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HUNGARIAN MIXED COURT WITHOUT REPRESENTATIVITY. AN EMPIRICAL RESEARCH.*

Abstract: *A research group consisting of the authors of this study determined to carry out comprehensive empirical research on the opinions of lay assessors and professional judges in Hungary. Since such an endeavour had not taken place for more than fifty years, research was now aimed at detailing the system of lay judges. The commonly perceived negative view of lay assessor activities was thought to have been induced by myth, professional superiority and negative statements also similarly made in other countries rather than being based on the very views of those who actually had an insight as lay or professional judges into the effective functioning of the system. The objectives of that research were two-fold: not only did they intend to convey a full picture of the current lay assessor system based on specialist literature, legislation analysis and the opinions of lay and professional judges, but they also brought forward de lege ferenda proposals to the legislator if it was so desired. This study analyses one of the basic questions that goes to the heart of lay participation in dispensing justice: the problem of selection and representativity.*

Keywords: *professional judges, lay judges, Hungary.*

In the period of the single-party system, lay courts based on the Soviet model were in no way a reinforcement for lawyers that popular representation was serving any sensible purpose.¹ In Jackson and Kovalev's article, it is hypothesized that among the Council of Europe member states there is very little or no lay participation in the poorest states or in the legal systems that respect human rights

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¹ Kulcsár, Kálmán: A népi ülnök a bíróságon. Bp., Akadémiai K., 1971. p. 127.

least.² It is also highlighted that in former communist legal systems the reduction of lay participation takes place in response to the negative experience of the old regime and examples clearly show the above aspects may overlap from time to time. In his 2011 research paper on the reform of the Czech lay adjudication system,³ Michal Bobek also mentions the legislative reasons for whittling the lay element: their inactivity and modest participation coupled with technical difficulties arising from the functioning of the lay assessor system. In 2016, the Hungarian Ministry of Justice put forward a proposal to restructure the system of lay judges under the criminal procedure reform.⁴ In restructuring the Hungarian lay judge system, the legislator, which fervently supports reducing lay participation, makes reference to prior—albeit non-identified—negative experience, the tendencies that may be observed in other countries and how the development of the system diverted from the rule of law.⁵ Lay participation remains restricted to military and juvenile criminal proceedings. In practice, the reform leads to the consequence that the legislator will utilize lay judges' special (military, pedagogical or psychological) knowledge and not their general life experience. Arguments for the considerable curtailment of lay participation seem rather uncertain and reference to historic ties appears overwrought due to the similarly functioning mixed judicial system in various democratic states. Yet, this tendency is without a doubt in line with the expectations of a significant segment of the Hungarian legal community. It is therefore an open question whether there is a positive relationship between reducing lay participation and governmental intentions of restricting independent institutions or, rather, we are witnessing how legal lobbyists assert their will in legislation.

² JACKSON, John D. – KOVALEV, Nikolai P.: *Lay Adjudication in Europe: The Rise and Fall of the Traditional Jury*. *Oñati Socio-Legal Series*. 2016. 6/2.6. Retrieved 10 October 2016 from <http://ssrn.com/abstract=2782413>

³ BOBEK, Michal: *Judicial Selection, Lay Participation and Judicial Culture in the Czech Republic: A Study in a Central European (Non) Transformation*. *Research Paper in Law*. 2014. 3. 27. Retrieved 10 October 2016 from http://aei.pitt.edu/63516/1/researchpaper_3_2014_bobek.pdf

⁴ Draft legislation on the Hungarian Code of Criminal Procedure No. ME/163/2015. *Előterjesztés a Kormány részére az új büntetőeljárási törvény szabályozási elveiről*. (A proposal for the Government on the legislative principles of the new code of criminal procedure) Drafted on 30 January 2015 in Budapest by the Ministry for Justice, 2015. p. 32. Retrieved 10 October 2016 from <http://www.kormany.hu/download/1/21/40000/20150219%20IM%20el%C5%91terjeszt%C3%A9s%20az%20C3%BAj%20b%C3%BCntet%C5%91elj%C3%A1r%C3%A1si%20t%C3%B6rv%C3%A9ny%20szab%C3%A1lyoz%C3%A1si%20elveir%C5%91l.pdf>

⁵ “The 1949 lay judge system that became the general scene in criminal cases arose from the consideration that the totalitarian state apparatus intended to oppress independent administration of justice. Therefore, due to its original purpose and regarding the first sentence of Article U(1) and Article R(3) of the Fundamental Law, the system cannot be further tolerated in its unaltered form under rule-of-law principles. Instead of generally involving lay assessors, there is a need for determining the case types in which effective and fair justice is in fact promoted by social empowerment limited by special criteria.”

Without being aware of the objectives of the reform, a research group of the authors of this study had determined to carry out comprehensive empirical research on the views of lay assessors and professional judges in Hungary. Since such an endeavour had not taken place for more than fifty years, research was now aimed at detailing the system of lay judges. The commonly perceived negative view on lay assessor activities was thought to have been induced by myth, professional superiority and negative statements also similarly made in other countries rather than being based upon the views of those who actually possessed an insight as lay or professional judges into the effective functioning of the system. The objectives of that research were not only to convey a full picture of the current lay assessor system based on specialist literature, legislation analysis and the opinions of lay and professional judges, but also offer—if needed—*de lege ferenda* proposals to the legislator. This study analyses one of the basic questions that goes to the heart of lay participation in dispensing justice:

To what extent does the requirement of representativity prevail in recruiting Hungarian lay judges and what do lay and professional judicial opinions on selection suggest? Although the complex research concentrated on various issues, examining the above problem constituted one of the basic segments of research, since it covers one of the starting points of the negative assessment of lay participation in Hungary. It is still a widespread view among lawyers that lay judges representing the retired age group cannot be deemed to get any effective work done. At present, lay persons are exclusively engaged as part of the chambers of judges denoted by literature as mixed courts in the Hungarian justice system. A mixed court can be characterized as a chamber of professional and lay judges that adjudicate a case before the court. It happens in a way that the professional and lay judges in the chamber are in theory on equal footing as far as decision-making competences are concerned.⁶ Examples of involving lay persons typically in criminal or labour court proceedings is foremost characteristic of the Romano-Germanic legal family. Such a system operates in Germany⁷, Austria⁸, Finland⁹,

⁶ Instead of labeling this type of lay participation as mixed tribunal, the adjective ‘collaborative’ is generally used whenever reference is made to it. *Dubber, Markus – Pihlajamäki, Heikki, op. cit.* The usage of the adjective ‘collaborative’ is justified with the fact that in the case of a medieval jury trial the term ‘mixed juries’ is already taken. The term was attributed to a jury if the panel consisted of jurors from various locations. According to those in favor of this notion, it is safer to use one that is unsusceptible of confusion. *Jackson-Kovalev 2016, op. cit.*, p. 7.

⁷ MACHURA, Stefan, *op. cit.*, 451.; *Machura, Stefan: Fairness und Legitimität.* Baden-Baden, NomosVerlag, 2000. p. 385.

⁸ *Schöffen und Geschworene in Österreich. Ein Überblick.* Bundesministerium für Justiz, 2015. p. 83.

⁹ PIHLAJAMÄKI, Heikki: From Compurgators to Mixed Courts: Reflections on the Historical Development of Finnish Evidence Law and Court Structure. *Revue internationale de droit pénal.* 2001. 72/1. p. 159. Retrieved 10 October 2016 from http://www.cairn-int.info/article-E_RIDP_721_0159-from-compurgators-to-mixed-courts.htm

Norway¹⁰, Sweden¹¹, post-socialist countries in general¹² or Northern Ireland among common law countries as well as in South Africa¹³ since the decline of the Apartheid era. The common denominator of these legal systems is that professional judges holding a law degree and pursuing their careers as a profession and lay judges without a law degree jointly decide cases on the merit with equal rights in questions of law and fact as well as in sanctioning in criminal proceedings. The ratio of professional and lay judges may present a picture differing from country to country and their engagement is varied at different levels of the judicial hierarchy; however, it is common for each mixed court that judges and lay persons decide jointly in guilt or innocence, in questions of fact and those of law and sanctions. In these questions the professional judge and the jury decide separately: lay persons in questions of fact, and judges in questions of law. (As for sanctions, the solutions show a varied picture.)

A unique legal-sociological survey conducted in Hungary by Kálmán Kulcsár in the 1960s took place in a party state environment. The hypothesis of the authors of this study concerned the fact that merely a fragment of the findings of that time could be of merit today due to significant social changes. Although part of the survey questions of the prior research was addressed in a somewhat modified form to currently serving lay assessors, the focus had now shifted towards the findings of international research during the elaboration of the questionnaire. The research of Sanja Kutnjak Ivković and Stephan Machura into the mixed Croatian and German tribunals was an inspiration to the authors of this study. Sanja Kutnjak Ivković's work proved to be a determining factor because empirical research into mixed tribunals provided a convincing theoretical basis when applying the Status Characteristics Theory to interpret the activity of this task oriented group.¹⁴

1. METHODOLOGICAL LIMITS OF RESEARCH

Initially, a comprehensive assessment of some 5,000 actively engaged lay assessors had been contemplated by the authors in addition to analysing literary

¹⁰ STRANDBAKKEN, Asbjorn: Lay Participation in Norway. *Revue internationale de droit pénal* 2001. 72/1. p. 225.

¹¹ DIESEN, Christian: Lay Judges in Sweden-A Short Introduction. *Revue internationale de droit pénal* 2001. 72/1. p. 313.

¹² THAMAN, Stephen C.: Juries and Mixed Courts in the former Soviet Republics of Central Asia, Lecture at the Cornell Law School Clarke Program in East Asian Law and Culture Conference: Citizen Participation in East Asian Legal Systems (Sep. 22, 2006).

¹³ SELIGSON, Milton: Lay Participation in South Africa from Apartheid to Majority Rule. *Revue internationale de droit pénal* 2001. 72/1. p. 273. Retrieved 10 October 2016 from http://www.cairn-int.info/article-E_RIDP_721_0273--lay-participation-in-south-africa-from.htm

¹⁴ Sanja Kutnjak-Ivkovic: „Exploring Lay Participation in Legal DecisionMaking : Lessons from Mixed Tribunals” *Cornell International Law Journal* 2007/2. 441.

and legislative sources. During the assessment, a paper-based questionnaire technique (PAPI) would have been applied, bearing in mind that the vast majority of lay judges were from the elderly age group and an online questionnaire version (CAWI) would be less successful. In parallel, it had been planned to send online questionnaires to the judges that use computers on a daily basis.

To conduct research, the permission of the National Office of the Judiciary (hereinafter referred to as NOJ) was required, a new and centralized organization responsible for court management since 2011. In this regard, the ‘Open Court Program’ was mutually ensuring, since it had the allure of expanding the boundaries of research of the justice system. Based on an outlined research plan and a questionnaire, permission was granted to carry out research into lay judges. 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, yet in some other ones data collection was almost finished. At this point of research, the president of the NOJ unexpectedly put an end to data collection. He claimed that the NOJ management had not been aware of what questions had been included in the questionnaire.

After the authors had signalled 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 database¹⁵ (using what is 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. About a hundred (109 to be exact) professional judges sent a completed questionnaire. A number of them shared their 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 that¹⁶. For

¹⁵ The sample included lay assessors in service in the capital as well as 10 chosen counties in October 1968. (KULCSÁR, *op.cit.*, p. 10-12.)

¹⁶ The received sample that lacks proportionate territorial representation seems to show that there is an uncanny similarity among the counties included in the sample as far as age-specific features, gender ratio, received education and active employment status are concerned (with a striking overrepresentation of those over the age of sixty, of women, graduates holding a degree and inactive pensioners). With this in mind, the authors believe that their research is suitable for presenting major correlations—albeit without accurate proportions or data—, thus, it may not be regarded a mere tentative to search for answers.

this very reason, an alternative solution was contemplated in earnest: for the sake of partial explanatory force, all the data acquired during research would 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 only a point of view that this process is regarded as ‘forceful narrowing’ or ‘removal’). This, in turn, meant that the research might well be the last report on the lay assessor system of the post-socialist era.

2. SELECTION AND REPRESENTATIVITY

As for the chief purpose of lay adjudication, the method of selecting lay judges is worth special attention. Depending on the goal by which the legislator intends to engage lay persons, the selection method may be different. If, for example, the primary purpose lies in strengthening the legitimacy of justice, enhancing legal knowledge of society and ensuring the external control of justice, it is advisable to consider lay participation to be a civic duty and concentrate on ensuring representativity through the lense of randomized selection. When the objective is to integrate some special technical knowledge into the decision-making process, it is naturally the social group having that special knowledge that ought to be the basis for selection. When Goldbach and Hans tried to present the selection mechanism of mixed tribunals, they could mostly stress the fact that, similarly to jury selection, various forms of lay judge recruitment are in existence¹⁷. Kovalev and Jackson’s study also makes reference to an extraordinary diversity.¹⁸ There exist numerous versions of lay participation ranging from encouraging politically-induced selection and imposing the requirement of representativity to putting special technical knowledge in perspective.

Based on an comparative analysis of, and empirical research into, selection methods, it can be concluded that in the 20th and 21st centuries the question of representativity of popular participation occupied and continues to occupy an ever dominant role, which, resulting from the essence of lay adjudication, diverts from the global selection trend of professional judges. The main reason for this is lay persons participating in adjudication with adequate representation may put across their own groups’ values, norms and sense of justice. In addition, they enhance social legitimacy of courts if social control prevails through lay judge activity.

¹⁷ Toby Susan GOLDBACH – Valerie HANS: „Juries, Lay Judges, and Trials” *Encyclopedia of Criminology and Criminal Justice* (GerbenBruinsma and David Weisburd, eds.). *Cornell Legal Studies Research Paper No.* 2013. 13-87.

¹⁸ KOVALEV – JACKSON, *op. cit.*, p. 9.

While professional judge selection is followed by the strengthening of merit-based systems and the need for representativity appears mainly in literature and with only limited intensity¹⁹, in the case of lay assessors the significance of the latter has seen a gradual increase in practice. In the past decades, this has been taken more and more seriously in order to ensure typical legislative purposes of popular participation²⁰ on the one hand, and impartial and unbiased adjudication on the other²¹. The issue of representativity enjoys growing significance in systems featuring justices of the peace, juries or 'mixed tribunals'. As for jury representation, its centuries-old problematic is not only found in literature or in legislation that intends to ensure the former, but also in the dogmatics wrought and chiseled by the Supreme Court of the United States.²² The resulting effect is now detectable in jury or justice of the peace systems in continental countries²³. There is also a tendency in the case of mixed tribunals that the representativity requirement is observed by randomized selection or other means. With the unjustified raising of the age limit²⁴ or exclusion of some professions,²⁵ certain social groups continue to be absent from lay participation, not to mention them being limited by education censuses¹. As for mixed tribunals, both stages of lay judge selection, that is, appointment and specific assignment of lay judges, there are more and more examples of selection and representativity happening while also paying attention to impartiality.²⁶

3. SOCIAL REPRESENTATION OF HUNGARIAN LAY JUDGES

It is no use denying that in the Hungarian lay judge system not a single trace of representativity can be found in legislation on judicial selection. This is in spite

¹⁹ See Kate. L. MALLESON: "Modernising the Constitution: Completing the unfinished business" in Guy CANIVET [et al.] *Independence, accountability and the Judiciary* (London: British Institute of International and Comparative Law 2006) Kate MALLESON – Peter RUSSEL: „Rethinking the merit principle in judicial selection.” *Journal of Law and Society* 2007/33(1) pp. 1ur26-140.

²⁰ BADÓ, Attila: A laikus bírászkodás létjogosultságának korlátairól a tudományos vizsgálatok tükrében, *Állam- és jogtudomány*, LVII . évfolyam, Issue No. 2, 2016 pp. 3-15

²¹ Judith L. MAUTE: „English Reforms to Judicial Selection. Comparative Lessons for American States?” *Fordham Urban Law Journal* 2006/1. Article 13.

²² BADÓ, Attila: Laikus bírászkodás és reprezentativitás. (A „fair cross-section” doktrína) *Acta Juridica et Politica* 2000. p. 14.

²³ In addition to the English justice of the peace system, in the case of one of the most recent lay judicial systems (juge de proximité in France), it can be seen how accurately its representativity is analyzed by research. (See Antoine Pelicand- Jean-Philippe Tonneau: *Les juges de proximité: Une étude du recrutement* 2009. p.121.)

²⁴ Setting the age limit higher than that required for suffrage, which may be justified by the necessity of having life experience, results in the automatic exclusion of a populous age group.

²⁵ For example, in Greece, no teachers are eligible for lay participation.

²⁶ KOVALEV, *op. cit.*, p. 12.

of the fact that the current lay judge system was explicitly established to ensure social control. The role of civil society organizations and municipalities may ensure a certain kind of representativity; however, no technical solutions exist to enforce it. Since the Kálmán Kulcsár research, there has been no practical attempts in this regard, therefore, the authors of this study have taken on filling that void.

When it comes to representativity in general, it seems to be difficult to interpret the notion. In addition, it is appropriate to stress that ensuring all-inclusive representativity borders on being virtually impossible. As Kulcsár puts it, “a lay member in a judicial chamber does not represent society, but merely one of its layers in a variety of dimensions.”²⁷ Relying on this statement, one needs to determine the aspects relevant to lay adjudication during research into the social representativity of lay judges and act accordingly when analyzing it. These aspects mostly fit into the findings of Kulcsár. Thus, the authors now endeavour to examine to what extent the selected lay assessors reflect a fair cross section of society according to gender, age, education, profession, active or inactive employment status and being a member of a group of national or ethnic origin.

3.1. Representativity based on age

In Hungary, anyone aged at least 30 but under 70 is eligible for the position of a lay judge on the condition that they are Hungarian nationals with an unblemished criminal record proven by a recent extract showing no disqualification from public affairs, and that they have taken a judicial oath.²⁸ This rule has the potential of *a priori* narrowing representativity according to age by excluding persons aged between 18 and 29 and over 70 from the opportunity of becoming lay judges; therefore, in this sense, only limited social representativity is reached. There is of course a specific reason—mentioned by Kulcsár as well—for this choice: “for the proper functioning of popular lay participation, reaching a certain age is a prerequisite. It is the very experience as opposed to legal professional knowledge that is expected of lay assessors when participating in adjudication, and to gain such experience in itself is subject to the passage of time and, therefore, to reaching a certain age”.²⁹ Thus, having life experience is paramount for lay judges, which supposes a higher age. However, based on the findings of the 1966 research, Kulcsár himself notes that “age distribution is shifting overly in favour of elderly age groups”. He does not reveal exact data, only that the ratio of lay assessors aged over 50 is greater than those under that threshold. Although fifty years following this research it may not be established that the distribution of lay assessors according

²⁷ KULCSÁR, Kálmán: *A népi ülnök a bíróságon*, Akadémiai Kiadó, 1971

²⁸ Sections 212(1), 214(3), 18(1) and 220(1)(d) of Act No. CLXII of 2011 on the status and remuneration of judges (hereinafter referred to as ‘Status Act’)

²⁹ KULCSÁR, Kálmán: *A népi ülnök a bíróságon*, Akadémiai Kiadó, 1971.

to age groups corresponds exactly to the findings of the 2016 research—due to lack of representativity. It may, however, be concluded that since that time the ‘lay judiciary’ has not regressed in years. Moreover, no risk is taken by concluding that it even progressed in years compared to the 1966 conditions. The minimum age required to be eligible for a lay assessor is 30, yet no person under the age of 35 has completed the questionnaire, which gives way to the presumption that very few of them are that young. The ratio of lay assessors aged under 50 is 6.4% compared to the 72.5% of those over 60, which signifies a considerable shift even if it is assumed that the elderly (old-age pensioners mostly) with more spare time on their hands were more willing to answer the questions.

Table 1: Distribution of lay judges according to age groups

Which age group do you belong to?					
		Case number	%	Valid %	Aggregate %
Valid	aged 35-39	3	0.9	0.9	27.5
	aged 40-44	6	1.7	1.8	
	aged 45-49	13	3.7	3.8	
	aged 50-54	21	6.0	6.1	
	aged 55-59	51	14.7	14.9	72.5
	aged 60-64	130	37.4	38.0	
	aged 65 or over	118	33.9	34.5	
		Összesen	342	98.3	100.0
Absent	Hiányzó adat	6	1.7		
Total		348	100.0		

Based on the 2011 census data, a population ratio of 11.8% representing the age group of 60-69 years of age³⁰ is considerably lower than the ratio found during the 2016 research. Therefore, in connection with the age composition of lay judges, it can be established that there is a significant distortion as far as social representativity is concerned, showing that younger age groups are underrepresented, while older age groups are overrepresented.

3.2. Labour market status; active and inactive lay judges

With a high ratio of those over the age of 60, the age composition of lay judges leads to the probable conclusion that the balance of active and inactive persons is tipped in favour of the latter. Among the lay judges that completed the questionnaire, 74.2% are retired, 16.9% are actively employed either full-time or part time,

³⁰ 2011 census by the Hungarian Central Statistical Office, Budapest 2013.

or sole traders, 1.8% are occasional workers and 1.5% are unemployed. No data is available for 5.6% of them; however, they are most likely to belong to the inactive group such as housewives, contributing family workers, etc.

Table 2: Composition of lay judges according to employment status

		Case number	%	Valid %	Aggregate %
Valid	Employed full time	41	11.8	12.1	16.9
	Employed part time	10	2.9	3.0	
	Work in own business	6	1.7	1.8	
	Employed in addition to pension	40	11.5	11.8	74.2
	Old-age pensioners in their own right	187	53.7	55.3	
	Widowed pensioners	5	1.4	1.5	
	Retired with disability pension	19	5.5	5.6	
	Remunerated on mandate or doing occasional work	6	1.7	1.8	3.3
	Unemployed	5	1.4	1.5	5.6
	Other	19	5.5	5.6	
		Total	338	97.1	100.0
Missing	Missing data	10	2.9		
Total		348	100.0		

If the lay assessors that are employed in addition to receiving pension are taken into consideration, they cannot be regarded as inactive by definition. Therefore, their ratio—together with the unemployed—is still 62.4%. Kulcsár considers the high proportion of the retired age group problematic for two reasons. On the one hand, “the set of values and a specific understanding of society represented by an elderly group of lay judges may differ from those of another group of lay judges that represent other layers of society because a generation gap exists. The difference in itself is not a problem; however, the ratio is, because it means that it is the retired lay assessors’ views that appear in court as the general understanding of the social environment.”³¹ Kulcsár warns us of the differences of the younger and the older generations’ values, norms, knowledge and world views already at the end of the 1960s. Moreover, he considers it outright dangerous if either group—the retired group in this case—puts across their values in a significantly higher proportion than what their number in society may indicate. If the generation gap is put under the microscope, it can be safely said that, compared to the middle and the end of the 1960s, there is an even wider gap between the

³¹ KULCSÁR, Kálmán: *A népi ülnök a bíróságon*, Akadémiai Kiadó, 1971.

retired and the younger generation today. What is more, one may go so far as to state that there is a striking differentiation among generations, since one may now talk about generations Y and Z, etc. Their world view, values, norms and knowledge are also different from each other's. Consequently, the problem of social representativity is even more acute nowadays than it used to be at the end of the 1960s. On the other hand, Kulcsár's second concern regarding the high ratio of retired lay judges is that "lay assessors' ageing or becoming old-age pensioners does not boost the social prestige of the lay assessor function, either; and it influences court work feedback towards the social environment". Provided that Kulcsár's arguments about the high retired lay assessor ratio leading to the lowering of the position's prestige are accepted, the retirement ratio among lay judges must be examined now. Having done so, one may notice that the ratio of pensioners has further increased to 46-47% compared to the 1966 conditions; therefore, further lowering of the position's prestige is a real threat.

3.3. Level of education

No data is available from the 1966 research regarding levels of education. Nonetheless, inferences can be drawn from relevant employment data. The ratio of industrial and agricultural blue-collar workers among lay judges, most of whom may have been unskilled or skilled workers, is 51.8% in the capital, Budapest, and 63.9% in the country. The ratio of white-collar workers was established by Kulcsár to be 38.4% in Budapest and 19.7% in the country. However, we may not be absolutely sure whether a white collar equals the attainment of higher education. The underlying reason is that white-collar positions, sometimes even at a managerial level, were filled without having reached a level education designed for the position. As for representativity according to education, the current national data can be accepted as relevant. In 2015 they indicated the following composition³²: the nationwide ratio of unskilled workers (reaching a maximum of 8 completed years of primary education) is 23.77% among those aged over 15, 23.98% among skilled workers (having completed a vocational training or an apprenticeship in a specialized school), 32.02% among those having completed general secondary education and 20.23% among those holding a degree in higher education. Based on the data collected nationwide, the lay judges taking part in the current research approximate national data in a single category: the ratio of those holding a general certificate of secondary education is 31.5%, which does not diverge from the national average of 32.02%. However, in the other two types of education, there are profound differences compared to national data. The ratio of those not having completed secondary education (unskilled and skilled workers) amounts to 47.75%

³² www.ksh.hu/docs/hun/xstadat/xstadat_eves/i_qlf015.html

nationwide, which is in reality lower among the adult population, because underage secondary school students are registered as having only completed primary education. Nevertheless, there is a radical difference between the national situation and the position of lay judges. It seems that only 4.4% of the lay assessors that completed the questionnaire do not have a certificate of secondary education. As for those holding a degree in higher education, 64.1% of the lay assessors completing the questionnaire actually hold a degree in comparison with the 20.23% national percentage. This, however, may be higher among the adult population, because those still attending university are deemed to have only completed secondary education. Therefore, regarding formal education, the ‘secondary education tier’ is considered representative while the ‘two ends’ show severe distortions because the ratio of those not holding a certificate of secondary education is substantially lower and the ratio of those with a degree is about three times higher than the national ratio. If the viewpoint outlined above concerning the advanced age of lay judges is justified due to life experience, this may also be true for achieved education. It would entail a ‘distortion’ towards higher education, since, in order to carry out substantive work, one needs knowledge, an understanding of cause and effect linkages as well as empiricism, the attainment of which higher education may be better designed to ensure.

Table 3: Education level of lay judges

What is the highest level of education you have attained?						
		Case number	%	Valid %	Aggregate %	
Valid	Primary school (8 years)	3	0.9	0.9	4.4	No secondary certificate
	Vocational training	3	0.9	0.9		
	Apprenticeship	9	2.6	2.6		
	Vocational school certificate	50	14.4	14.7	31.5	Secondary certificate
	Secondary grammar school certificate	57	16.4	16.8		
	College degree/ higher technical training	147	42.2	43.2	64.1	Degree
	University degree	71	20.4	20.9		
	Total	340	97.7	100.0		
Missing	Missing data	8	2.3			
	Total	348	100.0			

3.4. Current or pre-retirement division of labour status

Data on the level of education, including the 64.1% ratio of those holding a degree and 31.5% of those having only attained a certificate of secondary education,

forecasts that white-collar employees heavily outweigh blue-collar workers. In 1966, Kulcsár discovered that there were fewer lay assessor blue-collar workers in the capital and in the country than their actual ratio would have indicated. As for white-collar workers, they were overrepresented both in Budapest and in the country. Distortions, however, were nowhere near as paramount as they are nowadays. In Budapest the ratio of blue-collar workers was 59% as opposed to their ratio in lay participation, which showed a percentage of 51.8%. In the county, compared to their 82.2% ratio in the entire population, their ratio was only 63.9% in lay participation. As for white-collar employees, both locations indicate a higher number among the selected lay judges than what their actual ratio would have justified. The ratio of white-collar workers in Budapest was 27.3% as opposed to their ratio of 38.4% among the selected lay judges. Outside the capital, figures indicated a 11.1% ratio compared to the ratio of 19.7% among the selected lay judges. No doubt, one is forced to take into account the changes that have taken place since the 1966 research in the employment structure. Since 1966, a considerable restructuring has been under way in the ratio of blue-collar and white-collar workers in Hungary as well, showing a decrease in blue-collar employment as opposed to an increase in white-collar employment. However, these opposite tendencies have not been as extensive as with lay judges. Concerning the occupations of the participants in the survey, 73.2% of them may be regarded as white-collar workers. The majority of them is in an executive position: top level and middle level management represent 28.9%, while lower level and operative management amount to 17.3%. Regarding blue-collar workers, their ratio hovers around 4.5%, which is extremely low, even if one presumes that the remaining lay judges are all blue-collar workers. Of course, this cannot be the case, because even among them there might be white-collar workers.

Table 4: Occupations and positions of lay judges

What is (was) your current (last) occupation or position?					
		Case number	%	Valid %	Aggregate %
Valid	Top-level or mid-level manager	97	27.9	28.9	73.2
	Lower-level or operative manager	58	16.7	17.3	
	Junior administrator	67	19.3	19.9	
	Administrative staff	24	6.9	7.1	
	Skilled worker	13	3.7	3.9	4.5
	Semi-skilled or unskilled worker	2	0.6	0.6	
	Other	75	21.6	22.3	22.3
	Total	336	96.6	100.0	
Missing	Missing data	12	3.4		
Total		348	100.0		

Regarding occupations, the tendency is what Kulcsár described in connection with their research in 1966. The process of there being more white-collar workers among lay judges than their actual ratio would have justified has continued up until now. However, working peasantry participation was listed first in order of priority at the time for political reasons. If proportions are not exactly in line with the current research findings due to lack of representativity, it is highly probable that, compared to their actual ratio, white-collar workers represent a significantly higher, while blue-collar workers represent a significantly lower, number among lay judges. Among (last) occupations there are two fields that stand out because of higher lay assessor participation. These are (1) public administration along with politics (20.1%) and (2) culture, education, science and church (29%), with the ratio of the remaining fields under 10%. Concerning employment, publicly employed lay assessors (as public or civil servants) dominate the scene with a ratio of 68.4%, while private sector employees (at companies, public limited companies, limited partnerships, limited liability companies, etc.) represent 28%. The ratio of those working in the civil society (at foundations, non-profit organizations, associations, etc.) remain at 3.6%.

3.5. Male and female lay judges

Data on the 1966 research showed an overrepresentation of men among lay judges in Budapest and in the country. To be exact, the ratio of male lay judges was 8% higher in the capital and 19% higher in the country than their actual ratio. Social proportions have not changed radically in the past 50 years as far as gender ratio is concerned. Overall, the ratio of 50 years ago is still valid today with 47-48% of men and 52-53% of women in society. However, there are two important changes regarding the gender ratio of lay judges. On the one hand, there has been a change compared to the 1966 situation, because women are overrepresented compared to their actual ratio. On the other hand, this overrepresentation is considerable according to the research findings, since almost 71% of those having completed the questionnaire are women, which is a substantial difference in comparison to their actual ratio.

Table 5: Gender distribution of lay judges

You are:		Case number	%	Valid %
Valid	Male	100	28.7	29.2
	Female	242	69.5	70.8
	Total	342	98.3	100.0
Missing	Missing data	6	1.7	
Total		348	100.0	

As for the distribution of lay assessors according to gender, Kálmán Kulcsár made a somewhat overreaching statement during the 1966 research: he considered distribution as a social activity index as well. He said that “despite formal equality, data indicate a tendency towards the stabilization of female public passivity.”³³ Data today, however, show a radically different distribution of both sexes, which reflect a strong female dominance in number. Does this mean overt overrepresentation, and if so, can it be interpreted as an ‘activity’ index? If one examines the demographic factor, there is reason to suggest overrepresentation. This is true even if one is aware that nearly three quarters of those engaged in lay participation (72%) are aged 60 or over. On the other hand, the ratio of women in this age group slightly exceeds 60% (60.2% to be exact). This, however, does not explain the 71% ratio of women among lay judges. Also, one needs to include a further factor that in lay adjudication—and it seems that even at the selection stages as well—pedagogical qualifications and practice play an important role. Almost 30% of the survey participants (28.4%) answered that they mostly used their pedagogical knowledge and qualifications during lay participation. In addition, 77% of those having such a pedagogical background were women. Indirect data referring to rendering the pedagogical field female-dominated seem to be in accordance with data from a representative data collection some 20 years ago.³⁴ To explain female overrepresentation, one may rely on the pedagogical factor instead of the demographic one. However, the question remains: To what extent does this show women’s growing social activity? The answer would require more insight into the nomination process.

3.6. Participation of national/ethnic minorities in lay adjudication

Based on the data from the 2011 census, the ratio of national/ethnic minorities in Hungary amounts to 6.5%³⁵ determined by a method of ‘self-declaration’: one may profess to belong to one of the 13 official national/ethnic minorities. At first glance, the 4.8% of such affiliation among lay judges does not differ substantially from the national 6.5% ratio.

³³ KULCSÁR, *op. cit.*, p. 55.

³⁴ In 1996, a nationwide representative research (N=2411) found that overall 75.3% of those working in primary and secondary educational facilities were women. The rate of women aged 20-39 (40-59 today) represented 76.7%, while women aged 40-59 (60-79 today) represented 74.3%. See DEÁK, ZSUZSA – NAGY, MÁRIA: Társadalmi és szakmai mobilitás, at <http://ofi.hu/tudastar/tanari-palya/tarsadalmi-szakmai>

³⁵ 2011 census by the Hungarian Central Statistical Office, Budapest 2013.

Table 6: Lay judge membership of national or ethnic minorities

Do you consider yourself to belong to one of the ethnic minorities in Hungary?		Case number	%	Valid %
Valid	No	316	90.8	95.2
	Yes	16	4.6	4.8
	Total	332	95.4	100.0
Missing	Missing data	16	4.6	
Total		348	100.0	

A more detailed territorial analysis, however, revealed that 10 out of the 16 participants who professed to belong to an ethnic group were lay judges at courts in Békés county, while the remaining 6 were from four other counties (1 person per county) and 2 were at courts in the capital. This shows a significant territorial disparity, which is in strong relation to the territorial distribution of national minorities in Hungary as well. Moreover, similarly to Békés county, there are counties where the number of participants was high, yet no one admitted belonging to any national or ethnic group. Nevertheless, 13% of participants (10 persons) in Békés county, which has a relatively high number of those belonging to the Romanian and Slovakian national minorities, admitted belonging to one of the ethnic minorities (4 to the Romanian and 3 to the Slovakian minority).

How about the most populous minority in Hungary, the Roma? In the current sample, only two lay judges are mentioned having such identity. This corresponds to a 0.6%³⁶ representation. How can this ratio be interpreted? In connection with the ratio of the Roma minority within the population, the numbers based on self-declaration taken from the 2011 census as well as the research estimations could serve as a starting point. While their ratio is 315,000 (3.2%) based on self-declaration, the Roma population is estimated by research to be around 650,000 to 750,000 (6.5-7.5%)³⁷. As the current research has naturally been carried out based on self-declaration, Roma representation in lay adjudication must be examined in relation to the census data due to methodological reasons. Relying on the authors' calculations and taking the social age structure of the Roma³⁸ and the age composition of lay participants in adjudication³⁹ into consideration, the rather modest

³⁶ 332 out of the 348 participants answered the question about membership of an ethnic minority group.

³⁷ For reasons of space, it cannot be discussed here that the Roma ratio is substantially underrated based on self-declaration. Nor is there an opportunity to discuss that substantial differences of scale that emerge in research estimations can be caused by the divergence in classification logic.

³⁸ Their ratio are as follows: those aged no older than 14 is 7%, in the 15-39 age group is only 3.9%, in the 40-59 age group it is 2.3% and in the group of 60 years of age or over only a 0.6% is present.

³⁹ The ratio of lay judges under 60 is 28%, while those aged 60 or over represent 72%.

ratio of 0.6% is about half of the ratio that can be expected in a statistical sense (1.4%). The ‘missing’ 0.8% is quite straightforward when explained: in the field of the preferred level of education⁴⁰ in lay participation, the indices of the Roma population⁴¹ are substantially more unfavourable.

Based on the available data, it can be established that members of national/ethnic minorities participate in lay adjudication. They are not excluded from lay participation; however, their actual ratio might be somewhat lower than this research should indicate. This actual ratio may result in significant territorial differences. On the one hand, it can be in objective correlation with the ethnic composition of a region. On the other hand, there may exist diverging territorial subjective practices (or preferences) of the institutional participants in the appointment process as well.

4. RESEARCH FINDINGS ON LAY JUDGE SELECTION

With the exception of political parties, the selection of lay judges in Hungary today is carried out by proposals formulated by civil organizations, and depending on which court the lay assessor will be appointed to, is subject to the decision of different local self-government bodies. They decide on who will be selected into lay participation bodies; however, based on the findings of the current research, it is highly probable that the aspect of social representativity does not play any role in their decisions. During the current research lay assessors and judges were asked about how lay selection should be carried out, whether the current system is adequately functioning or an alternative selection method should be considered.

Table 7: What is the best method for selecting lay judges?

Which solution would you prefer in the selection of lay judge candidates?				
	Lay judges		Judges	
	Case number	%	Case number	%
Local self-government councils should continue to decide on selection	136	40.1	22	20.4
Court should decide on selection	185	54.6	67	62.0
Other professional organization should decide on selection	18	5.3	16	14.8
Selection should be carried out in other ways	0	0	3	2.8
Total	339	100.0	108	100.0

⁴⁰ Based on the foregoing, 95% of lay judges hold a certificate of secondary education or a degree.

⁴¹ According to the calculations made based of the data of the 2011 census, 7% of the Roma (or Roma identity) population aged between 20 and 79 years of age hold a certificate of secondary education or a degree.

In both groups, the majority would prefer a court decision on lay judge selection: 54.6% of lay judges and 62% of professional judges. Moreover, about 40% of lay judges are satisfied with the present system, while professional judges are more critical, because only about 20% of them consider the system well-functioning. 5.3% of lay judges and 14.8% of professional judges believe that a different body should decide on selection. It is interesting that the option of carrying out the selection in other ways was not chosen by any lay assessors and only 2.8% of professional judges chose that option. Concerning the most popular solution—that courts should decide on the selection of lay judges—, it is worth mentioning the experience already formulated in the 1966 research that the originally distorted composition of selected lay assessors was further distorted by assigning lay judges to specific cases, during which a specific criteria of the court prevailed. If this was so nowadays as well, it is rightly assumed that in the case of court ordered lay selection the social representativity of lay judges would be even more distorted.

Lay and professional judges were also asked which of the three selection aspects below they thought to be the most important one in the case of those wishing to take part in lay adjudication. The preferences of both lay and professional judges were no different. They unequivocally considered the candidate's life experience, useful technical knowledge, independent way of thinking, level of education and knowledge about issues related to lay participation to be the most important aspects. This shows that lay judges' age, educational and occupational distortions meet both the lay and professional judges' expectations.

Table 8: The three most important aspects of lay judge selection

	Lay judges		Judges	
	Case number	%	Case number	%
The candidate's life experience	224	23,2%	81	25,1%
The candidate's useful professional knowledge	177	18,3%	76	23,5%
The candidate's attainment of education	155	16,0%	49	15,2%
The candidate's knowledge about issues related to lay participation	103	10,7%	27	8,4%
The candidate's public activity, acceptance and support by the public	57	5,9%	10	3,1%
The candidate's adaptable personality	52	5,4%	11	3,4%
The candidate's independent way of thinking	177	18,3%	60	18,6%
The candidate's local reputation	12	1,2%	5	1,5%
Other aspects	9	,9%	4	1,2%
A decision would be taken by drawing lots	1	,1%	0	0,0%
Total	967	100,0%	323	100,0%

The fact that no one thought other aspects or aleatory selection important allows for the conclusion that for neither the lay nor the professional judges the necessity of social representation is an issue among the selection criteria.

Concerning these findings, it is perhaps worth a professional discussion on the methods of lay selection and taking a stand on the issue of social representativity. If social representativity is found to be an important factor, a discussion should be held to decide how lay judges should be selected in order for them to actually represent society based on certain important criteria. It is all the more justified because, based on the above data, the current selection system leaves a great deal to be desired in ensuring that.

CONCLUSION

The research team of this study endeavoured to carry out empirical research into Hungarian lay and professional judges's views concerning the functioning of Hungarian mixed tribunals, as such research had not taken place for more than fifty years. This study aimed at evaluating the role and importance of lay adjudication as well as the selection and representativity of Hungarian lay judges. Due to the peculiar decision of the organization carrying out the central administration of the Hungarian justice system, the questionnaire-based research was somewhat more limited than planned. Despite this, in addition to shedding light on the legislative background and the roots of the Hungarian lay court system, the views of lay and professional judges proved to be important input for an insight into the functioning of mixed tribunals.

A basic question of the research was to determine to what extent the requirement of representativity prevails during the recruitment of Hungarian lay assessors, and what the lay and professional judges' opinions were concerning selection.

Relying on selection methods and comparative analysis of empirical research into these methods, the starting point was that the question of the representativity of popular participation played and continues to play an ever increasing role in the 20th and 21st centuries. The main reason is that lay persons that take part in adjudication can assert their own groups' values, norms, sense of justice if adequate representativity has been ensured. Moreover, the legitimacy of justice may be reinforced with an appropriate amount of representativity. It was assumed that from 1990, the year of the chute of a monolithic state apparatus, the social composition of lay judges had to change due to considerable social changes. This was true even if no politico-legal measures took place in order to improve or otherwise alter representativity. The above assumption seemed to be justified because, compared to the 1960s, there have been significant changes in the distribution of lay

assessors, while social representativity has not improved at all. It can be established that the group of lay judges was not getting any younger, but a certain ageing can be determined based on research findings. This is considered a serious problem between different generations due to far greater differences in perceptions. In a society comprising even a generation 'Z', an elderly age group and the overrepresentation of inactive people makes the realization of the original goal of popular representation doubtful. Furthermore, to borrow Kulcsár's words, this leads to the lowering of the prestige of lay participation. Due to the characteristics of the lay assessor activity, the overrepresentation of those holding a certificate of secondary education or a degree seems less problematic. In contrast to the Kulcsár research, which showed a higher ratio of men among lay assessors, the overwhelming predominance of women has also been justified. Hungarian women also feel a greater willingness to take part in dispensing justice in either a lay or professional capacity.

As for minorities, the research ended with misleadingly positive findings thanks to significant territorial disparities. In the county bordering Romania, a considerable number of Romanian lay judges could be seen, whereas in a number of other counties no ethnic minorities were represented. This, however, does not mean that the representation of different minority groups would be ensured at all. It can be stated that, among the participants in the questionnaire, not a single member of the otherwise populous and prejudice-prone Roma minority could be identified. Concerning the selection process, research has found that the current selection system does not even comply with the legislative purposes of popular representation either, not to mention the purposes that have been formulated in international literature.⁴² The selection system of the politically organized local self-governments that rely on the nomination of civil organizations results in a kind of lay participation that does not in the least meet the 'fair cross-section' requirement. What is more, assigning lay judges to specific cases on an *ad hoc* basis happens based on tradition or upon the request of professional judges themselves regardless of giving effect to any prior planning or aspects of impartiality. The authors' dissatisfaction is supported by lay and professional judges' opinions, because the majority of the research participants do not consider the current system an appropriate one. Most of them would trust courts with the entire selection process. The vast majority of the participants regard life experience as the most important selection criterion, while rejecting the aleatory element of selection. Contrarily, it is the firm view of this research group that the basis for popular participation based on civic duties can be created by randomized selection. This would have to be amalgamated with other selection techniques in order for the

⁴² CATELLANI Patrizia-MILESI, Patrizia *Understanding world jury systems through social psychological research*, Psychology Press, New York 2006

representativity and impartiality requirements to be given effect together with a need for life experience.

In conclusion, it can be stated that the lay assessor society is markedly different from the Hungarian adult society: the elderly (aged over 60) are strongly overrepresented, together with women, inactive workers (especially the retired population), white-collar workers and those with a higher level of education. Consequently, the composition of the lay judge group does not represent the Hungarian adult society at all. This is due to the selection process, which does not intend to assert the requirement of representativity during either the appointment of lay judges nor their assignment to particular cases.

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Репрезентативност судија лаика у Мађарској. Емпиријско истраживање

Сажетак: *Наша истраживачка група је још пре него што је објављена намера да се реализује ова реформа одлучила да у Мађарској спроведе једно свеобухватно емпиријско истраживање које ће обухватити и мишљења приседника и професионалних судија. Овим смо истраживањем желели добити прегледну слику о систему приседника лаика будући да овакво истраживање није спроведено уназад задњих 20-то година. Смањали смо да је често негативна оцена делатности приседника лаика индукована превасходно мишљенима и стручном надмоћи правне струке те негативним изјавама о њиховом раду какве се у сличној форми могу чути и у другим земљама, а да она није последица мишљења оних људи који имају стварни увид у право функционисање система, било да су лаици или професионални судије. Циљ истраживања је био да на основу анализе врела садржаних у стручној литератури и правних пројеката, те упознавања мишљења приседника лаика и професионалних судија добијемо увид у актуално стање система приседника лаика, као и да у случају потребе припремимо *de lege ferenda* предлоге за потребе законодавца. У овом раду се бавимо анализом проблема избора и репрезентативности судија као једног од базичних питања саме суштине лаичког суђења.*

Кључне речи: професионалне судије, судије лаици, Мађарска.

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