1 Introduction

Overview

Jury/lay judge systems are a distinctive institution in developed democracies. Unlike in ancient Athens, most avenues for political participation in contemporary democracies only offer citizens the opportunity to participate *indirectly* in state decision-making. Elections, for instance, allow citizens to elect public officials who, in turn, make policy, but they do not allow citizens to engage in policymaking themselves. Similarly, petitions and protests enable citizens to exert pressure on elected officials, but the elected officials are the ones who ultimately make policy decisions. In contrast, serving as a juror or a lay judge presents a rare opportunity for the average citizen to take part directly in the making of consequential state decisions (Gastil et al. 2010: 19).[1]

Aristotle argued that in a democracy, "judges selected out of all should judge, in all matters, or in most and in the greatest and most important."[2] Indeed, the practice of lay participation in trials can be traced back to ancient Greece, where citizens directly engaged not only in legislating and administrating but also judging (Jackson and Kovalev 2006/7). Historians have located the origins of the English jury in the Norman era (Lloyd-Bostock and Thomas 1999). Trial by jury is deeply embedded in the histories of other countries in the English "common law" tradition, such as Australia, Canada, and New Zealand. The American colonies inherited this legacy, and the right to criminal trial by jury is stipulated in the 1787 US Constitution (Article 3). Many continental or "civil law" systems also have long histories of lay judge participation. In Germany and France, historians have found precedents going

[1] The referendum offers another example. For the growth in the use of the referendum, see Scarrow (2003).

[2] Aristotle, *The Politics*, Book VI, in Stephen Everson, ed., *Aristotle: The Politics and The Constitution of Athens* (Cambridge: Cambridge University Press, 1996), p. 155.

back to the seventh century (Dawson 1960). Other civil law countries with longstanding traditions of lay participation in court trials include Austria, Italy, Portugal, Sweden, and Switzerland (Malsch 2009).

Not all countries have such long traditions of lay participation in their criminal trials, however. Another option is the bench trial, in which the task of verdict and sentencing is left entirely in the hands of professional judges. Yet the period since the 1990s has seen a wave of countries around the world introducing new lay judge or jury systems in place of professional judge-dominated criminal trial proceedings. Among developed democracies, Spain, Japan, and South Korea legislated new jury or lay judge systems in 1995, 2004, and 2007, respectively. In the Republic of China (Taiwan), both major political parties have introduced competing legislative proposals to achieve this reform, although as of writing none has yet been formally adopted. The wave has also swept over countries outside the developed world. Russia, Ukraine, Georgia, Azerbaijan, Kazakhstan, Uzbekistan, Thailand, the People's Republic of China, Bolivia, and parts of Argentina have established systems of lay participation since the 1990s (Fukurai et al. 2010: iii–vi).

The recent adoption of jury/lay judge systems for criminal proceedings in these countries represents a potentially major shift in the delivery of justice, one of the core functions of the modern state. Citizens in many countries are sitting in judgment of their peers for the first time; others are doing so after many decades of hiatus. In Japan, for instance, from the introduction of the Japanese "*saiban-in*" (lay judge) system in April 2009 up to October 2016, 53,828 randomly selected citizens served as lay judges on trials involving 9,350 accused individuals (Saiko Saibansho n.d.[1]).

From the perspective of state elites, allowing this many members of the public to take part in criminal proceedings clearly entails both opportunities and risks. First and foremost, juries/lay judges are likely to use different bases than professional judges for deciding whether the accused is guilty or not guilty or what sentence might be appropriate. Precisely for this reason, some elites may view the introduction of jurors/lay judges as a means of making trial outcomes more reflective of common sense. But juries/lay judges may also undermine the practices and norms that professional judges have created and adhered to for decades, and that citizens have come to expect. This uncertainty could erode public trust in the justice system, despite the fact that the new systems are often introduced to promote it.

Second, another potentially double-edged sword from the perspective of state elites is the civic education function of participation as a juror/lay judge. Numerous studies of the American jury have found that the experience of serving as a juror often enhances the civic-mindedness of citizens and makes them more aware of various social and political issues (e.g. Diamond 1993; Gastil et al. 2002). Surveys conducted by the Secretariat of the Supreme Court of Japan also confirm that many citizens found that serving as lay judges opened their eyes to new issues and made them more aware of the world around them (see Chapter 9). While some policymakers may welcome a more empowered and civic-minded citizenry, it may cause worries for others. For instance, since the introduction of the *saiban-in* system in Japan, some of the ex-lay judges have formed a movement to oppose the death penalty.[3]

Political scientists have often noted the expansion of judicial independence across the globe in recent decades, in form if not in substance (e.g. Hirschl 2002; Linzer and Staton 2015). Judicial independence gives courts greater space to rule according to judges' professional beliefs without political interference (Helmke and Rosenbluth 2009). But the political science literature has almost entirely overlooked the contemporaneous spread of jury/lay judge systems, which have made the courts *less* independent vis-à-vis citizens in many countries, both in the developed and the developing world. In short, just as a growing number of countries have given courts greater space vis-à-vis the political sphere, they have also increasingly constrained the courts vis-à-vis the public, albeit to varying degrees in different countries. To what extent they have done so, and why, requires systematic investigation.

Part of the explanation for the introduction of new jury/lay judge systems since the 1990s is international diffusion, or "legal transplantation" as it is known in the comparative law literature. The mere fact of diffusion, however, fails to explain why different countries have adopted jury/lay judge systems that delegate quite varying degrees of power from professional judges to jurors/lay judges. For instance, the rulings of jurors/lay judges are binding on professional judges in Japan and Spain, but they are not binding in South Korea or the proposed

[3] "Shikei Shikko Teishi Hoshorahe Youseie Moto Saiban-in 'Kokumintekina Gironwo' [Ex-Lay Judges to Call on Justice Minister to Suspend the Death Penalty, Urging a 'National Discussion,'" *Nikkei Shimbun*, February 1, 2014.

system in Taiwan. What factors account for the differences in the extent to which the four countries have empowered juries/lay judges? Why have different states chosen to undermine their own powers to different degrees?

This book advances a new, two-step framework to account for this variation. First, the more that parties embrace new left causes, the more they may be expected to favor jury/lay judge systems that considerably undermine the powers of professional judges. Leftist parties in many developed democracies in recent decades have become champions not only of greater government intervention in the economy and income redistribution, but also so-called "new left" or "postmaterialist" causes such as environmental protection, decentralization, and participation. As Herbert Kitschelt (1994) has noted, these new left-oriented parties express concern not only over the achievement of substantive policy outcomes, but also the "quality of the process" through which those outcomes come about. Enthusiasm for strong new jury/lay judge systems epitomizes their postmaterialist preferences. But the extent to which leftist parties have taken up new left concerns varies considerably, both across different parties within the same country and across different countries.

Second, the book hypothesizes that the extent to which the preferences of new left-oriented parties actually translate into a major transfer of powers from professional judges to juries/lay judge depends on the relative power of those parties vis-à-vis other parties within the political system at the time that the issue of jury/lay judge participation emerges onto the policy agenda. *Ceteris paribus*, the stronger the new left-oriented parties vis-à-vis conservative parties and "old left" parties, the more the new jury/lay judge systems may be expected to delegate powers to juries/lay judges.

The book draws on both mixed-method analysis of the Japanese case and comparative case studies of Taiwan, South Korea, and Spain to support the hypotheses offered above. Japan presents a particularly crucial case for this study because it has the oldest democratic regime among the four countries and thus also the most entrenched professional judicial bureaucracy, yet it introduced a lay judge system in the 2000s that imposed relatively strong constraints upon the power of professional judges. The study presents quantitative content analyses of over fifty years of postwar parliamentary discussions over the possibility of reviving a jury/lay judge system, as well as

qualitative process-tracing of the precise mechanisms through which partisan dynamics shaped the design of the new Japanese system in the late 1990s and early 2000s. The book also reports the results of in-depth original field research on the case of Taiwan. As Taiwan has not yet introduced a new jury/lay judge system, it offers an especially useful case for this book. Not only do the reform proposals advanced by different Taiwanese parties provide additional opportunities to test the validity of the hypotheses presented in this study, but the case also illuminates the conditions under which no transfer of power from professional judges to ordinary citizens may occur. The book also features shadow case studies of Spain and South Korea, which offer important variation in jury/lay judge system design.

The case studies demonstrate that judicial reform granted more power to juries or lay judges in countries where leftist parties had adopted new left issues to a greater extent and were stronger vis-à-vis other parties in the system. Spain presents a prototypical case of this constellation of factors, whereby a new left-oriented governing party legislated an extensive transfer of powers to the jury. In Japan, new left-oriented parties had enough power at key junctures to achieve a substantial transfer of power from the professional judges, despite the reluctance of the conservative ruling party. In South Korea, the new left orientation even of the leftist parties was weak, and the leftist president faced a conservative legislature, so the resulting jury system was weak. In Taiwan, new left-oriented parties controlled neither the legislature nor the executive branch during the period under study, and this situation severely hampered their efforts to introduce a system that transferred extensive powers from professional judges to lay judges.

It should be noted at the outset that the term "jury" is typically reserved for the Anglo-American lay judge system. "Lay judge" is a generic term for the institution in both common law and civil law systems. Thus, in the remainder of the book, the term "jury" or "pure" jury will refer to lay judge systems of the Anglo-American tradition, while the term "lay judge system" will refer more generally to systems of public participation in criminal trials.

Transfer of Powers: Substantive Impact

Jury and lay judge systems are only one component in the complex of institutional arrangements that support the criminal justice system

in a country. Nevertheless, the introduction of a jury or lay judge system can have important impacts on the delivery of justice, in terms of verdicts and sentencing as well as criminal procedures. Chapter 9 of this book will detail some of those impacts in the case of Japan, with briefer remarks on the cases of South Korea and Spain. These impacts include a rise in the percentage of acquittals of defendants who had been charged with committing the most serious crimes. The launch of the system was also followed by a decline in the percentage of the heaviest sentences, such as death sentences and life sentences, and a rise in the percentage of suspended sentences with probation. Moreover, the introduction of the system was followed by a large drop in the percentage of cases booked by police that ended up being charged by prosecutors, a rise in the percentage of denied prosecutorial requests for detentions, and a rise in the percentage of detainees released before final ruling. Many of these trends were already underway before the system came into effect in 2009, so the new lay judge system may not have been the only cause of these trends, but it can at least be said that it reinforced and often accelerated them. Overall, the changes that have occurred since the introduction of the lay judge system thus far seem to have been in a pro-defendant direction.

In addition to their impacts on verdicts, sentencing, and criminal procedure, lay judge systems also have important impacts on the lay judges themselves. In Japan, South Korea, and Spain, thousands of citizens have participated in trials as jurors or lay judges since the new systems were created. For many of these people, it was the first significant interaction they had ever had with the criminal justice system. Survey data collected from Japanese people who served as lay judges overwhelmingly indicate that they found the experience rewarding, empowering, and educational. These findings lend support to Tocqueville's view that the jury may serve as a "school for democracy."

A Brief History of Lay Judge Systems

In an influential article, the economists Glaeser and Schleifer (2002) claim that countries with common law systems, such as the United Kingdom, are characterized by jury systems, while those with civil law systems, such as France, typically lack juries. This institutional difference, they argue, accounts for the higher economic growth rates in

common law countries than in civil law countries today. But historians and comparative legal scholars have long known that many civil law countries actually do incorporate lay participation in trials. Indeed, these lay judge systems often have at least as long a history as the English jury (Dawson 1960; Malsch 2009; Donovan 2010).

As noted earlier, evidence of lay judge systems in Germany and France can be found as early as the seventh century (Dawson 1960: Chapter 2). According to Dawson (1960), early forms of lay judge systems used local notables as a way to address the shortage of professional judges during Merovingian rule. Continental states' reliance on local notables to dispense justice generally declined over subsequent centuries, but the situation changed dramatically as a result of the French Revolution and the Napoleonic empire, which played a key role in instituting the modern jury, not only in France but elsewhere in continental Europe as well (Hans and Germain 2011). In 1791, during the French Revolution, France adopted a new penal code that provided for jury trials. The system that France adopted was similar to the English jury, with professional and lay judges performing separate functions (ibid). As Napoleon expanded his empire across Europe, he transplanted the institution of the jury to the occupied areas (Langbein 1981). In many countries, this institutional innovation remained popular even after Napoleon's defeat, and thus the nineteenth century saw a wave of now-independent European countries formally adopting lay judge systems. For instance, Belgium, which had seen the brief introduction of a jury system while it was under French rule, reintroduced the system after gaining independence in 1831 (Traest 2001). Portugal introduced the jury in 1830. Greece began to experiment with a jury in 1834, and its 1844 constitution guaranteed trial by jury (Vidmar 2000). The German Reich constitution of 1849 stipulated for jury trials for more serious offenses (Casper and Ziesel 1972).

In 1850, the Kingdom of Hanover innovated the modern German lay judge system as we know it today, with lay judges sitting alongside professional judges. This "mixed jury" system quickly spread to other parts of Germany and Europe. Austria informally adopted a German-style lay judge system in 1850, then formally in 1869. Most Eastern European states retained the system after the fall of the Austro-Hungarian empire and even after World War II (Vidmar 2000; Bobeck 2015). The current lay judge systems in many Eastern European countries thus typically predate, and continued during, communist rule

(Leib 2007). Scandinavian countries formally introduced lay judge systems during the late nineteenth century as well, although the forerunners of Scandinavian lay judge systems go back much further into the past; in fact, some scholars have argued that early forms of the Scandinavian lay judge system served as the model for the medieval English jury (Turner 1968). Even France was not immune to the appeal of the German-style lay judge system. Despite the English-influenced jury system established by the Napoleonic Criminal Code, over time the French lay judge system underwent a number of reforms that strengthened the power of professional judges, and Vichy France in 1942 saw the introduction of a German-style system that was retained after the war (Vidmar 2000; Hans and Germain 2011).[4]

Despite the widespread use of this institution, however, a handful of developed countries still lacked any system of public participation in criminal trials as of 1990. Among the OECD countries, these included Japan, Luxembourg, the Netherlands, South Korea, and Spain. The Netherlands had briefly had a jury system during the French occupation (1811–13), but it was cancelled shortly after the end of occupied rule and was never restored (Malsch 2009). Luxembourg had long had a lay judge system for its criminal trials but abolished it in 1987 (ibid). The reason given for the cancellation of Luxembourg's lay judge system was that its verdicts could not be appealed, and this potentially violated the European Convention of Human Rights (ibid: 57). Nor did Estonia, Mexico, and Turkey (which were not yet OECD members in 1990) have any system of public participation at the time (Jackson and Kovalev 2006/7). Finally, Taiwan, which has levels of income commensurate with other OECD countries, although not a member of the OECD, also lacked such a system.

But several of these countries introduced some form of lay participation in subsequent years, as part of the "global proliferation" of jury/lay judge systems in the post-Cold War era (Wilson et al. 2015).

The overall distribution of OECD member countries and Taiwan as of 2015 in terms of whether they had "pure" jury systems, "mixed" jury systems, both, or neither is shown in Table 1.1. Underlined countries/regions are recent adopters, since 1990.

[4] Of course, the French and German systems are not the same. For instance, one major difference is that lay judges in Germany serve a fixed term (typically five years), while French lay jurors only sit on one case. See Jackson and Kovalev (2006/7).

Table 1.1 ***Distribution of jury/lay judge systems among OECD countries (as of 2015) and Taiwan***

"Pure" juries	"Mixed" juries	Both "pure" and "mixed" juries	No jury/lay judge system
Australia, Belgium, Canada, England and Wales, Ireland, New Zealand, Northern Ireland, Scotland, South Korea, Spain, the United States (11 countries and regions)	Austria, Croatia, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Japan, Norway, Poland, Portugal, Slovakia, Slovenia, Sweden, Switzerland (19 countries)	Denmark (1 country)	Chile, Israel, Luxembourg, Mexico, Netherlands, Republic of China (Taiwan), Turkey (7 countries and regions)

Underlined countries/regions are recent adopters since 1990. Scotland and Northern Ireland adopt different systems than England and Wales and are thus listed separately.
Sources: Jackson and Kovalev (2006/7), Leib (2007), and Malsch (2009).

Table 1.1 shows that the overwhelming majority, or thirty-one of thirty-eight OECD countries and regions, now have some form of public participation in criminal trials. Of these thirty-one countries and regions, nineteen rely on the "mixed" jury system in which lay and professional judges deliberate together to reach sentence and verdict. As noted earlier, the civil law countries of continental Europe typically opt for this system, as did Japan more recently. Meanwhile, eleven countries and regions rely on the "pure" jury system, in which the jury deliberates and votes separately from professional judges. Most of these are Anglo-American common law countries, but "pure" jury systems can also be found in civil law Belgium,[5] Spain, and, somewhat less clearly, in South Korea as well. Denmark uses *both* "pure" and

[5] In early 2016, Belgium adopted a reform that moves its system closer to a "mixed" jury system. Professional judges will now be present during jury deliberations, although they will not have a vote.

"mixed" juries.[6] Finally, seven countries/regions do not have any systems of jury/lay participation, including Taiwan, although in Taiwan a pilot "lay observer" system was launched in 2012.

OECD countries that newly introduced or re-introduced jury or lay judge systems from the 1990s are shown underlined in Table 1.1. This group of countries includes Estonia, Japan, South Korea, and Spain. This group of countries forms the focus of the present book. The case of Estonia will not be discussed in this book as it was not a member of the OECD at the time that it adopted its lay judge system in the early 1990s (Wilson et al. 2015).

The Configuration of Different Lay Judge Systems

Table 1.1 conceals a much more complicated institutional reality. It is important to recognize that lay judge systems are designed very differently in different countries. Simply noting that states have decided to adopt a lay judge system, or even making the distinction between "pure" and "mixed" juries, obscures rich variation among those systems. Indeed, the question that lies at the heart of this book is that of explaining the *variations* in the design of new jury/lay judge systems. In particular, this book seeks to explain the different extents to which the new lay judge systems in Japan, South Korea, Spain, and the proposed systems in Taiwan *transfer powers* from professional judges to juries/lay judges. The extent to which countries empower juries/lay judges and undermine the powers of professional judges may be viewed as the single most significant measure of the extent to which countries have broken from their preexisting bench trial systems, in which professional judges held monopoly power over verdicts and sentencing. In short, this book asks: how much genuine change is represented by the reforms in different countries, and why might some countries have chosen to make a more dramatic break from the past than others?

The extent to which different states transfer powers from professional judges to juries/lay judges may be conceptualized along seven

[6] In Denmark, "pure" jury trials are held for cases in which the prosecution asks for imprisonment of four or more years or those in which the defendant may be placed in custody or other forms of detention (Courts of Denmark n.d.). "Mixed" jury trials are held for cases in which the defendant pleads not guilty but the prosecution asks for imprisonment (ibid). According to the Courts of Denmark, the number of "pure" jury trials is very small (ibid).