

## **The new Macedonian concept of lay judges and their role in the criminal procedure**

### **Abstract**

The participation of citizens in criminal procedure as a part of mixed trial councils is a concept existing in almost all European countries, although there are diverging opinions on the quality and real contribution that can be expected from lay judges. One has to agree with the findings that the participation of lay judges reflects the role of citizens' involvement, as well as citizens' access to justice as an important and essential component of a democratic society.

The modest purpose of this paper is to present the dilemmas related to the criteria for selection of lay judges and their role in the criminal procedure as determined by the legislative provisions on one side, and lay judges' perception of their position during the proceedings, on another side. It is also important to evaluate the domestic legislation in the light of the recommendations deriving from the European Charter for lay judges.

Finally, the paper aims to present research conclusions and to give recommendations on the system of lay judges, having in mind the newly adopted amendments on the Law on courts. Equally, it aims to reconsider the participation of lay judges when the most complicated crimes are tried.

**Key words: lay judges, Republic of Macedonia.**

### **1. Historical perspective of citizen's participation in criminal procedure**

The institution of jury as a form of citizen participation in trial existed since the ancient types of accusatorial criminal procedure.

The lay *iudex* of the Roman praetorian system was chosen from a panel of around 900 eligible persons of high rank in the Roman society.<sup>1</sup> In a more academic manner, the lay judges can be analyzed since the XII century, after the appearance of the universities. According to Magna Charta, the right to be judged by your peers encompassed only the right of the nobles not to be judged in the same courts as the ordinary people.<sup>2</sup>

The participation of lay judges had disappeared in the period of the absolute monarchy when inquisitorial type of procedure was

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<sup>1</sup> John P. Dawson, *A History of Lay Judges*, The Lawbook Exchange, Ltd., New Jersey, 1999, p. 4.

<sup>2</sup> Christian Diesen, 'The advantages and disadvantages of lay judges from a Swedish perspective', *Revue internationale de droit penal*, 2001/1 - Vol. 72, ISSN 0223-5404, p. 355.

introduced. Their involvement would be directly opposite with the dictator's way of enforcing power.

The origins of jury at the European continent can be found in England. Namely, after King Henry II ascended the throne in 1154, one of his priorities was to rebuild the links between the central government and local society. His great insight into medieval governance led him to recognize that access to information is a form of power. During Henry's reign there were three types of participation of citizens in decision-making: a) presentment jury<sup>3</sup> which reported on criminal acts, particularly felonies, b) possessor assize juries, which resolved local property disputes using a distinctive form of civil procedure and c) criminal trial juries which determined questions of innocence and guilt.<sup>4</sup> The trial jury underwent a period of rapid dissemination and extension soon after its introduction. Thus, in less than a generation it had established itself as the default procedure for deciding the issues of innocence and guilt. The trial jury was a result of the consideration that presentment jury needed a mechanism to conclude the process began by the jury's formal accusation.<sup>5</sup> From the middle of the XIII century, jury trials became standard in criminal cases.<sup>6</sup>

The participation of lay judges in modern mixed trial council is connected with the principle of separation of powers. Democratic countries that foster equal justice cannot exist without the participation of lay judges as citizens' representatives, albeit the repressive dictatorships can hardly exist with the participation of lay judges.<sup>7</sup>

On the European continent, the French Revolution brought the practice of citizen's participation in trials. French revolutionaries believed that the participation of citizens in trials is a successful tool, enabling the guarantee of personal freedoms and rights of citizens against the tyranny of government.<sup>8</sup>

The French jury had so many shortcomings that it became obvious that the English type of jury deciding upon the facts cannot function successfully on the French soil. A result of the jury's "bad image" was the emergence of a serious competitor - the German practice of so-called Skabin courts (Schöffengerichte). The latter consist of mixed trial councils where lay judges, along with professional judges, decide both upon the facts and legal issues.<sup>9</sup>

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<sup>3</sup> This term derives from the work the juries performed. They "presented" information to officials, including information about suspected felons. James Masschaele, *Jury, State, and Society in Medieval England*, Palgrave MacMillan®, 2008, p. 46.

<sup>4</sup> James Masschaele, op.cit., p. 46.

<sup>5</sup> Masschaele, op.cit., p. 74 – 85.

<sup>6</sup> Masschaele, op.cit., p. 85

<sup>7</sup> Alexis De Tocqueville, *De la démocratie en Amérique*, Vol. I, 371-73 (1981), p. 374, quoted by S. C. Thaman, 'Sudjenje pred novom ruskom kaznenom porotom i nulifikacija kaznenog zakona u njezinu pravorijeku: pouke za porotom inspiriranu reformu u Euroaziji i šire', *Hrvatski ljetopis za kazneno pravo i praksu* (Zagreb), vol. 15, no 1/2008, p. 363.

<sup>8</sup> Vladimir Bayer, 'Suci porotnici', *Zbornik Pravnog fakulteta u Zagrebu*, 1955, god V, no. 3-4 Zagreb, p. 143.

<sup>9</sup> Bayer, op.cit., p. 148.

These mixed courts consisted of professional judges, as well as lay judges deciding together on all aspects in the criminal procedure. The legal skill and training is not a part of qualification of lay judges. The concept of lay judges serves to legitimize the sentencing; it strengthens public confidence in the criminal justice system and it teaches the individuals to respect the law. Lay judges represented the citizens and their involvement was understood as a guarantee for the protection of personal rights and liberties, as well as the dignity of citizens in criminal proceedings.<sup>10</sup>

During the XIX century mixed trial council were accepted in almost every European country and the participation of lay judges in court proceedings became a constitutional principle.

## 2. Criteria for lay judges in Macedonia

The participation of lay judges in court proceedings is a constitutional principle. According to Article 103, the court tries cases in council and lay judges participate in trials where it is determined by the law (procedural law). The lay judges have immunity and they cannot be held responsible for expressed opinions and decisions concerning the verdict. The Judicial Council of the Republic of Macedonia elects and dismisses judges, as well as lay judges. When selecting lay judges, (Article 43, Law on courts), the Judicial council of the Republic of Macedonia needs to take into consideration the following standards and restrictions: a) to avoid discrimination based on gender, race, color, national or social origin, political or religious beliefs, property and social status; b) to ensure equitable representation of citizens belonging to all ethnic communities; c) not to elect a person who is closely related, relative in-laws or spouse to judge or lay judge in the same court; d) not to elect a person who is closely related, relative in-laws or spouse to a member of the Judicial council of the Republic of Macedonia.

Lay judges are involved in the court proceedings in cases when it is prescribed by the procedural laws and they participate in mixed trial councils. The latest reform of the Macedonian Law on courts introduced a crucially new concept of general and specific criteria for the election of lay-judges.<sup>11</sup>

Under Article 48, the general criteria for election of lay judges are as follows: a) to be an adult, b) to have Macedonian citizenship, c) to have at least high education, d) to speak fluently the Macedonian language, e) to have dignity for performing this duty and f) not to be older than 64 years.

Apart from the requirement to possess dignity, in order to perform the duty of a lay judge, each candidate needs to pass through a psychological test and a test of integrity. The psychological test should be taken at the Judicial council of the Republic of Macedonia and its main purpose is estimating the social skills of the candidates for lay judges. The psychological test is based on an internationally

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<sup>10</sup> John P. Dawson, *The Role of Lay People in the English Legal System*. Available at: <http://www.peterjepson.com/>. Bayer, op.cit., p. 142.

<sup>11</sup> Law on Courts, "Official Gazzete of the Republic of Macedonia", no. 58/2006; 62/2006; 35/2008 and 150/2010.

recognized psychological test for performing the function of judges, applied in at least one member of the European Union and OECD. The test of integrity is also taken at the Judicial council of the Republic of Macedonia. It is based upon ethical and professional codes of performing the function with the purpose to establish the candidate's ethical and moral values. The integrity test consists of two parts: I. written anonymous test and II. obtaining information on the ethical and moral values of the candidates. Thus, each candidate should provide: a) a list of 50 persons with at least four years secondary school who know the candidate for at least three years, and b) there should not be any close relative, relative in-laws or any other person with status upon mutual agreement (for example, adopter or adopted child) with the candidate for lay judge among the persons from the list. In order to implement the psychological test, as well as the first part of the test of integrity, the Judicial Council of the Republic of Macedonia needs to hire experts from an independent and fully accredited professional institution.

After being elected, every lay judge must attend specialized training at the Academy of training judges and prosecutors. After the completion of training, the lay judge needs to pass a final exam. The Judicial council of the Republic of Macedonia decides to dismiss the candidates who failed the final exam. After receiving demands from all elementary and appellate courts on the necessary number of lay judges, the Judicial council of the Republic of Macedonia takes a decision on the exact number of lay judges in each elementary and appellate court. This decision is published in the Official Gazette of the Republic of Macedonia.

The lay judges have terms of service of four years with a possibility of re-election.

In juvenile cases, only a person with an experience in upbringing and education of juveniles can be elected for a lay judge.

The Minister of justice decides upon the compensation the lay judges receive for performing the lay judge duty.

According to the transitional and final provisions of the Law on courts, these conditions will be obligatory after January 1, 2016. Until then, when electing the lay judges, the Judicial council of the Republic of Macedonia should give priority to candidates with high education.

The Macedonian criteria differ significantly from the concept of lay judges that we had for nearly 50 years. In the process of harmonization of domestic legislation with the European standards, the newly adopted provisions of the Law on courts should be compared with the principles from the European Charter of Lay Judges.<sup>12</sup> Under the European Charter of Lay Judges, the term "lay judge" refers to all persons taking part in legal decision-making where three conditions need to be fulfilled: a) they do not make a career as judges, b) they may receive compensation but no salary and c) they can be elected or appointed for a period of time.

Having in mind the previously elaborated criteria for lay judges, it is quite problematic to determine whether they are harmonized with the principles deriving from the European Charter of

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<sup>12</sup> Final Draft Version, November, 2011.

Lay Judges which aim to improve the plausibility and comprehensibility in proceedings and judgments, enhance confidence in the legal system, bring human nature to justice, improve efficiency in justice, as well as increase acceptance of decisions.

If we compare the Macedonian system of selection of lay judges with the other European legislations, we may conclude that in the countries with mixed trial councils several models exist – in some countries (France, Greece) lay judges are randomly-selected, while in others (France, Austria and Portugal) lay judges are selected from lists of eligible voters to sit for a single case, or they are randomly selected to seat for a certain period of time (Italy, Greece).<sup>13</sup>

In Serbia, the participation of lay judges is also a constitutional principle. The judges and lay judges participate in the trial in a manner prescribed by the law (Article 142 paragraph 3, Constitution of the Republic of Serbia). The Law on judges (Article 81) envisages that a lay judge can be an adult who is worth performing this function. The following criteria should be taken into account when appointing the lay judge: gender, age, occupation and social position of the candidates, their knowledge, expertise and inclination toward certain types of legal matters.<sup>14</sup>

Under the Croatian Constitution (Article 118), lay judges participate in trial proceeding in accordance with the law.<sup>15</sup> The Law on courts prescribes that a lay judge can be an adult who is worth performing this function.<sup>16</sup>

### **3. The role of lay judges in the Macedonian criminal procedure**

**Structure of mixed trial councils.** The Republic of Macedonia accepted a system of “mixed trial council” where professional judges sit together with lay judges and decide on the law, facts, guilt and sentence. The Code of criminal procedure prescribes the structure of mixed trial councils, as well as their procedural competences during the criminal procedure.<sup>17</sup>

Lay judges participate in the first instance courts in every criminal procedure, except of these in the competence of a single-judge who is a professional judge (investigating judge, single-judge in summary procedure and juvenile judge). Regarding the prescribed criminal sentence in the Criminal Code of the Republic of Macedonia, for a crime punishable with imprisonment up to 15 years, the mixed trial council consists of one professional judge and two lay judges. For

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<sup>13</sup> Ethan J. Leib, ‘A Comparison of Criminal Jury Decision Rules in Democratic Countries’, *Ohio State Journal of Criminal Law*, Vol 5, 2008, p. 629-644., p. 640-642.

<sup>14</sup> Law on judges, December 22, 2008. In force since January 1, 2010.

<sup>15</sup> Constitution of the Republic of Croatia, available at: <http://www.usud.hr/uploads/Redakcijski%20prociscen%20tekst%20Ustava%20Republike%20Hrvatske,%20Ustavni%20sud%20Republike%20Hrvatske,%2023.%20ozujka%202011.pdf>.

<sup>16</sup> Law on courts, *Narodne novine*, no. 150/05, 16/07, 113/08, 153/09 i 116/10.

<sup>17</sup> Code of criminal procedure, “*Official Gazette of the Republic of Macedonia*” no. 15/1997; 44/2002; 74/2004; 83/2008, 67/2009 and 51/2011.

more serious crimes, punishable with an imprisonment of more than 15 years or life imprisonment, there are two professional judges and three lay judges. Lay judge is not envisaged only in case of a criminal chamber of the court where three professional judges decide upon legal matters concerning privacy (custody, special investigative measures, appeals on investigative judge's decisions etc.). In the Courts of Appeal, lay judges participate in mixed trial council only when there is a decision to hold a hearing. The second instance court's hearing is in competence of two professional judges and three lay judges. There is no lay judge in the Supreme Court of the Republic of Macedonia which is a court of third instance.

**Additional lay judges.** Several important issues emerge from the analysis of the position of lay judges during criminal procedure. The lay judges have to be continuously present during the entire main hearing. In accordance with the Article 275 of the Code of criminal procedure, if it is likely that the main hearing will last long, the president of the courts may require the president of the court to determine one or two lay judges to be present at the main hearing, in order to represent the members of the courts in case they are impeded.

If there is any change regarding lay judges as members of the courts, the main hearing should start from the beginning. Otherwise, there is an absolute violation of the provisions of the criminal procedure - the court has been improperly composed or a lay judge participated in the pronouncement of the verdict, but he did not participate at the main hearing or has been excluded from the trial with a legally valid decision.

**Main hearing.** Lay judges have a role in some important decisions during the criminal procedure. Namely, the mixed trial council decides about excluding the public from trial; if the lay judge must seek an exemption and he is obliged to terminate the work in the criminal case, he needs to inform the president of the court who will appoint another lay-judge; dismissal of defense lawyer during the trial; determining temporary measures for providing property claim at the trial; removing the defendant from the courtroom for a certain period of time and if the defendant has already given a statement, the mixed trial council can remove the defendant during the entire evidence procedure etc. During the main hearing, after the president of the court completes the interrogation of the defendant, the members of the council will question the defendant directly.

**Deliberation (counseling and voting about the verdict).** Lay judges have a significant role during deliberation. A decision will be considered adopted if the majority of members of the mixed trial council have voted for it. The president of the mixed trial council is obliged to manage the counseling and voting, to be the last one to vote and to consider all questions fully and completely. When votes on separate questions are divided and majority of votes is not accomplished, the questions shall be separated and voting shall be repeated until a majority of votes is accomplished. If the majority is not accomplished in this manner, the decision shall be adopted so that votes which are the least favorable for the defendant shall be added to

the votes which are less favorable, until majority is accomplished. The members of the mixed trial council cannot refuse to vote on questions set by the president of the council. However, a member of the council who has voted in favor of releasing the defendant or in favor of revoking the verdict and who has remained in the minority group shall not be obliged to vote for the sanction. If she/he does not vote, it shall be comprehended as if she/he has agreed with the vote which is in favor of the defendant. In deciding on the main matter, the first voting concerns the question whether the defendant has committed a crime and whether he is criminally liable. After that, voting on the sentence, other criminal sanctions, criminal procedure costs, legal property claims and other issues pending for decision takes place.

Deliberation shall be performed at a secret session. Special minutes shall be composed and only members of the council and the person who takes the minutes can be present at deliberation. The results of voting must not be announced. The minutes shall be signed by all members of the council, as well as by the person who takes the minutes. Dissenting opinions shall be included in the minutes, unless previously excluded. Only a court of a higher instance has right to access to the minutes when it decides upon a legal remedy.

#### **4. Surveys regarding the role of lay judges in criminal procedure**

##### **4.1. Macedonian survey**

**Methodological approach.** The only short survey on the role of lay judges in the Republic of Macedonia was undertaken in the period from May 1, 2008 to October 30, 2008, in the basic courts in Macedonia. A total of 270 questionnaires have been sent and responses were received from 187 lay judges.<sup>18</sup> All of them participated voluntarily and the answers were given anonymously. The questionnaire consisted of 11 questions and answers of multiple choices. Thus, the lay judge could choose only one answer. In order to contribute to the modest purpose of this article, we are going to analyze the answers to nine questions closely connected to the role of lay judges.

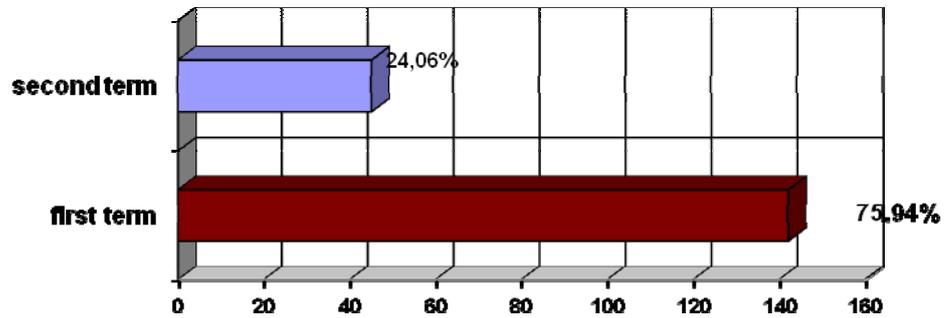
The main purpose of this short survey was to obtain basic insight into the implementation of the Code of criminal procedure's provisions concerning the role of lay judges during the trials - how are they treated by the professional judges; is it possible for them to express their own attitude; how they really vote before the judgment is pronounced etc.

**Received answers.** The answers were as follows:

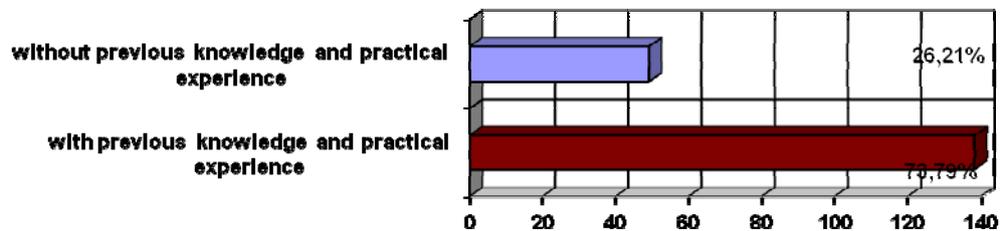
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<sup>18</sup> Лазар Нанев, 'Местото и улогата на судиите поротници во кривичната постапка пред судовите во Република Македонија', *МПКК*, по. 2-3/2008, p. 373-389.

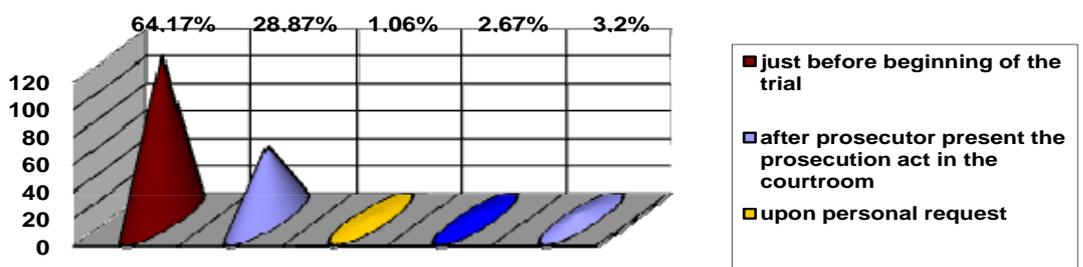
1. Is this your first or second term as a lay judge?



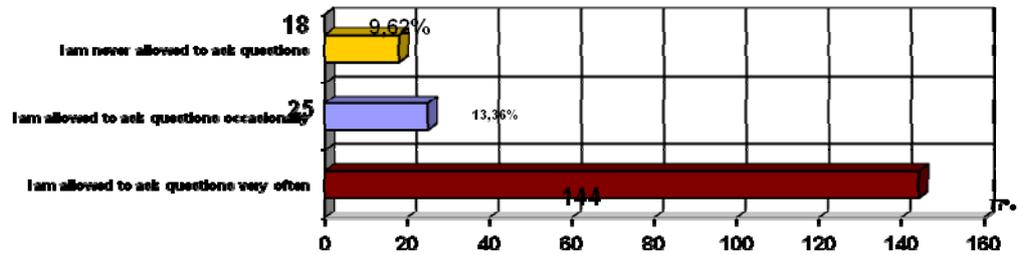
2. Knowledge about the legal system in general and criminal procedure.



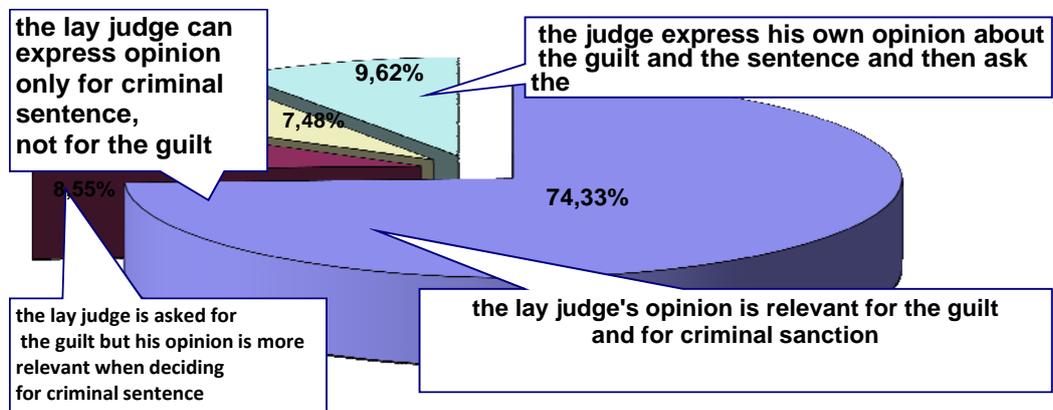
3. When does the lay judge become familiar with the particular criminal case?



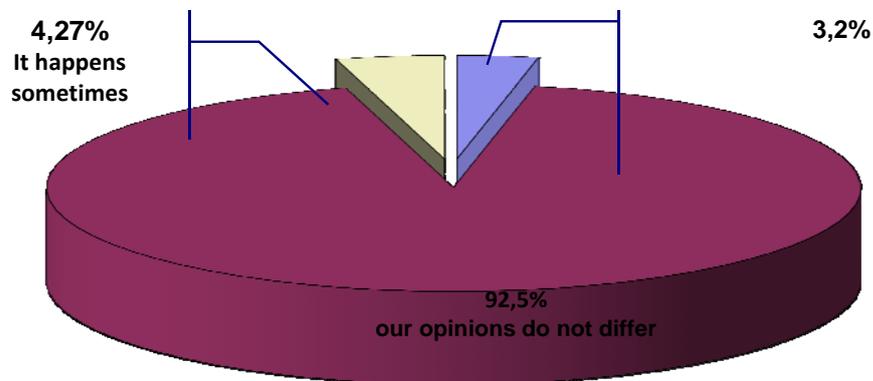
4. Is the lay judge active during the main hearing through asking questions the parties and other participants?



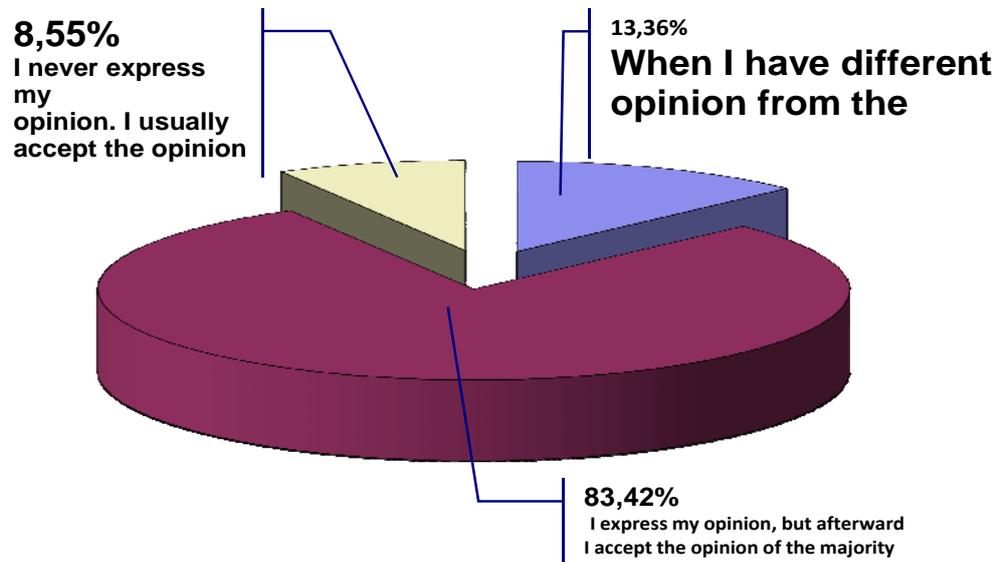
5. What is the role of the lay judge when deciding on the verdict?



6. Are there cases when the professional judges' opinion about the guilt and the criminal sentence is different from the opinions of lay judges?



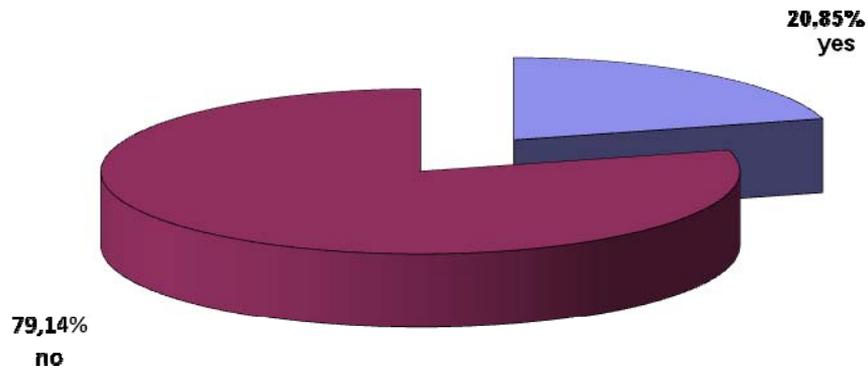
7. Are the differences in the opinion of the lay judge recorded in the minutes?



8. What is the attitude of lay judges about the significance of their role in the criminal procedure?



9. Does the engagement as lay judge have any impact on the personal attitudes toward the legal system?



**Conclusions from the survey.** The received answers of the lay judges involved in the survey allow us to reach several conclusions.

Although 142 lay judges or 75.94% were elected as lay judges for the first time, 73.79% of all respondents have prior information related to legal matters. Thus, the engagement as lay judge was not the main source of information about law and judicial procedures for them. Regarding any knowledge of the particular criminal case before the main hearing and the manner how the professional judge familiarizes the lay judge with the particular case, it is interesting to consider the fact that several lay judges answered that their familiarity with the case before the trial is "up to the judge". Their experiences with the judges differ on that matter. A total of 64.17% of lay judges get familiar with the matter immediately before the main hearing begins, 28.87% of them after main hearing have already begun, while others were either not familiar with the matter at all or they received some information upon their own request before the beginning of the main hearing. One can be surprised that a total of 77% of lay judges still ask questions during the trial, even though most of them get familiar with the matter just before the beginning of the main hearing. A total of 74.33% of the respondents were asked by the professional judge for their opinion separately regarding the guilt and separately regarding the criminal sanction, but it is really bizarre that their opinions almost never (92,5%) differ from the opinions of professional judge. The reasons for such a high percentage of opinions' conformity emerge from the analysis of the answers on the seventh question. Namely, 83.42% of lay judges encompassed with the survey express their own opinion, but at the end they accept the opinion of the majority members of mixed trial councils, even when it differs from their personal attitude about the guilt and sentence. The cases when the lay judge remains on his opinion, although it differs

from the opinion of the other members of mixed trial council are very rare. The lay judge in these cases insists that his opinion is noted in the minutes of counseling and voting.

Although one may consider that lay judges are present in the courtroom just in order to fulfill the procedural prerequisites for holding the main hearing and pronouncing the verdict, the lay judges encompassed with the survey have a different attitude - 69.5% of them still consider their role in criminal procedure as a very significant one.

Taking into account all aspects of the role of lay judges in criminal procedure, one should not be surprised that 79,14% of lay judges consider that their engagement as lay judges had no impact on their attitude toward the legal system in general, as well as toward the ways of its functioning.

#### 4.2. Surveys in Croatia

Very similar conclusions emerge from two surveys on the role of the lay judges in Croatia.

**Koprivnica.** The survey encompassed 18 lay judges of the Municipal Court in Koprivnica.<sup>19</sup> They have stated that during the counseling and voting about the verdict, their opinions were not contrary to the opinion of the presiding judge. Further, the lay judges stated that they generally adhered to the opinion of the other members of the mixed trial council. According to their opinions, the actual role of the lay judge depends upon the participants at the main hearing, as well as upon the attitude of the presiding judge toward lay judges. A total of 89% lay judges stated that the presiding judge usually familiarize them with the matter of the case before the trial, but 33,33% were never allowed to ask questions during the main hearing. Having in mind the legal role of the lay judges, in accordance with the Croatian Code of criminal procedure, this is unusual. This attitude of the professional judges toward the lay judges reflects in the counseling and voting, before pronouncing the verdict. Namely, in the Municipal Court in Koprivnica 44,44% lay judges have opinions which differ from the opinions of the professional judge. The lay judges remain to their opinion and in almost all cases they insist that their opinion is noted in the minutes on counseling and voting.

**Zagreb.** Survey on the role of lay judges in County Court in Zagreb was taken in the period between February 21, 2005 and March 4, 2005.<sup>20</sup> Only 17 lay judges out of 222 responded to the survey. According to the received answers, 68.75% of lay judges stated that the presiding judge usually familiarized them with the matter of the case before the trial and 62,50% of respondents stated that they were always allowed to ask questions. There is one very problematic

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<sup>19</sup> V. Piškorec, 'Suci porotnici u kaznenom postupku, s posebnim osvrtom na sudjelovanje sudaca porotnika u kaznenim postupcima na Općinskom sudu u Koprivnici', *Hrvatski ljetopis za kazneno pravo i praksu* (Zagreb), vol. 10, no 1/2003., p. 109-121.

<sup>20</sup> Anamarija Pavičić, 'Sudjelovanje sudaca porotnika u kaznenim postupcima pred Županijskim sudom u Zagrebu', *Hrvatski ljetopis za kazneno pravo i praksu* (Zagreb), vol. 12, no 1/2005, p. 63-85.

finding - 18.75% of respondents indicated that in case that they have not attended the previous trial session, they were neither familiar with the subject of the trial, nor the presiding judge had read the previously presented evidence. This is contrary to the principle of immediacy, thus making their participation in deciding the case highly questionable. A total of 56,25% of lay judges were asked by the professional judge for their opinion separately regarding the guilt and separately regarding the criminal sanction. However, 68,75% of respondents stated that their opinions do not differ from the opinions of the professional judge, even though 11,76% of lay judges remained on their opinion which differs from the opinion of the other members of the mixed trial council. In these cases, the lay judge insists that his opinion is noted in the minutes of counseling and voting. It is not very encouraging that 76,47% of lay judges considered that their engagement as lay judges had no impact on their attitude toward the legal system in general and the way of its functioning.

#### **4.3. German experiences with the participation of lay judges in mixed trial councils**

There are mixed trial councils in Germany, where one to three professional judges sit collaboratively with two or three lay judges. Lay judges are ultimately chosen to sit in a particular case through a lottery system, although the pool is not drawn from the population at random, as in the United States. The majority rule prevails in procedural matters and a majority of two-thirds is required to convict and sentence a defendant; failures to achieve convictions are treated as acquittals.<sup>21</sup>

A study was conducted in Germany in order to identify the proportion of cases in which lay and professional judges have found themselves in an initial disagreement. Also, the study was supposed to determine how frequently the laymen persisted in their views. The main findings may be summarized as follows:

- on the question of guilt (verdict), some lay and professional judges in the mixed trial councils found themselves in some disagreement at the outset of their deliberations in 6.5 percent of all cases;
- on the question of sentence, where the range of permissible outcomes is much broader than on verdict, some initial disagreement between lay and professional judges occurred in 20.1 percent of all cases;
- in 6.5 percent of the cases in which there was initial disagreement on guilt, one or more of the lay judges persisted in voting against the professionals in 30 percent of the cases; in 21 percent (mostly in the Two-One court) the lay votes affected the verdict. The cases where lay voting altered the outcome constituted 1.4 percent of the entire sample of cases;

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<sup>21</sup> Walter Perron, 'Lay Participation in Germany', 72 *Revue Internationale de Droit Pénal*, 181 (2001), quoted by Ethan J. Leib, 'A Comparison of Criminal Jury Decision Rules in Democratic Countries', *Ohio State Journal of Criminal Law*, Vol 5, 2008, p. 629-644.

- lay influence on sentencing was greater, in part because sentencing disagreements were often resolved by compromise. The lay votes affected 32 percent of the cases in which there was initial disagreement, or 6.2 percent of the entire sample of cases.<sup>22</sup>

#### 4. Arguments *pro* and *contra* participation of lay judges in mixed trial councils

There is a dynamic debate about the role of lay judges in mixed trial councils. One has to accept all arguments regarding differences between the judgment based on common sense (lay judging) and the judgment based on legal science (professional judging).<sup>23</sup>

**Arguments *pro*.** The participation of lay judges should be understood as a democratic argument according to which lay judges bring broader life experience at the main hearing and enable the citizens to take part in the hearing and deliberation. It is true that a certain degree of democracy in the courts is truly desirable. Thus, the participation of lay judges helps in preventing courts and professional judges from moving too far away from the society and it permits an involvement of individual citizens in the administration of justice. Their participation has a predominantly preventive purpose, as it will deter professional judges from political subservience and from arbitrariness. The role of lay judges is a reflection of so-called representative democracy and a political precondition that should be provided in the court procedure.<sup>24</sup>

The participation of lay judges has double meaning. First, lay judges decide upon common sense, not upon conclusions based on legal science. Thus, they bring general awareness of law, people's sense of justice and fairness, enhance the system's legitimacy, increase public confidence, as well as the acceptance of the outcome by the public.<sup>25</sup> Second, the involvement of lay judges enhanced their knowledge about the legal system, the juridical aspect of administration of justice, as well as the perceptions on the impact of crimes on victims.

**Arguments *contra*.** Criticism of the participation of lay judges can be placed under so called technocratic argument. There are

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<sup>22</sup> G.Casper, H.Zeisel, *Der Laienrichter im Strafprozess* 9, Heidelberg: C. F. Müller Juristischer Verlag, 1979, quoted by Langbein, John H., *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?* (1981), p. 202. Available at: [http://digitalcommons.law.yale.edu/fss\\_papers/535](http://digitalcommons.law.yale.edu/fss_papers/535)

<sup>23</sup> Diesen, op.cit., p. 360.

<sup>24</sup> Diesen, op.cit., p. 359 – 361. Marijke Malsch, *Democracy in the courts: lay participation in European criminal justice systems, International and comparative criminal justice*, Ashgate Publishing Company, 2009, p. 1. Bayer, op.cit., p. 142. Langbein, John H., *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?* (1981), p. 205. Available at: [http://digitalcommons.law.yale.edu/fss\\_papers/535](http://digitalcommons.law.yale.edu/fss_papers/535)

<sup>25</sup> Malsch, op.cit., p. 3.

so many findings that demystified the real role of the lay judges!<sup>26</sup> There is a risk of subjectivity, as lay judges have more emotional point of view ("the bleeding heart syndrome"), intuition and personal values which define their starting point in the understanding and deciding all issues during the hearing and deliberation.<sup>27</sup> Sometimes, they decide on the basis of the body language of defendants.<sup>28</sup> Also, lay judges have difficulties with the question of relevance and they mix the question of guilt with the question of punishment.<sup>29</sup> One has to agree that a successful trial and a fair verdict depend upon the appropriate legal education and professional skills. As lay people lack such competences, they can make mistakes. Either they can be more lenient, or they bring decisions on the basis of great empathy. In many cases they hardly understand the legal terminology or the activities undertaken during the trial. Thus, their participation may lead to misunderstanding or even miscarriage of justice.<sup>30</sup>

### 5. Criticism of the role of jurors in Anglo Saxon jury

In the deliberation and reconsideration of the mixed trial councils, it is also useful to look at the criticisms and disadvantages of jury trials.

The role of jurors is subject of criticism for more than 50 years.<sup>31</sup> The reform of the jury system preoccupied the criminal justice policy-makers in England and Wales. Their debates raised several questions:

- the proper scope of the jury's jurisdiction (whether it should try complex cases, as well as whether it tries too many non-serious cases),
- the defendant's ability to waive jury trial,
- the accountability of the jury (whether it should justify its decisions and to what extent appeal courts should investigate allegations about biased jurors),

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<sup>26</sup> On different opinions regarding the participation of lay judges in court procedure, Bayer, *op.cit.*, p. 142.

<sup>27</sup> Diesen, *op.cit.*, p. 362.

<sup>28</sup> Unfortunately, one has to agree with the additional questions, such as the following: what does body language mean for the people who are unluckily charged with crimes they have not committed? Are they nervous in the courtroom, restless, have a difficulty articulating themselves under the stress and pressure of trial? Namely, in such a case there is a real risk that they will be adjudged to be guilty as charged. Tony Olsson, Sweden's Lay Judge System: Pretty Secure? Or Pretty Much Not? Available at: [rixstep.com](http://rixstep.com)

<sup>29</sup> Diesen, *op.cit.*, p. 359-360.

<sup>30</sup> Malsch, *op.cit.*, p. 4.

<sup>31</sup> Charles O. Betts, *Jury Sentencing*, 1956, 2 National Parole & Probation Association, p. 369. James P. Juras, (1952) 'On Modernizing Missouri's Criminal Punishment Procedure', 20 *Univ. of Kansas City Law Rev.* 299, Webster, Charles W. (1960) 'Jury Sentencing: Grab-Bag Justice', 14 *Southwestern Law J.* 221.

- the proper composition of the jury in 'racially sensitive' cases.<sup>32</sup>

In 2001, the New Zealand Law Commission published an extensive report on the criminal jury.<sup>33</sup>

One aspect linking various reform issues is the question how to manage the tension between the accurate fact-finding in the criminal trial and the other normative aspects of the trial, in particular the element of democratic engagement involved in the use of the jury. The vast majority of cases are heard in the magistrates' court, where there is no jury. Even in the Crown Court, majority of defendants pleads guilty, as a result of which they are sentenced by a judge, but not tried by a jury.<sup>34</sup>

Some have suggested that jurors, who are less experienced, more impressionable, less likely to have prosecutorial background and demographically more diverse than judges could be a source of leniency in favor of defendants in sentencing.<sup>35</sup> One of the critics' major claims regarding sentencing by jury is that juries, lacking both the experience and access to sentencing norms that judges have, would impose wildly disparate, ad hoc sentences for offenders of identical culpability.<sup>36</sup>

In order to define some criteria for taking decisions, some countries have adopted judicial sentencing guidelines. However, these are designed for judges, not for jurors. It should be a cause for concern that the judges use guidelines when imposing sentences after a guilty plea or after a courts trial and, on the contrary, juries which make decisions upon the guilt when the defendant has opted for jury trial are not informed about these guidelines.<sup>37</sup> Even worse, the state law provides that the judicial sentencing guidelines do not apply in cases tried by a jury and it denies the defense attorneys the opportunity to provide jurors with information about the judicial sentencing guidelines.<sup>38</sup> The survey clearly shows that criminal jury systems are not necessary for designing democratic polities. Although juries may have certain salutary effects, it should not be assumed that a criminal

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<sup>32</sup> *Auld LJ*, 'Review of the Criminal Courts of England and Wales: Report' (London, TSO, 2001), chapter 5 and the Decision of the House of Lords on the bias question in: *R. v. Connor, R v Mirza* [2004] UKHL 2, quoted by Mike Redmayne, 'Theorising Jury Reform in The Trial on Trial', Volume 2, Judgment and Calling to Account, (eds. Antony Duff, Lindsay Farmer Sandra Marshall, Victor Tadros), Hart Publishing, Oxford and Portland, Oregon 2006, p. 99.

<sup>33</sup> *Juries in Criminal Trials*, NZLC R69 (Wellington, Law Commission, 2001), quoted by Mike Redmayne, op.cit., p. 99.

<sup>34</sup> Mike Redmayne, op.cit., p. 99-100.

<sup>35</sup> Hoffman, Morris B. (2003), 'The Case for Jury Sentencing', *52 Duke Law J.* 951.

<sup>36</sup> King, Nancy J., & Rosevelt L. Noble (2004) 'Felony Jury Sentencing in Practice: A Three-State Study', *57 Vanderbilt Law Rev.* 885, p. 333.

<sup>37</sup> This is the case in Arkansas and Virginia, King/Noble, op.cit. Stephanie Gardner Holder, (1994) 'Survey, Criminal Procedure', *16 Univ. of Arkansas Little Rock. Law J.*, p. 99.

<sup>38</sup> Holder, op.cit., p. 99.

jury is a necessary qualification for democracy in the contemporary global community.<sup>39</sup>

While analyzing criticism toward the jury system, one has to agree that there were types of evidence that jurors were allowed to consider, as well as the ways these evidence was presented. There is a good reason to believe that the lack of rules on evidence led to many acquittals. In the absence of such rules, jurors must have often been befuddled or overwhelmed in trying to determine on their own the relevance of testimony or how to weigh confusing and often contradictory evidence.<sup>40</sup> Some historians believe that before 1908 juries were much harsher toward thieves than toward violent criminals, as the jurors were composed of bourgeois. Before 1944, the jurors have acquitted a far higher proportion of accused women than men. This was due to the fact that all of them were males and thus frequently gallant toward female defendants or they perceived them as less criminally responsible than men.<sup>41</sup> We should also be aware of the fact that the jury deliberates without professional participation and it decides without giving reasons. There is virtually no opportunity to provide the jurors with a knowledgeable guidance during deliberations and the means of detecting and relieving against errors after verdict are quite limited.<sup>42</sup>

In some countries, the contemporary reform of criminal procedure law tends toward accepting jury system instead of mixed trial councils. This is the case with the newly adopted jury systems in Russia and Spain.<sup>43</sup>

There were also some ideas on introducing a jury system in Italy, but they are still without any conceptual result.

## 6. Concluding remarks

**Selection criteria.** The analysis of the conclusions from the Macedonian survey demonstrates that although the role of lay judges and their participation is regulated by law, they do not have any effective possibilities to accomplish their real position during the trials. There are several questions that cannot be answered affirmatively - how can the lay judge be active during the main hearing without any elementary information about the matter of trial? How can lay judges avoid the obvious position of passive observers of the procedural acts taken by the judge and the parties? Even when lay judges are active during the trial, it is easy to consider what kind of

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<sup>39</sup> Ethan J. Leib, 'A Comparison of Criminal Jury Decision Rules in Democratic Countries', *Ohio State Journal of Criminal Law* [Vol 5:629-644].

<sup>40</sup> James M. Donovan, 'Juries and the Transformation of Criminal Justice in France in the Nineteenth and Twentieth Centuries', *University of North Carolina Press*, 2010, p. 178.

<sup>41</sup> J.M Donovan, op.cit., p.178.

<sup>42</sup> Langbein, John H., "Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?" (1981), p. 202. Available at: [http://digitalcommons.law.yale.edu/fss\\_papers/535](http://digitalcommons.law.yale.edu/fss_papers/535)

<sup>43</sup> Stephen C. Thaman, 'Europe's new jury systems: the cases of Spain and Russia, Law and contemporary problems', Vol. 62, no. 2, (233-259), 1999. Available at <http://www.law.duke.edu/journals/62LCP>. Stephen C. Thaman, *Hrvatski ljetopis za kazneno pravo i praksu*, op.cit.

questions they can ask and how relevant those questions are regarding the facts of the case, guilt and punishment.

Contrary to these conclusions, the new Macedonian Law on courts prescribed too harsh criteria for recruitment of lay judges. It is true that the European Charter of Lay Judges proposed that lay judges should receive properly funded initial and continuous training, as well as an access to appropriate resources, including information technology. However, there is no single country where the general conditions for election of judges are very close to those related to the lay judges. Usually, minimal age of 18 years and dignity are crucial criteria everywhere, apart from Macedonia.

Comparing the Macedonian criteria for lay judges with the criteria required by the justices of the peace and magistrates (so-called quasi-judges) may provide an example. They are primarily local governmental officials who can take decisions in various fields - divorce, juvenile, water, probate and traffic courts. However, some may hear general cases, including small claims and misdemeanors. Although the majority of quasi-judges hear both civil and criminal cases with limits on the amount in dispute and maximum sentencing, specialization is still required. In most cases, they do not have legal training. Actually, many states have the same basic qualifications for judicial officers, including residency and degree requirements. However, although in some cases legal training is required, in others it is not.<sup>44</sup>

According to the Macedonian criteria, the lay judges must have much higher level of education, although their role in the procedure is not that important as the role of so called quasi-judges. The Macedonian system is far from the systems where lay judges are people without specific education and training and who ensure reduction of the technical language, thus making the law accessible to ordinary people. There is no link with the main idea that participation of lay judges ensures that in the judicial system the decisions are taken by ordinary people with a variety of backgrounds. That advances the promotion of the idea of a society which is free from state control.

**Cost-effectiveness.** One of the arguments in favor of lay judges is that they are less expensive than the professional ones.<sup>45</sup> There is a dilemma whether the lay judges in the new Macedonian system will be really less expensive. The selection criteria are not realistic in comparison with the compensation the lay judges receive. The realistic approach requires that we admit that there will not be a single candidate with “at least high education” agreeing to receive a compensation of 3,5 Euro per trial session. Beginning with the prescribed criteria and all conditions that the lay judge needs to fulfill, one may expect a new law on lay judges’ salaries. That would be in direct contradiction to the provisions of the European Charter of Lay Judges, but it would motivate the candidates to become lay judges. Otherwise, we would face a total collapse of the mixed trial councils system, as nobody would apply for lay judge. Even if there is no new

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<sup>44</sup> Mary C. McFarland, The role of quasi-judicial officers in today’s changing courts, p.18. Available at: [www.nacmnet.org](http://www.nacmnet.org)

<sup>45</sup> Malsch, op.cit., p. 2.

law of lay judges' salaries, their compensation needs to be much higher. That will inevitably affect the State Budget and it will bring to significant increase of the costs of judiciary. Hence, the new solution is neither cost-effective, nor an efficient one.

**Lay judges and high risk level of criminal offences.** If we accept the fact that we live in a society which has become more and more specialized, an important argument against lay judges is their lack of juridical competence.<sup>46</sup> One should agree with the opinion that the commitment toward raising the professional level of judiciary can be achieved only by increasing the expertise and competences of the professional judges.<sup>47</sup>

We cannot fully agree with the opinions in favor of abolishing the lay judge system as a relic from the Middle Ages and replace it with a court system consisting of professional judges, as a model providing more secure judicial system where guilt will be determined by evaluating evidence.<sup>48</sup> Still, it is true that the existing model of mixed trial councils should be reconsidered from several aspects.

Shall we keep the lay judges only because their involvement has a long tradition? The tradition is important, indeed, but we have to agree that tradition cannot be understood as an argument in itself. It is clear that only compelling reasons should result in changes of the judicial system and creation of only professional courts. An important question in this context is whether to create specialized courts for the most difficult criminal cases (such as organized crime, for example) without any involvement of lay judges, but keep lay judges as a part of courts for less serious crimes. From the other point of view, one should agree that the science of jurisprudence has not yet been able to prove that justice is done better without lay judges.<sup>49</sup>

According to the Croatian legislation, there is neither a lay judge in trials for criminal offences within the competence of USKOK,<sup>50</sup> nor for crimes against the international war and humanitarian law. The lay judges are excluded from the trial councils (consisted of three professional judges), because of the high-risk level of criminal offences within competence of USKOK. Another reason for this is the overwhelming complexity of the criminal proceedings where the successful conducting and judging requires an exceptional legal knowledge and firm guarantees of independence and impartiality.<sup>51</sup>

The Serbian legislation prescribed that there are no lay participants in trial councils when criminal procedure on war and

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<sup>46</sup> Disen, op.cit., p. 357.

<sup>47</sup> Bayer, op.cit., p. 154.

<sup>48</sup> Tony Olsson, op.cit.

<sup>49</sup> Diesen, op.cit., p. 356

<sup>50</sup> Office for combating corruption and organized crime.

<sup>51</sup> D. Krapac, *Kazneno procesno pravo, Prva knjiga: Institucije*, IV izmenjeno i dopunjeno izdanje, Narodne Novine, Zagreb, 2010, p. 185 (paragraph 257).

organized crime is conducted. Those crimes are within the competence of two special prosecutions offices (for war crimes and for organized crime) and the trial councils consist of three professional judges.<sup>52</sup>

**Proposals.** It should be taken into consideration that one of the arguments in favor of lay people involved in trials is enhancing their knowledge about the legal system, the juridical aspects of the administration of justice, as well as providing them with knowledge about the impact of crimes on the victims. Conclusions suggest that the individuals involved did not obtain a better insight into the legal and judicial system while being lay judges. Also, the new Macedonian system does not provide any guarantee that the participation of lay judges is a precondition providing the judicial system with legitimacy. Equally, it is not clear that the public will have a positive attitude toward the judicial system because the justice is administered by lay judges who do not represent the citizens anymore, but who are selected by criteria that are far away from the ordinary people and the common sense.

Before deciding on keeping the concept of lay judges in the Macedonian system, one should answer several questions. - Weather the participation of lay judges can be understood as a democratic alibi instead of being a democratic justice? Weather the participation of lay judges is only a formal precondition for the trial if they do not contribute truly in deciding on the guilt and the criminal sentence in mixed trial council? What types of crimes should be tried with participation of lay judges?

On the basis of the above, the following proposals can be underlined:

- the selection criteria need to be reconsidered in accordance with the comparative experiences which prove that high education, specific training and exams for lay judges are not acceptable,

- participation of lay judges should be envisaged only when less serious crimes are tried (mixed trial councils of one professional and two lay judges for crimes punishable with an imprisonment of up to 15 years),

- there should be no lay judges in cases of organized crimes and criminal offences where imprisonment of 15 years and more can be imposed. Instead, the councils should consist of three professional judges,

- there should be lay judges in appellate courts when main hearing is held only for less serious crimes (punishable with imprisonment of up to 15 years).

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<sup>52</sup> The Code of criminal procedure (*Official Gazette* no. 58/04, 85/05, 85/05, 115/05, 49/07, 20/09, 72/09, 76/10), the new Code of criminal procedure, as well as the Law on public prosecution office (*Official Gazette*, no. 116/08, 104/09) will enter into force on January 15, 2012 for war and organized crimes and on January 15, 2013 for all criminal offences.

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