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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.


2Id.

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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. 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.” 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. 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

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

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

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

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

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

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

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 five years of a preparatory period. On May 21st 2009, the law finally went into effect, and ordinary citizens selected at random from local electoral rolls are now expected to make decisions in serious criminal cases. A judicial panel of three professional and six lay judges is required 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 is expected to adjudicate an uncontested criminal case where there is no dispute on facts and evidence identified during pre-trial procedures.

6Frank Ching, “The jury is in,” South China Morning Post, February 28, 2003. This bill was, however, not approved by the government.
8Joo Sang-min. 2005. “Military Seeks to Revise Martial Laws,” Korea Herald, July 20. In 2012, the South Korean jury system will be reviewed and permanently implemented with or without major changes.
In May 2004, the Japanese government also revised another lay participatory law, the Act to Revise the Code of Criminal Procedure, and improved the grand jury system called the Prosecutorial Review Commission (PRC). Japan’s PRC revision is another major judicial reform in re-energizing citizens’ active participation in the grand jury system. The PRC’s main objective is to provide direct civic oversight of the government and its institutions. The new PRC law also gave the PRC’s indictment decision the legally binding status. Until 2009, Japanese prosecutors were extremely reluctant to indict prominent politicians, government bureaucrats, and members of law enforcement and the judiciary. After the implementation of the new system in 2009, the PRC’s decisions so far has forcefully indicted a former deputy police chief, three past presidents of Japan Railway West (JR West) which is one of the most powerful Japanese private corporations, and a member of the ruling Democratic Party. The PRC is now seen as providing powerful civic oversight of political organizations and administrative agencies of the Japanese government.

2. The popular jury in former Soviet Republics in Central and Western Asia

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

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

Kazakhstan began a jury trial on January 1, 2007, though only in criminal cases involving capital offenses.12 The jury consists of eleven people, selected by a computer program from a list of people’s surnames, suggested by regional Akimat. Excluded from the jury candidacy are public servants, police officers, military personnel, lawyers, those with criminal history, people without legal residency, and those who know the accused personally or are younger than 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 its first jury trial, more than 4000 candidates were chosen from all voters in northern Kazakhstan. Then a computer program selected a group of 40 jury candidates, in which 37 appeared in court.15

10Latvia is located in Western Europe, not in Central Asia.
13Id.
14Id.
15Id. Satybaldy Nurushev, who worried about leaving his stock room un-attended became the first juror chosen to serve in the jury trial in Kazakhstan.

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

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

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

3. The 2010 inaugural East Asian law and society conference in Hong Kong

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

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

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

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

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

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

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

Wang and Fukurai provide comparative analyses of new systems of lay adjudication in China in Japan. China’s lay assessor system has gone through significant transformations in 2004, 2005 and 2010, strengthening popular commitments to lay adjudication by select groups of Chinese citizens. Japan also introduced its own version of lay assessor trials in 2004, which then came into effect in 2009. The analysis reveals that the recent change in lay assessor

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

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

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

4. Conclusion

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

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

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

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