

Civil Justice: Lay Judges in the EU Countries

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Abstract

Lay judges fulfill important functions for the justice system of a country. In the European Union member states, scholars have analysed the use of lay judges in criminal cases. However, little is known about lay participation in civil justice. The paper introduces commonly cited reasons to have lay judges as well as the principal forms of lay participation and then surveys the EU countries for its implementation in civil cases. Mixed tribunals, involving lay judges under the leadership of a professional judge, are relatively frequent. Several countries have special labour courts or commercial courts with lay members and others have single lay judges, or all-lay judge panels. Roughly a third of the 28 EU member states have no lay participation in civil justice but only three of those have no lay judges in any branch of the courts. Almost all the reasons for including lay decision makers are served somehow by the existing forms, including providing different experiences and perhaps expert knowledge. The article concludes, citing non-EU states and lay participation in criminal and administrative courts as further evidence, that lay judges in one form or another are an element of European legal systems.

Key words

Lay judges; civil justice; commercial courts; labour courts; mixed tribunals; civil jury

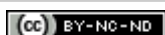
Resumen

Los jueces legos cumplen funciones importantes para el sistema de justicia de un país. En los Estados miembro de la Unión Europea, académicos han analizado el uso de jueces legos en casos criminales. Sin embargo, se sabe poco acerca de la

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participación de los legos en la justicia civil. El artículo presenta las razones que habitualmente se citan para tener jueces legos, así como las formas principales de la participación de legos, para a continuación medir su implementación en casos civiles en los países de la Unión Europea. Son relativamente frecuentes los tribunales mixtos, en los que participan jueces legos, bajo la dirección de un juez profesional. Varios países tienen tribunales laborales especiales o tribunales comerciales con miembros legos y otros cuentan con jueces legos individuales, o jurados de jueces legos. Aproximadamente un tercio de los 28 Estados miembros de la UE no tienen participación de legos en la justicia civil, pero sólo tres de ellos no tienen jueces legos en ninguna sección de los tribunales. Casi todas las razones para incluir responsables legos se basan de alguna manera en las formas existentes, incluyendo ofrecer diferentes experiencias y, tal vez, el conocimiento de expertos. Citando Estados de fuera de la UE y la participación de legos en tribunales penales y administrativos como evidencia, el artículo llega a la conclusión de que los jueces legos, en una u otra forma, son un elemento de los sistemas legales jurídicos europeos.

Palabras clave

Jueces legos; justicia civil; tribunales de comercio; tribunales de trabajo; tribunales mixtos; jurado civil,

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1. Introduction

Most of the literature on lay participation in the administration of justice is on but one country, the United States, one form of lay participation, the jury, and, moreover, the jury in one area of justice: criminal cases. US criminal juries are well researched, to be followed by US civil juries. Beyond that, articles and books are few and far between.

In recent years, attempts have been made to broaden the horizon with comparative work.¹ Juries worldwide, mainly in the states influenced by English law, have been systematically studied (Vidmar 2000). For the situation outside of the United States and beyond juries, there are few overviews available. One such under-researched area is the European Union.

The majority of the European Union member states have indeed lay judges in their past or present justice systems. How widespread is their use today? So far, the criminal courts have drawn most of the attention and an overview on lay participation in criminal courts in the member states of the European Council (a different, larger entity) has already been provided (Jackson and Kovalev 2006). This article attempts to contribute by focusing on *civil justice*. There is little known about lay participation in civil justice in Europe, more specifically, in the European Union member states. The civil side has proven much more difficult to research as lawyers from a country often lack awareness of its forms; it is less prominently reported in the media, and social scientists tend to focus on criminal law.

It is a difficult task to locate lay participation in civil cases. No official or academic institution keeps an up-to-date inventory. Comparative academic literature is rare. One of the problems encountered is the state of flux that is characteristic of codified law, especially when comparing several countries. Legislators and governments experiment with new forms of court organization and jurisdiction. There also is the language problem in the European Union Tower of Babel. One has to rely largely on literature written in one's native language and English, on publications possibly already surpassed by the events. Excluded from the following analysis are private ("social") or religious courts. This leaves state courts, even if in the extreme case they are run by a lay person and administered in private buildings, as long as the service is part of the state legal system.²

This paper attempts to cover *the different institutional forms of lay judges in civil justice*. When it comes to defining "lay judge," two concepts compete. In the first instance, laity and academically trained lawyers are distinguished. Alternatively, for "lay judges," judging is not a main source of income. The following analysis uses the latter concept because it seems that most jurisdictions do not exempt lawyers from becoming lay judges. Occasionally, lay judges are even generally trained lawyers. For example, at the German Federal Labour Court employers and unions are represented by trusted legal experts who are lay judges. Even though lay judges usually receive monetary compensation for their time and travel expenses, and their compensation can be generous, they are not professional judges whose careers revolve around court work.

The article reports new research attempting to fill the gap in knowledge about lay judges in civil cases in European countries. First, I present reasons for lay participation in the administration of justice, then the principal forms lay participation can take. After I describe the research method, I provide an overview of the range of forms in civil justice within the EU member states. In the

¹ Stephen C. Thaman organized a pioneering conference in Siracusa/Italy in 1999. A special issue in the *Revue internationale de droit pénal* has some of the conference papers. Soon after, within the (American) Law and Society Association, the Collaborative Research Network "Lay Participation in Legal Systems" was founded and meets regularly.

² For example, German lay mediators (*Schiedspersonen*), supported by the local administration and supervised by the president of the local court, sometimes hear the parties in their living rooms.

conclusion, I summarize the existing forms and relate them to the commonly discussed reasons to have lay participation in the courts.

2. Why lay participation?

In the literature and in political discussions, there are a number of reasons in favour of lay participation in general.³

2.1. Democracy-related arguments

Lay judges reflect the principle of democratic rule. It is not enough for voters to send representatives to parliament (Kulcsár 1972, p. 491) or (in some countries) to directly elect government figures, or (in some countries) to vote in plebiscites on laws. Citizens need to participate in the administration of justice, too, namely, in decision-making by the courts. After all, this is where the laws are applied. The argument is relevant to civil law as civil disputes form the bulk of all cases going to court.

2.2. As a counterweight or supplement to professional judges

The concept of “common sense” evokes the independent thinking of the reasonable citizen. Professional judges are seen as tempted to surrender to the real or perceived pressure of their work, demands for efficiency, the press, career necessities, and the powerful. In addition, with lay participation a much larger proportion of the population is taking part in the tasks of judging. Professional judges belong to a socially and economically relatively well-off middle class of state employees. Years of higher education distinguish them from the majority of their compatriots. It has been said (Dahrendorf 1963, p. 195) that judges who belong to the upper half of society sit in judgment of the lower half, which they would not know. Where a legal system features lay judges there is at least a better chance that the life experiences of a broader spectrum of the population would come into play.

These arguments based on profession and class may find special support in civil cases. Most judges never experience the struggles of the self-employed, the ordinary worker, and the welfare recipient. Professional judges are protected against many of the indignities, pressures and privations of a market economy, leaving them with experiences of affluent consumers. Where they are economically active, they may be likely to side systematically with the economically powerful. For example, judges renting out apartments may be inclined to find in favour of landlords. Studying and training for a judgeship takes a long time and is costly. In addition, sons and daughters from the upper middle class may gain from their acquired habit when applying for a position as judge. The advantage of having the “right” parents not only comes from being pointed towards intellectual work, or indeed, being encouraged to aim for the highest careers, but extends to e.g. feeling comfortable at a required formal lunch as one ethnic minority lawyer told the author. At least in principle, lay judges involve a wider social spectrum of people in the work of the courts.

2.3. Lay judges may contribute area-specific knowledge

In a typical constellation, a professional judge collaborates with lay judges, and each group is knowledgeable in its respective areas. Even if a professional judge specializes in a certain area of law, her knowledge of business practice is not as extensive as those who work in business. For this reason, many countries employ lay judges who contribute area-specific knowledge and who have actual experience in the field of specialization. A legally trained professional judge may know the

³ Machura (2006) with more literature, Lieber (2008, p. 11-13), Jackson and Kovalev (2006, p. 87-93) discuss democracy and human rights in relation to lay participation in criminal justice.

letter of the law but in a dispute among farmers on the use of rented land, expert lay judges from the farming community are able to contribute from firsthand experience in farming. Commercial courts with lay judges recruited from the ranks of managers and entrepreneurs form the most prominent example of the expert lay judge category.

2.4. *Lay judges represent different, legally approved interests to an area of law*

In addition to legal and area-specific knowledge, it is crucial that the judges represent social interests regularly implicated in typical cases. Again, commercial court lay judges are an example. In specialized labour courts, legislators accept that labour law has to be developed and applied in cooperation with representatives of both employers and workers.

2.5. *Lay judges allow a discussion among judges*

It is expensive to have several professional judges hear a case. But if lay judges participate, judges have to explain their opinion and listen to other arguments (Rennig 1993, p. 589). As a consequence, a better and more well-informed court decision can be made. In the realm of private law, this reason does not carry less weight than in the realm of criminal law. A group of decision makers may arrive at a more balanced conclusion.

2.6. *Additional effects*

Once lay participation has been introduced for these reasons, it can result in certain additional effects:

1. The parties involved and the public may experience a better court system that is closer to the people (*legitimation function*).⁴ This function does not depend on a specific type of case and therefore applies equally to civil and criminal disputes.
2. The *education function* of lay participation may take three forms. In the first, it is the lay judge who is educated by her experience in court. Alexis de Tocqueville emphasised that Americans sitting on a civil jury will learn about the civil law, the area of law which is most relevant to their lives, and also become able, responsible citizens.⁵ Similarly, in the Soviet bloc countries of the 20th century, comrades, colleagues and neighbours were to be familiarized with socialist law through participation in the legal system (Melkich 1931, p. 542, Mathes 1999, p. 42). In the second form of the educational function, the lay judge explains or advertises. Lay judges may report to their colleagues, family and friends about their experience. They may share their experience and thus broaden public knowledge of law and courts (*multiplication function*). If it is true that criminal cases in many instances are more understandable, and if furthermore, as everywhere in modern societies, the civil law is more complex than criminal law, the multiplication function can be claimed to be most relevant for civil courts. Regarding the third aspect, trials before lay judges have to be held in an accessible language and in all necessary detail to allow a lay person to come to a conclusion. This makes it more likely that the parties to a civil dispute

⁴ E.g. Diesen (2001). In a study with juvenile prisoners, evaluations of the justice of the criminal procedure correlated with perceptions of the behaviour of the lay assessors (Haller *et al.* 1995, p. 132).

⁵ "The jury ... may be regarded as a gratuitous public school ever open, in which every juror learns to exercise his rights, enters into daily communication with the most learned and enlightened members of the upper classes, and becomes practically acquainted with the laws of his country, which are brought within the reach of his capacity by the efforts of the bar, the advice of the judge, and even by the passions of the parties. I think that the practical intelligence and political good sense of the Americans are mainly attributable to the long use which they have made of the jury in civil causes" (Tocqueville 2013, Chapter XVI, Part II, not paginated). The point has recently been highlighted again by American jury scholars Marder and Hans (2015, p. 800-801).

will understand the arguments, and that any audience present in the court room, including journalists, also can follow the proceedings.

3. In political parties, labour unions and civic associations, lay judges may influence the development of legal policies (*political function*). The discussion of aspects of civil law is widespread in those organizations that mediate between the populace and the state. Lay judges may contribute with their direct experience of working with the law. And again, civil law is much more encompassing and affects more aspects of life than criminal law.

From the German experience, the *multiplication and the political functions* rarely materialize (Machura 2006, 2011). However, empirical research provides support for all the other functions, and not only in Germany (e.g. Machura 2001, Lempert 2015).

There are therefore several justifications for the use of lay judges. They all apply to civil justice. How and where is lay participation institutionalized and what does it tell us about the objectives of lay participation? First, we will look at the different principal forms of lay participation, before we turn to a survey of the EU countries.

3. Different forms of lay participation

Lay participation in the administration of justice can be organized in different ways. It is a challenge to learn about all the constellations and varieties of lay participation. The following discussion is based mainly on the state of affairs in summer 2011. Some updates on more recent developments are provided.

Table 1: Principal forms of courts

	Single decision maker	Group of decision makers
Lay judges only	Single lay judge	Panel of lay judges
Combination of lay and professional judges		Jury (professional judge presiding) Mixed court
Professional judges only	Single professional judge	Panel of professional judges

In order to give an overview, Table 1 provides lay participation forms, and distinguishes between single judges and panels.

Single professional judges are usually employed for small claims or in disputes over medium-high sums of money, and where the courts tread the path of well-established routines. This description applies to most trials at courts of first instance. As a consequence, they may also see lay judges acting as a single decision maker.⁶ In Spain, for example, Justices of the Peace deal with “minor” civil disputes (Lieber 2010, p. 89). The lay mediator employed in several German

⁶ The French *juges de proximité* would not count as lay judges as these are not defined as living off judging. The steady stream of cases provides *juges de proximité* with an income. Candidates also need to have a legal education/considerable legal practice and the *juges de proximité* are very similar to professional judges (Zwikel 2011, p. 57-58, 63). The Ministère de la Justice (2012) defines them as “non-professional judges” and apart from four categories of criminal cases, describes their duties as: “En matière civile, le juge de proximité statue en premier et dernier ressort (c'est-à-dire sans appel) sur les litiges personnels et mobiliers pour un montant n'excédant pas 4000 €. Cette juridiction est également chargée de l'exécution des procédures d'injonction de payer et d'injonction de faire.” For the end of 2017, a court reform is planned which is likely to include the *juges de proximité* (Zwikel 2015).

provinces to address neighbourhood disputes is also an example (Machura and Weiß 2003, Röhl and Weiß 2005). Those volunteer *Schiedspersonen* were prepared to spend more time working with the parties compared to lawyers as mediators who had to process cases more quickly due to economic pressure. In Belgian commercial courts, *Konsularrichter* from the business community do not only sit in a mixed tribunal, but also may supervise insolvency administrators (Lennertz 2012, p. 52).

Yet, the main constellation for lay judges seems to be the panel of judges: the court is made up by several individuals. These can be exclusively staffed with lay judges. The French commercial courts are filled from the ranks of entrepreneurs and managers.⁷ Typically, however, Continental European countries have mixed tribunals of professional and lay judges. Here, the presiding judge is invariably a professional judge. The German labour courts are an example, but mixed courts are also used for chambers for commercial cases in German regional courts and for agricultural disputes in the German county and province courts (Baumann and Lieber 2012, p. 6).

Whereas in mixed tribunals lay and professional judges mainly have the same rights and can enter into joint discussion at any time, the jury court strictly separates the lay from the professional element. Here, the jurors typically deliberate and decide in isolation. Finally, the bench may consist exclusively of professional judges. In civil cases, this form is characteristic for trials at higher echelons of the courts and if matters of legal principle are at stake. The *civil* jury never got a foothold on the European Continent. Tellingly, the main example discussed in academic literature is the US civil jury (e.g. Hans 2008, p. 282). The features of a civil jury include the following: The presiding professional judge is limited to the role of a referee between the two parties who argue their case in front of the jury. In this function, the judge makes procedural decisions, including admissibility of evidence, without the jury. The judge provides the relevant law for the jury before it retires for its deliberation. The jury finds for plaintiff or defendant, and decides on the award. The jurors are specifically selected for the trial. Every aspect of the case and the applicable law needs to be explained to them in painstaking detail because they have no prior knowledge at all. This structure makes the jury the most time-consuming and expensive form of lay participation. As a consequence, the parties mostly try to solve disputes themselves with the help of lawyers, or the cases go to single professional judges or mediators.

The main advantage of mixed courts and panels of lay judges is their low cost compared to juries. They do not require lengthy juror selection procedures (as in the case of US juries), and they involve a smaller number of lay judges who will typically sit for a longer period of time and hear multiple cases. The relevant law can be provided by the professional judge in a mixed court during the deliberations and does not need to be extensively discussed in the courtroom. Consequently, mixed courts can hear many more cases than. The lay magistrates in England and Wales can be joined in the deliberation room by a legally trained law clerk. In a mixed court, lay and professional judges make all decisions together, including on procedural matters. Even the lay judges on mixed courts or all-lay adjudicator courts typically though not always,⁸ gain experience through years of participation in court. However, panels of lay and professional judges face a particular challenge that juries do not. For lay and professional judges the opportunity to participate meaningfully depends on the personality of the presiding judge. If they are inclined to do so, presiding judges (professional and lay) can often curtail the rights of all side judges, professional and lay. This is supported by several studies (overview in

⁷ Notably with the exception of the Alsace, Lorraine, and Moselle provinces where mixed commercial courts can be found (Kunzler 2008, p. 2).

⁸ Jackson and Kovalev (2006, p. 106) mention countries in which lay adjudicators are summoned for one criminal case.

Machura 2001). For example, based on interviews with professional and lay judges at different branches of the German court system, Ekkehard Klaus (1972, p. 213) found that it is only possible for lay judges to make a "positive contribution" if they are accepted as partners by the professional judges. The chairperson at an English Magistrates' Court (all lay people) determines through her encouraging or stifling behavior how much influence the other bench members have (Burney 1979, p. 121). "Everywhere the most highly rated chairmen were those who not only consulted their colleagues but also deliberately brought them into the discussion." (Burney 1979, p. 123). Vultejus (1999, p. 61) reports that authoritarian presiding judges take offense when in a court hearing junior professional judges come up with questions of their own. Years of professional experience in combination with the specific rights the president has to facilitate the proceedings, provide the professional presiding judge with instruments to dominate the other court members. In a mixed court, this affects lay judges and junior professional judges. The lay judges may be silenced in court and their views not heard during deliberations. Junior professional judges depend on the court president for their careers. The threat to judicial independence and rational debate is real and it sometimes takes courage for court members to stand up against a powerful lead figure. The best safeguard is a careful selection of judges for their cooperative character and readiness to speak out.

Status difference theory postulates that in a social group, status characteristics assumed to be closely related to the task at hand determine the influence individuals have. It has been employed for mixed courts by Kutnjak Ivkovich (1999, 2015) to explain why professional judges dominate lay judges. The theory also offers insights into the position of lay judges beyond mixed courts. It suggests that a single lay judge or a lay judge panel will be more accepted by the parties when lawyers are not present at court. If parties are legally represented, the lawyers may compete with the lay judges regarding case-relevant legal knowledge and the kind of know-how which goes with years of trial experience. Social status also matters for juries (Lempert 2015, p. 845). Within a jury, members with legal education, any type of relevant higher education, or with work-related experience that seems relevant have a higher chance to convince their fellow jurors. Some US jurors are inclined to take cues from the behaviour of the presiding professional judge on how to best decide the case (Podlas 2001: effect of frequently watching the TV show "Judge Judy"). Status characteristics theory also offers an explanation for the higher esteem in which expert lay judges are held by some professional judges and legal scholars: they are expected to make a task-related contribution. Even some principal opponents of lay participation view expert lay judges favourably (e.g. Görlitz 1970, p. 306). At a recent German lawyer congress, a wider use of honorary commercial court judges as experts was unsuccessfully suggested by a leading law professor, Galf-Peter Callies, in order to avoid German courts losing cases to private mediators or foreign courts (Bubrowski 2014a, 2014b). Sometimes, even expert lay judges might see the professional judges as superior experts (Brandstätter *et al.* 1984, p. 154 on German labour courts).

Though there are theories about the functioning of different types of lay participation, the extent to which lay judges are employed is much less clear. The research project introduced below seeks to establish which countries have single lay judges or mediators, panels of lay judges, juries and mixed courts in their civil justice systems.

4. Method

For this study, a mixed methods approach was used to gather information about lay participation in civil justice in European Union countries. The author started with his knowledge about certain countries from previous field research (e.g. Machura 2001, Machura and Weiß 2003) and prior readings. In addition, the author was invited to talk about lay participation in civil trials to delegates at the Third European Lay

Judge Forum in London from July 22 to 24th, 2011. On this occasion, about fifteen of the participants shared their knowledge on national systems of lay participation with the author in informal expert interviews. The event, and indeed the move to constitute the European Network of Associations of Lay Judges, was heavily supported by the German Lay Judge Association DVS which published a series of articles in its journal *Richter ohne Robe*. The articles proved to be reliable sources of information on the use of lay judges in civil courts. The author located additional sources. Interest groups like the European Union of Judges in Commercial Matters and the European Metal Workers' Federation have listed specific forms of lay participation on their websites. Professor Stefan Voigt sent the author his data set on lay participation around the world that he had used for a comparative analysis of the economic benefits of lay participation (Voigt 2009). The author obtained additional information through searches on the internet using key word combinations such as "country" and "lay judge."

In the end, there were several sources available for a specific country, but each source did not necessarily address every aspect of lay participation in the country. When sources provided conflicting information, those closer to the actual practice of lay participation were given preference. On other occasions, publications closer to the year of comparison (2011) were used rather than older articles. More recent, post-2011 publications inform supplementary discussion in this article.

Table 2: Lay judges in civil cases in European Union member states, summer 2011

Austria	Commercial cases sometimes involve expert lay judge / labour and social courts, mixed ^{1,2}
Belgium	Commercial courts, mixed ³ and single judges ⁴ / social (labour) courts, mixed ^{4,5}
Bulgaria	Mixed tribunal in matters of guardianship and custody ^{2,6}
Czech Republic	Mixed tribunal ⁷
Cyprus	None ⁷ (at all)
Denmark	Labour courts, mixed ⁵
Estonia	None in civil justice ⁸
Finland	Labour courts, mixed ⁵ / family cases, mixed ⁹ / commercial courts and insurance courts, mixed ¹⁰
France	Lay arbitrators ¹¹ / commercial courts ¹⁰ / agricultural courts ¹² / labour court: initial trial only lay judges representing employers and workers; if no agreement, continue as mixed court / (<i>juge de proximité</i>) ¹⁰
Germany	Mixed courts at: commercial courts, and for agricultural cases, labour courts / in several provinces: lay mediators
Greece	None in civil justice
Hungary	Mixed tribunal (in some cases) ¹
Ireland	Jury ¹³
Italy	Justices of the Peace ¹⁰ / honorary single judges ¹⁰ / agricultural cases and youth court mixed ¹⁴
Latvia	None in civil justice ⁷
Lithuania	None ¹⁵ (at all)
Luxembourg	Arbitrage courts, mixed ¹⁰ / labour courts, mixed ⁵
Malta	None ¹⁶ in civil justice
Netherlands	None ¹⁷ (at all)
Poland	Mixed tribunal ⁷
Portugal	Arbitrage courts, as single lay judge or tribunal of lay judges ¹⁸
Romania	Advisory lay judges in labour and insurance cases ¹⁹
Slovakia	None ⁷ in civil justice
Slovenia	Mixed tribunal ⁷ / labour courts, mixed ⁵
Spain	Justices of the Peace
Sweden	Mixed tribunal ⁷
United Kingdom	Labour courts ⁵ and other courts ²⁰ : mixed / jury / England and Wales: Justices of the Peace (family cases)

(continued)

Table 2 primary sources:

- 1 Europäisches Justizielles Netz für Zivil- und Handelssachen (2009)
- 2 Cain (2010b)
- 3 European Union of Judges in Commercial Matters (n.d.)
- 4 Lennertz (2012)
- 5 European Metal Workers' Federation (n.d.)
- 6 Hristova (2012)
- 7 Voigt (n.d.)
- 8 Cain (2011b)
- 9 Cain (2010a)
- 10 Information from delegates at the European Lay Judge Forum, July 2011
- 11 Zwickel (2011, p. 59)
- 12 Zwickel (2013, p. 29)
- 13 Citizens Information Board (2010)
- 14 Cain (2011a)
- 15 Brooks and Eisenhart (2010)
- 16 The Judiciary of Malta (2011)
- 17 Bosma (2012)
- 18 Nascimento (2011)
- 19 Gane (2014a, 2014b)
- 20 Darbyshire (2014, p. 218)

Table 3: Forms of lay participation in civil justice in EU countries as of summer 2011

No lay participation in civil justice	Single lay judge / mediator in civil justice	Panel of lay judges in civil justice	Professional judge, lay jury in civil justice	Mixed tribunal in civil justice
Cyprus	Belgium	France	Ireland	Austria
Estonia	France	Portugal	UK	Belgium
Greece	Germany	UK		Bulgaria
Latvia	Italy			Czech Republic
Lithuania	Portugal			Denmark
Malta	Spain			Finland
Netherlands				France
Slovakia				Germany
				Hungary
				Italy
				Luxembourg
				Poland
				Romania
				Slovenia
				Sweden
				UK

5. Results

Tables 2 and 3 contain an overview of the lay participation in civil courts for the EU member states as of summer 2011. It turns out that most EU countries use some form of lay participation in their civil justice system. Only eight out of 27 member states seem to have no lay judges in civil procedures at that time. Croatia entered the EU in 2013 as the 28th state, and also does not seem to use lay participation in civil courts.⁹

The overview (Tables 2 and 3) demonstrates an extraordinary diversity in the use of lay judges in civil matters. Mixed tribunals are relatively widely employed, though countries have single lay judges/mediators. Where lay judges in mixed tribunals exist, they almost always have voting rights. In Romania, lay judges are restricted to an "advisory" function (Gane 2014a). Some countries use lay judges only in a certain types of cases.

In Europe, the *jury in civil cases* only exists as a legacy of the old British Empire: in the Republic of Ireland, Northern Ireland, England and Wales, and Scotland. Yet, the civil jury is extremely rarely used. The situation in Scotland was recently summarized in the Journal of the Law Society of Scotland (2014): "Jury trials are

⁹ Early after liberation from the Axis powers, Croatia introduced lay participation in civil courts and later courts with expert lay judges, including commercial courts (Kutnjak Ivkovich 1999, p. 136, 150). Following independence from Yugoslavia, Croatia has maintained lay participation in civil cases. Sanja Kutnjak Ivkovich (1999, p. 162) expressly mentions commercial courts. Mixed courts in this branch of the justice system must have been abolished in the meantime as a more recent overview on Croatian commercial courts by the President of the High Commercial Court no longer mentions the participation of lay (expert) judges (Vukelić n.d.).

permitted in most civil damages cases, though less commonly held." In the Irish Republic, the civil jury deals only with four types of cases: libel, slander, assault, and false imprisonment (Jackson *et al.* 2000, p. 204). Libel and slander, fraud, false imprisonment, and malicious prosecution formed part of the workload of civil juries in England and Wales (Lloyd-Bostock and Thomas 2000, p. 59). Again, cases are very few and far between, as a result of the parties and the courts being able to influence which type of court the dispute goes to (details in Gerding 2007, p. 283-287, Darbyshire 2014, p. 440-442). In Northern Ireland, the civil jury may hear libel claims, or cases in which a judge "accedes to a particular application" (Jackson *et al.* 2000, p. 204). Notably, the political history of the jury as the quintessential English legal institution resulted in its opponents not being able to abolish it completely as it is just too popular (Gerding 2007, p. 286; Darbyshire 2014, p. 463). Unusual and outrageous damage awards are the main criticism of civil juries in England and Wales (Darbyshire 2014, p. 440-441). Awards allocated by the civil jury may be reported only if sensational, as has been described for juries in the United States (Hans 2008, p. 282). Lempert (2015, p. 840-843) arrives at the conclusion that despite "jury horror stories," the decision making of US civil juries is reasonable. Deliberating apart from the professional judge, juries in England and Wales as well as Scotland have to be instructed by the judge about the calculation of damages (Gerding 2007, p. 284, 414).¹⁰ Another reason cited for the long-term decline of the English civil jury is the country's case law system which requires taking into account issues of uniformity in legal precedence as the facts of the case are established (Ziyadov 2013, p. 63).

In France and Portugal, as well as in England and Wales, certain civil cases are dealt with by panels of lay judges without any professional judges involved. The most widely known example is the English Magistrates Court, where most cases are heard by a bench of two or three lay magistrates. Another example is the French labour court of first instance which is only joined by a professional judge if the lay judges representing employers and employees cannot agree.

As further shown in Table 2, nine countries – Austria, Belgium, Denmark, Finland, France, Germany, Luxembourg, Slovenia and the UK – adhere to the view that lay judges represent the different but legally accepted interests of employers and workers. At least ten countries also have special courts for defined economic disputes, whether commercial or agricultural: Austria, Belgium, Finland, France, Germany, Italy, Luxembourg, Portugal, Romania, and finally the UK (e.g. Scottish Land Court 2015). These courts involve lay judges with special, area-specific knowledge.¹¹ Sixteen states have mixed courts which supplement professional with lay judges and thus facilitate deliberation (Table 3).

6. Conclusion

Little has been known about lay participation in civil justice in EU countries. This article finds that the majority of countries employ lay judges in one form or the other, most typically in mixed courts and in specialised courts that require special expertise. The article identified nine reasons to have lay participation in courts, and also in civil justice: democratic participation, supplementing professional judges, special knowledge, representation of interests, enabling a discussion, legitimation, education, multiplication and political function. It is interesting to consider these values as we review the broad employment of lay judges in civil cases. Overwhelmingly, lay persons work in panels of judges, be they all-lay judge

¹⁰ As late as 2015, the Scottish Court of Session Bench decided that jurors before their deliberation will be informed about the usual damages awarded by judges and juries (Jones 2015).

¹¹ The actual extent of using these mixed courts may vary. According to Lindloh (2012, cited Lieber 2012), his professional judge colleagues at German commercial courts indeed value their expert lay colleagues. Yet, with the agreement of both parties, the professional judge can decide cases alone. It would affect 90% of all the trials at his Hamburg court. On the one hand, the state saves money; on the other, the professional judge does not need to write down the votes.

tribunals, juries, or mixed courts. Improving the discussion seems to be a main reason for having lay judges in Europe. Within this group of countries, most have mixed courts. Therefore, informing, supplementing and controlling the professional judges is another function of lay participation. Not unlike Tocqueville's description of the US civil jury as an instrument of educating citizens, lay judge panels, mixed courts and juries in Europe offer an opportunity for lay people to learn about the law and the functioning of the legal system on the one hand and to learn useful skills for democratic practice, on the other. Being less familiar with legal language, the presence of lay judges may also enhance the chance that other lay people in the courtroom better understand the trial. The participation of any kind of lay judges, in panels or as a single judge, introduces the life experience and views of a larger spectrum of society into the workings of the courts, beyond what professional judges contribute. In several countries, lay judges contribute expert knowledge. In some countries, lay judges at labour courts and specialized commercial courts represent certain interests in the application of the law. The state entrusts them with the development of laws, most of the time in tandem with a legally trained member of the judiciary. The presence of lay judges will in all likelihood add to the legitimacy of the courts as the public tends to favour lay participation.¹² However, without further investigation, particularly in the form of case studies, it is difficult to know how much lay judges take part in general political discussions to influence the law.

We have only dealt with lay participation in civil cases. It is possible that some information is still missing and more examples can be added to the list. Still, the research confirms that the overwhelming majority of the EU countries have lay judges in civil courts. In this, they are joined by non-EU states such as Switzerland,¹³ Russia (arbitrage courts) (Pashchenko 2002¹⁴), and Norway (Domstol Administrationen n.d., p. 5). EU member Estonia, for example, has lay judges in criminal courts only (Cain 2011b, p. 140-141). Indeed, of the eight European Union member states that according to this study had no lay participation in civil justice in summer 2011 (see Table 3), only three according to Jackson and Kovalev (2006, p. 94) also had no lay participation in criminal courts. They are Cyprus, Lithuania, and the Netherlands. Furthermore, changing the frame of reference, of the 46 member states of the Council of Europe, only 12 had no lay participation in criminal justice (Jackson and Kovalev 2006, p. 83, 93-94).¹⁵ Furthermore, citizen judges also work in administrative courts, in countries in which those exist separately from courts of general jurisdiction,¹⁶ and in at least one example in constitutional courts.¹⁷

The extraordinary variety of forms of lay participation should not overshadow the fact that lay judges are widespread in European legal culture. The lay judge is a citizen of Europe.

¹² Regrettably, studies outside of the US are very rare. In Germany, they date back quite some time: Kaupen (1972, p. 561, 1973, p. 44), Smaus (1985, p. 171), Villmow *et al.* (1986, p. 344-359). See also discussion in Marder and Hans (2015, p. 789-790).

¹³ Switzerland has a very large number of lay judges and justices of the peace/mediators. They deal with civil justice, including labour and commercial courts. Judges in courts of first instance are typically non-lawyers (Cain 2010b, p. 103).

¹⁴ According to article 19, Russian Commercial Procedure Code, commercial court assessors can join the professional judge at the commercial court of first instance if the court grants the request of a party on grounds of either case complexity or special knowledge (Russian Federation 2012).

¹⁵ They include Luxembourg, which has mixed courts in labor and arbitration cases (see Table 2 in this article).

¹⁶ For Germany, see Machura (2006, 2007). The German social courts, dealing with welfare-related disputes, are a type of administrative court. Lay assessors at these courts are discussed in: Großmann 1978 and Pauli 1999. Military courts would be another variety of administrative courts where lay assessors and professional judges sit on non-criminal cases.

¹⁷ E.g. in the German Province of Brandenburg.

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