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## Introduction

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The power to convict and punish those who break the law is one of the most fundamental powers of government. In most countries, meting out justice is in the hands of legally trained judges. Remarkably, however, in many countries around the world, the government shares this awesome power with ordinary citizens. Through lay participation, citizens who have no training in the law participate in the criminal justice system and decide the guilt or innocence of their fellow citizens.

This book provides a view of the different forms of lay participation and the ways in which they are evolving across the globe. Some countries have their citizens participate as jurors on traditional juries, in which the jury reaches a verdict on its own. Other countries use a mixed tribunal or mixed court that includes lay citizens (also called lay assessors) and professional judges working together to decide the case. Still other countries use lay magistrates who can consult an adviser on questions of law, or use lay courts with lay judges who decide cases without professional input. Some countries use more than one form of lay participation.

The chapters in this book explore not only the different forms of lay participation around the world, but also how ordinary citizens bring certain advantages to the task. Lay participation incorporates community perspectives into legal decision-making and helps to provide greater legitimacy for the legal system and for verdicts. These benefits help to explain why countries in East Asia, Europe, and South America have made recent and remarkable advances toward lay decision-making, introducing for the first time traditional or advisory juries, or mixed tribunals with lay and professional judges. These benefits also help to explain why some countries have used lay participation for decades, if not centuries. Their use of lay participation is long-standing and enjoys widespread public support.

However, the use of lay participants in the criminal justice system is not without its challenges. Their use raises questions about their competence. After all, they are not trained in the law. There is also the question whether lay participants provide sufficient explanations for their decisions so that criminal defendants understand the verdict and accept it as fair. These concerns have led some countries to pull back from the use of laypersons as legal decision-makers. Yet another reason countries

might retreat from lay participation is when the government or members of the judiciary want to exercise greater control over legal decision-making. In these countries, governments might restrict the kinds of cases that can be heard by lay participants, may shift from an independent jury to a mixed court of lay and professional judges, or might even abandon lay participation altogether.

The book chapters capture countries' diverse approaches to lay participation. Accordingly, we group together countries that have made advances in lay participation, countries that have enduring systems of lay participation, and countries that have responded to the challenges of lay participation by pulling back from it. The organization of this book illustrates that lay participation in a country is not fixed in stone; lay participation is being advanced, reinforced, or replaced in countries around the world. These shifting responses to lay participation also suggest the importance of stepping back and taking a global perspective, and this we do in our final section.

#### LEARNING FROM THE PAST

Historical accounts from Greece, England, Germany, and elsewhere document the fact that lay members of the community have long participated as decision-makers in legal disputes. For example, early accounts from England describe how propertied men from local communities formed juries that decided criminal and civil claims, determining both factual and legal issues (Constable, 1994; Green, 1985). Likewise, in Germany, free men from the community determined the outcomes of legal controversies. German practice evolved from including all free men from a community in the decision-making body, to a subgroup of free men, and by the eighth century to landowners and other prominent men who would serve permanently as lay judges (Kutnjak Ivković, 1999). In other countries, indigenous courts and tribal courts, presided over by community leaders, decided legal disputes. Community members were thus in an ideal position to decide cases in line with local knowledge, norms, and values.

The development of the legal profession in these countries, however, led to a gradual but marked shift in the role of lay participants. In England, for example, law-trained judges began to distinguish between “law” and “facts,” appropriating the former to themselves and the latter to lay jurors, thus constricting the jury's law-interpreting role. In Germany, the complexities of Roman law, which increasingly dominated German courts, required legal knowledge and expertise, and thus legally trained judges joined lay judges to determine the outcomes of German cases.

As the legal profession continued to develop over the centuries, and the number of lawyers and law-trained judges increased (Abel & Lewis, 1995), many countries shifted substantial responsibility for legal fact-finding to legally trained experts. As these shifts occurred, people debated the appropriate roles and tasks of legal professionals versus lay members of the community. However, as we see in the chapters in

this volume, this debate continues today. As the chapters reveal, continuing tensions persist as countries assess the optimal nature and scope of lay participation in their legal systems.

### ADVANCES IN LAY PARTICIPATION

Substantial advances in lay participation have occurred around the globe in the past 25 years. Each of the chapters in Part I describes one of those recently implemented systems. Although these countries that are new to lay participation come from different cultural and legal traditions in South America, East Asia, and Europe, several consistent themes appear in the conditions that laid the foundation for lay participation and the concerns that influenced the design of these systems. Nonetheless, these countries chose different approaches, and they invite comparisons now and in the future as more cases are tried in these still-new systems.

In the modern world, legal systems typically are controlled by a cadre of professional judges and lawyers. What then leads a country to give laypersons a decision-making role in a setting previously characterized by professional control? In each instance, the proposal to include laypersons arose in a democracy in response to dissatisfaction with the professionally run legal system and mistrust of the judiciary. Stimulated by popular perceptions of judicial incompetence or corruption, skepticism about the ability of the criminal justice system to provide security, or the belief that the judiciary was responsible for wrongful convictions, movements arose to address public discontent by introducing direct community participation. In each instance, the call for lay participation received support from important elites, including both judges and scholars. But the introduction and adoption of lay participation was neither hasty nor sudden. In each country, the move was preceded by intense debate, and in some instances, by public mock trials and an experimental period.

The form of lay participation chosen in each country responded to common concerns, but the ways used to address those concerns differed. Thus, some legal professionals in each of these countries worried that by giving up substantial control to laypersons, the resulting decisions would be punitive or arbitrary, and untethered to the relevant law. To address that concern, some systems retained direct participation of professional judges in decision-making through mixed tribunals (Japan and the province of Córdoba in Argentina) while others included legal advisors (Spain) or made the all-lay jury's verdict advisory (South Korea). The newest systems in Argentina, however, took the full step toward lay participation, creating classic all-lay jury systems and focusing on jury instructions to provide legal guidance.

The choices in design did not end there and are still evolving. How many laypersons should participate in each trial? What offenses should laypersons decide? Should they also participate in sentencing? Should the decision rule require unanimity? If not, what majority? On a mixed tribunal, can laypersons outvote the

professional judges? What form should the verdict take, a general verdict or a verdict accompanied by reasons? And how final is the verdict? As these systems mature, they will present opportunities to compare the effects of the different choices made by each country in designing the features of its system. Part I presents a first look.

Argentina has the newest institutions in Part I that have implemented lay participation. Nine authors wrote “The Rise of the Jury in Argentina: Evolution in Real Time” (Chapter 2): Vanina G. Almeida, Denise C. Bakrokar, Mariana Bilinski, Natali D. Chizik, Andrés Harfuch, Lilián Andrea Ortiz, Maria Sidonie Porterie, Aldana Romano, and Shari Seidman Diamond. They characterize their chapter as “evolution in real time” because the development of the jury in Argentina has spread and is evolving very quickly in the modern era. Most of this chapter’s authors have been directly involved in educational and legislative efforts to bring trial by jury to Argentina.

Although the country’s 1853 federal constitution promised jury trials, jury systems in Argentina took more than 150 years to emerge. Scholars, judges, and reformers in recent years argued that jury systems could address widespread distrust in the legal system. In the face of resistance, the constitution provided support for the change. Although no federal jury law has yet been passed, the provinces have taken up the mantle of fulfilling that constitutional promise. In the past decade, 8 of the country’s 23 provinces have passed all-lay jury laws, the most recent in 2019. Others are currently considering jury legislation. Against the backdrop of a civil-law context, with its inquisitorial traditions, the move toward jury trials has been accompanied by the introduction of adversarial procedures and a shift to oral, public trials, bringing increases in transparency and decreases in the delay that previously characterized criminal justice proceedings. Thus, the jury has been operating as a Trojan horse to produce structural changes beyond the introduction of lay participation. Early research on the reception to jury trials has found support from both the jurors and the legal professionals who have participated in them. It has also highlighted the need for more professional training to deal with these new procedural demands. One future trend to watch is whether the early interest in Argentina’s lay activity from its neighbors will lead to expansion of lay participation in other countries in South America.

In designing its new jury trials, Argentina has instituted features not typically seen in other jury systems. For example, all of Argentina’s juries are required to have equal gender representation. But the Argentine provinces also vary in the procedural features they have included in their jury systems. In Mendoza, where the jury is required to reach a unanimous verdict, if the jury cannot agree and a second trial also results in a hung jury, the defendant will be acquitted rather than eligible for another trial. In Chaco, a province with a substantial indigenous population, half the jurors in a trial with an indigenous community member as victim and defendant must be members of the indigenous community. In 2019, the Supreme Court of Argentina explicitly endorsed the right of each province to design its own jury

procedures, so innovative versions of the jury are likely to continue to develop in Argentina and perhaps influence lay systems elsewhere.

María Inés Bergoglio's chapter, "Twelve Years of Mixed Tribunals in Argentina" (Chapter 3), describes the experience in the province of Córdoba, which implemented the first system of lay participation in Argentina over a decade ago. In 2004, it introduced mixed tribunals. Unlike the all-lay juries that have been introduced more recently in other provinces, Córdoba's mixed tribunals sit in panels of eight laypersons and three professional judges. The members of the panel include a presiding judge who only votes if the other 10 are equally divided. A majority determines the verdict, so in principle the laypersons can outvote the professionals on the tribunal, although they almost never do so. Bergoglio was able to examine the final vote distributions for the 721 defendants tried by the mixed tribunals between 2005 and 2017. Concurrence on final votes between judges and jurors was lower than in other countries with mixed tribunals, but higher than the level of judge–jury agreement found when juries deliberate alone.

As in other countries, and despite surveys indicating increased support for being tough on crime, when citizens and professional judges on the tribunals disagreed, the laypersons tended to favor acquittals or convictions on lesser offenses. Although surveys and interviews indicated that most laypersons on the mixed tribunals were satisfied with their experience, interviews revealed some instances in which laypersons reported having been pressured by the professional judges. In 2017, the Supreme Court of Córdoba specified that the laypersons should deliberate amongst themselves before the professional judges join them, which was a change expected to empower the laypersons.

The hope among advocates of the mixed tribunals was that they would increase legitimacy and trust in the justice system. Surveys comparing attitudes in 1993 and 2011 showed that modest increases in perceived legitimacy had occurred, but it was still early in the life of the new system. Further surveys are needed to assess its full impact.

Dimitri Vanoverbeke and Hiroshi Fukurai's chapter, "Lay Participation in the Criminal Trial in Japan: A Decade of Activity and Its Sociopolitical Consequences" (Chapter 4), describes *Saiban'in seido*, a system of mixed tribunals that was introduced in Japan in 2009, after a five-year period of preparation. The intent was to promote citizen understanding of the judicial system as a way to raise citizens' confidence in it, and to address discontent with some high-profile instances of innocent defendants who had been executed.

*Saiban'in seido* consists of six laypersons and three professional judges who deliberate together to determine the verdict and sentence (if the defendant is convicted). Decisions are made by a majority vote, although the majority must include at least one professional judge. During its first decade, the *Saiban'in* tried over 12,000 defendants. The authors show that the nearly 100% conviction rate in these trials has never dropped below 98%. They also identify changes that have

occurred in these trials over the decade. Trials and deliberations have become longer, the number of trials has dropped, and defendants are less likely to confess. The mystery is why acquittals remain so rare. Prosecutors may have changed the approach they take to charging decisions by bringing only extremely strong cases to trial. Another possibility is that the laypersons have had little influence on the verdicts.

The *Saiban'in* system, however, appears to have had important sociopolitical effects not measured directly by trial verdicts. The participation of laypersons in the justice system has been welcomed on the island of Okinawa because it has given the islanders jurisdiction over American military personnel stationed there. In addition, throughout Japan, former *Saiban'in* have organized associations and actively participated in policy debates on the death penalty and the push to videotape interrogations as a way to reduce the likelihood of a wrongful conviction. This post-*Saiban'in* activity highlights the important role that lay participation can play in enhancing civic engagement.

Jaihyun Park's chapter, "The Korean Jury System: The First Decade" (Chapter 5), provides an analysis of Korea's decade-long experience with its advisory jury system. A compromise between the all-citizen jury and the mixed tribunal, the jury's verdict in Korea is not binding. A constitutional provision giving defendants the right to trial by a judge has been used to justify having judges retain the final decision on the verdict, but early questions about juror competence also contributed to hesitation about giving laypersons complete responsibility for the verdict. To address questions about jury competence, a five-year monitoring program was implemented. Although the favorable evaluation included a recommendation to presumptively accept the jury's verdict, the Korean jury remains advisory.

Another distinctive feature of the Korean jury system is that if the jurors cannot reach unanimity, they must consult with the presiding judge and may then decide by a majority vote. Unanimous votes are ultimately reached in about 80% of cases, but we cannot tell how often judicial consultation occurred. Thus, although judge–jury agreement rates in Korea appear to be quite high, it is difficult to assess the independence of the Korean jury. Where the judge and jury disagree, the pattern of disagreement mirrors the greater relative leniency of the jurors seen in other countries, and also appears in the sentencing recommendations that Korean jurors are permitted to give.

Support for the Korean jury system has emerged not only from the Korean jurors, but also from the *Daebeobwon* (Supreme Court of Korea), which emphasized that jury decisions need to be respected. This support may lay the groundwork for future changes that will further strengthen the Korean jury.

Spain is the oldest of the lay participation systems discussed in Part I. Mar Jimeno-Bulnes's chapter, "The Twenty-Fifth Anniversary of the Spanish Jury" (Chapter 6), describes a jury system that was designed to incorporate elements from the common law in a country with a civil-law tradition, but with a variation on common-law

practice that provides for greater legal control. The Spanish jury trial is an adversarial procedure in which the jurors are instructed on the law by the judge, but can be assisted by a legally qualified court clerk who might provide legal advice or assist in writing a “reasoned” verdict that gives explanations for the jury’s decision. In the early years of the Spanish jury, growing pains were evident, as judges found the jury’s reasons insufficient in nearly half the cases. The court clerk is in a position to help the jury with stating its reasons, but how much the court clerk does or should assist is the subject of some discussion.

Several changes have occurred over time in the types of offenses heard by juries, and there has been a general increase in plea bargaining and a drop in jury trials. These changes make it difficult to assess whether conviction probabilities have changed, but the percentage of convictions is higher in recent years than it had been in the early years.

The reaction to several high-profile jury verdicts in Spain points to an important and controversial role for media coverage of these trials when lay participation is not a deeply rooted feature of the criminal justice system. An unpopular verdict may raise questions about the viability of the institution, and in Spain it appeared to contribute to a drop in popular support for the jury. Nonetheless, despite such threats posed by these high-profile cases in Spain, Mar Jimeno-Bulnes reports that the jury trial at 25 years appears to have achieved social and legal acceptance in Spain.

In all of the systems described in Part I, the first jury or mixed court trials were heralded as important democratic experiments and covered extensively in the media. These initial trials were monitored carefully. Although some verdicts received mixed reactions, favorable reports emerged on the diligence and contributions of the lay participants. The legal professionals reported approvingly, sometimes with surprise, on the changes. In surveys of the lay participants in all of these systems, a large majority of respondents consistently expressed positive reactions to their service on the trials, although in some cases lay participants raised objections to particular procedures or rules. Overall, all five chapters provide evidence that, although some procedural adjustments may be required, the systems have promising futures for both decision-making and the legitimacy of lay participation in these countries.

## ENDURING SYSTEMS OF LAY PARTICIPATION

The chapters on lay participation in England and Wales, Germany, and Canada describe enduring systems of lay participation. The forms of lay participation in these countries differ – with magistrates in England and Wales, lay assessors in Germany, and jurors in Canada – yet these forms of lay participation are well accepted and have endured for centuries. One benefit to countries with a long-standing tradition of lay participation is that they have found a way to introduce

community values into their legal decision-making. In addition, they can serve as models for other countries interested in introducing lay participation into their legal decision-making in order to make their legal decision-making more accessible to the citizenry. Another benefit is that these countries can learn from each other in order to make improvements in their own forms of lay participation. Finally, countries such as England and Wales, Germany, and Canada, with their long-standing tradition of lay participation, can help to shed light on the question: What enables a country to sustain its form of lay participation over time?

Stefan Machura's chapter, "... And My Right': The Magistrates' Courts in England and Wales" (Chapter 7), describes the practice of magistrates' courts in England and Wales. These courts trace their lineage back to the fourteenth century. The courts make use of lay participants who serve as magistrates, sometimes sitting as single decision-makers and sometimes sitting in panels of two or three, to decide criminal cases. The magistrates are not professionals, but are assisted by a legal adviser who is trained in the law. When the magistrates sit as a panel, the senior chairperson presides. The hearing is adversarial, with the prosecutor presenting the case and the defendant usually represented by counsel. The panel of magistrates deliberates together, but can invite the legal adviser into the deliberation room to answer questions of law. The magistrates decide whether the defendant is guilty or not guilty, and if guilty, then the magistrates determine the sentence as well. The magistrates also take care in explaining their verdict and sentence to the defendant so that he or she understands both.

The magistrates' court has several striking features. One is that the position of magistrate is well-regarded in England and Wales, and although it requires a significant time commitment, it is viewed as an honor. Another feature is that the magistrates take more time than the professional judges to hear a case, to learn about the defendant, and to issue an appropriate sentence that they explain carefully to the defendant. The youth court in England and Wales, which is a special section of the magistrates' courts, works even harder than the general magistrates' courts to engage the young defendant, to hear his or her perspective, and to explain its decision in a way that the young defendant will understand. Thus, the magistrates' court works hard to make the legal system understandable to those who are brought before it, and having lay participants as magistrates helps to ensure that the case will be presented and explained in terms that a layperson can understand.

Although magistrates are not as common around the world as other forms of lay participation such as jurors and lay assessors, they do offer other countries a model that has several advantages. Magistrates introduce community values into the legal decision-making process. They are also well suited as laypeople to make the law accessible to those who appear before them. They are able to explain their decisions so that an ordinary citizen will understand them. Of course, no system is perfect, and magistrates' courts raise questions about how representative magistrates are of the general population and how independent they can be as a legal decision-maker if



they have to rely on legal advisers for questions of law. However, magistrates' courts are well regarded in England and Wales. Perhaps this is because they are so deeply rooted in the countries' history. Other potential explanations are that they continue to be a way of ensuring that community values play an integral role in deciding criminal cases and that the decisions reached by magistrate courts are well explained to the parties affected by them.

Stefan Machura and Christoph Rennig's chapter, "In the Name of the People': Lay Assessors in Germany" (Chapter 8), describes the role of lay assessors who serve on mixed tribunals in Germany alongside professional judges. Lay assessors are ordinary citizens who sit with professional judges on a variety of courts, including the criminal courts, which is the focus of this chapter. Lay participation in criminal trials in Germany dates back to the nationwide unification of the judiciary code in 1869 and has been widely accepted since then.

The proceedings and the trial are investigatory in nature, and the professional judges perform the work during the preparatory phase, which means the professional judges acquire background about the case that the lay assessors lack. Indeed, only the professional judges have access to the case dossier, which the public prosecutor has prepared. The lay assessors participate only during the oral and public trial, but they have the same responsibilities as the professional judges. All of the judges – professional and lay judges alike – have to decide the factual and legal questions. The challenge for lay assessors is to make sure that they participate during the trial and deliberations and to avoid being deferential to the professional judges, who after all have legal training, access to the dossier before the trial, and a greater preliminary role to play than the lay assessors. The voting rule helps to ensure that the lay assessors remain relevant; the verdict and sentence require a two-thirds majority by all participating judges (both professional judges and lay assessors) by the mixed tribunal, typically featuring the majority of lay judges.

Interestingly, the lay assessors and professional judges who sit on a mixed tribunal together strive to reach a consensual decision. In other words, they try to reach agreement and to avoid a vote. Machura and Rennig explain that the German court strongly encourages cooperation and consensus and that there is also a culture of consensus in the judges' chambers where the lay assessors and professional judges deliberate together.

Lay assessors, like jurors in the United States, usually regard their experience in a positive light. They report that professional judges treat them well and respect them, and these favorable perceptions add to their overall positive experience and sense that the tribunal has reached a just result. The lay assessors, like magistrates in England and Wales, introduce community values into legal decision-making in criminal cases. The professional judges, and in particular the presiding judge, like the chairperson on the magistrates' court, need to set a tone in which all the judges on the mixed tribunal, including the lay assessors, feel that they can speak and their views are valued. Of course, the system depends on the presiding judge treating lay

assessors fairly. Although Machura and Rennig recommend adequate training for lay assessors, perhaps presiding judges should also receive adequate training so that they will work well with the lay assessors.

With lay assessors in Germany, as with magistrates in England and Wales, the form of lay participation is much respected. One reason might be because the history of lay assessors in Germany runs very deep. Another reason might be because lay assessors enable community values to filter into legal decision-making in criminal cases. In addition, there seems to be a good fit between the German court culture of consensus and cooperation, and the lay assessors and professional judges' culture of consensus and cooperation during deliberations.

Marie Comiskey's chapter, "The Jury in Canada: Testing the Comprehensibility of Styles of Jury Instructions and the Effectiveness of Aids" (Chapter 9), focuses on jurors in Canada and how to improve their understanding of jury instructions. Canada has had traditional juries "almost since the beginning of the development of the separate English colonies that eventually became the nation of Canada" (Vidmar, 2000, p. 217). Comiskey undertook an experiment with mock jurors in which they observed an abridged criminal trial based on an actual case. She arranged for lawyers to present the case in a courtroom presided over by a judge, after which the juries deliberated for up to 45 minutes. Comiskey tried to replicate the courtroom experience as closely as possible.

Comiskey wanted to see which version of jury instructions – the traditional legal language of *CRIMJI: Canadian Criminal Jury Instructions* ("CRIMJI"), the integrated step instructions of the Canadian *Watt's Manual of Criminal Jury Instructions* ("WATT"), or the concise plain language instructions of *California Criminal Jury Instructions* ("CALCRIM") – led to greater mock juror comprehension. She also tested some aids, including a written copy of the instructions and a decision tree (that reduces the instructions to a visual chart with a list of questions), to see whether either aid helped mock jurors understand the instructions read aloud by the judge. Comiskey hypothesized that the aids would provide mock jurors with more than one way of acquiring the legal knowledge conveyed by the instructions. Comiskey looked to the jury instruction literature from several countries, including the United States, Australia, and New Zealand, in designing her experiment, and she used jury instructions from California to see if they would be a more effective model than the Canadian versions.

Comiskey found that the mock jurors who received the WATT integrated step style instructions achieved the highest overall comprehension scores of the three instructions. She also discovered that the mock jurors who had been given both aids (written instruction and decision tree) had the highest comprehension levels, but that the decision tree alone had little effect.

Although Comiskey examined jury instructions in Canada, the challenge is one that magistrates in England and Wales and lay assessors in Germany also face, which is how to convey legal concepts to lay participants most effectively. In England and