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Excerpts from the „Empirical Research in Hungary about Lay and Professional Judge Relations in Mixed Tribunals: Fair or Self-Distancing Aristocratism?"[2]

A mixed or collaborative tribunal[3] is defined as a body of professional and lay judges that form a judicial chamber and adjudicate in various types of cases. Theoretically, lay judges participate on equal footing in delivering the final judgment. The common denominator of these legal systems is that professional judges, holding a law degree and actively pursuing their careers, are paired with lay judges, people without a law degree. However, these judges work together in deciding cases on merit with equal rights in questions of law and fact as well as in sanctioning in criminal proceedings.

Debates regarding the jury system, established in the 19th century, have provided the most well-known arguments in favor of or against the necessity or superfluity of lay participation.[4] The ephemeral Hungarian jury system was based on the French system with Germany acting as intermediary. This can be traced mostly in its composition and selection methods.[5] However, the Hungarian jury system was eradicated by World War I. The subsequent Horthy system was not interested in a tribunal that could give rise to conflict and to add insult to injury, a tribunal that might not even take legislation into account if its sense of justice was gravely infringed. 1948 and 1949 saw the socialist change when the communist party takeover laid down the bases for a Soviet-type state apparatus. Act No. XI of 1949 that limited appeal in criminal matters also provided for the introduction of the popular lay assessor system. From then on, in select cases, a judicial chamber consisted of professional judges and lay judges known as popular lay assessors at various levels of the court system.

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[2] Attila Badó – Gábor Feleky – János Lőrinczi: Empirical Research in Hungary about Lay and Professional Judge Relations in Mixed Tribunals: Fair or Self-Distancing Aristocratism. HSOA Journal of Forensic, Legal & Investigative Sciences, Vol. 5, Issue 1, 2019. p. 1-12. (https://www.readcube.com/articles/10.24966%2Fflis-733x%2F100028 Last visit: 24 November 2021). In Hungarian: Badó, Attila - Feleky, Gábor - Lőrinczi, János: Laikus és professzionális bírák viszonya a kevert bíróságban – egy empirikus vizsgálat eredményei a magyar ülnökrendszerről ÁLLAM- ÉS JOGTUDOMÁNY 58, 2017. p. 3-28. See also: Attila Badó – Gábor Feleky – János Lőrinczi: Hungarian mixed court without representativity. An empirical research. Zbornik radova Pravnog fakulteta, Novi Sad 2016, vol. 50, issue 4, pp. 1415-1436 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2971525 Last visit: 24 November 2021). Attila Badó: Ártatlanok vagy bűnösök. Pro Talentis Universitatis, 2021, 360 pp. ; Attila Badó: Quality of Justice and Lay Participation in the Light of Scientific Studies. In: Mátyás, Bencze; Gar, Yein Ng (szerk.) How to Measure the Quality of Judicial Reasoning. Springer International Publishing, 2018 p. 73-86.

The research was carried out in the framework of a project Reg. OTKA, No. K 120693 entitled Ensuring impartiality in justice. A comparative analysis.

[3] John D. JACKSON - Nikolai P. KOVALEV: "Lay Adjudication in Europe: The Rise and Fall of the Traditional Jury" Oñati Socio-Legal Series. 2016. 6/2. pp. 368-395. Retrieved 10 October 2016 from http://ssrn.com/abstract=2782413

[4] CSIZMADIA, Andor: "Az esküdtbíróság Magyarországon a dualizmus korában" in: CSIZMADIA Andor (Ed.): Jogtörténeti tanulmányok. I. (Budapest: Közgazdasági és Jogi Könyvkiadó1966) pp. 131-147.; ANTAL, Tamás: "Lessons and Criticism of the Criminal Jury in the History of Hungary" Canadian Social Science. Vol. 11, No. 6, June 2015. pp. 215–220.

[5] BÓNIS, György – DEGRÉ, Alajos – VARGA, Endre: A magyar bírósági szervezet és perjog Zalaegerszeg : Zala M. Bíróság 1996) pp. 242–252.; ANTAL, Tamás: "The Codification of the Jury Procedure in Hungary" The Journal of Legal History. Vol. 30, No. 3, December 2009. pp. 279–297.; ANTAL, Tamás: "The Jury in Hungary" Зборник Радова (Collected Papers) Vol. 42, No. 1–2/2008. pp. 927–939.; ANTAL, Tamás: A Hundred Years of Public Law in Hungary (1890–1990): Studies on the Modern Hungarian Constitution and Legal History (Novi Sad: Agape Doo, 2012) pp. 15–36.

There was a virtually instantaneous demand for the reform of lay adjudication following the free elections held in 1990. The main objective was to introduce the jury system.[6] This demand was seen as quite logical for many following dictatorship, and the underlying reasoning put an increased emphasis on its political advantages. Regardless of historical traditions, the concepts and ideas about reintroducing the jury system were gradually removed from the agenda. In the 2000s, a referendum proposal was initiated, yet it was blocked by the decision of the National Election Commission followed by the Hungarian Constitutional Court.[7] The lay judge system remained unaltered with the mere cosmetic change of removing the adjective 'popular'.

A comprehensive reform of the Hungarian justice system took place in 1997. The Reform Act also contained changes concerning the lay judge system. Most of the rules laid down are still in effect. Pursuant to the Act, the tribunal's decision-making process still required the participation of lay judges, whose mandates were conferred based on the principle of popular sovereignty. The act fixed the age of eligibility to 30 instead of 24. This constituted an amendment running parallel with the raise in age necessary for judicial appointment. Lay selection was basically subject to prior regulations which is still true nowadays. Excluding political parties, lay judges are nominated by Hungarian citizens with voting rights residing in the area of competence of the tribunal or local municipalities operating in the area of competence of the tribunal and civil society organizations. Various self-government bodies are entitled to elect lay members, depending on which level of the judicial system lay assessors are assigned to.

The basis for the empirical research carried out during 2015 and 2016 by a paper-based (PAPI) questionnaire supplemented by an online (CAWI) questionnaire targeting the younger generation. At the same time, professional judges who used computers on a daily basis were also invited to complete an online questionnaire. In order to conduct research, permission was to be sought from the National Office for the Judiciary (NOJ), a new and centralized organization responsible for court management since 2011. Permission to conduct the research was granted based on the outlined research plan and the dispatched questionnaire. Data collection was based on the idea that questionnaires would be delivered on site to lay assessors arriving at court to be filled in individually or in groups and then collected. The organization of data collection had been initiated at courts of law. In some counties, only preparatory work was in progress whereas in some other counties data collection was almost finished. At this point of research, the president of the NOJ unexpectedly put an end to data collection, claiming that the NOJ management had not been aware of what questions had been included in the questionnaire. After the authors had signaled that much of the rather costly preparatory work would go to waste in the wake of the decision, the NOJ gave permission for the questionnaire to be completed online. This, however, only yielded little success, which came as no surprise. Thus, the authors' vision of carrying out a full-scale comparison using the Kulcsár research eventually faded. That research had come up with a 1,223-person database (known as a multi-stage sampling method), while the authors' research could rely on a sample of merely 348 people. The silver lining, however, was that an opportunity was offered to seek professional judges in the matter of completing an online questionnaire on assessing lay participation - 109 professional judges sent a completed questionnaire. A number of them shared detailed views on the lay judge system, which in itself is of considerable value. Naturally, the authors as empirical sociologists are well aware of where the essential methodological difference lies between data analysis relying on a sample that represents the population or one that is eventually formed from that. For this very reason, an alternative solution was contemplated in earnest. For the sake of partial explanatory force, all the data acquired during research would

[6] BOTOS, Gábor : Az esküdtbíróság újbóli bevezetéséről Rendészeti Szemle, 1992/2. pp. 11-51.
[7] Decision No. 30/2007. (V.24.) of the Hungarian Constitutional Court
Sections 122-128 of the Act No. CLXII of 2011 on the status and remuneration

be discarded and, thus, be left without further analysis. In the end, the authors arrived at the conclusion that, regardless of methodological limitations, the analysis of the archive of lay participation as a document of an era would still be completed. In the meantime, downsizing lay participation in the Hungarian justice system was already in progress and it is a point of view that this process can be regarded as 'forceful narrowing' or 'removal'. This, in turn, means that the research might well be the last report on the lay assessor system of the post-socialist period. In addition, due to the questionnaire-based research being thus rendered moot, additional research was conducted concerning lay participation at the end of 2016. It consisted of interviewing lay assessors, during which three former lay judges from Budapest, the capital, and seven from the country were encouraged to provide more detail on what the questionnaire-based research had been silent. Similarly, in order to refine the questionnaire answers collected from professional judges, interviews were held with professional judges who had been working with lay assessors for a longer period of time, one from Budapest and four from outside the capital.

Addressed and supported by similar empirical research into mixed tribunal systems, the status characteristics theory has led the authors to the assume that, despite statutory provisions ensuring equal rights, this specific problem-solving group is characterized by such an internal hierarchical relationship that discourages increased lay participation.

It is observed that political intentions were gradually overridden by the organizational sociological element in parallel with the consolidation of the communist rule. It may even be stated that the latent function defeated the manifest one. This is especially intriguing considering that the political system formally attempted to prove its legitimacy by presenting itself as a system that had enforced "people's power". One of the tenets of the ruling ideology was that politics were directed in favor of the "people" symbolized by those working in manual professions. This meant this "people" would send their representatives to both the legislative and the judicial branches. The name attached to such lay participants ("popular lay assessors") also refers to this ideological component.

The authors' hypothesis was that social changes, especially those concerning the established set of values, that took the place of the ceasing ideological and political pressure created favorable conditions to dilute asymmetry. It is true even if the natural landscape of the most essential structural factor, the judicial decision itself, has remained unchanged. There is still not any "qadi judicial practice"[8] in the working, but formalized (rational) law, in which the judicial decision remains a professional decision. Also, this decision is made to adjust itself to the normative order with a law enforcement or legal nature,[9] regarding the consequences of which the ensuing responsibility is shouldered by the professional judge. Naturally, this would not exclude a stronger expression of the lay contributor's participatory needs.[10] However, the

[8] Max Weber's legal sociological work presented this ideal type of justice in contrast with rational, formal and predictable justice. It is characterized by Károly Mannheim as adjudication where "deliberation happens case by case and the decision on the merits is based on situation and legal sense" (MANNHEIM, Károly: Tudásszociológiai tanulmányok (Budapest: Osiris 2000) p. 337; See also David M. TRUBEK: "Max Weber on Law and Rise of Capitalism." Wisconsin Law Review 1972/3. pp. 720-753; Martin SHAPIRO: "Islam and Appeal" California. Law Review 1980/1. pp. 350-381.
Jerome Frank viewed the jury institution as the "qadi" element of the American justice system. However, he saw such an element even in the judicial function. Others (e.g. Roscoe Pound) regarded administrative tribunals as the embodiment of qadi-justice. See Julius PAUL: "The Legal Realism of Jerome N. Frank: A Study of Fact-Skepticism and the Judicial Process" (The Hague, Nijhoff 1959) pp. 104-105; Sherman A. JACKSON: "Islamic law and the state: the constitutional jurisprudence of Shihāb al-Dīn al-Qarāfī" (Leiden; New York: E.J. Brill 1996) p. 147.

[9] The authors regard Kulcsár's relevant conclusions as acceptable to this day. See KULCSÁR, op. cit., pp. 80-84.

[10] See KULCSÁR, op. cit., 84-88. He correlates this partly with institutional factors and partly with the concept of lay "role perception".

authors may have difficulty turning a blind eye to the effect of the condition (or weakness) of the civil society that influences this act of expression.

Notwithstanding, this research resulted in acknowledging a more elevated level of lay activity compared to the former period in certain fields. The increase in activity can only be proven with respect to formulating and representing opinions that are different from those of the professional judges. However, due to the lack of data-based comparability, only suppositions can be supported in other fields. Lay judges today dare state their opinions in a significantly higher percentage. This, of course, does not considerably alter the fact that the scene is still dominated by professional judges who, depending on their role perceptions ensure procedural rights of lay participants. However, as a general rule, professional judges struggle to maximize their own autonomy and independence when it comes to a decision on the merits of a case. Based on the findings of the two empirical studies, the authors attempted to typify judicial attitudes as well. The applied types (fairness, fair aristocratism, self-distancing aristocratism and ambivalence) are thought to adequately classify professional judges that regard lay judges in different ways.

However, the authors may most certainly state that, compared to the general opinion found in offensive names attributed to lay assessors, the lay judge system shows a positive picture. While the selection process that ignores representativity may give rise to trenchant criticism,[11] lay participation (both in the procedural and decisional stage) can be established as quite favourable under organizational sociological circumstances that are necessarily characteristic of mixed tribunals.

The findings of the completed professional and lay judicial questionnaires demonstrate that lay judges are not theatrical extras in the trial and decision-making process. Their activities, often acknowledged even by professional judges, contribute to the functioning of the justice system in a more active way than is suggested by the general opinion about them.

[11] Badó Attila - Feleky Gábor - Lőrinczi János: Reprezentativitás a magyar ülnökrendszerben (2016) Egy empirikus vizsgálat alapkérdése I. MTA Law working papers 16, pp. 1-18.