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Sanja Kutnjak Ivković  
*Michigan State University*

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# EARS OF THE DEAF: THE THEORY AND REALITY OF LAY JUDGES IN MIXED TRIBUNALS

SANJA KUTNJAK IVKOVIĆ\*

## INTRODUCTION

Everyday citizens participate as decision-makers in criminal trials held in courtrooms across the world. They may be sitting as a jury—a group of lay people—determining whether the defendant is guilty. They may be presiding over the trials as lay magistrates, lay people sitting in groups of two or three. They may be heading informal procedures in minor criminal cases as lay judges in lay courts. Or, they may be joining professional judges in mixed tribunals and deciding both the guilt of the defendant and the appropriate sentence. Some countries do not use lay participation (e.g., Israel, Saudi Arabia), others use one form (e.g., Croatia, Germany, Japan), and still others use more than one form (e.g., United Kingdom, United States). Variations on the theme are plentiful, ranging from size, composition, and qualifications for the group; types of cases; and potential decisions.

One form of lay participation in criminal cases is mixed tribunals; heterogeneous groups composed of professional judges and lay judges who make legal decisions jointly. They are traditionally utilized in countries whose legal systems are founded on the civil-law tradition (e.g., Germany, Norway, Sweden, Finland) or socialist-law tradition (e.g., the former Yugoslavia, USSR, China). Mixed tribunals have also

\* Sanja Kutnjak Ivković is Professor at the School of Criminal Justice, Michigan State University. She holds a doctorate in criminology (Ph.D., University of Delaware) and a doctorate in law (S.J.D., Harvard University). Her research focuses on comparative and international criminology, criminal justice, and law. Professor Kutnjak Ivković is the author of *Reclaiming Justice: The International Tribunal for the Former Yugoslavia and Local Courts* (Oxford University Press 2011; co-authored with John Hagan), *The Fallen Blue Knights: Controlling Police Corruption* (Oxford University Press 2005), and *Lay Participation in Criminal Trials* (1999). She is the co-author of *Enhancing Police Integrity* (Springer 2006; co-authored with Carl Klockars and Maria R. Haberfeld) and co-editor of *Contours of Police Integrity* (Sage 2004; co-edited with Carl Klockars and Maria R. Haberfeld) and *Measuring Police Integrity Across the World* (Springer 2015; co-edited with Maria R. Haberfeld). Professor Kutnjak Ivković's work has appeared in leading academic and law journals, such as the *Law and Society Review*; *Journal of Criminal Law and Criminology*; *Criminology and Public Policy*; *Law and Policy*; *Stanford Journal of International Law*; *Cornell International Law Journal*; *Policing and Society*; *Policing: An International Journal of Police Strategies and Management*; and *Police Quarterly*.

begun to appear in countries whose legal systems are built on the more than one legal tradition (e.g., Japan, South Africa, Thailand).

Lay judges serving in mixed tribunals have long been criticized. They have been called “puppets with strings in the hands of the professional judge” in Germany,<sup>1</sup> “bodyguards of the [professional] judge” in Russia,<sup>2</sup> “the ears of the deaf” in China,<sup>3</sup> and “two heads of cabbage” in Croatia.<sup>4</sup> By contrast, lay judges in Japan, and more recently China, have received more positive evaluations.<sup>5</sup>

This paper explores mixed tribunals around the world. It begins with a short overview of different types and sizes of mixed tribunals. It continues with the theoretical arguments grounded in the status characteristics theory and the hypotheses about the nature and extent of interaction in mixed tribunals. It follows with empirical assessments of these theoretical arguments and other potential challenges mixed tribunals might face. Finally, the paper explores avenues and recommendations for further research on mixed tribunals.

## I. MIXED TRIBUNALS

Mixed tribunals are groups of professional judges and lay judges who try and make legal decisions in criminal cases. Unlike the separation of the jury and the professional judge, who presides over the jury trial while the jury decides the defendant’s guilt, members of mixed tribunals jointly make the decisions about guilt and sentence. A professional judge presides over the mixed tribunal, but all members of the tribunal are encouraged to participate during trials and decision-making processes. This unique characteristic of mixed tribunals—the joint decision-making by professional and lay judges—gives professional judges an opportunity to explain the law and “correct” the views of lay judges, while lay judges have the opportunity to bring the fresh

1. Arnd Koch, *C.J.A. Mittermaier and the 19<sup>th</sup> Century Debate About Juries and Mixed Courts*, 72 INT’L REV. PENAL L. 347, 353 (2001).

2. Stefan Machura, *Interaction between Lay Assessors and Professional Judges in German Mixed Courts*, 72 INT’L REV. PENAL L. 451, 458 (2001).

3. Liling Yue, *The Lay Assessor System in China*, 72 INT’L REV. PENAL L. 51, 52 (2001).

4. Sanja Kutnjak Ivković, *Mixed Tribunals in Croatia*, 72 INT’L REV. PENAL L. 57, 74 (2002) [hereinafter Kutnjak Ivković, *Mixed Tribunals*].

5. VALERIE P. HANS ET AL., *Global juries: A Plan for Research*, in THE PSYCHOLOGY OF JURIES: CURRENT KNOWLEDGE AND A RESEARCH AGENDA FOR THE FUTURE (forthcoming 2015).

approach of an average citizen and “correct” the professional judges’ routinized view.<sup>6</sup>

Unlike professional judges, who should be skilled professionals educated in law, lay judges are expected to be no different from an average citizen. They should not be any more familiar with the law than a typical citizen is and should have no systematic legal knowledge. Some countries even make this expectation explicit in their legal documents; they prohibit members of certain occupations that require extensive education in law, such as professional judges, prosecutors, attorneys, and police officers, from serving as lay judges (e.g., France,<sup>7</sup> Germany,<sup>8</sup> Norway<sup>9</sup>).

On the other hand, countries may require that lay judges serving in particular types of cases have specific other, non-legal skills or knowledge. In some countries (e.g., Croatia<sup>10</sup> and Germany;<sup>11</sup> but not China,<sup>12</sup> Denmark,<sup>13</sup> or South Africa<sup>14</sup>), lay judges participating in the cases involving juvenile defendants may be required to meet certain qualifications, such as a degree in educational studies or parenting experience. These special qualifications would make lay judges particularly valuable as members of the tribunals; they would have expert knowledge on a specific issue and would be particularly qualified to decide such cases. While discussing why lay judges at juvenile courts need to have certain skills, Walter Perron noted that “educative skills and practical experiences in upbringing are considered as the necessary in juvenile affairs.”<sup>15</sup>

Another type of case in which lay participants may be required to have specialized knowledge or skills are white-collar or economic crimes. Norway’s legislature provides the professional judge serving as

6. See generally SANJA KUTNJAK IVKOVIĆ, *LAY PARTICIPATION IN CRIMINAL TRIALS: THE CASE OF CROATIA* (1999).

7. See generally Michel Bonnieu, *The Presumption of Innocence and the Cour d’Assises: Is France Ready for Adversarial Procedure?*, 72 INT’L REV. PENAL L. 559, 559–77 (2001).

8. Walter Perron, *Lay Participation in Germany*, 72 INT’L REV. PENAL L. 181, 191 (2001).

9. Asbjørn Strandbakken, *Lay Participation in Norway*, 72 INT’L REV. PENAL L. 225, 243 (2001).

10. Kutnjak Ivković, *Mixed Tribunals*, *supra* note 4, at 66.

11. Machura, *supra* note 2, at 453; Perron, *supra* note 8, at 191.

12. Yue, *supra* note 3, at 55.

13. Peter Garde, *The Danish Jury*, 72 INT’L REV. PENAL L. 87, 109 (2001).

14. Milton Seligson, *Lay Participation in South Africa from Apartheid to Majority Rule*, 72 INT’L REV. PENAL L. 273, 278 (2001).

15. Perron, *supra* note 8, at 191.

the president of the court with an opportunity to appoint expert judges in complex cases of economic crimes.<sup>16</sup>

The number of professional judges and lay judges required to sit in a mixed tribunal varies dramatically across countries. For example, mixed tribunals at Danish trial courts are composed of one professional judge and two lay judges.<sup>17</sup> Mixed tribunals at trial courts in both Finland and Sweden are somewhat larger; they are composed of one professional judge and three lay judges.<sup>18</sup> France, which utilizes mixed tribunals for the most serious cases (five years of imprisonment or more), has one of the largest mixed tribunals—three professional judges and nine lay judges.<sup>19</sup>

Some countries' court systems anticipate the use of mixed tribunals of several sizes. Generally, if the sizes of mixed tribunals in a country vary, the number of judges in a mixed tribunal is related to the seriousness of the case;<sup>20</sup> the more severe the penalty prescribed in the statute, the larger the number of mixed tribunal members. For example, Germany features mixed tribunals at two types of courts. In the lowest-level courts (*Amtsgericht*), in which mixed tribunals can mete out sentences of up to four years of imprisonment, mixed tribunals are composed of one professional judge and two lay judges.<sup>21</sup> In the middle-level courts (*Landgericht*), mixed tribunals, handling more serious felonies, are composed of two or three professional judges and two lay judges.<sup>22</sup> Croatia has a court system with three different sizes of mixed tribunals. In the lowest-level courts (district courts), offenses for which the potential punishment is between three and ten years' imprisonment are tried by a mixed tribunal composed of one professional judge and two lay judges.<sup>23</sup> The same size tribunal—composed of one professional judge and two lay judges—tries cases at the middle-level courts (regional courts) for which the potential punishment is between ten

16. See, e.g., Strandbakken, *supra* note 9, at 244.

17. Garde, *supra* note 13, at 91.

18. Christian Diesen, *Lay Judges in Sweden: A Short Introduction*, 72 INT'L REV. PENAL L. 313, 314 (2001); Heikki Pihlajamäki, *From Compurgators to Mixed Courts: Reflections on the Historical Development of Finnish Evidence Law and Court Structure*, 72 INT'L REV. PENAL L. 159, 159 (2001).

19. Bonnieu, *supra* note 7, at 559.

20. See generally Sanja Kutnjak Ivković, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, 40 CORNELL INT'L L.J. 429, 432–33 (2007) [hereinafter Kutnjak Ivković, *Exploring Lay Participation*].

21. Perron, *supra* note 8, at 182.

22. *Id.*

23. Sanja Kutnjak Ivković, *Lawyers About Mixed Tribunals: Do Croatian Professional Judges, State Attorneys, and Private Attorneys Share the Same View?* 13 SOC. JUST. RES. 55, 60 (2000).

and fifteen years' imprisonment.<sup>24</sup> As the severity of the potential punishment increases to fifteen years of imprisonment, the size of the tribunal increases to two professional judges and three lay judges.<sup>25</sup> Finally, cases involving the most serious punishment, imprisonment of twenty to forty years, are tried by mixed tribunals in regional courts composed of three professional judges and four lay judges.<sup>26</sup>

The composition of the tribunal (i.e., the number of professional judges and the number of lay judges) at the trial level can vary as well. In some countries, lay judges always outnumber the professional judges,<sup>27</sup> while in other countries, professional judges may outnumber lay judges, or the professional judges and lay judges may be represented in equal numbers.<sup>28</sup> For example, although there are three different sizes of mixed tribunals in Croatia, in every one of these mixed tribunals lay judges always outnumber professional judges.<sup>29</sup> On the other hand, the larger of the two German mixed tribunals at the *Landgericht* is composed of two or three professional judges and two lay judges.<sup>30</sup> Similarly, Chinese Higher Courts, or the Supreme Court, have the same number of professional judges and lay judges in their mixed tribunals; "the collegial panel is composed of three to seven judges or same number judges with assessors."<sup>31</sup>

There is also substantial variation in the way countries handle appeals from the trial courts. As a rule, the appellate stage implies a more limited jurisdiction of mixed tribunals than the trial stage. Denmark offers one of the most extensive inclusions of lay judges at the appellate level; three professional judges and three lay judges decide appeals at the High Court.<sup>32</sup> Germany differentiates between the appeals on both fact and law (*Berufung*) and appeals on law only (*Revision*).<sup>33</sup> If a party appeals the *Amtsgericht's* decision, the new trial will be held before the *Landgericht*, which is an appellate court. In that case, the mixed tribunal is composed of one professional judge and two lay judges.<sup>34</sup> On the other hand, mixed tribunals composed of professional

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*; Bonnieu, *supra* note 7, at 559; Strandbakken, *supra* note 9, at 225.

28. See Yue, *supra* note 3, at 51; Perron, *supra* note 8, at 188.

29. Kutnjak Ivković, *Mixed Tribunals*, *supra* note 4, at 65.

30. Perron, *supra* note 8, at 188.

31. Yue, *supra* note 3, at 51.

32. Garde, *supra* note 13, at 91.

33. Perron, *supra* note 8, at 182.

34. *Id.*

judges only resolve appeals on law.<sup>35</sup> In Sweden, as the case progresses further, lay participation weakens.<sup>36</sup> Mixed tribunals, composed of one professional judge and three lay judges, make decisions in criminal cases.<sup>37</sup> At the Court of Appeals, mixed tribunals have a larger percentage of professional judges (three professional judges and two lay judges) than trial mixed tribunals do (one professional judge and three lay judges).<sup>38</sup> When the case reaches the Supreme Court, there is no lay participation at all, and professional judges make decisions about all of the issues.<sup>39</sup> Finally, some countries, including Croatia<sup>40</sup> and China,<sup>41</sup> completely exclude lay judges from the appellate decisions, involving only professional judges at that stage.

## II. RATIONALE FOR THE INTRODUCTION OF MIXED TRIBUNALS

Many countries have introduced mixed tribunals into their courtrooms (sometimes called “the collaborative court”). A number of these countries are democracies, including Germany,<sup>42</sup> Austria,<sup>43</sup> Denmark,<sup>44</sup> France,<sup>45</sup> Finland,<sup>46</sup> Japan,<sup>47</sup> Norway,<sup>48</sup> and Sweden.<sup>49</sup> Others are either the former socialist countries (and their legal successors), such as the

35. *Id.*

36. Diesen, *supra* note 18.

37. *Id.*

38. *Id.*

39. *Id.*

40. Kutnjak Ivković, *Mixed Tribunals*, *supra* note 4, at 65.

41. Yue, *supra* note 3, at 51.

42. See, e.g., AXEL GÖRLITZ, VERWALTUNGSGERICHTSBARKEIT IN DEUTSCHLAND (1970) (Ger.); EKKEHARD KLAUSA, EHRENAMTLICHE RICHTER: IHRE AUSWAHL UND FUNKTION, EMPIRISCH UNTERSUCHT (1972) (Ger.); Gerhard Casper & Hans Zeisel, *Lay Judges in the German Criminal Courts* 1 J. LEGAL STUD. 135, 135 (1972); Jutta Gerken, *Bürger als Richter. Über Jugendschöffen und den Erziehungsanspruch des Jugendstrafrechts*, in EIN TROJANISCHES PFERD IM RECHTSSTAAT (Jutta Gerken and Karl F. Schumann eds., 1988) (Ger.); Machura, *supra* note 2, at 451; Perron, *supra* note 8, at 181; Christoph Rennig, *Influence of Lay Assessors and Giving Reasons for The Judgement in German Mixed Courts*, 72 INT'L REV. PENAL L. 481, 481 (2001).

43. Ingrid Frassine et al., *Kapitel: Österreich*, in DER LAIENRICHTER IM STRAFPROZESS 87 (Gerhard Casper & Hans Zeisel eds., 1979) (Ger.).

44. See, e.g., Stanley Anderson, *Lay Judges and Jurors in Denmark*, 38 AM. J. COMP. L. 839 (1990); Garde, *supra* note 13, at 87.

45. See, e.g., Bonnieu, *supra* note 7, at 559.

46. See, e.g., Heikki Pihlajamäki, *From Purgators to Mixed Courts: Reflections on the Historical Development of Finnish Evidence Law and Court Structure*, 72 INT'L REV. PENAL L. 159, 159 (2001).

47. Hiroshi Fukurai, *People's Panels vs. Imperial Hegemony: Japan's Twin Lay Justice Systems and the Future of American Military Bases in Japan*, 12 ASIAN-PAC. L. & POL'Y J. 95, 96 (2010).

48. See, e.g., Strandbakken, *supra* note 9, at 225.

49. See, e.g., HANNU TAPANI KLAMI & MERVA HÄMÄLÄINEN, *LAWYERS AND LAYMEN ON THE BENCH: A STUDY OF COMPARATIVE LEGAL SOCIOLOGY* 13 (1992); Diesen, *supra* note 18, at 313.

former Czechoslovakia,<sup>50</sup> the former German Democratic Republic,<sup>51</sup> Hungary,<sup>52</sup> Poland,<sup>53</sup> the former USSR,<sup>54</sup> and the former Yugoslavia,<sup>55</sup> or present socialist countries, such as China.<sup>56</sup> Finally, other countries in transition with mixed legal heritage, such as South Africa,<sup>57</sup> also utilize mixed tribunals.

The rationale for the introduction of mixed tribunals into a country's legal system could be quite diverse. Political function and the tendency to provide for independent and democratic decision-making have been consistently emphasized as a reason for the introduction and/or preservation of the system of mixed tribunals.<sup>58</sup> Kálmán Kulcsár argued:

[W]ith the centralization of the administration of justice, e.g., when royal judicial process gained hegemony, lay participation gained political significance (either in the representation of local interest, or as a factor of influence of the "unprivileged classes" or as the opponent to royal power) which today has crystallized into the principle of the democratic control of the courts.<sup>59</sup>

Another rationale is that professional judges are a part of the state court system, which potentially limits their credibility and independence. Because lay judges are not part of the state court system, they are not bound by the organizational restrictions and are thus less suscep-

50. See, e.g., Zdenek Krystofek, *The Function of the Lay Judge in Czechoslovakia*, in *JAHRBUCH FÜR RECHTSZOLOGIE UND RECHTSTHEORIE: ZUR SOZIOLOGIE DES GERICHTSVERFAHRENS* 301 (Manfred Rehbinder ed., 1976) (Ger.).

51. See, e.g., Irmgard Buchholz, *The Role of the Lay Assessors in The German Democratic Republic (GDR)*, 10 *INT'L J. COMP. & APPLIED CRIM. JUST* 215, 215 (1986).

52. See, e.g., KÁLMÁN KULCSÁR, *PEOPLE'S ASSESSORS IN THE COURTS: A STUDY ON THE SOCIOLOGY OF LAW* 7 (1982); Kálmán Kulcsár, *Lay Participation in Organizational Decision Making*, in *HUNGARIAN SOCIOLOGICAL STUDIES* 151 (P. Halmos & Martin Albrow eds., 1972).

53. See, e.g., Leszek Kubicki & Sylwester Zawadzki, *Lay Assessor Judges in Penal Proceedings in the Light of Empirical Research*, in *UDZIAŁ LAWNIKÓW W POSTĘPOWANIU KARNYM* 97–111 (Leszek Kubicki & Sylwester Zawadzki eds., 1970) (Pol.).

54. See, e.g., Stephen C. Thaman, *Juries and Mixed Courts in the former Soviet Republics of Central Asia*, Lecture at the Citizen Participation in East Asian Legal Systems Conference (Sep. 22, 2006).

55. See, e.g., SAMUEL KAMHI & BRANKO ČALIJA, *SISTEM POROTE U NAŠOJ ZEMLJI I PROBLEMI VEZANI ZA UČEŠĆE GRADJANA U VRŠENJU PRAVOSUDJA* (1974) (Bosn. & Herz.); VLADIMIR LJUBANOVIĆ, *DEMOKRATIZACIJA KRIVIČNOG PRAVOSUDJA* (1989) (Croat.) [hereinafter LJUBANOVIĆ (1989)]; Vladimir Ljubanović, *Sudjelovanje građana u suvremenom jugoslavenskom krivičnom sudjenju* (1983) (unpublished Ph.D. dissertation, University of Zagreb, Croatia) [hereinafter Ljubanović (1983)].

56. Yue, *supra* note 3, at 51.

57. Seligson, *supra* note 14, at 273.

58. See, e.g., Fukurai, *supra* note 47, at 100 (providing the rationale of including mixed tribunals into the Japanese system: "Japan's new lay assessor system holds the potential to democratize the Japanese judiciary by transforming the purely professional, inquisitorial structure into an equitable justice system with greater transparency and accountability.").

59. KULCSÁR, *supra* note 52, at 34.



tible to the state's direct influence.<sup>60</sup> In turn, this makes them more independent and, once they are included in mixed tribunals, their presence makes the decision appear more legitimate. Thus, the introduction of lay participants into the courtrooms gives legitimacy to the system.<sup>61</sup>

Proponents of mixed tribunals in South Africa made a similar argument. In 1991, at the dawn of the new non-apartheid and more democratic society, South Africa moved to amend the statute that originally established mixed tribunals.<sup>62</sup> The revised statute sought to mend the situation of having mixed tribunals on the books for decades, but never utilizing them. It removed some of the obstacles (e.g., easing the appointment process for lay judges) and opened the doors to the involvement of lay people in South African courtrooms.<sup>63</sup> The key argument for the change was greater legitimacy; the changes were made "in an attempt to involve the black majority in the all-white court system which was seen by many as illegitimate and unrepresentative."<sup>64</sup>

The legitimacy argument can take a different twist in socialist countries. In alignment with Marxist ideology, and the view that progression toward the communist society will result in the process of withering away the state control system,<sup>65</sup> countries of the socialist-law tradition appreciate mixed tribunals as a step on the road toward non-judicial decision-making. Mixed tribunals are viewed as "a step in building the institutions of the socialist state and socialist state organization";<sup>66</sup> a part of the obligatory passing of the law into the hands of the judicial body composed of members of the people;<sup>67</sup> an affirmation that the power of the state belongs to the working class;<sup>68</sup> as well as a way to democratize the administration of justice<sup>69</sup> and judiciary;<sup>70</sup> a

60. *Id.* at 37.

61. Diesen, *supra* note 18, at 314.

62. Seligson, *supra* note 14, at 278.

63. *Id.*

64. *Id.* at 273.

65. KUTNJAK IVKOVIĆ, *supra* note 6, at 36.

66. KULCSÁR, *supra* note 52, at 37.

67. MILENKO JOVANOVIĆ, *POROTA U PRAVOSUDJU JUGOSLAVIJE* 41–42 (1958) (Serb.).

68. Milivoje Kovačević, *Porota u našem sistemu sudovanja*, 4 *PРАВНА МИСАО* 3–6 (1973).

69. JOVANOVIĆ, *supra* note 67.

70. Davor Krapac, *Neki osnovni problemi u vezi sa sudjelovanjem građana-nepравnika u vršenju sudske funkcije prema odredbama novog krivičnog zakonodavstva SFRJ*, 31 *NAŠA ZAKONITOST* 13, 14 (1977).

way to “bring judiciary closer to the people;<sup>71</sup> and “the right of the public to participate in the administration of justice.”<sup>72</sup>

Another reason for the introduction of mixed tribunals into criminal courtrooms is the so-called “latent function.”<sup>73</sup> The argument begins with the proposition that, because professional judges are state employees, they can be biased and/or zealous. By simply being present in the tribunal, lay judges serve to deter the professional judges from behaving in unethical ways and reaching biased decisions. Perron described the evolution of thinking about the potential influence on professional judges:

After the inquisitorial system had been abolished, the legislator originally intended to strengthen judicial independence and to counterbalance the power of professional judges who then were not only employees of the state but also under the influence of executive authorities. Today the professional judges can hardly be influenced by the executive anymore, in fact they hold a strong position as a result of their constitutionally granted independence.<sup>74</sup>

However, not all of the countries in the world have a truly independent judiciary<sup>75</sup> capable of resisting the influence of the executive branch of the government. In such countries, lay judges in mixed tribunals may serve as a deterrent safeguard<sup>76</sup> and protect the defendants against the potential tyranny by the government.<sup>77</sup> On the other hand, in countries in which the judiciary is independent, lay judges could perform the latent function and, by being present in the tribunal, compel the professional judge to make the reasoning for the decision explicit and transparent. While describing the operation of the new mixed tribunal system in Japan, Valerie Hans and colleagues argued, “By necessity, legal officials had to change their presentations of evidence and legal arguments so that they were more understandable to the lay members of the mixed tribunal, which in turn made the court proceedings much more accessible to the public at large.”<sup>78</sup>

71. Krystofek, *supra* note 50.

72. Yue, *supra* note 3, at 51.

73. Maria Borucka-Arckowa, *Citizen Participation in the Administration of Justice: Research and Policy in Poland*, in *ZUR SOZIOLOGIE DES RICHTSVERFAHRENS*, *supra* note 50, at 286–99, 289.

74. Perron, *supra* note 8, at 194–95.

75. *Freedom in the World 2015 Methodology*, FREEDOM HOUSE, [https://freedomhouse.org/sites/default/files/Methodology\\_FIW\\_2015.pdf](https://freedomhouse.org/sites/default/files/Methodology_FIW_2015.pdf).

76. See Borucka-Arckowa, *supra* note 73.

77. See Bonnieu, *supra* note 7.

78. HANS ET AL., *supra* note 5.

By virtue of serving only a small number of days every year, lay judges tend to bring fresh perspectives into the courtrooms,<sup>79</sup> allowing their judgment to be unclouded by mundane and routine activities and thereby enabling them to devote their attention to the specifics of each and every case. Kàlmàn Kulcsàr used exactly such an argument when he described how changing conditions in society influenced the change in the goals of lay participation in Hungary:

[U]nder present-day conditions within advanced socialist society . . . the significance of this control is far greater in reconciling the contradiction between the professional who acts out of routine and the lay judge who better sense the specific circumstances.<sup>80</sup>

Consequently, lay judges could introduce community values and local knowledge<sup>81</sup> and subsequently promote justice and equity.<sup>82</sup>

### III. MIXED TRIBUNALS AND STATUS CHARACTERISTICS THEORY

Most scholars who study mixed tribunals have placed a strong emphasis on assessing the work of mixed tribunals empirically or discussing the advantages and disadvantages of the introduction of mixed tribunals into their courtrooms. Yet, scholars have rarely focused on developing a theoretical framework for the interaction in mixed tribunals. This paper utilizes a theoretical framework—the status characteristics theory<sup>83</sup>—to explain the interaction in mixed tribunals.<sup>84</sup>

Status characteristics theory is a psychological theory that seeks to explain interaction in small groups. Mixed tribunals are small groups; they are task-oriented, formal, and heterogeneous. They are task-oriented groups<sup>85</sup> whose task is legal decision-making. They are formal groups because the positions of the tribunal members are normatively specified in advance; professional judges are state employees who have legal training and experience in deciding legal issues, while

79. See Kubicki & Zawadzki, *supra* note 53, at 100; KULCSÀR, *supra* note 52, at 37.

80. Kulcsár, *supra* note 52, at 40.

81. *Id.*

82. See KLAMI & HÄMÄLÄINEN, *supra* note 49, at 15.

83. JOSEPH BERGER ET AL., STATUS CHARACTERISTICS AND SOCIAL INTERACTION: AN EXPECTATION-STATES APPROACH (1977); Joseph Berger et al., *Status Organizing Process*, 6 ANN. REV. SOC. 479 (1980) [hereinafter Berger et al., *Status Organizing Process*]; Joseph Berger et al., *Status Cues, Expectations, and Behavior*, in 3 ADVANCES IN GROUP PROCESSES 953 (Edward J. Lawler ed., 1986) [hereinafter Berger et al., *Status Cues*]; Paul Humphreys & Joseph Berger, *Theoretical Consequences of the Status Characteristics Formulation*, 86 AM. J. SOC. 953 (1981).

84. See also KUTNJAK IVKOVIĆ, *supra* note 6, at 215–37; Kutnjak Ivković, *Exploring Lay Participation*, *supra* note 20, at 436.

85. KENNETH GERGEN, SOCIAL PSYCHOLOGY: EXPLORATIONS IN UNDERSTANDING 204–10 (1974).

lay judges are persons who have received no systematic training in law. They are also heterogeneous groups because they are composed of members with different demographic characteristics.

#### *A. Mixed Tribunals as Task-Oriented Groups*

Mixed tribunals in criminal cases are task-oriented groups because they gather to hear legal cases, decide the defendants' guilt, and, if appropriate, mete out the punishment. The process of decision-making could be viewed as a continuum.<sup>86</sup> On one end of the continuum is the automatic response when the decision is reached by fitting the new situation into a preexisting classification. The decision-making at the automatic level requires skills and familiarity with the preexisting classification. When a new case is similar to an already decided case, the legal precedent or the idea of legal consistency becomes the guiding principle for the resolution of the new case. A set of sentencing guidelines creates the preexisting classification, thus forcing an automatic response and leaving little discretion in the hands of the judges. On the other end of the continuum is the non-automatic response in which there is no preexisting classification. The new case requires an assessment and weighing of alternatives. Scholars argue that sentencing is considered a task typically placed in the middle of the continuum.<sup>87</sup>

Regardless of the specific case, professional judges' personal experiences may be related to how automatic their response is. Novice professional judges are more likely to make decisions in a less automatic way and devote more attention to each case. Experienced professional judges are more likely to make decisions in an automatic way, particularly if they are restricted by the sentencing guidelines or if the legal rules leave few options or no discretion at their disposal (e.g., the three strikes laws, mandatory sentencing laws). As professional judges progress through their careers, they will decide a substantial number of cases, and likely tend to decide similar cases in the same way (i.e., consistently).

Lay judges, who serve at most several days per year and are not familiar with the laws and/or sentencing guidelines, likely do not resort to automatic decision-making. Instead, they probably lean toward the non-automatic side of the continuum because each of the few cases

86. KUTNJAK IVKOVIĆ, *supra* note 6, at 204.

87. See generally SALLY LLOYD-BOSTOCK, *LAW IN PRACTICE* (1989).

they try are novel to them. However, if these same lay judges are called to serve more often, they may start building a set of cases (although not nearly as comprehensive as professional judges' sets) and reach for inner consistency across these cases.

Mixed tribunals must make legal decisions, that is, decide the facts and apply the law to the specific case. They must decide whether the defendant in a criminal case is guilty of the specific crime, and, if so, what possible punishments apply. The part of the decision dealing with the facts of the case may require knowledge of the law only to the extent of knowing which facts are legally relevant, an area of professional judges' strength. However, the process of determining whether the relevant fact has been proven is something to which both professional judges and lay judges who have good problem-solving skills (i.e., critical thinking) should be able to contribute.

The mixed tribunals' decisions have to be made in accordance with existing legal rules. Most of the time, they will have a situation in which legal rules exist, are unambiguous, and can be directly applied to the case.<sup>88</sup> In the overwhelming majority of the first-instance criminal cases, legal rules are the key issue for the resolution of the case and knowledge of the law is critical.<sup>89</sup> In such cases, professional judges, who have an extensive knowledge and training in law, have an advantage compared to lay judges.

In the performance of their duties, mixed tribunals may face various types of obstacles. They may have a case in which the existing norms are conflicting, in which professional judges have an advantage because they know which legal rules should take precedence. Another potential situation arises when it is not clear which law applies to the case. In such situations, decision-making should rely on legal terms, legal principles, or broad conceptual stipulations.<sup>90</sup> Because professional judges possess systematic knowledge, not only of specific legal rules but also of legal concepts and general legal principles, they obviously have an advantage over lay judges. Such cases, without directly applicable specific legal rules, might require greater reliance on general problem-solving skills and the ability to think critically, which would minimize the importance of knowing the law. General problem-solving skills (i.e., critical thinking) could be a quality of both professional and lay judges. At the same time, it is the first component of

88. KUTNJAK IVKOVIĆ, *supra* note 6, at 204.

89. KLAMI & HÄMÄLÄINEN, *supra* note 49, at 21.

90. *Id.* at 19–20.

“thinking like a lawyer.”<sup>91</sup> Professional judges would differ from lay judges in the second component of “thinking like a lawyer,” in their “ability to use and practice these skills to solve real legal problems,”<sup>92</sup> because they have received systematic legal education and training in defining legal problems, selecting factors important for the definition and resolution of the problem, and drawing appropriate conclusions.

### *B. Mixed Tribunals as Formal Groups*

Formal groups are groups in which the positions of the group members are determined in advance. Mixed tribunals fit this criterion; professional judge and lay judge positions are normatively predetermined by law well before members of the tribunal enter the courtroom. Depending on the size and composition of the tribunal, a professional judge (in many instances the only professional judge in the tribunal) is always the presiding judge at the tribunal, while lay judges are always members of the tribunal. By the very nature of their assignment, presiding judges have a more active role in the tribunal than other members do, whether they are professional judges or lay judges.

In addition, the majority of the countries featuring mixed tribunals come from the civil-law tradition,<sup>93</sup> with a greater reliance on active decision-makers than is traditionally experienced in common-law countries.<sup>94</sup> The mixed tribunal could be viewed as an active inquisitor, free to seek evidence and to control the nature and the objectives of the inquiry. Norway, a country with a legal system grounded on a mixture of inquisitorial *and* adversarial criminal procedure, expects members of mixed tribunals to have an active role; the court “has an

91. John O. Mudd, *Thinking Critically about “Thinking Like a lawyer”*, 33 J. LEGAL EDUC. 704, 704 (1983).

92. *Id.*

93. Norway’s legal system is a combination of civil-law and common-law traditions. See ERIKA FAIRCHILD & HARRY. R. DAMMER, *COMPARATIVE CRIMINAL JUSTICE SYSTEMS* (2d ed. 2001); Strandbakken, *supra* note 9, at 225. Similarly, the South-African legal system is a mixture of both civil-law and common-law traditions. See FAIRCHILD & DAMMER *supra* note 93. China is an example of a country that utilizes mixed tribunals, yet its legal system is not based on civil law, but socialist law. See *id.*; Yue, *supra* note 3, at 51. However, criminal procedure in socialist countries is considered to be similar to, and derived from, criminal procedures in civil law countries. In fact, Yue wrote in 2001 that the “reformed [Chinese] criminal procedure law constitutes a move from the inquisitorial model to the adversary trial by making the judge’s role less dominant and active as before.” Yue, *supra* note 3, at 52.

94. See PHILIP L. REICHEL, *COMPARATIVE CRIMINAL JUSTICE SYSTEMS: A TOPICAL APPROACH* 205 (6th ed. 2012).

independent duty to ensure that the facts of the case are clarified . . . [and] may decide to obtain new evidence.”<sup>95</sup>

Croatia’s criminal procedure law of 1993 may serve to illustrate a typical continental European system of mixed tribunals. Once the investigative judge declares the indictment valid,<sup>96</sup> the presiding judge determines the date for the beginning of the trial and summons the defendant, witnesses, and expert witnesses.<sup>97</sup> The presiding judge has control over the trial<sup>98</sup> and has the responsibility of providing a thorough examination of the case. The trial begins with reading of the indictment.<sup>99</sup> If necessary, the presiding judge offers additional explanations of the charges. Next, the defendant is asked to give a statement.<sup>100</sup> The defendant’s confession does not circumvent the trial; the tribunal still has the responsibility to examine other evidence and question witnesses and expert witnesses. Then the presiding judge and, *subsequently*, other tribunal members, the prosecutor, the victim, and the defense attorney, question the defendant. They may question the defendant directly or through the presiding judge. Accordingly, the presiding judge’s interrogation (the so-called “fundamental examination”) is dominant, and other participants’ questioning is “supplementary.” The trial proceeds with the examination of witnesses and expert witnesses and the presentation of material evidence in the case.<sup>101</sup>

The tribunal performs a multitude of roles. It not only determines which evidence will be examined and which witnesses will be heard (and in which order), but also carries out the actual examination or questioning. Once the mixed tribunal indicates that the examination of evidence is completed, the parties give their closing statements and the tribunal declares that the trial is over.<sup>102</sup> The parties leave the courtroom, upon which the tribunal begins the deliberation and voting stage of the proceedings.<sup>103</sup> The decisions, covering both factual and legal issues in the case, are made after oral discussion.<sup>104</sup> Each tribunal member’s vote, be they professional or lay members, carries the same

95. Strandbakken, *supra* note 9, at 229.

96. 1993. Članak 278. Zakon o krivičnom postupku (Criminal Procedure Code) (Croat.).

97. *Id.* at članci 279–86.

98. *Id.* at članak 292.

99. *Id.* at članak 315.

100. *Id.* at članak 316.

101. *Id.* at članak 322.

102. *Id.* at članci 339–44.

103. *Id.* at članak 344.

104. *Id.* at članak 116.

weight; the presiding (professional) judge votes last.<sup>105</sup> A majority vote suffices for a valid legal decision.<sup>106</sup>

### *C. Mixed Tribunals as Heterogeneous Groups*

In a very general sense, by their very nature mixed tribunals are heterogeneous groups<sup>107</sup> because members of mixed tribunals differ with respect to at least one characteristic—age, gender, education, occupation, hair color, shoe size, and so on. However, not all characteristics are important. Because mixed tribunals are task-oriented groups whose task is legal decision-making, characteristics directly related to the task should be of critical importance. Discussion about the mixed tribunals' heterogeneity should incorporate the key elements of the status characteristic theory.

Joseph Berger and colleagues<sup>108</sup> developed status characteristics theory to explain interaction in small, task-oriented, and heterogeneous groups. The theory states that, based on status characteristics, individuals who interact in such groups develop expectations about the task-related contributions of other members of the group.<sup>109</sup> Status characteristics are attributes with culturally specified meaning, which makes them potentially relevant to the performance of the group's task.<sup>110</sup>

When the group has more than one status characteristic, some of the status characteristics may be directly related to the successful completion of the task (i.e., *specific status characteristics*), while other status characteristics may be related to the task only indirectly (i.e., *diffuse status characteristics*). Be they specific or diffuse, status characteristics exhibit two states, with one evaluated more positively than the other. Because the mixed tribunals' task is legal decision-making, specific characteristics—the ones directly relevant for legal decision-making—are legal education and experience in legal decision-making acquired through systematic training and regular practice. Diffuse

105. *Id.*

106. *Id.*

107. Gergen, *supra* note 85, at 212–15.

108. BERGER ET AL., *supra* note 83; Berger et al., *Status Organizing Process*, *supra* note 83; Berger et al., *Status Cues*, *supra* note 83.

109. *Id.*

110. James W. Balkwell, *Status*, in *GROUP PROCESS: SOCIOLOGICAL ANALYSES* 119, 124 (Martha Foschi & Edward J. Lawler eds., 1994).



characteristics are all other characteristics used to differentiate among the group members, such as age and gender.

Professional judges are law school graduates who have completed their legal training, have passed the bar exam, and have a certain number of years of experience working on legal issues. In other words, professional judges are persons with legal knowledge and systematic training and experience in resolving legal disputes, and thus are group members who have high states on these specific status characteristics. Alternatively, lay judges are neither educated in law nor trained and experienced in resolving legal issues; they are elected to serve for a period of several years and actually perform their role, at most, a couple of days per year.<sup>111</sup> However, participating in the work of mixed tribunals once or, at best, several times per year, provides them only with an *ad hoc* and sporadic experience in legal decision-making and does not make them competent in law. Therefore, lay judges have low states on these specific characteristics directly relevant for legal decision-making.

Each judge, professional or lay, is a person with at least two specific characteristics (legal education and training in legal decision-making) and a number of diffuse status characteristics. The common trait of all diffuse characteristics is that they are secondary to specific status characteristics because they are related to the group task indirectly. From the perspective of mixed tribunals, not all diffuse characteristics are equally important. It could be argued that experience in legal decision-making and education will have a stronger effect on a judge's ability to make legal decisions than their gender, age, or occupation. Assuming a continuum of status characteristics, specific status characteristics would be clustered on one end of the continuum and diffuse status characteristics, depending on their relevance for the task, dispersed across the continuum from almost one end of the continuum to the other.

Clearly, professional judges would have much more experience in legal decision-making than lay judges, but, among the lay judges, not all lay judges would have the same extent and nature of experience. Studies suggest that lay judges typically do not have a clear view of what is expected of them and what their rights are.<sup>112</sup> Lay judges who have served longer and on more trials (particularly those with strong disa-

111. KUTNJAK IVKOVIĆ, *supra* note 6, at 154.

112. Borucka-Arctowa, *supra* note 73.

greements among judges) would probably have an advantage relative to less experienced lay judges. However, this relation need not be linear, but, rather, it may be curvilinear. In particular, compared to the lay judges who have already participated in a few trials, lay judges at the beginning of their mandate may be less likely to participate because they are still learning the rules, while lay judges at the end of their mandate may already modify their behavior depending on what their experience has been. A relatively negative experience (i.e., professional judges did not really encourage them or directly discouraged them from participating) would imply a lower level of participation. One study demonstrated that, the longer lay judges participated in mixed tribunals, the less likely they were to attempt to influence the outcome.<sup>113</sup>

Education is another potentially stronger diffuse characteristic. It is directly related to the ability to understand the evidence in the case and apply the law. Professional judges, uniformly, are law-school graduates, while lay judges could potentially differ in terms of their education. Although lay judges with higher levels of education will not necessarily know more law at the outset, they will be better equipped to understand the law and legal issues once the professional judge explains them to the members of the tribunal. If there are no clear rules, there are conflicting rules, or the decision has to be made based on legal principles, these more educated lay judges would also have an advantage over lay judges with lower levels of education. The rationale is that they will probably possess better critical thinking skills, which, in turn, would allow them to better analyze the problem, develop competing hypotheses, and draw logical conclusions.

Education can play a role in another way too. Although legal education is directly relevant for legal decision-making, lay judges who have direct, specialized knowledge of other, non-legal fields crucial for the decision-making in a particular case (e.g., physicians in cases involving assault or murder; car mechanics in cases involving a traffic accident) will probably have a higher status in the tribunal; their comments will be evaluated as more important, and they will be provided with more floor time.

The Croatian legal system currently recognizes the specific contributions that such “experts” in certain areas can make. For example, in

113. Gunther Arzt, *Book Review*, 30 AM. J. COMP. L. 154, 154 (1982) (reviewing DER LAIENRICHTER IM STRAFPROZESS (Gerhard Casper & Hans Zeisel eds., 1979)).

criminal cases concerning juveniles the law requires that lay judges be selected from the ranks of professors, teachers, and other persons who have experience with the education of juveniles.<sup>114</sup>

Occupation is another diffuse status characteristic. By the nature of their job, professional judges will hold one of the most prestigious occupations.<sup>115</sup> Professional judges are outranked by only a few more distinguished occupations, such as medical researchers, chiefs of hospitals, governors, high church officials, university presidents, and chiefs of state. All other occupations are ranked below professional judges. Occupations that result in power and prestige are highly regarded.<sup>116</sup> Lay judges who are members of the more prestigious occupations are expected to be more accustomed to being in powerful positions, being treated with respect, being used to having their statements valued, and more accustomed to problem-solving group conversations. Lay judges with more prestigious occupations may also expect to be more respected by the other members of the tribunal and may be provided more opportunities to participate.

Gender is yet another diffuse status characteristic. Whether professional judges or lay judges, members of the tribunal could vary across this characteristic. Despite the strides to achieve equality between men and women, being male (still) resonates with the deep-rooted social reality of being “superior”—having more power and prestige, more opportunities, etc. However, whether this status characteristic will become important for the interaction in the mixed tribunal is another issue; it will depend on how different status characteristics get to be combined to form aggregate expectations.

Status characteristic theory develops explanations and hypotheses about how different status characteristics combine and set expectations for interaction and hierarchy in the group. General propositions of the theory are summarized in four hypotheses about the operation of status processes in task-oriented groups.<sup>117</sup> The *salience hypothesis* stipulates that, if there is a specific status characteristic based on which group members can be distinguished, this specific status characteristic will come operative or activated.<sup>118</sup> In the context of mixed

114. 1997. Članak 40. Zakon o sudovima za mladež (Juvenile Courts Act) (Croat).

115. Treiman created the occupational prestige scale. He had ranked various occupations based on how prestigious they are. Professional judges are in all societies on the top of this hierarchy. DONALD J. TREIMAN, OCCUPATIONAL PRESTIGE IN COMPARATIVE PERSPECTIVE 235–60 (1977).

116. *Id.*

117. Balkwell, *supra* note 110, at 125.

118. *Id.*

tribunals, two specific status characteristics exist (i.e., legal education, systematic training and experience in legal decision-making), and members of the tribunal can be distinguished based on these characteristics (i.e., professional judges have high states and lay judges have low states).

The *burden of proof hypothesis* suggests that a salient status characteristic will link its possessor to the potential outcomes of the group's task.<sup>119</sup> Any activated status characteristic, unless clearly unrelated to task competence, will contribute toward the structuring of social interaction. In the context of mixed tribunals, legal education and systematic training and experience in legal decision-making should influence social interactions in a mixed tribunal; expectations will be different of members with high states on these specific characteristics (i.e., professional judges) from the expectations of members with low states on these specific characteristics (i.e., lay judges). The normative set up of mixed tribunals—with professional judges being presiding judges—will further contribute toward these differential expectations.

The *aggregation hypothesis* elaborates on how status information on multiple status characteristics, both specific and diffuse status characteristics, is combined into aggregate performance expectations for the other members of the tribunal and for the person forming the expectations.<sup>120</sup> Specific status characteristics, directly related to the task, should carry greater weight in the formation of aggregate performance expectations than diffuse status characteristics, which are only indirectly related to the task. In the context of mixed tribunals, specific status characteristics, such as legal education and experience in legal decision-making, will have a stronger impact on the overall expectations of the professional judge's or lay judge's ability to decide legal cases than diffuse status characteristics, such as a judge's gender or age. In other words, being a professional judge or a lay judge should carry more weight in terms of the performance expectations than being male or female.

The *translation hypothesis* asserts that a member's performance outcome is a direct consequence of the member's aggregated performance relative to the aggregated performances of other group members.<sup>121</sup> In other words, higher performance expectations should

119. *Id.*

120. *Id.* at 126.

121. *Id.*

translate into more important and more frequent contributions toward the decision-making process and, in the long run, toward the task. In the context of mixed tribunals, professional judges (members with higher states on specific status characteristics) are expected to be more active and make more important contributions toward the resolution of the case than lay judges (members with lower states on specific status characteristics). The normative nature of mixed tribunals will further enhance this differentiation. Because only a professional judge may be the presiding judge, with additional rights and responsibilities in the tribunal, by virtue of procedural law, that judge will be expected to be more active and contribute more toward the resolution of the case. Finally, because specific status characteristics are present in mixed tribunals, diffuse status characteristics neither will be as important in the formation of aggregate expectations nor will translate into expectations of substantially differential contributions toward the task. The exceptions might be some diffuse status characteristics, such as education and occupation, which may help some lay judges achieve higher status in the tribunal.

The information about each member of the tribunal is then combined to form an aggregated or overall expectation. In the groups in which members know little information beforehand about the other members' competencies on task resolution, the theory argues that diffuse status characteristics will be important as well.<sup>122</sup> However, members of mixed tribunals, although potentially strangers, would still have plenty of information about other members beforehand. In other words, by knowing that a member is a professional judge or a lay judge, they will be able to develop expectations about the member's ability to make legal decisions. Thus, although professional judges and lay judges may not know each other personally on the first day of trial, they will still have sufficient information about specific status characteristics of each member to form expectations, based on a simple fact of whether somebody is a professional judge or a lay judge.

In addition to status characteristics, performance expectations could be developed based on status cues (i.e., indicators of different social status people possess),<sup>123</sup> including the aspects of the members' appearance, behavior, or possessions. Task cues (e.g., voice, physical position in the group, speech rate) give information about performanc-

122. Linda L. Carli, *Gender, Status, and Influence*, in 8 *ADVANCES IN GROUP PROCESSES* (S.R. Thye and Edward J. Lawler eds., 1991).

123. Berger et al., *Status Cues*, *supra* note 83, at 1.

es during the interaction itself, while categorical cues (e.g., tattoos, business suit, expensive jewelry) give information about the larger social groups. When little information about specific characteristics is available beforehand, status cues will be used as indicators.<sup>124</sup> In the context of mixed tribunals, plenty of information about specific status characteristics is available before members of the tribunal walk into the courtroom, so status cues will be of lesser importance if they point in the same direction as specific status characteristics.<sup>125</sup> On the other hand, if these status cues (particularly task cues) point in a different direction, these status cues may be used to alter the initial status hierarchies. For example, if a female judge speaks in a low voice and shows nonverbal cues of feeling uncomfortable in a leadership position, other members of the tribunal would probably lower their initial, high expectations of her performance developed from the fact that she is a professional judge.

Status characteristics and status cues will be directly relevant for performance expectations and interaction in the group. Status characteristics theory implies that members with high status in a group will be given more opportunities to contribute to the group, and their contributions are more likely to receive favorable reactions from others.<sup>126</sup> Groups tend to allocate more or less “floor time” among their members in direct relation to how useful a particular contribution is expected to be, which, in turn, is inferred from the status of the person.<sup>127</sup> Prior studies on small groups provide support for these assertions: individuals with higher status speak first during interactions,<sup>128</sup> talk quickly,<sup>129</sup> and loudly,<sup>130</sup> are more likely to interrupt, and are more successful in interrupting when they interact with lower status individuals.<sup>131</sup> These

124. Lisa S. Rashotte & Lynn Smith-Lovin, *Who Benefits From Being Bold: The Interactive Effects of Task Cues and Status Characteristics on Influence in Mock Jury Groups*, in 14 *ADVANCES IN GROUP PROCESS* 235, 237 (Edward J. Lawler et al. eds., 1997).

125. KUTNJAK IVKOVIĆ, *supra* note 6, at 221.

126. Berger et al., *Status Organizing Process*, *supra* note 83, at 482–83.

127. Balkwell, *supra* note 110.

128. Cecilia L. Ridgeway, Joseph Berger & LeRoy Smith, *Nonverbal Cues and Status: An Expectation States Approach*, 90 *AM. J. SOC.* 955, 958 (1985); see also Theodore A. Lamb, *Nonverbal and Paraverbal Control in Dyads and Triads: Sex or Power Differences*, 44 *SOC. PSYCHOL. Q.* 49 (1985).

129. Richard M. Sorrentino & Robert G. Boutillier, *The Effect of Quantity and Quality of Verbal Interaction on Ratings of Leadership Ability*, 11 *J. EXPERIMENTAL SOC. PSYCHOL.* 403, 404 (1975).

130. William T. Packwood, *Loudness as a Variable in Persuasion*, 21 *J. COUNSELING PSYCHOL.* 1, 1 (1974).

131. WILLIAM T. ROGERS & STANLEY E. JONES, *EFFECTS OF DOMINANCE TENDENCIES ON FLOOR HOLDING AND INTERRUPTION BEHAVIOR IN DYADIC INTERACTION* 113 (1975); Derek Roger & Willfried Neshsoever, *Individual Differences in Dyadic Conversational Strategies: A Further Study*, 26 *BRIT. J. SOC.*

findings indicate that the quantity and quality of verbal contributions to a group interaction affect the opinion that group members have about the speaker's competence, influence, and leadership ability.<sup>132</sup> Benefits associated with higher status transcend the simple more-floor-time paradigm; studies show that, even when high and low status individuals behave in a similar way, higher status individuals are evaluated more positively.<sup>133</sup>

In the context of mixed tribunals, professional judges are expected to have a higher status in the tribunal, be more competent, be evaluated as more competent, participate more frequently, and actually perform better in making a legal decision than lay judges. The status characteristics theory postulates that high status members in small groups (i.e., professional judges in mixed tribunals) should be more influential than low status members<sup>134</sup> (i.e., lay judges in mixed tribunals) along two dimensions: by resolving the disagreements in the direction of their initial opinion and by being selected as leaders. Berger and colleagues explicitly hypothesize that, when disagreements occur, high status members in small groups will be expected to yield more influence (not because of the strength of the argument, but because of the power of the source of the argument), which, in turn, will lead toward the resolution of disagreements in their favor.<sup>135</sup>

The theory also implies that professional judges in mixed tribunals will be selected as leaders more often.<sup>136</sup> Moreover, the professional judge's leadership position is also partially predetermined by the law; only professional judges may preside over trials by mixed tribunals. In other words, the institutional framework mandates that lay judges will be given less "floor time" or opportunities to participate and, once they do participate, their contribution will be considered to be of lesser importance than the contributions by professional judges.

PSYCHOL. 247, 247 (1987); see generally WILLIAM O'BARR, *LINGUISTIC EVIDENCE: LANGUAGE, POWER, AND STRATEGY IN THE COURTROOM* (1987).

132. Carli, *supra* note 122; Sorrentino & Boutillier, *supra* note 129.

133. Ronald Humphrey, *How Work Roles Influence Perception: Structural-Cognitive Processes and Organizational Behavior*, 50 AM. SOC. REV. 242, 250 (1985).

134. *Id.*

135. BERGER ET AL., *supra* note 83.

136. Carli, *supra* note 122.

## IV. INTERACTION IN MIXED TRIBUNALS

The propositions of the status characteristics theory may serve as a guide in developing our expectations about the work of, and interaction in, mixed tribunals. The results of empirical studies will be used to discuss how the interaction in mixed tribunals and the lay judges' contributions really might look like. However, my comparative assessment should take into account several caveats.

First, my survey is limited to the studies that contain the results of actual empirical projects<sup>137</sup> published mostly in English. I have also incorporated some studies published in German and Croatian. The exploration of mixed tribunals around the world has been rather regional, with authors conducting research and publishing in their own native tongue.<sup>138</sup> With globalization and continued reliance on English as the dominant language of scientific communication, the number of publications in English on mixed tribunals has begun to increase.<sup>139</sup>

Second, mixed tribunals are normative groups, and their country's existing laws regulate their work. When engaging in comparative studies on lay participation, we should keep in mind not only substantial variation in the laws across the countries belonging to different legal traditions (e.g., socialist law v. common law), but also a variation within the same legal tradition (e.g., the United States and the United Kingdom).

Third, the majority of scholars' methodologies used to collect the data is quite diverse and could partly explain the difference in findings.<sup>140</sup> For example, Leszek Kubicki and Sylwester Zawadzki studied

137. I did not incorporate papers in which the authors relied only on the general wisdom or popular sentiments about lay judges and their contributions. Rather, I included papers in which the data have been collected using one or more traditional methodologies of scientific research.

138. GÖRLITZ, *supra* note 42; KAMHI & ČALIJA, *supra* note 55; KLAUSA, *supra* note 42; LJUBANOVIĆ (1989), *supra* note 55; Lida Bajić-Petrović, *Odluke i osobenosti sudija porotnika u sudskoj praksi*, 2 PRAVO 48 (1985) (Russ.) [hereinafter Bajić-Petrović (1985a)]; Lida Bajić-Petrović, *Učešće građana u ostvarivanju sudske funkcije u opštinskim i višim sudovima SAP Vojvodine*, 27 KOMUNA 43 (1985) (Croat.) [hereinafter Bajić-Petrović (1985b)]; Gerken, *supra* note 42; Ljubanović (1983), *supra* note 55; Vladimir Ljubanović, *Osnovna obilježja ostvarivanja i mogući dalji pravci daljeg razvoja sudjelovanja građana u krivičnom sudjenju*, 38 NAŠA ZAKONITOST 1315 (1984) (Croat.) [hereinafter Ljubanović (1984)].

139. See generally e.g., KUTNJAK IVKOVIĆ, *supra* note 6; Kutnjak Ivković, *Mixed Tribunals*, *supra* note 4; Kutnjak Ivković, *Exploring Lay Participation*, *supra* note 20; Machura, *supra* note 2; Perron, *supra* note 8; Rennig, *supra* note 42; Yue, *supra* note 3; Zhuoyu Wang & Hiroshi Fukurai, *China's Lay Participation in the Justice System: Surveys and Interviews of Contemporary Lay Assessors in Chinese Courts*, in EAST ASIA'S RENEWED RESPECT FOR THE RULE OF LAW IN THE 21<sup>ST</sup> CENTURY: THE FUTURE OF LEGAL AND JUDICIAL LANDSCAPE IN EAST ASIA (forthcoming 2015).

140. Kutnjak Ivković, *supra* note 23, at 57–58.



Polish mixed tribunals<sup>141</sup> and relied on court apprentices—future professional judges—to observe criminal cases. They measured lay judge contributions by observing frequency of questions and comments made during trials, frequency of comments made during deliberations, and frequency of disagreements during deliberations. Gerhard Casper & Hans Zeisel<sup>142</sup> asked German professional judges to report the results of deliberations conducted in cases with mixed tribunals. They measured lay judge contributions by the professional judges' perceptions of the frequency of disagreements in mixed tribunals. Samuel Kamhi & Branko Čaliĳa surveyed professional and lay judges in Bosnia and Herzegovina<sup>143</sup> and assessed lay judge contributions by the perceived frequency of majority verdicts.

Fourth, when we try to assess lay judge contributions, we may be assessing contributions to different issues. One approach would be to assess the broad contribution that lay judges or mixed tribunals make in enhancing the legitimacy of the court system. Another approach would be to focus more narrowly on specific tasks performed by the mixed tribunal (e.g., deciding facts, making legal decisions). Yet another approach would be to discuss the specific contribution made in different stages of the criminal trial (e.g., lay judge contributions to the trial, lay judge contributions to the verdict).

Fifth, not all mixed tribunals are of the same size and composition. Mixed tribunals typically range in size from as few as three members (one professional judge and two lay judges)<sup>144</sup> to as many as nine members (three professional judges and six lay judges).<sup>145</sup> Also, mixed tribunals could be composed mostly of lay judges or mostly of professional judges. The interaction in the tribunal may be heavily affected by the size and composition of the tribunal.

### *A. Mixed Tribunals and Trial Preparations*

Although a trial is the key part of the process, various pretrial activities occur in its anticipation. The presiding professional judge receives the existing case dossier, reads it, schedules the trial date, sends summons to the defendants, decides which evidence to examine, and

141. Kubicki & Zawadzki, *supra* note 53, at 102.

142. Casper and Zeisel, *supra* note 42.

143. KAMHI & ČALIĴA, *supra* note 55.

144. See Garde, *supra* note 13, at 91; Kutnjak Ivković, *supra* note 6, at 18; Perron, *supra* note 8, at 182.

145. Bonnieu, *supra* note 7, at 559.

sends invitations to the witnesses and experts.<sup>146</sup> At the same time, either the professional judge or a clerk in the court administration notifies lay judges of the trial date.

Studies have suggested that some lay judges may have a tendency to try to avoid the service. For example, studies conducted in the former Yugoslavia<sup>147</sup> reveal that many lay judges did not respond to the court's mail and, thus, did not participate in trials at all.<sup>148</sup> The process of dismissing such lay judges from duty was never initiated.<sup>149</sup> Instead, courts relied on lay judges who did respond and used them more often.<sup>150</sup> Lida Bajić-Petrović argues that such behavior might have influenced the atmosphere in the courtroom and negatively predisposed the presiding professional judges toward lay judges even before lay judges walked into the courtrooms.<sup>151</sup>

The trial preparation stage is the time when lay judges can also prepare for the trial by reading the case dossier. However, not all countries allow their lay judges to read the case dossier. German lay judges, for example, do not have this opportunity.<sup>152</sup> On the other hand, Croatian and Polish lay judges legally have the option of doing so, but studies show they do not take advantage of this opportunity often. The Polish study uncovered that only one out of eleven lay judges reported reading the dossier.<sup>153</sup> Similarly, the majority of lay judges in the Croatian study reported reading the dossier only occasionally.<sup>154</sup> Lay judges in Hungary complained that the key reason why they did not read the case dossier was that they were not given sufficient time to study the dossier in advance.<sup>155</sup> The dossier remains locked in the professional judges' closet or stored somewhere in the court administration offices. At the end of this preparatory stage, the presiding professional judge is fully prepared for the trial, while lay judges—either for legal or practical reasons—typically did not read the case dossier. Not having access to the dossier, as lay judges in Kulcsár's study emphasized, creates

146. KUTNJAK IVKOVIĆ, *supra* note 6, at 297–99.

147. Bajić-Petrović (1985a), *supra* note 138; Bajić-Petrović (1985b), *supra* note 138; Ljubanović (1984), *supra* note 138.

148. Bajić-Petrović (1985b), *supra* note 138, at 44 (suggesting that one out of five elected lay judges did respond to the court's mail).

149. *Id.*

150. Bajić-Petrović (1985a), *supra* note 138; Bajić-Petrović (1985b), *supra* note 138.

151. *Id.*

152. *See, e.g.*, Machura, *supra* note 2, at 454; Perron, *supra* note 8, at 184.

153. Kubicki & Zawadzki, *supra* note 53, at 104.

154. KUTNJAK IVKOVIĆ, *supra* note 6, 333–38.

155. KULCSÁR, *supra* note 52, at 101.

obstacles for full and active participation.<sup>156</sup> Peter Garde commented that Danish lay judges may have more access to the case dossier; “in really big cases involving *economic crime* [as] it is customary for the lay assessors to have a copy of the dossier themselves.”<sup>157</sup>

### B. Mixed Tribunals and Trials

Unlike the preparatory stage for the trial, trial itself is a part of the criminal process that is heavily regulated and carefully monitored by both the defense and the prosecution. Legal rules in a particular country prescribe what the mixed tribunal is expected to do and not allowed to do. However, not all members of mixed tribunal are equals here; one of the members—typically a professional judge—is the presiding judge. While the specific procedural rules differ from country to country, there is a common feature across all countries using mixed tribunals: the presiding judge has a more active role during the trial than the rest of the tribunal.

As is the case in all countries using mixed tribunals, the presiding judges in Croatian mixed tribunals have a very active role. The Croatian Criminal Procedure Law of 1993 assigns additional rights and responsibilities to the presiding (professional) judges.<sup>158</sup> The presiding judge keeps order in the courtroom; calls the defendants, witnesses, and expert witnesses; questions them; gives other members an opportunity to speak; opens and closes the trial; and so on.<sup>159</sup> As discussed earlier, the presiding judge also lets other members of the tribunal speak<sup>160</sup> and ask questions *after* the presiding professional judge has completed his/her own examination.

Liling Yue summarized the lay judges' contributions to the Chinese trials as “very weak”; professional judges dominate the trials and lay judges are passive.<sup>161</sup> Indeed, the results of various empirical studies on mixed tribunals confirm the view that the presiding professional judge dominates and that lay judges are *perceived* as not being very active during trials, and their contributions are evaluated as not important. Kubicki and Zawadzki<sup>162</sup> reported that Polish lay judges were

156. *Id.*

157. Garde, *supra* note 13, at 94 (emphasis in original).

158. 1993. Članak 315. Zakon o krivičnom postupku (Criminal Procedure Code) (Croat.).

159. KUTNJAK IVKOVIĆ, *supra* note 6, 299–300.

160. 1993. Članak 292. Zakon o krivičnom postupku (Criminal Procedure Code) (Croat.).

161. Yue, *supra* note 3, at 52.

162. Kubicki & Zawadzki, *supra* note 53, at 104.

not very active during trials; two-thirds of lay judges did not ask any questions during trials. Similarly, Croatian lay judges, professional judges, state prosecutors, and defense attorneys all reported that lay judges asked questions “very infrequently” or “never.”<sup>163</sup> In addition, the majority of lawyers surveyed in the study perceived the lay judges’ questions to be “somewhat important” or “not important at all.”<sup>164</sup> Kulcsár also reported that at least one-half of Hungarian lay judges did not make any comments of merit.<sup>165</sup>

Asbjørn Strandbakken discussed another opportunity for lay judges to participate during trials. He noted that lay judges have the right to intervene in the trial if they observe that the presiding professional judge makes a procedural error.<sup>166</sup> However, this seems to remain a rarely exercised option; “since the lay judges have no general legal training, this will very seldom happen—if ever.”<sup>167</sup>

Perron wrote about a situation in which legal issues are discussed during the trial.<sup>168</sup> The legal professionals in the courtroom participate in the discussion, but lay judges tend to abstain:

Though the participants (prosecutor, defense counsel, secondary accuser) can discuss the relevant statutes in their closing arguments, they are not allowed to call upon the lay judges to oppose the professional judges. As a general rule German courts are quite reluctant to make a statement on the relevant law, trying not to give any impression of bias and thereby avoiding any challenge by the defense on grounds of bias. If the judge and defense counsel have a relationship of trust where challenges are out of question, it is not at all unusual for them to discuss legal issues more openly. Indeed, defense counsel often offers cooperation and shows his/her willingness to make concessions in order to get an idea about the court’s attitude. Lay judges rarely play an active role when a case is discussed exclusively amongst professionals (judges, prosecutors, defense counsel, attorney of the secondary accuser).<sup>169</sup>

### *C. Mixed Tribunals and Deliberations*

Unlike the trial itself, which is a highly regulated part of the process, deliberation, which includes the discussion of the case and voting,

163. KUTNJAK IVKOVIĆ *supra* note 6, at 245–50.

164. *Id.*

165. KULCSÁR, *supra* note 52, at 105.

166. Strandbakken, *supra* note 9, at 231.

167. *Id.*

168. Perron, *supra* note 8, at 185.

169. *Id.*

is relatively unregulated. The presiding professional judge typically continues as the leader of the group<sup>170</sup> and may be responsible for the thorough and complete discussion of all the relevant issues in the case.<sup>171</sup> Professional judges may give informal instructions on the laws<sup>172</sup> or present relevant legal rules to the tribunal.

While the laws do not determine the order in which the discussion should proceed, they will typically determine that professional judge and lay judge votes are equal.<sup>173</sup> The laws may even determine the order in which voting should be done. Perron described German rules on voting: “the lay judges vote first, starting with the youngest among them, followed by the professional judges, with the youngest voting first and the presiding judge last.”<sup>174</sup>

Decision-making in mixed tribunals is performed behind closed doors, with only members of the tribunals in attendance. Yue summarized the Chinese perceptions about what goes on behind closed doors: “[d]eliberations are carried on in secret. We believe that professional judges play a dominant role during the deliberation. They not only lead the deliberations, but also influence [them] greatly.”<sup>175</sup> Empirical studies show that these perceptions resonate across other countries.<sup>176</sup>

One approach toward assessing lay judge contributions during deliberations is to examine the frequency and importance of their participation. Lay judges and professional judges may hold different perceptions about what occurs during deliberations. Lay judges in the Croatian study reported making comments during deliberations frequently, while professional judges in the same study reported that lay judges made comments only occasionally and infrequently.<sup>177</sup> Professional judges evaluated these lay judge comments as only somewhat important.<sup>178</sup> They attributed the major source of problems with the lay judges’ comments to their lack of legal knowledge or to their lack of understanding of legal norms.<sup>179</sup>

170. *Id.* at 186; KUTNJAK IVKOVIĆ, *supra* note 6, at 383.

171. *See, e.g.*, KUTNJAK IVKOVIĆ *supra* note 6, at 383.

172. *See, e.g., id.* at 356; Strandbakken, *supra* note 9, at 231.

173. *See, e.g.*, KUTNJAK IVKOVIĆ, *supra* note 6, at 356; Perron, *supra* note 8, at 186.

174. Perron, *supra* note 8, at 186.

175. Yue, *supra* note 3, at 53.

176. Diesen, *supra* note 18; Kubicki & Zawadzki, *supra* note 53, at 106.

177. KUTNJAK IVKOVIĆ, *supra* note 6, at 394–98.

178. *Id.*

179. *Id.* at 417–18.

Another approach would be to explore the frequency of (dis)agreements between professional and lay judges. Quite expectedly, lay judges were perceived to disagree with professional judges rarely,<sup>180</sup> and, even then, disagreements were resolved by the lay judges changing their opinion.<sup>181</sup> In the South African study, professional judges and lay judges also reported that disagreements are rare.<sup>182</sup> Casper and Zeisel examined the initial disagreements and concluded that lay judges affected the verdict in 1.4% of the cases.<sup>183</sup> More than 60% of professional judges in the study by Kamhi and Čaliĳa<sup>184</sup> either did not believe that lay judges had any influence on the verdicts, or that they influenced verdicts very rarely.<sup>185</sup> In a German study, Stefan Machura indicated that less than one-fifth of lay judges in both Bochum and Frankfurt, Germany, reported stating an opinion different from the professional judges' during deliberations.<sup>186</sup> Perron summarizes the results of German studies on mixed tribunals:

All these studies unanimously point to the limited influence of lay judges in the German criminal trial. Professional and lay judges do not often disagree and the few discordances they have usually relate to the sentence rather than the question of guilt. If an agreement cannot be reached, it is usually the professional judges who assert themselves against their lay colleagues. All interviewees confirmed, however, that lay judges do influence judicial decisions to a certain extent.<sup>187</sup>

In a recent survey of Chinese mixed tribunals, over 80% of professional judges reported that lay judges expressed a different voice only "occasionally" or "rarely."<sup>188</sup> Lay judge evaluations of their own contributions indicate a similar view: over 90% stated that they expressed disagreement "occasionally" or "rarely."<sup>189</sup>

180. Diesen, *supra* note 18; Kubicki & Zawadzki, *supra* note 53, at 107.

181. Casper and Zeisel, *supra* note 42, at 186; Frassiné et al., *supra* note 43; KUTNJAK IVKOVIĆ, *supra* note 6, at 420–24.

182. The South African system of mixed tribunals is unique for several reasons. First, professional judges at district courts have the discretion as to whether lay judges will participate in a particular trial. JEREMY SEEKINGS & CHRISTINA MURRAY, *LAY ASSESSORS IN SOUTH AFRICA'S MAGISTRATES' COURTS* 19 (Law, Race & Gender Research Unit 1998). Second, lay judges participate only in the fact-finding part of the judgment. *Id.* Third, lay judges are not usually included in sentencing, and even if they are, their role is only advisory. *Id.* at 125.

183. Casper and Zeisel, *supra* note 42, at 189.

184. KAMHI & ČALIĳA, *supra* note 55, at 85.

185. *Id.*

186. Machura, *supra* note 2, at 462.

187. Perron, *supra* note 8, at 193.

188. Wang & Fukurai, *supra* note 139, at 13.

189. *Id.*

Because the frequency of disagreements between professional and lay judges is perceived to be rather low, the implication should be that the rate of agreement is high. Indeed, studies reported that the majority of the court decisions, sometimes up to 95%, seemed to be unanimous verdicts.<sup>190</sup> Christian Diesen reported that surveyed lay judges in Sweden outvoted the professional judge in only 1-3% of all criminal cases.<sup>191</sup> According to the professional and lay judges in the Croatian study, lay judges disagreed with professional judges “in only a few cases” or “never.”<sup>192</sup> In the few cases in which they did disagree, it seems that lay judges rarely exercised their right to outvote the professional judges. The situations in which lay judges outvote professional judges are rare. Diesen calls these decisions “lay verdicts” and argues that they:

reveal another interesting tendency; in contrast to juries in other countries (‘the bleeding heart-syndrome’) the Swedish lay judges tend to find the defendant guilty, or require a more severe punishment than the professional judge, who tends to want to free the accused or to give him a more lenient sentence.<sup>193</sup>

Christoph Rennig reports that, in cases with disagreement, lay judges were several times less likely to persuade the professional judge than the other way around.<sup>194</sup> In accordance with the propositions of the status characteristics theory, it seems that lay judges have a higher chance of being talked into accepting a different opinion even when the professional judge is in the minority than of convincing other members of the tribunal to accept their opinions:

A detailed analysis of the data collected by Casper & Zeisel and Rennig shows that the lay assessors’ chances to prevail tend towards zero if the lay assessors do not hold a common position at the outset of the deliberation. A professional judge in the minority has quite a good chance to convince one of the two lay assessors. A lay assessor in the minority will rather be convinced by the majority than be convincing himself.<sup>195</sup>

Yue noted that, “[E]ven if lay assessors have a different opinion about the case, professional judges may try to convince them with their own knowledge.”<sup>196</sup> Machura argues that the bulk of the activity in

190. KLAMI & HÄMÄLÄINEN, *supra* note 49, at 64.

191. Diesen, *supra* note 18, at 314.

192. KUTNJAK IVKOVIĆ, *supra* note 6, at 420.

193. Diesen, *supra* note 18, at 314.

194. Rennig, *supra* note 42, at 487.

195. *Id.* at 488.

196. Yue, *supra* note 3, at 52.

sorting out divergent opinions actually takes place before the official vote because the emphasis in German courtrooms is on discussion and consensual decision-making.<sup>197</sup> Rather than being outvoted, professional judges might use tools at their disposal to persuade lay judges and gently guide them into making the preferred decision. Garde, a professional judge himself, described how he persuades lay judges:

The judge has two means of persuasion, if the general respect of the lay assessors for the judge is lacking. He may warn the lay assessors that an unreasonable verdict or sentence will probably call forth an appeal from the losing party, and as also the prosecution has the right to appeal, this should not be ignored. Also, the judge may lodge a dissent, and even though such dissent is not signed, the parties will know the identity of the author from the reasoning and the wording of the dissent. In my own experience, an intimation of a dissent or a prophecy of an appeal has several times prompted the lay assessors—or one of them, which suffices—to go back on their original vote and join me.<sup>198</sup>

These findings support the basic propositions of the status characteristic theory and provide evidence of the influence of the legal framework: professional judges dominate deliberations and their voices are more powerful than those of lay judges. The overall impression gathered by lawyers was that lay judges made a minor contribution to the resolution of the case<sup>199</sup> or that the overall impact of their contribution on the case was minor.<sup>200</sup>

#### *D. Mixed Tribunals and the Lay Judges' Overall Contribution*

While both professional judges and lay judges tend to support the concept or idea of lay participation, nevertheless, lay judges are quite more positive about it. The respondents in the Polish study supported lay participation because, in their opinion, lay participation aligned the verdict with public opinion, contributed toward professional judges' better performance, and enhanced the court's independence.<sup>201</sup> Professional judges from Finland and Sweden in Hannu Tapani Klami and Merva Hämäläinen's study singled out the latent function as the foremost reason in support of lay judges in mixed tribunals (the profes-

197. Machura, *supra* note 2, at 463.

198. Garde, *supra* note 13, at 101.

199. KAMHI & ČALIJA, *supra* note 55, at 85; KULCSÁR, *supra* note 52, at 117; Seligson, *supra* note 14, at 281.

200. Casper and Zeisel, *supra* note 42, at 177.

201. Stanislaw Pomorski, Comment, *Lay Judges in the Polish Criminal Courts: A Legal and Empirical Description*, 7 CASE W. RES. J. INT'L L. 198, 203 (1974–1975).



sional judge must make his reasoning understandable to them). They also argued that the “evidence is evaluated by different people” and “different groups are represented.” On the other hand, they placed very little importance on the safeguard role (protection against majority power).<sup>202</sup>

The majority of professional judges, state attorneys, and attorneys in the Polish study<sup>203</sup> supported the concept of lay participation, but, at the same time, most of them were very critical of its actual implementation. Similarly, lawyers in Croatia were supportive of the idea,<sup>204</sup> but also pointed out that the system of mixed tribunals is riddled with problems. Professional judges in the Bosnian and Herzegovinian study criticized lay judges in mixed tribunals for their lack of legal knowledge, general education, and interest to participate in the cases.<sup>205</sup> Both Finnish and Swedish professional judges condemned lay judges for being “emotional” (Finnish professional judges were more likely to report this than Swedish professional judges), for having a lower standard of proof, for being persuaded by the professional judge too easily, and, specifically for Finnish lay judges, for revealing trial-related secrets.<sup>206</sup> Similarly, the Polish respondents criticized lay judges for being emotional and lenient.<sup>207</sup>

Jeremy Seekings and Christina Murray surveyed and interviewed magistrates in South Africa. Their summary of the key criticisms resonates with those pointed out by a number of professional judges across the world:

Most magistrates believe that the only value of assessors is in enhancing the legitimacy of the courts through changing public perceptions. The quality of justice is not improved very much, although assessors can ‘assist’ magistrates by providing advice on the culture and background of the accused. As far as most magistrates are concerned, there is nothing wrong with the quality of justice which magistrates administer; it is just that the public does not recognize the high quality of this justice.<sup>208</sup>

202. KLAMI & HÄMÄLÄINEN, *supra* note 49, at 54–55.

203. Pomorski, *supra* note 201, at 202.

204. Marko Lapaine, *Neka razmišljanja o sudjelovanju sudaca porotnika u našem krivičnom postupku*, 40 NAŠA ZAKONITOST 605 (1986).

205. KAMHI & ČALIJA, *supra* note 55.

206. KLAMI & HÄMÄLÄINEN, *supra* note 49, at 58.

207. Pomorski, *supra* note 201, at 203–04.

208. SEEKINGS & MURRAY, *supra* note 182, at 100–01.

Generally, lay judges express a more optimistic view about their role and contributions.<sup>209</sup> While more than 85 percent of Croatian lay judges had positive opinions about mixed tribunals, only slightly over 50% of professional judges or state attorneys shared their enthusiasm.<sup>210</sup> Diesen reported that “the [Swedish] lay judges have high self-esteem and think they exert important influence on the decisions, in spite of the accepted fact that it is the career judge who plays a primary role during deliberations.”<sup>211</sup>

The overwhelming majority of lay judges in the Polish study<sup>212</sup> and 90% of the lay judges in the study by Kamhi and Čalija<sup>213</sup> believed that their influence on the verdicts was substantial and beneficial. On the other hand, Machura emphasizes that “[a]bout two of three respondents [German lay judges] stated that court would have decided differently without lay assessors ‘in a few cases,’ while about 20% said that the court would have ‘almost never’ decided differently.”<sup>214</sup>

#### V. FUTURE RESEARCH ON MIXED TRIBUNALS

Mixed tribunals have been a part of criminal justice systems in many countries around the world, from civil-law countries to socialist countries. Some countries, like Japan, introduced them recently. Other countries, like Germany, Croatia, and Sweden, have incorporated mixed tribunals into their systems for decades. Still others, like China and South Africa, significantly amended their laws to enhance lay judge participation. Mixed tribunals have been both praised and criticized in the same breath. Recently, scholarly research on mixed tribunals has experienced a renaissance. Interest in mixed tribunals has been invigorated; new studies from Asia reveal a more optimistic picture about mixed tribunals. Nonetheless, many fundamental questions remain open for research.

First, how active do we expect lay judges in mixed tribunals to be? The current body of knowledge suggests that they are not very active

209. KLAUSA, *supra* note 42; LJUBANOVIĆ (1989), *supra* note 55; Kubicki & Zawadzki, *supra* note 53 at 110; Ljubanović (1983), *supra* note 55; *see generally* KUTNJAK IVKOVIĆ, *supra* note 6.

210. KUTNJAK IVKOVIĆ, *supra* note 6, at 449; Kutnjak Ivković, *Exploring Lay Participation*, *supra* note 20.

211. Diesen, *supra* note 18, at 315.

212. Pomorski, *supra* note 201, at 202.

213. KAMHI & ČALIJA, *supra* note 55, at 94.

214. Machura, *supra* note 2, at 464.

members (neither during trial nor during deliberation),<sup>215</sup> that professional judges tend to evaluate their participation at best as somewhat important,<sup>216</sup> and that lay judges rarely disagree with professional judges.<sup>217</sup> Yet, the reality of mixed tribunals around the world is that professional and lay judges do not start from the clean slate; by law, professional judges are put in the leading role and given additional procedural rights and duties that lend themselves to leadership roles in the tribunal. Moreover, professional judges' knowledge of law and systematic experience in deciding legal cases (i.e., specific status characteristics) creates an expectation that they should contribute more, that their contributions should be more important, and positions their contributions to be evaluated positively. In these circumstances, cards are stacked against lay judges; it is simply not fair to expect lay judges to be as active as professional judges in the decision-making process.

Future research on mixed tribunals could start by exploring expectations about lay judge contributions and seek to establish adequate benchmarks. Clearly, the straightforward approach of directly comparing lay judge contributions to the contributions made by the presiding professional judge will always find a large discrepancy. But, what should be the standard or the relative benchmark? What is the point of reference the respondents have used in various studies? In mixed tribunals, in which more than one professional judge participates, we should try to benchmark lay judge activity against the activity of the non-presiding professional judge(s).

The way in which questions concerning lay judge activities are worded may be critical. General questions about lay judge activities (e.g., how often do lay judges ask questions) may be more likely to capture stereotypes and be less accurate in measuring their participation than questions targeting a specific case (e.g., frequency of lay judges' participation in the last case tried in a mixed tribunal). On the other hand, reliance on information concerning only a single trial enhances the potential for measurement error in its own right. Moreover, in the countries in which professional judges are more negatively predisposed toward lay judges, asking such general questions may show lower levels of lay judge participation, not because lay judges partici-

215. KULCSÁR, *supra* note 52, at 104; KUTNJAK IVKOVIĆ, *supra* note 6, at 313–19, 394–98; Kubiccki & Zawadzki, *supra* note 53, at 104.

216. KULCSÁR, *supra* note 52 at 346–47; KUTNJAK IVKOVIĆ, *supra* note 6, at 421.

217. KLAMI & HÄMÄLÄINEN, *supra* note 49, at 63–71; KUTNJAK IVKOVIĆ, *supra* note 6, at 421; Casper and Zeisel, *supra* note 42, at 154.

pate less, but because professional judges incorporated their general opinion about lay judges into their assessment.

Second, what kind of contributions should lay judges make? Should their role be regarded as identical to the role played by professional judges? Assuming that professional and lay judges are expected to play the same role, if professional judges are performing their jobs well, there should not be much room left for lay judges to contribute. Indeed, studies suggest that lay judges are only occasionally viewed as having some explicit influence on the decision.<sup>218</sup> In explaining the fact that only 30% of lay judges asked questions during trials in the Polish study, Maria Borucka-Arctowa remarked very simply, "A lay judge will intervene actively only when the professional judge does not take due account of circumstances which the lay judge feels are essential to the case, or when the questions the lay judge poses may help to elucidate the case."<sup>219</sup>

We should take into account and explore the idea that professional judges and lay judges may not necessarily have the same roles in the tribunal. Borucka-Arctowa<sup>220</sup> argued that lay judges perform the "social" role, complementing the "professional" role performed by professional judges. Perceptions of lay judges in the well-known Polish study of mixed tribunals<sup>221</sup> seem to support this argument; the majority of lay judges (72%) thought that they served a function in counteracting the tendency of statutory law to ignore "the realities of life."<sup>222</sup> Moreover, I argued that it would be quite possible that professional judges believed that judicial decision-making requires "no less than a law degree, a license to practice, and trial experience"<sup>223</sup> and thus emphasized the "professional" role over the "social" role, both for themselves *and* for lay judges, while lay judges believed the social component to carry more weight.<sup>224</sup>

The results of existing research studies might be interpreted in accordance with the idea that the professional judge and lay judge roles are not necessarily identical. We know that professional judges consistently support the idea of mixed tribunals,<sup>225</sup> but are doubtful

218. Casper and Zeisel, *supra* note 42, at 189; Kubicki & Zawadzki, *supra* note 53, at 107.

219. Borucka-Arctowa, *supra* note 73, at 290.

220. *Id.*

221. Kubicki & Zawadzki, *supra* note 53.

222. Borucka-Arctowa, *supra* note 73.

223. PAUL E. DOW, DISCRETIONARY JUSTICE: A CRITICAL INQUIRY 197 (1981).

224. Kutnjak Ivković, *Exploring Lay Participation*, *supra* note 20, at 512.

225. Kahmi & Čalića, *supra* note 55, at 85; KUTNJAK IVKOVIĆ, *supra* note 6, at 446.

about the actual contributions lay judges make,<sup>226</sup> report that lay judges discussed peripheral details rather than the main issues,<sup>227</sup> and argue that they would have reached a wrong decision rarely, if ever, had there been no lay participants.<sup>228</sup> Future research can determine the degree to which the apparent disagreement about the lay judges' contributions is related to the differential views of the lay judge's role.

Third, are the size and composition of the mixed tribunal related to the interaction in the tribunal? If a country has more than one size/composition of the mixed tribunal, studies could explore the degree to which this heterogeneity influences the interaction. However, a study would have to take into account the use of different mixed tribunals in different types of cases (i.e., larger mixed tribunals for more serious cases); it would be critical to create an adequate control for the severity and nature of the case. One potential solution, though not without its share of problems, could be borrowed from jury scholars: mock trials of the same case with mixed tribunals of varying size/composition.

Fourth, is the frequency and nature of lay judge participation related to procedural rules? If we take a comparative perspective, future research should be able to explore the degree to which certain rules are enticing or diminishing lay participation. For example, in some countries, lay judges are allowed to read the case file and in other countries they are not. Would allowing lay judges, and giving them realistic opportunities, to read the case dossier make a difference in their activity levels? There is limited research supporting this idea. Specifically, although lay judges in the Croatian study reported that they rarely read the case dossier,<sup>229</sup> those who reported reading the case dossier, at least occasionally, were more likely to say that they asked questions more often as well.<sup>230</sup>

Fifth, are all diffuse status characteristics equally (ir)relevant for the interaction in mixed tribunals? The results of existing studies clearly support the idea that specific status characteristics are critical for mixed tribunals. If future research goes beyond specific status characteristics, it would be interesting to explore whether gender, occupation, or education in general would be more influential. For example, I

226. KUTNJAK IVKOVIĆ, *supra* note 6, at 346, 363, 395.

227. *Id.* at 413.

228. KULCSÁR, *supra* note 52, at 92.

229. KUTNJAK IVKOVIĆ, *supra* note 6, at 334.

230. *Id.* at 338.

found that there are no systematic gender differences between female and male professional judges and between female and male lay judges with respect to the lay judges' frequencies of participation, the importance of their contributions, their competences to make decisions about factual and legal issues in the cases, and the strengths of their influence.<sup>231</sup>

Sixth, does experience of serving as a lay judge enhance lay judge participation? What is the nature of the relation? One could argue that lay judges at the beginning of their mandate (while they are still learning the rules) and lay judges at the end of their mandate (when they have already experienced professional judges' treatment of lay judges) might be less likely to participate than lay judges in the middle of their mandate (when they know what is expected of them, but are still enthusiastic about their service). Gunther Arzt reported that the length of service and lay judge participation are negatively related; the longer lay judges had participated in mixed tribunals, the less likely they were to attempt to influence the outcome.<sup>232</sup>

Seventh, what political and social conditions create a more positive environment for lay participation? A future comparative analysis of larger political and social conditions in a number of countries may reveal interesting and practical implications. To what degree does government support, and promotion of lay participation influence, the rate at which potential lay judges follow the instructions and actually appear in court to serve as lay judges? Are true democracies the only countries in which lay participation can flourish?

There are numerous open questions about mixed tribunals to be explored both domestically and comparatively. Some would require the use of traditional methodology, while others would require approaches that are more creative. Either way, the field is truly open for scholars to explore. Hopefully, the renaissance of mixed tribunals will serve to (re)ignite the spark.

231. Sanja Kutnjak Ivković, *Does Gender Matter: The Role of Judge's Gender in Legal Decision-Making by Croatian Mixed Tribunals*, 23 INT'L J. SOC. L. 131, 150 (1995).

232. Arzt, *supra* note 113.

