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Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals

Sanja Kutnjak Ivković†

Introduction

Lay participation in the administration of justice, be it in the form of juries, mixed tribunal assessors, magistrates, or lay courts, is a cornerstone of democratic government. Kalven and Zeisel, two prominent jury scholars, describe the Anglo-American jury as:

[A] remarkable political institution. . . . It recruits a group of twelve laymen, chosen at random from the widest population; it convenes them for the purpose of the particular trial; it entrusts them with great official powers of decision; it permits them to carry on deliberations in secret and to report out their final judgment without giving reasons for it; and, after their momentary service to the state has been completed, it orders them to disband and return to private life.1

However, whereas juries have both been glorified and heavily scrutinized, lay judges, who serve jointly with professional judges on mixed tribunals, uniformly generate negative comments: “puppets with strings in the hands of the professional judges” in Germany;2 “bodyguards for the [professional] judge” in Russia;3 “ears of the deaf—like furniture or decora-

† Associate Professor, College of Criminology & Criminal Justice, Florida State University; skutnjak@fsu.edu.
40 Cornell Int’l L.J. 429 (2007)
tion" in China; and "two heads of cabbage behind which is hidden the professional judge" in Croatia. If mixed tribunals have been mocked to the point that these criticisms are becoming entrenched in the folk culture, why have they been preserved as crucial elements of the legal systems across Europe for many centuries? Do these criticisms have merit? How do mixed tribunals actually operate? What do mixed tribunals signify for lay participation across the world?

As many countries, such as Russia, Spain, Japan, and South Africa, are in the process of reviving lay participation, this article seeks to provide qualified answers to these questions, expand our understanding of the phenomenon of lay judges in mixed tribunals, and help establish the key elements for successful lay participation in legal decision-making. Part I identifies the basic characteristics of mixed tribunals. Part II describes the legal framework within which mixed tribunals operate. Part III provides a theoretical underpinning for mixed tribunals. Part IV explores the interaction between lay and professional judges serving on these tribunals. Part V presents lessons derived from the actual operation of mixed tribunals. The article concludes with suggestions for enhancing the system of mixed tribunals.

I. Learning about the Players: Mixed Tribunals in a Nutshell

Mixed tribunals have been an integral part of the court system in the Western democracies, such as Germany, Austria, Denmark, Russia, Spain, Japan, and South Africa. The article seeks to provide qualified answers to these questions, expand our understanding of the phenomenon of lay judges in mixed tribunals, and help establish the key elements for successful lay participation in legal decision-making. Part I identifies the basic characteristics of mixed tribunals. Part II describes the legal framework within which mixed tribunals operate. Part III provides a theoretical underpinning for mixed tribunals. Part IV explores the interaction between lay and professional judges serving on these tribunals. Part V presents lessons derived from the actual operation of mixed tribunals. The article concludes with suggestions for enhancing the system of mixed tribunals.

11. See, e.g., Ingrid Frassine et al., Kapitel: Österreich, in DER LAIENRICHTER IM STRAFPROZESS 87 (Gerhard Casper & Hans Zeisel eds., 1979).
France,\textsuperscript{13} Finland,\textsuperscript{14} Norway\textsuperscript{15} and Sweden,\textsuperscript{16} as well as in the former socialist countries (and their legal successors), such as the former Czechoslovakia,\textsuperscript{17} the former German Democratic Republic,\textsuperscript{18} Hungary,\textsuperscript{19} Poland,\textsuperscript{20} the former Union of Soviet Socialist Republics,\textsuperscript{21} and the former Yugoslavia.\textsuperscript{22} The most recent addition of mixed tribunals to a legal system took place in South Africa.\textsuperscript{23} The primary rationale for introducing mixed tribunals into the legal system is that lay participation will democratize the criminal justice process and enhance its legitimacy: lay participation promotes justice and equity,\textsuperscript{24} introduces community values and local knowledge,\textsuperscript{25} brings a fresh perspective,\textsuperscript{26} allows citizens to participate in the

\begin{itemize}
\item 19. See, e.g., Kálmán Kulcsár, Lay Participation in Organizational Decision Making, in Hungarian Sociological Studies 151 (Paul Halmos & Martin Albrow eds., 1972); Kálmán Kulcsár, People's Assessors in the Courts (1982).
\item 23. After decades of having mixed tribunals as a never-exercised option (pending approval from the Ministry of Justice, lay judges could have assisted the professional judge), South Africa amended the statute in 1991 (the magistrates at district courts now have the right to appoint zero, one, or two lay judges for the upcoming trial) and opened the doors to lay participation by easing the appointment process. This was done “in an attempt to involve the black majority in the all-white court system which was seen by many as illegitimate and unrepresentative.” Seligson, supra note 9, at 273. The argument was that the introduction of lay participants should result in the greater legitimacy of the court system, which, unfortunately, has not been achieved. See id.
\item 24. Id.
\item 25. See Klami & Hämäläinen, supra note 16.
\item 26. Id. at 15.
\item 27. See Kubicki, supra note 20; see also Kulcsár, supra note 19.
administration of justice,\textsuperscript{28} serves as a deterrent safeguard,\textsuperscript{29} and protects against potential tyranny by the government.\textsuperscript{30}

Mixed tribunals are heterogeneous groups that consist of lay judges and professional judges who jointly decide legal cases. Professional and lay judges sit together during trials, hear and examine evidence, and deliberate before making a decision. It is a unique form of lay participation because professional judges have an opportunity to “correct” the views of lay judges and explain the law; at the same time, lay judges have the opportunity to “correct” the professional judge’s view by bringing the fresh approach of an average citizen.\textsuperscript{31} Lay judges are common citizens, expected to possess neither legal education nor training in legal decision-making. Some countries, such as France,\textsuperscript{32} Germany\textsuperscript{33} and Norway,\textsuperscript{34} explicitly prohibit certain occupations with legal education or experience—professional judges, prosecutors, attorneys, or police officers—from serving as lay judges to preserve this common lay element. Many countries, such as Croatia\textsuperscript{35} and Germany,\textsuperscript{36} also require that lay judges possess non-legal specialized skills, such as a degree in educational studies or parenting experience, to serve in select types of cases, primarily those dealing with juvenile defendants.\textsuperscript{37} Norway, for example, allows the court president to appoint expert judges in complex cases of economic crimes.\textsuperscript{38}

There is substantial variation in the size and composition of mixed tribunals across the world.\textsuperscript{39} If countries incorporate mixed tribunals of different sizes in their legal systems, then the tribunal size is proportional to the severity of the statutory punishment. Typically, as in Croatia and Germany, the less serious cases are typically assigned to small mixed tribunals composed of one professional judge and two lay judges, whereas the

\begin{itemize}
  \item \textsuperscript{28} Yue, supra note 4.
  \item \textsuperscript{29} See, e.g., Maria Borucka-Arctowa, \textit{Citizen Participation in the Administration of Justice: Research and Policy in Poland}, in \textit{ZÜR SOZIOLOGIE DES GERICHTSVERFAHRENS [SOCI OLOGY OF THE JUDICIAL PROCESS]} 286 (1976); Kulcsár, supra note 19.
  \item \textsuperscript{30} Bonnieu, supra note 13.
  \item \textsuperscript{32} See Bonnieu, supra note 13, at 562.
  \item \textsuperscript{33} See Perron, supra note 10, at 191.
  \item \textsuperscript{34} See Strandbakkken, supra note 15, at 243.
  \item \textsuperscript{35} See Kutnjak Ivković, supra note 5, at 66.
  \item \textsuperscript{36} See Machura, supra note 10, at 453; see also Perron, supra note 10, at 191.
  \item \textsuperscript{37} But see, e.g., Yue, supra note 4, at 55; Garde, supra note 12, at 109; Seligson, supra note 9, at 278.
  \item \textsuperscript{38} See Strandbakkken, supra note 15, at 244-45.
  \item \textsuperscript{39} France has mixed tribunals only for serious cases—five years of imprisonment or more—tried at the Cour d’Assises. See Bonnieu, supra note 13, at 559. The tribunal is relatively large, composed of three professional judges and nine lay judges. See id. Denmark has mixed tribunals at courts of first instance composed of one professional and two lay judges. See Garde, supra note 12, at 91. Sweden has one professional and three lay judges deciding criminal cases in the first instance. See Diesen, supra note 16, at 314. Finland has had a mixed tribunal in rural areas composed of one professional and seven lay judges since the Middle Ages, but a recent change reduced the size of the tribunal to one professional judge and three lay judges. See Pihlajamäki, supra note 14, at 159.
\end{itemize}
more serious cases are assigned to larger mixed tribunals. In some countries, such as Croatia and Norway, lay judges in large mixed tribunals outnumber professional judges, whereas in other countries, such as Germany, the number of professional judges is greater than or equal to the number of lay judges on the tribunal. Traditionally, a single professional judge decides the least serious cases to increase efficiency and cut costs. Offenses typically assigned to a single professional judge are punishable by fine or short-term imprisonment. Consequently, single professional judges handle most criminal cases.

Including mixed tribunals at the trial stage does not automatically guarantee lay participation at the appellate stage. For example, China provides professional judges with the exclusive authority to decide appeals and review capital cases. Similarly, Croatia assigns appeals to tribunals composed only of professional judges. Even though Sweden includes lay judges in appellate decision-making, it gives the majority vote to professional judges. Germany differentiates between two types of post-conviction reviews, and lay participation depends upon the type of review.

40. See Kutnjak Ivković, supra note 5, at 65 (describing Croatia); see also Perron, supra note 10, at 182 (describing Germany).
41. See Kutnjak Ivković, supra note 5, at 65.
42. See Strandbakken, supra note 15, at 225.
43. The Croatian grand mixed tribunal, assigned to try cases for which the maximum sentence exceeds fifteen years of imprisonment, is composed of two professional and three lay judges. See Kutnjak Ivković, supra note 5, at 63. The Norwegian grand mixed tribunal, assigned to cases concerning felonies punishable with imprisonment of more than six years, is also composed of two professional judges and three lay judges. See Strandbakken, supra note 15, at 230.
44. See Perron, supra note 10, at 188-89.
45. The Strafkammer court at the Landgerichte is composed of two or three professional judges and two lay judges. See id. at 188.
46. For example, Croatia determines that the jurisdiction of the single professional judge is crimes punishable by fine or imprisonment of up to three years. See Sanja Kutnjak Ivković, Lay Participation in Criminal Trials: The Case of Croatia (1999); see also Yue, supra note 4 (reporting that the single professional judge tries minor cases).
47. Denmark assigns cases for which the potential penalty is only a fine or a warning to the professional judge, and assigns any cases that potentially carry imprisonment to the mixed tribunal. See Garde, supra note 12, at 87.
48. See, e.g., Perron, supra note 10, at 182 (reporting that Germany assigns a single professional judge to offenses that require up to two years of imprisonment); see also Kutnjak Ivković, supra note 46 (reporting that Croatia assigns a single professional judge to offenses that require up to three years of imprisonment).
49. In Denmark, single professional judges decide about 60,000 criminal cases every year, and, out of these, approximately 10,000 result from the abbreviated trial following a confession. See Garde, supra note 12, at 87. Mixed tribunals decide only 11,000 criminal cases every year. See id. Similarly, a single professional judge in Germany decides 86% of the criminal cases in the first instance, while mixed tribunals only decide 14% of the cases. See Perron, supra note 10, at 188.
50. See Yue, supra note 4, at 51.
51. See Kutnjak Ivković, supra note 5, at 65.
52. See Diesen, supra note 16, at 314.
53. If the Landgericht is the court of second instance, then lay judges do not participate in the Revision, which only addresses legal issues, but they do participate in Berufung, which addresses both factual and legal issues. See Perron, supra note 10, at 182.
Denmark is one of the countries that provide the greatest degree of lay involvement at the appellate level, as three professional judges and three lay judges comprise each appellate tribunal.54

II. Setting the Stage: The Mixed Tribunal's Legal Environment

Most countries55 that incorporate mixed tribunals derive their legal systems from the civil law tradition.56 The well-established differences between civil law and common-law traditions57 create legal environments distinct not only in terms of substantive and procedural criminal law, but also in terms of legal education and status of the legal profession. Despite many disparities in the criminal procedure rules across the civil-law countries themselves, there are also numerous similarities that directly affect mixed tribunals.

First, in civil law countries the defendant's confession does not circumvent the trial.58 Rather, these countries treat the confession as an important, but not determinative, piece of evidence.59 Members of the mixed tribunal will evaluate the confession together with other evidence. However, a defendant's confession may shorten the duration of the trial,60 lead toward an abbreviated trial,61 or result in summary judgment.

Second, unlike common law systems, in which a defendant may select between a bench or jury trial, civil law systems, such as Croatia,62 Germany,63 and Norway,64 traditionally do not allow defendants to choose the decision-maker. However, if the procedural rules allow an abbreviated trial following a confession of guilt, as in Denmark, the parties may request a trial by a mixed tribunal, instead of a bench trial, in lieu of the jury trial.66
In Norway, if the prosecutor requests and the defendant consents, then the corroborated confession of a crime punishable by less than ten years imprisonment will lead to a summary judgment instead of trial by a mixed tribunal. Unlike defendants, prosecutors effectively decide whether a single professional judge or a mixed tribunal decides the case because prosecutors control which charge to file and with which court to file it. Suggesting a punishment to the courts will not affect whether a single professional judge or a mixed tribunal decides the case, however, because the courts need not follow the punishment that the prosecutor requested in the indictment.

Third, compared to the common-law tradition, the civil-law tradition requires decision-makers to perform more active roles in criminal cases. The mixed tribunal functions as an active inquisitor who seeks evidence and controls the nature and objectives of the inquiry. Even in Norway, whose legal system is grounded in a mixture of adversarial and inquisitorial criminal procedure, the mixed tribunal is expected to be active. Specifically, the court "has an independent duty to ensure that the facts of the case are clarified . . . [and] may decide to obtain new evidence." A different question, addressed later in this paper, and common to all systems using mixed tribunals, is whether all members of the tribunal de facto share this burden equally.

Croatia's criminal procedure law of 1993 illustrates a typical continental European system of mixed tribunals. After the investigative judge declares the indictment valid, the professional judge determines the trial date and summons the defendant, witnesses, and expert witnesses. The professional judge controls the trial and has the responsibility of providing for a thorough examination of the case. The trial officially begins with the reading of the indictment. If necessary, the professional judge offers an additional explanation of the charges. The defendant is then asked to give a statement. The defendant's confession does not circumvent the trial because the tribunal still must examine other evidence and question witnesses and expert witnesses. The professional judge questions the defendant first, and other members of the tribunal, the prosecu-

68. See, e.g., Perron, supra note 10, at 182. However, prosecutorial decisions may be driven more by the nature and number of appeals subsequently available than by the extent to which lay judges participate in the tribunal. See id. at 189.
69. The courts must conform to the range of available punishments predetermined by the statute and to the statutory decision-maker, such as a single judge, small mixed tribunal, or large mixed tribunal.
70. See REICHEL, supra note 57.
71. See Strandbakken, supra note 15, at 229.
72. See Narodne novine [Criminal Procedure Law] No. 38/93, § 278 (Croatia).
73. See id. §§ 279–86.
74. See id. § 292.
75. See id.
76. See id. § 315.
77. See id. § 316.
78. See id.
tor, the victim, and the defense attorney may subsequently question the defendant either directly or through the professional judge. The professional judge's interrogation is the dominant one—the "fundamental examination"—and the questioning by other participants is prescribed to be "supplementary." The trial proceeds with the examination of witnesses and the presentation of material evidence. The tribunal not only determines which evidence will be examined and which witnesses will be heard (and in which order), but also performs the actual examination or questioning. After the tribunal determines that the examination of evidence is complete, the parties give their closing statements and the tribunal declares the trial over. The parties leave the courtroom and the tribunal deliberates and votes. The decisions, covering both factual and legal issues, are made after oral discussion. Each tribunal member's vote carries the same weight, regardless of whether the member is a lay or professional judge, and the presiding judge votes last. A majority vote suffices for a valid legal decision.

III. Predicting the Group Dynamic: Status Characteristics Theory

Berger and colleagues developed status characteristics theory to explain interaction in small task-oriented groups. The theory states that individuals in task-oriented groups develop expectations about the potential contributions of group members toward the resolution of the task. The bases for these expectations are status characteristics, attributes whose culturally specified meaning makes them potentially relevant to the performance of the group's task. Some of the status characteristics may be of direct relevance to the successful completion of the task; such characteristics are called specific status characteristics. Some status characteristics may be related to the task indirectly, in which case they are called diffuse status characteristics.

79. See id.
80. See id. § 322.
81. See id.
82. See id. §§ 339-44.
83. See id. § 344.
84. See id. § 116.
85. See id. § 116.
86. See id.
90. See Bonito, supra note 88.
91. See Balkwell, supra note 89.
Mixed tribunals are task-oriented groups and their task is legal decision-making, that is, deciding the defendant's guilt and, if appropriate, determining the sentence. Professional and lay judges in mixed tribunals differ in terms of two specific status characteristics: legal education and legal decision-making experience acquired through systematic training and regular practice. Professional judges in mixed tribunals 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 after passing the bar exam. Lay judges are neither educated in law nor experienced in resolving legal issues. Typically, they are elected for a period of four years and only occasionally serve as lay judges. Because lay judges may serve more than once during their mandate, they may possess some experience in legal decision-making. However, their experience is gathered ad hoc and only sporadically, lacking systematic training.

Status characteristics theory suggests that, if the members of the group differ in regard to a specific status characteristic, that specific characteristic will become activated and will thereby be an important factor in the group dynamic.\(^9\) Because group members can differ along more than one characteristic, be it specific or diffuse, the theory describes how members combine all status information on multiple characteristics to form aggregate performance expectations and indicates that specific status characteristics will carry greater weight in the formation of aggregate performance expectations than diffuse status characteristics.\(^9\) Thus, according to the aggregation hypothesis,\(^4\) the performance expectation and power of each group member will include information about all status characteristics, be they specific or diffuse, but different weights will be attached to them.

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 surrounding the judges' ability to decide legal cases than diffuse status characteristics, such as gender or age. For example, it seems plausible that a relatively inexperienced young female professional judge will have a lower status than an experienced older male professional judge. However, the relative strength of specific status characteristics suggests that the status of either of these two professional judges in the tribunal would be higher than the status of, for example, an older male physician serving as a lay judge.

A lay judge's non-legal education may have an impact on his or her status in the tribunal. Mudd argues that "thinking like a lawyer" has two important components.\(^9\) The first component is critical thinking, which involves clarity, precision, and quality of thinking not "different in kind

\(^92\) See id.
\(^93\) See id.
\(^94\) See id.
\(^95\) See John O. Mudd, Thinking Critically About "Thinking Like a Lawyer", 33 J. LEGAL EDUC. 704 (1983).
from thinking like a physicist or philosopher." The second component is the ability to use and practice these skills to solve real legal problems. Highly educated lay participants are likely better to deal with the first component of thinking like a lawyer—critical thinking—which involves a number of skills ranging from the ability to define a problem to the ability to draw appropriate conclusions. Not only are the highly educated lay judges more likely to understand the law when it is explained to them, but they will also be better able to define legal problems and provide relevant hypotheses.

The second component of thinking like a lawyer, the ability to use and practice these skills to solve real legal problems, ultimately differentiates professional judges from educated lay judges. Although educated lay judges are likely to understand the legal concepts and rules once explained to them, only lawyers receive systematic training in defining a legal problem, selecting factors important for the definition and resolution of the problem, forming relevant hypotheses, and drawing appropriate conclusions. Their legal skill is further enhanced by the opportunity to regularly practice legal decision-making in trials and thereby amass considerable experience.

The task of making legal decisions, especially in Roman law countries, substantially relies on the knowledge of existing legal rules and their application to a particular case, which makes legal education crucial. Whereas sentiments or community values might lead jurors to nullify the law if they believe that its application will result in gross injustice, mixed tribunals decide within the framework of existing legal rules and must provide reasons for their decision in a written verdict. The verdict, written by the presiding professional judge, may be reviewed on appeal, which may be initiated by either party, regardless of whether the decision was an acquittal or conviction. A serious violation of legal rules, either procedural or substantive, provides grounds for appeal, annulment of the verdict, and the return of the case for trial de novo.

Knowledge of law is particularly important for mixed tribunals, but knowledge of other fields or extensive life experience may be important for resolution of cases as well. Lay judges who have direct specialized knowledge of other non-legal fields crucial for decision-making in a particular case, such as physicians in cases involving assault or murder or car

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96. Id. at 706.
97. See id. at 704.
98. See PAUL L. DRESSEL & LEWIS B. MAYHEW, GENERAL EDUCATION: EXPLORATIONS IN EVALUATION 179-80 (identifying five critical thinking skills: (1) the ability to define a problem; (2) the ability to select pertinent information for the solution of the problem; (3) the ability to recognize stated and unstated assumptions; (4) the ability to formulate and select relevant and promising hypotheses; and (5) the ability to draw conclusions validly and to judge the validity of inferences).
99. See Mudd, supra note 95.
101. See id.
102. See id.
mechanics in cases involving a traffic accident, will probably have a higher status in the tribunal, their comments will be deemed more influential, and they will be provided with more floor time. The Croatian legal system currently recognizes the specific contributions that such expert lay judges can make in certain areas. For example, Croatian law requires in criminal cases concerning juveniles that lay judges be selected from the ranks of professors, teachers, and other persons with experience in juvenile education. 103

Status characteristics are important not only because of the different expectations associated with each member, but also because they have consequences for group behavior. Groups tend to allocate more or less floor time to certain members in direct relation to how useful the expected contribution inferred from the member's status is. 104 Members with high status in a group will be given more opportunities to contribute, and their contributions are more likely to receive favorable reactions from others. 105 Prior studies on the interaction in small groups clearly support the status characteristics theory, as individuals with higher status are more likely to interrupt, be successful in interrupting when they interact with lower status individuals, 106 speak first during interactions, 107 and talk quickly 108 and loudly. 109

Empirical studies 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. 110 Thus, the benefits gained from higher status exceed the simple floor time phenomenon. Even when high and low status individuals behave in a similar way, higher status individuals are evaluated more positively. 111 Meeker and Weitzel-O'Neill argue that this happens because low status members are perceived not only as less competent, but also as lacking legitimacy if they contribute more than expected from an individual of their status. 112

103. See Narodne novine [Juvenile Courts Law] No. 111/97, § 40 (Croatia).
104. See Balkwell, supra note 89.
105. See Berger (1980), supra note 87.
110. See Sorrentino & Boutillier, supra note 108; see also Linda L. Carli, Gender, Status, and Influence, 8 Advances in Group Processes 89 (1991).
High status members are expected to further enhance their status, while an attempt by low status members to increase their status is not viewed favorably. The only exception is when a leader explicitly puts low status members in a leadership position or when low status members show a desire to help the group resolve the task instead of achieving their own goals.\textsuperscript{113}

Consistent with the status characteristics theory, professional judges possess high specific status characteristic and a higher status on the tribunal. They are expected to be more competent, lay judges will evaluate them as more competent, and the professional judge actually will perform better and more frequently in achieving the resolution of the group task than lay judges. An important caveat is that the professional judge's status is partially predetermined by law, which requires that presiding professional judges lead and coordinate trials.\textsuperscript{114} That is, the institutional framework mandates that lay judges have less floor time or opportunities to participate, and, when they do participate, their contribution will be considered of lesser importance than the contribution made by professional judges.

According to the status characteristics theory, high status members in small groups, such as professional judges in mixed tribunals, are more influential than low status members.\textsuperscript{115} This influence can be exerted in two ways: resolving disagreements in the direction of their initial opinion and being selected as leaders. Berger and colleagues explicitly hypothesize that high status members in small groups are expected to wield more influence when disagreements occur, not because of the strength of the argument, but because of the power of the argument's source, which leads toward resolution of disagreements in their favor.\textsuperscript{116} Another consequence of this influence is that high status members, such as professional judges in mixed tribunals, frequently will be selected as leaders.\textsuperscript{117} This suggests that professional judges, statutorily placed in a leadership position during trials, also will be expected to take a leadership position during deliberations.

IV. Exploring Mixed Tribunals: The Reality Check

How frequently do lay judges actively participate by providing their opinions, bringing community values, disagreeing with the professional judge, or protecting the innocent from government tyranny? Are lay judges successfully able to perform all of these idealized roles?

Empirical studies suggest that lay judges were neither perceived as very active during trials and deliberations, nor were their contributions evaluated as important. Based on estimates and observations of trials, Kubicki and Zawadzki\textsuperscript{118} reported that two-thirds of lay judges surveyed in

\begin{itemize}
\item \textsuperscript{113} See Carli, supra note 110.
\item \textsuperscript{114} See id. at 91.
\item \textsuperscript{115} See id.
\item \textsuperscript{116} See Berger, supra note 87.
\item \textsuperscript{117} See Carli, supra note 110.
\item \textsuperscript{118} See Kubicki, supra note 20.
\end{itemize}
Poland did not ask any questions during trials. Kulcsár\textsuperscript{119} wrote that at least one-half of lay judges in Hungary failed to make comments of merit;\textsuperscript{120} moreover, only one of eleven lay judges in Poland read the case file.\textsuperscript{121} Similarly, Croatian lay judges, professional judges, state prosecutors, and defense attorneys all reported that lay judges asked questions "very infrequently" or "never."\textsuperscript{122} Furthermore, when asked about the importance of the lay judges' questions, the majority of lawyers perceived them to be "somewhat important" or "not important at all."\textsuperscript{123}

Professional judges surveyed in the Croatian study reported that lay judges only infrequently made comments during deliberations and that those comments were evaluated as only somewhat important, whereas lay judges surveyed in the same study reported making comments more frequently.\textsuperscript{124} Not surprisingly, lay judges and professional judges' perceptions regarding the frequency of lay judges' comments during deliberations were different.\textsuperscript{125} When asked about major problems related to lay judges' comments, the majority of professional judges did not blame lay judges for failing to follow the trial carefully, for their lack of interest in participation, or for their inability to understand evidence. Rather, they attributed problematic lay judge commentary during deliberation to the lay judges' lack of legal knowledge or their lack of understanding of legal norms.\textsuperscript{126} In other words, the greatest problem, according to the surveyed professional judges, is the very essence of "lay" in lay judges—their lack of legal knowledge.

Quite expectedly, professional judges dominated deliberations,\textsuperscript{127} lay judges rarely disagreed with professional judges,\textsuperscript{128} and, whenever disagreements did occur, it was the lay judges who changed their opinions to resolve disagreements.\textsuperscript{129} According to professional and lay judges surveyed in the Croatian study, lay judges disagreed with professional judges "in only a few cases" or "never."\textsuperscript{130} In the few cases in which they did disagree, it seems that lay judges rarely exercised their right to outvote professional judges. Diesen reports that lay judges surveyed in Sweden outvoted the professional judge in only one to three percent of all criminal cases.\textsuperscript{131} Machura writes that less than one-fifth of lay judges in both Bochum and Frankfurt, Germany reported stating an opinion different

\textsuperscript{119} See Kulcsár, supra note 19.
\textsuperscript{120} See id.
\textsuperscript{121} See Kubicki, supra note 20.
\textsuperscript{122} KUTNJAK IVKOVIC, supra note 46.
\textsuperscript{123} See id. at 460–61.
\textsuperscript{124} See id.
\textsuperscript{125} See id.
\textsuperscript{126} See id.
\textsuperscript{127} See Kubicki, supra note 20; see also Diesen, supra note 16.
\textsuperscript{128} See, e.g., Görlitz, supra note 10; KLAMI & HAMALÄINEN, supra note 16; KUTNJAK IVKOVIC, supra note 46; Diesen, supra note 16; Kubicki, supra note 20; Machura, supra note 10.
\textsuperscript{129} See, e.g., Casper & Zeisel, supra note 10; Frassine, supra note 11; KUTNJAK IVKOVIC, supra note 5.
\textsuperscript{130} See KUTNJAK IVKOVIC, supra note 46.
\textsuperscript{131} See Diesen, supra note 16, at 314.
from the professional judges' during deliberations.¹³² Professional and lay judges in South Africa also report that disagreements are rare.¹³³

Most studies reported that the majority of court decisions, sometimes up to ninety-five percent, were unanimous verdicts.¹³⁴ It appears 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 tribunal members to accept their opinion:

A detailed analysis of the data collected by Casper & Zeisel and Renning 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.¹³⁵

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 little discordance they have usually related 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 interviews confirmed, however, that lay judges do influence judicial decisions to a certain extent.¹³⁶

These findings support the basic status characteristic theory propositions and provide evidence of the impact of the legal framework: professional judges dominate deliberations and their voices are more powerful than lay judges' voices are.

At the theoretical level, a key diffuse status characteristic is the lay judges' experience (its extent and type). Arzt reports that the longer a lay judge participates in mixed tribunals, the less likely he or she will be to influence the outcome.¹³⁷ Kutnjak Ivković examines gender differences between female and male professional judges, and between female and male lay judges, regarding perceived lay judges' frequency of participation in trials and deliberations, importance of their contributions, competence to make decisions regarding factual and legal issues in the cases, and strength of their influence through disagreements with professional judges' during deliberations.¹³² Professional and lay judges in South Africa also report that disagreements are rare.¹³³

¹³² See Machura, supra note 10, at 462.
¹³³ See Jeremy Seekings & Christina Murray, Lay Assessors in South Africa's Magistrates' Courts (1998). The South African system of mixed tribunals is unique for several reasons. First, district court professional judges have the discretion whether lay judges will participate in a particular trial. See id. at 19. Second, lay judges only participate in the fact-finding part of the judgment. See id. at 19. Third, lay judges usually are not included in sentencing, and, even if they are, their role is only advisory. See id. at 125.
¹³⁴ See Klam & Hämäläinen, supra note 16.
¹³⁵ See Rennig, supra note 10, at 488.
¹³⁶ Perron, supra note 10, at 193.
judges). Kutnjak Ivković concludes that:

The results of this study suggest that gender, neither lay judges’ nor professional judges’, is not an important variable that influences the interaction between them: out of 16 situations examined, gender differences were statistically significant in only one situation (the professional judges’ evaluation of the lay judges’ competence to understand legal issues). In all other situations, the respondent’s gender within a group of lay judges or professional judges did not influence the answer selected.\(^{139}\)

Education in non-legal fields seems more relevant. Krystofek suggests that if lay judges possess specialized non-legal technical knowledge of the issues, then they usually express their opinion and tribunals tend to rely on their expertise.\(^{140}\) Croatian mixed tribunals indicate that when lawyers—state attorneys, defense attorneys, and professional judges—were asked about possible improvements to the existing system of mixed tribunals, they frequently advocated use of blue-ribbon lay judges.\(^{141}\) One of the professional judges elaborated:

Mixed tribunals are a positive feature of our legal system, but it is necessary to elect lay judges more selectively, and to dispatch them to tribunals depending on their education and occupation. For example:

- violent offenses - an average person from the community;
- white-collar offenses - persons who were employed in the same occupation;
- traffic offenses - persons who are drivers; and
- juvenile delinquency - persons whose occupations are related to children.\(^{142}\)

The overall impression gathered by lawyers was that lay judges made a minor contribution to resolution of the case\(^ {143}\) or that their impact on the case was minor.\(^ {144}\) For example, Kamhi and Ėalića report that over sixty percent of professional judges either did not believe that lay judges influence the verdicts, or believed that they influenced verdicts rarely, or, even worse, believed that legal decisions would have been “more correct” but for the lay judges’ participation.\(^ {145}\) Criticism of the mixed tribunal system was clearly expressed by a district attorney in Croatia:

The professional judge (educated, well paid, interested, ambitious, serious, conscientious, unburdened . . . ) is the only one competent to decide about the future of a criminal case. In mixed tribunals, the professional judge de facto tries the cases, signs, and is responsible for the verdicts. Current lay judges either do not influence the decision at all or influence it insignifi-


\(^{139}\) Id. at 150.

\(^{140}\) See Krystofek, supra note 17.

\(^{141}\) See Kutnjak Ivkovic, supra note 46.

\(^{142}\) Id. at 483.

\(^{143}\) See, e.g., Kamhi & Ėalića, supra note 22; Kulcsár, supra note 19; Seligson, supra note 9.

\(^{144}\) See Casper & Zeisel, supra note 10.

\(^{145}\) Kamhi & Ėalića, supra note 22.
cantly. There is no use keeping this current system.\textsuperscript{146}

However, lay judges expressed more positive views of their participation and its importance. For example, lay judges in Croatia were much more enthusiastic about mixed tribunals than any group of respondents with a legal background was.\textsuperscript{147} More than eighty-five percent of Croatian lay judges had positive opinions about mixed tribunals, as opposed to slightly over fifty percent of professional judges or state attorneys.\textsuperscript{148} The most frequent opinion about mixed tribunals was positive, but not highly enthusiastic ("somewhat favorable").\textsuperscript{149} The overwhelming majority of lay judges in the Polish study\textsuperscript{150} and ninety percent of lay judges in Kamhi and Ėalija’s study\textsuperscript{151} believed their influence on verdicts was substantial and beneficial. Lay participants in other studies also expressed a more positive view regarding their own abilities and role in tribunals than professional judges.\textsuperscript{152} However, the majority of lay participants may feel that their contribution to the tribunal is not crucial. Machura emphasizes that few German lay judges exert strong influence: "about two of three respondents [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."\textsuperscript{153}

Although the majority of professional lawyers—professional judges, state attorneys, and attorneys—in the Polish study supported the idea of lay participation, most were very critical of its actual implementation.\textsuperscript{154} Similarly, according to Lapaine, lawyers in Croatia support the idea of mixed tribunals, but are quick to emphasize that the system experiences many problems.\textsuperscript{155} Kovačević points out that these problems reduce the quality of the system, and that the lay element in mixed tribunals has only a formal value, not a substantive impact.\textsuperscript{156} While most authors who have written about mixed tribunals discuss negative characteristics of trials by mixed tribunals, they all agree that the political function of mixed tribunals is considerably more important, and that this function by itself justifies retaining the system.\textsuperscript{157}

\begin{thebibliography}{99}
\bibitem{146} KUTNJAK IVKOVIĆ, supra note 46.
\bibitem{147} See id.
\bibitem{148} See id.
\bibitem{149} Id. at 445.
\bibitem{151} See KAMHI & ĖALIJA, supra note 22.
\bibitem{152} See, e.g., KLAUSA, supra note 10; KUTNJAK IVKOVIĆ, supra note 46; Kubicki, supra note 20; Ljubanović, supra note 22.
\bibitem{153} Machura, supra note 10, at 464.
\bibitem{154} See Pomorski, supra note 150.
\bibitem{155} See Marko Lapaine, \textit{Neka razmisljanja o sudjelovanju sudaca porotnika u našem krvivom postupku}, 40 NASA ZAKONITOST 605 (1986).
\bibitem{157} See, e.g., Lida Bajić-Petrović, \textit{Odlike i osobenosti sudija porotnika u sudskoj praksi}, 2 PRAVO 48 (1985); Lida Bajić-Petrović, \textit{Učešće gradjana u ostvarivanju sudске funkcije u opštinskim i višim sudovima SAP Vojvodine}, 27 KOMUNA 43 (1985); Vladimir Bayer, \textit{Suci porotnici}, 5 ZBORNIK PRAVNOG FAKTETETA U ZAGREBU 142 (1955); Kovačević, supra note 46.
\end{thebibliography}
The idea of lay participation was supported among the respondents from the Polish study because they believed that lay participation brings the verdict into accord with public opinion, contributes to the improved performance of professional judges, and enhances the court’s independence. Klami and Hämäläinen’s study finds that professional judges from Finland and Sweden emphasized the latent function as the most important reason in favor of the system of mixed tribunals, whereas they placed very little importance on the safeguard role. Lay judges reported that the lay judges’ roles are important because “different groups [are represented],” “evidence [is] evaluated by different people,” they provide “knowledge about local issues . . . promoting confidence of people” and they represent the “principle of democracy.”

V. Jeopardizing the Quality of Lay Participation: Lessons Learned

Regardless of the specific advantages of lay participation envisioned by its proponents, even systems that look superb on paper might turn into a bitter disappointment. This section outlines some of the traditional problems with, and myths about, mixed tribunals.

First, the existing selection processes create pools of lay judges that represent their communities. The selection process typically involves compiling a list of potential candidates who fulfill the eligibility requirements and do not belong to occupations exempt or excluded from serving. In heterogeneous communities with a strong immigrant population, it is impossible to achieve the representative pool by imposing the traditional eligibility requirement of citizenship. Furthermore, politics strongly affect the selection process. In Norway, the nomination committee “usually picks most of the candidates from those who are also registered as members of political parties.” The potential outcome is clear overrepresentation of middle-class citizens and, consequently, significant underrepresentation of lower-class citizens. Machura describes the situation in Germany:

People between 40 and 50 years of age, men and the civil servants are overrepresented. In addition, the lower social classes are underrepresented among lay assessors. This is particularly true for industrial workers. There

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156; Davor Krapac, Neki osnovni problemi u vezi sa sudjelovanjem gradana-nepravnika u vršenju sudске funkcije prema odredbama novог kriviщог zakonodavstva SFRJ, 31 NASA ZAKONITOST 13 (1977); Lapaine, supra note 155.
158. See Pomorski, supra note 150, at 203.
159. See Klami & Hamalainen, supra note 16, at 55.
160. Id.
161. The selection process in France is atypical because it involves a modified version of the voir dire process used in jury systems. See Bonnieu, supra note 13.
162. See, e.g., Machura, supra note 10, at 453. Norway is one of the few countries that does not require future lay judges to be citizens. See Strandbakken, supra note 15, at 243.
163. See, e.g., Machura, supra note 10; Perron, supra note 10; Strandbakken, supra note 15.
164. Strandbakken, supra note 15, at 244.
is an overrepresentation of civil servants, who find greater support in being selected to be a lay judge. It has also been said, that in order to provide the courts with candidates really interested in being a lay judge, the authorities in charge actually select people with a judge-like social background and attitude.165

Another problem affecting the pool of eligible lay judges relates to the lay judges' tendency to avoid service. Studies on mixed tribunals in the former Yugoslavia166 suggest that, although a number of lay judges neither responded to the court's mail nor participated in trials, the process of dismissing such lay judges from duty had never been initiated.167 When faced with this problem, the courts relied on the lay judges who did respond and formed a pool of reserve lay judges.168 If the originally scheduled lay judges did not appear at court, the reserve lay judges would assume their positions in the tribunals. Although this solution was practical and helped courts maintain their caseloads without unnecessary delays, it contradicted the idea of involving as many citizens as possible in the criminal justice system.

What were the consequences of not dismissing lay judges who failed to respond to the courts' mail? The immediate consequence was that either the court session was postponed, which increased duration of the trial process, or the oral presentation of evidence to decision-makers was circumvented by reading transcripts of earlier testimonies. According to Bajić-Petrović, another long-term consequence was selective re-election of only those lay judges who responded to the courts' mail.169 Bajić-Petrović also argues that such behavior might influence the courtroom atmosphere by making the presiding professional judge less positive and less sensitive to lay judge opinions.170

Second, giving lay and professional judges' votes the same weight will give them equal influence during trials and deliberations. Although virtually all countries that incorporate mixed tribunals into their criminal justice systems formally state that professional judges and lay judges are equal during both trials and deliberations, the reality is different.171 Procedural rules typically put the professional judge in the driver's seat. For example, despite the seeming equality of tribunal members in Croatian mixed tribunals,172 the Croatian Criminal Procedure Law of 1993 assigns

165. Machura, supra note 10, at 453.
166. See Vladimir Ljubanović, Osnovna obilježja ostvarivanja i mogućih dalji pravci daljeg razvoja sudjelovanja gradjana u krivōnom sudjenju, 38 NASA ZAKONITOST 1315 (1984); Bajić-Petrović, supra note 157.
167. See, e.g., Bajić-Petrović, supra note 157, at 44 (suggesting that one out of five elected lay judges did respond to the court's mail).
168. See id.
169. See id.
170. See id.
171. See, e.g., Garde, supra note 12, at 94; Kutnjak Ivković, supra note 5, at 69; Machura, supra note 10, at 454; Perron, supra note 10, at 184; Yue, supra note 4, at 52.
172. See Narodne novine [Regular Courts Law] No. 66/91, § 13 (Croatia) (specifying the respective positions of the tribunal members and establishing the equality of professional judges and lay judges de jure during trial and deliberation).
additional rights and responsibilities to presiding judges, who may only be professional judges.  One of the key roles assigned to the presiding judge is the examination of defendants, witnesses, and expert witnesses. The presiding judge may only allow other members of the tribunal to speak and ask questions after the presiding professional judge has completed his or her own examination. For example, the examination conducted by a presiding professional judge is called the fundamental examination, whereas the examination conducted by all other parties—lay judges, prosecutor, defense attorney, victim, legal guardian, legal representative, co-defendants, and expert witnesses—is called the supplementary examination. The professional judge also has additional duties during deliberation, such as directing the discussion, the order of which is not predetermined by the law, and ensuring that the tribunal discusses all relevant issues comprehensively and thoroughly.

Furthermore, while the professional judges may access the case dossier, lay judges are either explicitly prohibited by law from having access, as in Germany, or do not have realistic opportunities to review the dossier even when allowed to do so, as in Croatia or Poland. Only one out of eleven lay judges in Poland report reading the dossier. Similarly, the majority of lay judges in Croatia report reading the dossier only occasionally. One of the problems with Hungarian mixed tribunals, as discovered by Kulcsár, was that they were not given sufficient time to study the dossier in advance. The dossier remains locked in the professional judges’ closet or stored somewhere in the court administration offices. Either way, assuming the lay judges understand their right to read the dossier ahead of trial, it requires substantial effort and determination to secure access to the dossier. Limited access to the dossier, as lay judges in Kulcsár’s study emphasized, creates obstacles for full and active participation.

Finally, even though procedural rules provide the professional judge with a more active trial role, if no other factors give professional judges a higher status, then the interaction between professional judges and lay judges during deliberations might assume more egalitarian tones. However, an additional factor that propels the professional judge into a leadership position is the legalistic nature of the decision. Decisions must be made in accordance with existing legal rules; decision-makers may not nul-

173. See Narodne novine [Criminal Procedure Law], supra note 72, § 292.
174. See id.
175. See id.
176. See id.
177. See id.
178. See id. § 116.
179. See, e.g., Machura, supra note 10; Perron, supra note 10.
180. See, e.g., KUTNJK IVKOVIC, supra note 46, at 71-72; Kubicki, supra note 20.
181. See Kubicki, supra note 20.
182. See KUTNJK IVKOVIC, supra note 46, at 71-72.
183. See Kulcsár, supra note 19.
184. See id.
185. See id. at 160.
lify the law, and both the defendant and prosecutor may appeal the mixed tribunals' decision for errors of fact and law. In sum, professional judges are "first among the equals" during legal decision-making because of their specific status characteristics, such as legal education and experience in deciding legal cases. Indeed, mixed tribunal research suggests that the primary and dominant bases of professional judges' high status and lay judges' low status are specific status characteristics, whereas diffuse status characteristics play a marginal role.

Third, giving lay judges the right to outvote the professional judge establishes them as important players in the courtroom. Although lay judges may disagree with and de jure outvote the professional judge, the reality is that this happens rather rarely, and the frequency of disagreement depends upon the stage of deliberation. The three key stages are: the lay judge forms a different opinion from the professional judge, the lay judge expresses the disagreement, and the lay judge must convince the majority of tribunal members to outvote the professional judge.

According to Croatian professional and lay judges, lay judges explicitly disagreed with professional judges during deliberations "in only a few cases" or "never." When they disagreed with professional judges, they rarely exercised their right to outvote them. In the domain of German courtrooms, Casper and Zeisel examine such disagreements and report that lay judges affected the verdict in approximately one percent of cases. Rennig reports that lay judges were several times less likely to persuade the professional judges than the other way around. Casper and Zeisel conclude that: "The traceable overall effect of the lay judges on the verdicts of the German criminal courts is indeed small. Whether it is politically negligible as well is difficult to say. The answer depends upon the goals one seeks to accomplish through lay participation." However, Machura argues that most work related to sorting out divergent opinions occurs before the official vote takes place because the emphasis in German courtrooms is on discussion and consensual decision-making. The professional judges' active role, mandated by procedural law, the informal practice of summarizing the case at the beginning of deliberation, and their higher status in the tribunal all contribute to an atmosphere in which the professional judges' voice commands discussion during deliberation. Rather than being outvoted, the professional judge may use these tools to persuade lay judges and gently guide them towards making the preferred decision.

187. See id at 104-5.
188. KUTNJAK IVKOViĆ, supra note 46, at 420-22.
189. See Casper & Zeisel, supra note 10, at 190.
190. See Rennig, supra note 10, 487.
191. Casper and Zeisel, supra note 10, at 189.
192. See Machura, supra note 10, at 463.
193. See KUTNJAK IVKOViĆ, supra note 46, at 297.
Fourth, allowing professional judges to make discretionary decisions that affect lay judges will result in fairer opportunities for lay judges. Research studies\textsuperscript{194} suggest that professional judges support the theoretical idea of lay participation, but most are critical of its practical implementation. Those who opposed the idea of lay participation in the Polish study argued that lay judges were more emotional and lenient, emphasizing that professional tribunals were preferable.\textsuperscript{195} Professional judges in the Bosnian and Herzegovinian study were critical of the lay judges for a wide variety of reasons, ranging from lay participants' lack of legal knowledge, general education, and interest, to the argument that mixed tribunals slowed down the trial.\textsuperscript{196} Ms. Sympathy and Mr. Prejudice might have been present as well because four out of ten lay judges reported they were sometimes influenced by their emotions in a case.\textsuperscript{197} Klami and Hämäläinen found that Finnish professional judges criticized lay judges for being emotional, having a lower standard of proof, being too easily persuaded by professional judges, and revealing trial-related secrets.\textsuperscript{198} If professional judges share such negative opinions of lay judges, then giving them power to make discretionary decisions about lay judges may result in less than optimal decisions. If professional judges do not regard lay judges' questions, comments or contributions as important,\textsuperscript{199} then they may be reluctant to offer lay judges adequate opportunities to express their views, especially when the law puts the professional judge in a leadership position.

Finally, another distortion may occur when hastily incorporating lay participation into legal decision-making for political reasons. As a desperate last-minute reformist attempt to legitimize white apartheid government in 1991, South Africa gave professional judges, who were mostly white, discretion whether to sit with lay judges, who were mostly black.\textsuperscript{200} Seligson reports that between 1991 and 1995 the overall number of cases across the country in which lay judges participated was "exceedingly low."\textsuperscript{201} Seekings and Murray surveyed and interviewed South African professional judges (magistrates) and concluded that they opposed mixed tribunals:

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

\textsuperscript{194} See, e.g., Lapaine, supra note 155; Pomorski, supra note 150.
\textsuperscript{195} See id. at 203.
\textsuperscript{196} See Kamhi & Ealija, supra note 22.
\textsuperscript{197} See id.
\textsuperscript{198} See Klami & Hämäläinen, supra note 16, at 58.
\textsuperscript{199} See Kutnjak Ivković, supra note 46, at 445.
\textsuperscript{200} See Seligson, supra note 9, at 278. The use of lay judges only was compulsory for the magistrates at regional courts trying murder cases. See Seekings & Murray, supra note 133, at 72.
\textsuperscript{201} Seligson, supra note 9, at 279.
recognize the high quality of this justice.\textsuperscript{202}

As South Africa demonstrates, giving professional judges discretion to determine whether they want lay judges to participate in legal decision-making may result in no lay participation at all. Such discretion becomes particularly troublesome if professional judges dislike lay judges or directly oppose the system of lay participation.\textsuperscript{203}

\textbf{Conclusion: Enhancing the System of Mixed Tribunals}

Passing a statute to introduce mixed tribunals is merely a first and necessary step towards successful lay participation. Many challenges and obstacles may arise during the period between the initial proposal for mixed tribunals and a well-developed mixed tribunal system.\textsuperscript{204} Several suggestions may make the experience less troublesome and improve the implementation of a mixed tribunal system.

First, adjust the expectations of what lay judges realistically contribute to the legal environment that requires them to make legal decisions jointly with a professional judge. Research studies suggest that lay judges are inactive during trial and deliberations,\textsuperscript{205} professional judges tend to evaluate lay judge participation as only "somewhat important,"\textsuperscript{206} and lay judges rarely disagree with professional judges.\textsuperscript{207} Overall, lay judges only occasionally exert direct influence on the decision.\textsuperscript{208} Thus, in reality, lay judges in most cases will neither introduce community values nor interpret the laws in less formalistic ways.

Should we be disappointed with these findings? The answer depends on our expectations. Borucka-Arctowa explained why only thirty percent of Polish lay judges asked questions during trials: 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."\textsuperscript{209} Thus, we should not expect lay judges to participate as frequently as professional judges, safeguard every defendant, or introduce community values in each case. Otherwise, we would seriously doubt the fairness and quality of the legal system, the way the system operates, and the quality of professional judges. Lay judges will participate and intervene if they deem it necessary. The mere presence of lay judges may deter professional judges from being arbitrary, corrupt, or biased. It may also compel profes-

\begin{itemize}
\item \textsuperscript{202} Id. at 100-1.
\item \textsuperscript{203} See id. at 100.
\item \textsuperscript{204} See Part V, supra.
\item \textsuperscript{205} See, e.g., KULCSÁR, supra note 19; KUTNJA\textsc{J} I\textsc{v}KOV\textsc{I\c{c}}, supra note 46; Kubi\textsc{c}ki, supra note 20.
\item \textsuperscript{206} See KULCSÁR, supra note 19, at 102; see also KUTNJA\textsc{J} I\textsc{v}KOV\textsc{I\c{c}}, supra note 46, at 346.
\item \textsuperscript{207} See Casper & Zeisel, supra note 10, at 152; see also Klami \& Hämäläinen, supra note 16, at 64; KUTNJA\textsc{J} I\textsc{v}KOV\textsc{I\c{c}}, supra note 46, at 420.
\item \textsuperscript{208} See, e.g., Casper & Zeisel, supra note 10; Kubi\textsc{c}ki, supra note 20.
\item \textsuperscript{209} Borucka-Arctowa, supra note 29, at 290.
\end{itemize}
ional judges to disclose the reasoning behind their decisions and discuss these reasons with the lay judges. Lay judges can serve as "a sounding board" for the professional judge or, as one black magistrate in South Africa noted, to keep professional judges "on their toes."

Second, accept and acknowledge that professional judges and lay judges' respective roles are not identical. Borucka-Arctowa argues that lay judges perform a social role, which complements the professional role of professional judges. Perceptions of lay judges in Polish mixed tribunals support this argument, as the majority of lay judges think they counteract the tendency of statutory law to ignore "the realities of life." Professional judges likely believe that judicial decision-making requires "no less than a law degree, a license to practice, and trial experience," emphasizing the professional over social roles, while lay judges likely believe that the social component carries more weight. Research studies show that professional judges consistently support the idea of mixed tribunals, but are doubtful about the actual contribution lay judges make.

The majority of professional judges in Croatia and Bosnia and Herzegovina reported that lay participation had no positive impact on the quality of legal decisions and that lay judges discussed peripheral details rather than the main issues. Similarly, even though Hungarian and Croatian professional judges expressed generally positive opinions of lay participation, professional judges also believed that there would have been fewer wrong decisions if there had been no lay participation.

Third, provide pre-trial preparation opportunities to lay judges and create incentives for them to participate in trials. The very courtroom atmosphere signals to the lay judges the degree to which their participation is expected and valued. A presiding professional judge who shows genuine interest in lay judges' contributions and makes reasonable efforts to solicit their input during trial and deliberation creates an environment in which lay judges feel more comfortable. Research studies demonstrate that "while the majority of lay judges who perceived that their comments would be evaluated [by a professional judge] as important . . . reported making

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210. Past and present experiences of powerless lay participants, such as the Revolutionary Tribunal in Paris from 1793 to 1795, the Volksgerichthof during the Third Reich, and comrades' courts in Cuba, indicate that this possibility—the deterrent function—may not be always exercised, especially when any lack of conformity with the professional judge would result in serious consequences for the well-being of lay participants themselves.

211. SEEKINGS & MURRAY, supra note 133, at 94.

212. Id.

213. See Borucka-Arctowa, supra note 29.

214. See, e.g., Kubicki, supra note 20.


217. See, e.g., KAMHI & EALIJA, supra note 22; KUTNJAK IVKOVIĆ, supra note 46.

218. See KUTNJAK IVKOVIĆ, supra note 46.

219. See KAMHI & EALIJA, supra note 22.

220. See id. at 60, 85.

221. See id.

222. See id.
comments frequently, the majority of lay judges who perceived that their comments would be evaluated as unimportant... reported that they made comments infrequently.223 Furthermore, lay judges unable to review the case dossier are in a disadvantaged position compared to a professional judge. Two studies of mixed tribunals in Hungary224 and Poland225 warned that lay judges are not given sufficient opportunities to read the case dossier in advance. Lay judges in Croatia reported that they rarely read the case dossier,226 but those who reported reading the case dossier were more likely to report that they asked questions more often as well.227 Creating realistic opportunities for lay judges to review the case dossier may provide for more thorough pre-trial preparation and jolt their interest in the case.

Fourth, educate lay judges about the upcoming trial and their role in the trial process. Lay judges receive neither systematic information about the flow of the trial nor their rights and duties during the trial. As some lay judges argued, “we were put on a playing field not knowing what game we were playing or what was hoped to achieve.”228 Consequently, until they gain some experience, novice lay judges are not familiar with the legal environment and what is expected from them. One South African lay judge eloquently stated:229

We did not know in the beginning what was expected of us... Because the courts were foreign to most of us as well as the rules and ethical behaviour in courts, most of us were very nervous the first time we were used as assessors... We as assessors were thrown into the deep end without any formal training or prior briefing.

England has required lay magistrates to take mandatory basic training since 1966230 and the United States231 requires pre-trial training for some magistrates or justices of the peace as well. Lay judges who serve in mixed tribunals should have a similar opportunity. The purpose of educating lay judges should not be to make them experts in law, as the “lay” element should be preserved. Rather, lay judges should obtain an introduction to basic legal concepts and their role in the particular tribunal. Lay judges familiar with their own rights during trials, such as asking questions or taking notes, and with a basic knowledge of criminal procedure will feel more comfortable in their roles and exercise their rights more frequently. Furthermore, if lay judges know the substantive criminal law at issue, then

223. See KUTNJAK IVKOVIĆ, supra note 46, at 417.
224. See Kulcsár, supra note 19.
225. See Borucka-Arciowa, supra note 29.
226. See KUTNJAK IVKOVIĆ, supra note 46, at 334.
227. See id. at 338.
228. SEEKINGS & MURRAY, supra note 133, at 45.
229. Id. at 112.
they will be more effective in discussing the particular case with the professional judge and more successful in winning any arguments that may arise.

In summary, although lay judges are not as active as professional judges during trials and deliberations, lay participation in mixed tribunals should not be abolished. On the contrary, lay participation should be stimulated and cherished. The key to successful lay participation is not only enacting laws introducing lay participation, but actually implementing the system in a way that provides lay participants with adequate opportunities to prepare for trial and stimulates them to participate in the decision-making process.