opportunity to go slightly deeper into the biopolitics of family planning.[7] With evidences from 38 Asian countries and a ton of bibliographic references, the book is a great addition to the burgeoning archives of demographic literature. Their analysis to relate the contraceptive-method mix to family-planning programmes, however, is lacking on multiple fronts. With a lengthy discussion on method-choice theories and conceptual frameworks, the study shapes up very structurally, and yet writings in later chapters are in the mould of a narrative analysis. For instance, the eight *key points* presented in the conclusion have not been included in the analytic structure and exist only as a suggestive corollary to the observations from country-level analysis. Although this is stylistically congruent with the three policy chapters and with the authors' claim of it being an "explorative study" and "not all-encompassing," its discord with the first couple of chapters is quite glaring. It is this epistemic dissonance between a structural and a narrative form of analysis that prevents a truly harmonious synthesis.

The book is an explorative study; examined exclusively with literary sources, it attempted to find the causal link between contraceptive choice and population policies. To what extent it has succeeded in that pursuit is debatable, but its value as an introductory read is undeniable. Although not groundbreaking in its findings, a comprehensible narrative style and a lucid prose largely devoid of academic jargon make it a preliminary read not just for demographers, but also for a wide array of practitioners and researchers in the fields of population and health studies and science policy, bureaucrats, and policymakers for both state and non-state organizations, and even for a larger audience not directly related to academia.

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Civil juries in Okinawa's past and Japan's future

Civil Jury Trials Could Change Japan [Minji Baishin Saiban Ga Nihon Wo Kaeru] By Osamu NIIKURA, Satoru SHINOMIYA, Hiroshi FUKURAI, & Takayuki II Tokyo: Nihon Hyōronsha, 2020. 288 pp. Hardcover $35.00.
doi:10.1017/als.2021.12

[7] Krause and De Zordo (2012).

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One interesting thing about being in Japan during the period preceding the inauguration in 2009 of the *Saiban'in* (lay-judge) system of civic participation in serious criminal trials was the preparatory marketing campaign.[1] By my recollection, this involved concentrated efforts by the judiciary and other sectors of government to first articulate, then assuage the (possibly imaginary) fears of the average Japanese person about their ability to participate in weighty decisions regarding culpability and punishment.

"*But I'm just a regular person! How can I possibly understand the law?*" went government-generated FAQs. These questions led to comforting answers: "*You don't have to worry about that; professional judges will tell you what the law is*" (my paraphrasing). That the entire system was designed to exclude anyone obviously tainted with legal knowledge (including law professors) who could challenge judges was rarely mentioned.[2]

Much of the "*is the average Japanese person capable of such weighty decisions*" discourse also seemed to ignore the fact that, from 1928 through 1943, Japan had a criminal jury system under a law that is still technically on the books.[3] Even less likely to be discussed was the Okinawan experience with juries during the American occupation, which lasted from the end of the war until 1972.

Yet, two generations ago, criminal juries in Okinawa garnered attention in Japan through the award-winning 1977 book *Gyakuten—Amerika shihaika Okinawa no baishin saiban (REVERSAL! Okinawan Jury Trial under American Occupation)*.[4] In it, Okinawan writer Chiharu Isa describes an occupation-era incident that saw a brawl between drunken marines and Okinawan men that resulted in the death of one marine and a murder trial in which Isa himself sat as a juror. Involving a real-life *Twelve-Angry Men*-like turnaround in which Isa helps to convince a mixed panel of Okinawan and foreign jurors to acquit the Okinawan/Japanese defendants of the homicide charge, *REVERSAL!* was presumably satisfying for a Japanese audience.[5] A dramatized documentary version of the story was also broadcast by the NHK (the nation's public broadcaster) and featured Isa playing himself.[6]

With civic participation in criminal trials now a fact of life for Japanese people and, by most accounts, a positive one, *Civil Juries Could Change Japan* is a book that will encourage them to think about how civil participation could improve the civil justice system also.[7] Published in 2020 for a non-specialist audience, *Civil Juries Could Change Japan* was produced by the *Baishinsaiban wo Kangaeru Kai* ("The Research Group on Jury Trials") and edited by

[1] Since the *saiban'in* system has been written about extensively in English, the details will not be rehashed here. See e.g. Corey & Hans (2010); Miyazawa (2014); Jones & Ravitch (2018).

[2] Art. 15 of the enabling legislation (citation follows) bars from serving as lay judges numerous categories of persons, including law professors, former judges or prosecutors, and lawyers and members of other legal professions. *Saiban'in no sanka suru keiji saiban ni kansuru hōritsu* [Act on Criminal Trials with the Participation of Saiban-in], Law No. 63 of 2004 (hereafter "Saiban'in Act"). Note that another form of civic participation existed before the *saiban'in* system in the form of Prosecutorial Review Commissions, which were established through an occupation-era law and establish citizens panels empowered to review prosecutorial decisions not to bring charges. *Kensatsu Shinsakaihō,Law* [Prosecutorial Review Commission Act], Law No. 147 of 1948. Until amendments in 2009, it had no powers to force prosecutions and was never empowered to prevent them from being brought.

[3] *Baishinhō* [Jury Act], Law No. 50 of 1923. The Jury Act was suspended in 1943 pursuant to the Act for Suspending the Jury Act (*Baishinhō no teishi ni kansuru hōritsu*; Law No. 88 of 1943), which, by its terms, only suspended the former law until the end of the war, after which it was to be reinstated by an imperial edict. It never was.

[4] Isa (1977).

[5] The book also generated a Supreme Court precedent which confirmed that truth is not a defence to defamation in Japan, at least not when it comes to disclosing criminal records; Isa had used the real names of the defendants in his non-fiction book and one of them sued. Supreme Court (3rd Petty Bench) judgment of 8 February 1994, 48 Minshū 149. See also Jones (2014).

[6] In my interview with him, Isa attributed this to the inability of the production company to find a Japanese actor to handle the courtroom English; *ibid.*

[7] *Baishinsaiban wo kangaeru kai* (2020).

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four leading scholars. It comprises short essays by a diverse body of contributors analyzing both the reality and potential of civil participation in the Japanese justice system.

Civil Juries Could Change Japan is written in Japanese for a Japanese audience. However, some of the substance—including the accounts of Okinawan jury trials—has already been introduced to foreign readers in *Japan and Civil Jury Trials*—a 2015 book by Matthew Wilson, Hiroshi Fukurai, and Takashi Maruta, all of whom also contributed to the more recent Japanese compilation.[8]

Civil Juries Could Change Japan starts with an introduction of the Okinawan experience with civil juries. This portion is founded in valuable research conducted by editor and contributor Professor Hiroshi Fukurai together with teams from the Okinawan Bar Association and Japan Federation of Bar Association into archival materials discovered at Ryūkyū University two decades after Okinawa reverted to Japanese sovereignty.

Occupied Okinawa had the full panoply of US-style juries: grand juries, criminal juries, and civil juries, though these did not appear until the latter half of the occupation. The first grand jury was empanelled in 1963 and, in the nine years remaining before the islands reverted to Japan, a few jury trials were conducted: seven criminal and four civil, two of which involved the same plaintiff.

The limited number of civil jury trials belies their significance. As noted by Professor Fukurai, they were remarkable, for several reasons. First, they all involved women suing large companies, including multinationals involved in the postwar reconstruction and administration for torts: preventable accidents resulting in death or injury to husbands or children. Second, in all of these cases, the plaintiffs prevailed and were awarded significant damages against powerful defendants.

Third, as with criminal-trial juries in Okinawa, the jury panels were highly diverse, containing a mixture of Okinawans, Americans, and residents of other nationalities, all bound by the common thread of being able to understand English.[9] Fourth, the panels also featured racial and gender diversity, with women sitting on juries in Okinawa before the US Supreme Court made it clear that this form of diversity was constitutionally required for jury trials in American courtrooms.[10]

The sections on the Okinawan experience alone are fascinating but, in *Civil Juries Could Change Japan*, they merely serve as a springboard for a broader discussion of how Japan's justice system could be improved through increased civic participation beyond the sphere of criminal proceedings. On this subject, Okinawa offers a real-life example: the frustrating series of unsuccessful lawsuits brought by large numbers of Okinawan people seeking relief from noise pollution caused by US military aircraft. Courts have rejected such lawsuits on the grounds that the Japanese government is not responsible for "third-party" activities.[11] This is not the only mass tort covered, with the struggles of those seeking compensation for the Fukushima nuclear disaster offering another example of how juries might be a solution.

The book comprises short chapters by a diverse and distinguished cast of scholars, practitioners, and other commentators, collectively forming a compendium of defects in Japan's civil justice system. In that sense, it will prove a useful source for those seeking

[8] Wilson, Fukurai, & Maruta (2015).

[9] There were no nationality requirements for jury service. According to Professor Fukurai, the requirements for jury service in Okinawa were being aged at least 21, being able to understand English, and having resided in Okinawa for at least three months. Fukurai (2020), pp. 13, 17.

[10] *Hoyt v. Florida*, 368 U.S. 57 (1961) (upholding a state law excluding women from jury pools except for those specifically opting in); *Taylor v. Louisiana*, 419 U.S. 522 (1975) (finding a Sixth Amendment violation in state law excluding women from jury pools unless they specifically requested to be included, and overturning *Hoyt*); *Duren v. Missouri*, 439 U.S. 357 (1979) (finding a Sixth Amendment violation in state law allowing women to freely opt out of jury service).

[11] Ikemiyagi (2020), pp. 72–4.

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to substantiate critiques of Japan's legal system. At the same time, however, it is essentially a work of advocacy and, as such, does not offer any contrarian viewpoints on the subject of civil juries.

As a work in favour of enhanced civic participation, it contains a number of useful perspectives. A chapter by Professor Shirō Kawashima points out some of the limited mechanisms for civic participation in civil justice that already exist. Court mediators (*chōteiin*) help to conciliate family and civil disputes. Judicial commissioners (*shihōiin*) help to resolve civil litigation in summary courts. Advisers (*san'yoin*) offer opinions on family-court proceedings, when requested to do so. Expert commissioners (*senmon iin*) enable courts to access medical or other professional expertise. And so forth. But these are all comparatively minor roles and exist primarily to support judges. Similarly, the system of labour tribunals in which a representative of management and labour participate together with a judge to promptly resolve many routine employment disputes has had some merits, but is again concerned more with judicial efficiency than actual civic participation.[12]

Legal practitioner Tatsuo Kamiguchi catalogues some of the problems with Japan's civil justice system, with trials deteriorating into unsatisfying empty formalities devoted primarily to encouraging settlement and so forth.[13] Veteran lawyer Futaba Igarashi warns of a possible decline in the legitimacy of the *saiban'in* system, as evidenced by the dramatic increase in those declining to answer summons to be candidates, and the overturning of *saiban'in* verdicts on appeals. She also suggests that administrative litigation is uncommon and the government almost always prevails.[14]

Attorney Toshihiko Morino, a former judge, writes about participating in a case involving a worker challenging an employer's order to move to a new post in a different geographic location. The worker initially prevailed but the judgment was overturned after a motion of objection. Morino reflects on how most judges were unlikely to feel empathy for the worker, given that the judicial career path involves moving to new posts every three to four years. Perhaps a panel of people with diverse work experiences would be more sympathetic.[15]

Drawing on bad experiences in intellectual-property (IP) litigation, patent attorney Seiki Takita opines that judges in civil litigation have too much discretion to come up with whatever justification they think suits what they consider to be the correct result. In patent litigation, this leaves them to make decisions without properly understanding an invention. While judges have access to expert committees to help understand technical matters in IP cases, whether to use such resources is entirely at the discretion of the court. In trademark cases, too, courts often make decisions from the "demand" (consumer) standpoint, but often lack realistic views. Takita makes a surprisingly compelling argument for how citizen participation could improve the quality of justice in IP disputes, notwithstanding the general perception that this area of law is highly "expertized."[16]

The contribution by editor and contributor Takayuki Ii offer a useful reminder that, while settlement may serve the needs of judicial efficiency, it may stand in the way of closure for those suffering harm yet coerced by the system to settle. His illustration is the tragic case of an accident in which a teenage boy was killed by a malfunctioning elevator. His parents endured a long struggle for justice involving parallel criminal and

[12] Kawashima (2020), pp. 58–63.
[13] Kamiguchi (2020), pp. 64–71.
[14] Igarashi (2020), pp. 75–80.
[15] Morino (2020), pp. 94–8.
[16] Takita (2020), pp. 141–6.

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civil trials. In the latter, the judges ultimately recommended settlement on the grounds that a trial resulting in the award of money damages would not really resolve the case![17] Yet, such a judgment would only be possible on a finding of fault on the part of the defendant, which would presumably be more satisfying than a settlement intended to specifically avoid such a result. A jury of fellow citizens deciding who was at fault and how much they should be would certainly be a more conclusive resolution than a panel of professional judges sloughing off their duties by acknowledging the limitations of their institution.

Several contributors add to the theme of civic participation as a means of improving administrative litigation. On paper, it seems like a well-structured system, but operationally suffers from a number of deficiencies, including a shortage of both judges and lawyers who understand how it is supposed to work. This may be due to a docket of administrative-litigation cases that is tiny compared to civil matters, but that may in turn be due to the dismal odds of prevailing against the government in court. As noted by lawyer and professor Yasutaka Mizuno, even if you have a good case and have found a lawyer to represent you (itself a sign that you have a good case), you are still likely to lose. Administrative litigation sees plaintiffs win at the initial trial in only about 10% of cases and, even then, there is a high likelihood of the victory being overturned on appeal (something that almost never happens in reverse).[18]

As an example of a judge's tendency to favour the government, Mizuno notes that, in administrative-case-litigation proceedings, they avoid using "proceedings for arranging and issuing evidence" (*sōten seiri tetsuzuki*). These are used in approximately of half of regular civil trials and help to force litigants to focus their pleadings on specific issues and how they are proven. In Mizuno's view, their limited use in administrative-case-litigation proceedings helps judges to avoid putting themselves in a position in which they *must* rule against the government.[19]

Although most civil litigation against the government is heard before panels of three judges, they clearly do not provide enough diversity of viewpoints. Use of juries would thus tilt the field more in favour of plaintiffs.

A section of the book is also devoted to international comparisons, which perhaps necessarily means primarily the US. A final short section advocating civil juries, including a welcome chapter by Miyazawa Setsuo and a closing chapter by Professor Fukurai, round out an important book. The *saiban'in* system made Japanese people pay more attention to how the criminal side of their nation's justice system works. Perhaps this book will help them to think more about the rest of that system.

In closing, I would offer both a question for further research and speculate about a possible answer. The question is this: *Why did America introduce a jury system in occupied Okinawa but not in occupied Japan?*

A potentially complex answer may lie in the different character and conditions of the two occupations. I will defer to historians to find and explain this answer.

A more simple answer may be that it was primarily a difference of timing.

The allied occupation of the Japanese islands other than those comprising Okinawa and the Ogasawara Islands ended in 1952. Juries did not appear in Okinawa until a decade later. Although President Eisenhower's Executive Order 10713 of 1957 had set the groundwork for the civil government of Okinawa under US occupation, it did not mention juries. Thanks to Professor Fukurai's writings, we know that the impetus for introducing juries in Okinawa was *Ikeda v. McNamara*—a 1962 habeas corpus case brought by a US citizen challenging a fraud conviction in Okinawa. Ikeda, the petitioner, argued that his rights

[17] Ii (2020), pp. 147–51.
[18] Mizuno (2020), pp. 158–62.
[19] *Ibid.*, p. 160.

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under the Fifth and Sixth Amendments to the US Constitution were violated by the lack of a grand-jury indictment and a jury trial.[20] The *Ikeda* court agreed with the petitioner and ordered him to be set free. The government did not appeal the *Ikeda* ruling and, the following year, Okinawa had juries.

But why did the government not appeal?

Here comes the speculation: my theory is that the government did not appeal because it would have been obvious that they would lose under what at the time would have been a recent development in a line of Supreme Court jurisprudence collectively known as the *Insular Cases*.

The *Insular Cases* date back to 1901 when the court had to begin addressing a number of questions relating to the applicability of the US Constitution in territories acquired at the end of the nineteenth century, primarily through the Spanish American War of 1898. The earliest cases were concerned primarily with different facets of the question of whether Puerto Rico was part of the US for the purpose of imposing duties and regulating trade between the island and the US mainland.[21]

One, however, addressed the question of whether the Fifth and Sixth Amendment rights to grand-jury indictments and unanimous jury trials applied in America's new insular territories. In *Hawaii v. Mankichi*, the court concluded that they did not, making the extraordinary statement that some of the rights guaranteed by Constitution were "not fundamental in their nature, but concern merely a method of procedure."[22] The following year, the court issued a similar ruling regarding jury trials in the Philippines in *Dorr v. U.S.*[23]

The *Insular Cases* relied on a new doctrine known as "incorporation." Derided by one dissent as having "some occult meaning," incorporation involved inventing a distinction between incorporated territories and unincorporated territories. Incorporated territories were those ultimately destined for statehood, while unincorporated territories might never achieve such a status and might even be disposed of by the US.[24] Since virtually all then current and past territories in the continental US fit under the "incorporated" ledger, past Supreme Court rulings on the applicability of the Constitution could be distinguished from the different rules established in the *Insular Cases*.

Scholars generally attribute the court's selective view of the applicability of the Constitution to America's new island territories as reflecting racially motivated fears directed primarily at the Philippines, where the US inherited a guerrilla insurrection and people considered potentially unfit for participation in the great American experiment. To the extent that the US might choose to dispose of some of these acquisitions, it would be inconvenient if the people of these territories were US citizens or enjoyed the full protections of the US Constitution.

However, even US citizenship was not enough to bring the full weight of the Constitution to bear in these territories. In *Balzac v. Porto Rico*, decided in 1922 and considered by some to be the last of the *Insular Cases*, the court found that Sixth

[20] *Ikeda v. McNamara, Habeas Corpus* No. 416-62 (D.D.C. Octo 19, 1962).

[21] The term "*Insular Cases*" originally applied to six cases decided in 1901: *Delima v. Bidwell* (182 U.S. 1 (1901)), *Goetze v. United States* (182 U.S. 221 (1901)), *Dooley v. United States* (182 U.S. 222 (1901)), *Armstrong v. United States* (182 U.S. 243 (1901)), *Downes v. Bidwell* (182 U.S. 244 (1901)), and *Huus v. New York and Porto Rico Steamship Co.* (182 U.S. 392 (1901)). As a reference to a class of jurisprudence in which the Supreme Court clarified the applicability of specific constitutional provisions to America's island territories, it is generally understood to refer to approximately two dozen cases in total, though there are different views about which cases should be included. See also Sparrow (2006); Lawson & Siedman (2004).

[22] *Hawaii v. Mankichi*, 190 U.S. 197, 218 (1903).

[23] *Dorr v. United States*, 195 U.S. 138 (1904).

[24] Dissent of Harlan, C.J., *Downes v. Bidwell* 182 U.S. 391 (1901).

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Amendment jury-trial requirements did not apply to Puerto Rico, even after the Jones Act of 1917 had granted US citizenship to the people of the territory.[25]

Given the nature of the territorial acquisitions that generated the *Insular Cases* and acquisitions preceding them, the jurisprudence that reflected on them also necessarily addressed more general questions of the extent to which the Constitution binds the US beyond its territorial dimensions. The key *Insular Cases* addressed essentially the same issue (the applicability of customs duties) at different times in the stages of Puerto Rico's transition from occupied spoil of war to US territory regulated by Congress. One key precedent arose from the imposition of tariffs by the military governor of occupied California during and after the Mexican-American War. It is here that we return to the question of why Okinawa might have had juries.

In 1957, the Supreme Court decided *Reid v. Covert*.[26] The ruling addressed aggregated appeals from two cases. Both involved murders of military personnel by their wives residing at US military bases abroad: one in Japan and one in England. Although not service personnel themselves, as dependants, both wives were tried by courts martial under the Uniform Code of Military Justice and convicted. Their appeals asserted, *inter alia*, that the charges were brought and military tribunals conducted in violation of their Fifth and Sixth Amendment rights.

The *Reid* court opened with a clear rejection of the idea that "when the United States acts against citizens abroad, it can do so free of the Bill of Rights."[27] In arriving at its decision, the *Reid* court had to make a number of stirring statements about the sanctity of the Constitution as a constraint on the US government anywhere in the world—except US territories, where it carefully distinguished *Mankichi* and other *Insular Cases* with powerful language declaring the extraterritorial effect of the Constitution, at least as it applied to US military communities abroad:

> The "Insular Cases" can be distinguished from the present cases in that they involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions whereas here the basis for governmental power is American citizenship. None of these cases had anything to do with military trials and they cannot properly be used as vehicles to support an extension of military jurisdiction to civilians. Moreover, it is our judgment that neither the cases nor their reasoning should be given any further expansion. The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and, if allowed to flourish, would destroy the benefit of a written Constitution and undermine the basis of our Government. *If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes.*[28]

Thus, with *Reid* having been decided just a few years previously, at the time of the *Ikeda* decision, it was likely clearly understood that juries were required in court systems controlled outside the US, at least to the extent of criminal proceedings against American citizens. However, with the *Reid* court having stated its proposition regarding the extraterritorial application of the Constitution unequivocally, without picking and choosing provisions of the Bill of Rights that did or did not apply in incorporated territories as

[25] *Balzac v. Porto Rico*, 258 U.S. 298 (1922).
[26] *Reid v. Covert*, 354 U.S. 1 (1956).
[27] 354 U.S. 5.
[28] 354 U.S. 14, emphasis added.

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in the *Insular Cases*, it would have been logical to assume the same rational applied to the Seventh Amendment too.

It thus seems reasonable to speculate that Okinawa had juries because it was the easiest way of ensuring that the constitutional rights of the many Americans visiting, living, or doing business in American-controlled Okinawa were protected without the bother of setting up an entirely separate justice system just for them. That native Okinawans may have also occasionally benefitted from the institution—as illustrated by *REVERSAL!*—may thus have been an entirely incidental by-product of the *Reid* decision.

A final irony is that, as to US territories, the *Insular Cases* for the most part remain good law. The applicability of the Bill of Rights and other parts of the Constitution remain an incomplete patchwork of acts of Congress and court decisions.[29] Decades after the end of Okinawa's involuntary experiment with juries ended, American Samoa still does not use them.

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[29] See e.g. Jones (2020).

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Environmental governance in Asia

Transboundary Environmental Governance in Asia: Practice and Prospects with the UNECE Agreements By Simon Marsden & Elizabeth Brandon Cheltenham: Edward Elgar Publishing, 2015. 384 pp. Hardcover $212.00
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Transboundary environmental governance is a well-known term in Western countries and a much-needed concern of the Asian states, but these states are lagging far behind in the timely understanding of this scholarship. Therefore, exploring and highlighting pertinent concerns in this area is a call of the day. To address this situation, Simon Marsden and Elizabeth Brandon picked the timely issue and presented the whole scenario in their book, *Transboundary Environmental Governance in Asia: Practice and Prospects with the UNECE Agreements*. The authors of this book (Simon Marsden and Elizabeth Brandon) recently have published two separate books, respectively: *Transboundary Environmental Governance: Inland, Coastal and Marine Perspectives* (2012) and *Global Approaches to Site Contamination Law* (2013). Therefore, the present collaboration of writing a new book was an idea of shared interests in the subject of transboundary environmental governance with a special focus on the various agreements of the United Nations Economic Commission for Europe (UNECE). This came due to their common interest in building and developing this academic piece based on the global governance and environmental regimes coupled with the regional (environmental) law. The whole discussion is mainly based on the public-participation treaties and the Environmental Impact Assessment (EIA), and the combination as well as relationships between these two agreements. Since most of the UNECE Member States are located in Europe, Europe is more focused on in the study. However, strong references have been made from the Asian region as well. For example, states that are typically located on the joint borders of Asia and Europe, such as Russia and Turkey, since they are the Asian as well as European states at the same time, are also included in the UNECE's Eurasian dimensions.

The practical implication of this study is based on the fact that compliance and implementations are the weakest elements of the environmental laws (whether domestically, regionally, or internationally). The comparative analysis was inspired by the practices such as that most of such agreements include the provisions concerning the non-compliance procedures as well the periodic reporting or implementation issues either in the discussion and decisions of the conferences or meetings of the parties or the texts of the treaties. Central Asia is considered as the case-study demonstrating the combined effects of these agreements based on the theory that they could potentially highlight the

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