidence and fair jury trials," Russian Analytical Digest, June 20, p.7 ("205 out of 1,160 defendants in 600 cases" were acquitted).

¹⁹ Id supra note 5.

²⁰ Id supra note 5, p.9.

²¹ Thaman, Stephen. 2001-2002. "Japan's new system of mixed courts: Some suggestions regarding their future form and procedures," Saint Louis-Warsaw TransAtlantic Law Journal, 89-90.

²² Id.

In times of the significant social change and political transformation, the jury emerged repeatedly as a symbol of democratic ideals because the system of lay judges effectively elevates ordinary citizens into the position of self-governance. For example, after the People's Republic of China (PRC) regained political and juridical control of Hong Kong from the U.K. in 1997, the Hong Kong government successfully introduced a bill in 2003 that Hong Kongites charged with treason, secession, subversion, terrorism, or other crimes against the government must be tried by an all citizen jury and that those charged with sedition or unlawful disclosure may also opt for jury trial if they prefer.²³ And Hong Kong is not the only country that tried to protect citizens from unreasonable prosecution by the government.

In the U.S., in addition to petit criminal juries, the grand jury has played an important role as popular oversight of government activities since its inception. The grand jury first emerged in England from ecclesiastical courts when Henry II called for a judicial panel of sixteen men to remove criminal indictments from the hands of the powerful church in 1164.²⁴ The first American grand jury was assembled in the Massachusetts Bay Colony in 1635, and all colonies instituted the system of the grand jury by 1638 and established the system of civic oversight of the colonial government controlled by the Britain.²⁵

Today the grand jury system was divided into two distinct systems of government oversight functions: (1) a "criminal grand jury" to determine indictments in criminal cases, and (2) a "civil grand jury" designed to investigate, assess, and examine the function of the local government. Today several states including California and Nevada require the use of all citizen civil grand juries to investigate the local government including DA's office, the police, and local jails and prisons. Several grassroots organizations are also created in California by a group of citizens who previously served as civil grand jurors. For example, the American Grand Jury Foundation was first established in 1979 and San Mateo County Association of Grand Jurors (SMCAGJ) in 1982.²⁶

Japan also created the similar oversight body called the Prosecutorial Review Commission (PRC). The PRC was originally created by the Allied Forces occupying Japan after World War II, and the PRC became a hybrid institution, adapting the American grand jury system into the Japanese cultural and legal context. The PRC's purpose is similar to that of the American civil grand jury in examining and inspecting the proper functioning of local public offices, including the DA's office. Also similar to the criminal grand jury, the PRC has an influence on the decision to indict. Given the fact that, in Japan, 99.9% of indicted cases result in conviction, the PRC's ex-post examination of the appropriateness of non-indictment decisions became an important mechanism of checking prosecutorial discretions and power.²⁷ The commission is comprised of eleven citizens randomly chosen from an electoral register, is appointed to a six months term, and has the power to review whether or not non-prosecution decisions made by public prosecutors are appropriate.

Similar to the American grand jury, the PRC investigates cases in private by summoning petitioners, proxies, and witnesses for examination,²⁸ questioning prosecutors,²⁹ asking them for

²³ Frank Ching, "The jury is in," *South China Morning Post*, February 28, 2003.

²⁴ Moore, Lloyd. 1975. *The Jury*. W.H. Anderson.

²⁵ Id.

²⁶ San Mateo County Association of Grand Jurors, see <http://www.co.sanmateo.ca.us/smcagj/mission.html> (last visited on October 22, 2007).

²⁷ Daijijiro Yasuda, *One Aspect of Criminal Justice in Japan: Confession*, Table 1, www.law.usyd.edu.au/anjel/documents/23Feb2005Conf/Yasuda2005_OneAspectOfCriminalJusticeInJapan.pdf (Feb. 2005). In 2003, while a total of 67 cases resulted in not guilty verdicts, 78,364 cases resulted in guilty verdicts (translating to a 99.91% conviction rate) in Japan's district courts. For summary courts, the conviction rate was 99.85% in 2003.

²⁸ Kensatsu Shinsakai Ho [Prosecutorial Review Commission Law], Law No. 147, art. 37 (1948) [hereinafter PRC Law]. The content of the PRC Law is available on the government web page, Kensatsu Shinsakai Ho (June 2006), <http://law.e-gov.go.jp/htmldata/S23/S23HO147.html>.

²⁹ PRC Law, art. 35.

additional information when necessary,³⁰ and seeking special expert advice on the case.³¹ After deliberating on the case, the commission submits one of three recommendations: (1) non-indictment is proper, (2) non-indictment is improper, and (3) indictment is proper.³² A simple majority is needed for either of the first two resolutions, while a special majority of at least eight votes is needed to pass the third resolution.³³ The commission then delivers a written recommendation to the prosecutor's office.³⁴ The revised 2004 PRC law gave PRC's indictment decisions the legally binding status. Since Japanese prosecutors have been extremely reluctant to indict prominent politicians, Japanese bureaucrats, and other political members of the Japanese government, the PRC is now seen as the powerful civic oversight of political organizations and administrative bureaucracies of the Japanese government.

In order to promote popular legal participation and publicize the importance of its duty in Japan, the Prosecutorial Review Commission Society (PRCS) was established in 1955. Currently many regional branch offices exist all over Japan, and PRCS offices are actively holding symposiums and forums to educate the general public about the importance of civic participation in PRC duties.

Transcommunal Alliance of Grassroots Organizations to Hold the Government in Check

UC Santa Cruz Sociology Professor John Brown Childs argues that the transcommunality involves positive grassroots dialogue, thereby posing "challenges to the smothering monologues of power elite."³⁵ Similarly, Professor Childs urges the establishment of constructive and developmental interaction "distinct autonomy-oriented communities and organizations, each with its own particular history, outlook, and agenda."³⁶

The establishment of the transcommunal alliance among cross-national grassroots organizations promotes the world-wide system of popular oversight of our governments. Several grass-roots organizations in Japan and the U.S. have already been established by citizens who previously served as lay judges. The American Grand Jury Foundation's primary objective has been to: (1) educate and train the general public and local government officials about grand jury matters, (2) encourage research into the American grand jury system by providing internships, grants, and awards, and (3) recognize and publicize achievements of grand jurors, governmental officials and employees, and other citizens who have contributed to improving the grand jury system.³⁷ Another influential civic organization, San Mateo County Association of Grand Jurors (SMCAGJ), also consists of former grand jurors with purpose to disseminate the importance of grand jury functions and provide training information and educational materials to children in schools. The association was first founded in 1982 and is also a certified chapter of the California Grand Jurors' Association.

In Japan, Former PRCS Vice-President Kiichi Hirayama has agreed to contact the officials of AGJF and SMCAGJ to engage in trans-continental exchanges of information regarding civic participation on grand juries between the U.S. and Japan.³⁸ The PRCS and its

³⁰ *Id.*

³¹ *Id.* art. 38.

³² The main difference between (2) "non-indictment is improper" and (3) "indictment is proper" is that the former resolution is a request for another formal investigation of the case to reconsider the non-prosecution, while the latter is the recommendation to immediately initiate the formal prosecution of the case.

³³ PRC Law art. 27.

³⁴ *Id.* art. 40.

³⁵ John B. Childs, 1994, "Identity politics: The value of transcommunal identity politics," *Z magazine*, at <http://www.zmag.org/zmag/zarticle.cfm?Url=articles/july94childs.htm> (last visited September 5, 2007).

³⁶ Childs, John Brown. 2003. *Transcommunality: From the Politics of Conversion to the Ethics of Respect*. Philadelphia: Temple University Press, p.10.

³⁷ *Id.*

³⁸ The author interviewed Mr. Kiichi Hirayama at the Annual Meeting of the Research Group on Jury Trial ("Baishin Saiban o Kangaeru Kai" at Toyo University in Tokyo, Japan, on August 6, 2007.

certified chapters in Japan have been extremely active in promoting educational programs, speaker's series, their own symposiums and town meetings, and participating in activities of other organizations that also advocate the importance of lay participation in legal decision making. The present author worked closely with Mr. Hirayama and other key representatives of PRCS chapters in eleven Japanese prefectures. In order to understand the effectiveness of their activities, Mr. Hirayama and I conducted surveys in 2006 to examine the experience and perceptions of grand jury duties and solicited suggestions for the up-coming quasi-jury trial which begins in 2009. The study found that the experience of jury service leads to a heightened sense of civic responsibilities and greater participation in other civic duties.³⁹

One exciting development in other nations that have adopted the popular legal participatory system is the emergence of similar grassroots organizations to disseminate educational functions of deliberative experiences of performing civic duties including jury service. Harvard Law Professor Martha Minow, in stressing the importance of transcommunality as espoused by Professor John Brown Childs, argues the function of sharing group-based harms and oppression without falling into confusions, fragmentation, and thus mistakes of identity politics.⁴⁰ The effort to establish the transcommunal alliance through the mutual and cross-national expression on the importance of deliberative experiences as lay judges would not suffer from such identity politics. The transcommunal establishment of those grassroots organizations further increases the public awareness of civic responsibilities and may lead to the creation of the effective system of civic oversight of their governments.

Our survival as conscientious citizens of the world may depend on the establishment of the transcommunal alliance of those emerging grassroots organizations that function as the important popular check on judicial and political power of the government. In the near future, the transcommunal project involving similar grassroots organizations will strengthen the global effort to elevate and transform ordinary citizens into political activists and intellectuals.

³⁹ Fukurai, Hiroshi. 2007. "The rebirth of Japan's petit quasi-jury and grand jury systems: A cross-national analysis of legal consciousness and the lay participatory experience in Japan and the U.S.," Cornell International Law Journal 40: 315-354.

⁴⁰ Martha Minow, 1996, "Not only for myself: Identity, politics, and law," 75 Or. L. Rev. 647. She provides six strategies to overcome the fragmentations of identity politics, while making transcommunality possible, including (1) debates over reparations for past harms, (2) acknowledgments in settings of as yet unrecognized histories, (3) exploration of strategies that permit people to choose their own temporary affiliations, (4) experimentation with achieving governmental ends by neither reiterating group-based categories nor ignoring them, (5) expanding opportunities for artistic expression and participation, and (6) aggressive challenges to continuing group-based harms.