

## Recent Developments about Lay Judges in the European Union

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## **Recent Developments about Lay Judges in the European Union**

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### **Abstract**

Lay participation adds to the quality of the administration of justice. Few people, though, have an idea about the extent to which EU member states draw on lay judges. This article for the first time provides an overview on lay participation in civil and criminal justice in EU countries.

Of the EU member states, the majority has some form of lay participation in criminal courts, mostly mixed courts (18 countries), in which lay and professional judges deliberate on cases together. Also in civil courts, a majority employ lay decision-makers, where 16 states have mixed courts. Juries, single lay judges, or panels exclusively consisting of lay people have become rare. Only four EU countries – Latvia, Lithuania, Romania, and The Netherlands – have no lay participation in criminal and civil trials. In some countries, lay participation is widespread, including for example, Austria, Finland, France, Germany, and Sweden. The article also identifies factors influencing the extent of lay participation in the courts. In conclusion: Lay judges are part of European legal culture.

### **Zusammenfassung**

Die Beteiligung ehrenamtlicher Richter trägt zur Qualität der Rechtspflege bei. Nur wenige haben eine Vorstellung davon, in welchem Ausmaß die EU-Mitgliedstaaten auf sie zurückgreifen. Dieser Artikel bietet erstmals einen Überblick über die Beteiligung ehrenamtlicher Richter an der Zivil- und Strafjustiz in den EU-Ländern.

Die Mehrheit der EU-Mitgliedstaaten verfügt über eine Beteiligung von Laien an Strafgerichten. Diese entsprechen oder ähneln meist den deutschen Schöffengerichten, in denen Laien- und Berufsrichter gemeinsam über Fälle beraten und entscheiden (18 Länder). In der Zivilgerichtsbarkeit verfügt ebenfalls die Mehrheit der EU-Staaten über ehrenamtliche Beteiligung – 16 davon in einer Art Schöffengericht. „Echte“ Geschworenengerichte, Laien als Einzelrichter und Beschlusskörper nur aus ehrenamtlichen Richtern sind selten geworden. Nur vier EU-Länder haben keine Laienbeteiligung: Lettland, Litauen, die Niederlande und Rumänien. Dagegen ist die Beteiligung Ehrenamtlicher in der Justiz einiger Länder weit verbreitet, darunter Deutschland, Finnland, Frankreich, Österreich und Schweden. Faktoren werden genannt, die das Ausmaß der Laienpartizipation in der Justiz beeinflussen. Zusammengefasst: Ehrenamtliche Richter sind Teil europäischer Rechtskultur.

### **Introduction**

Everyday citizens typically imagine a court as a jury of twelve peers at one end of the courtroom and a professional judge with a wig, robe, and a gavel sitting behind a raised bench at the other end of the

courtroom. But, as anyone familiar with the justice systems in Europe and, indeed, worldwide knows, other approaches to lay legal decision-making are frequently employed. In fact, they are employed even more frequently than the jury. Countries across the globe employ lay judges as decision-makers (Kutnjak Ivković and Hans 2021, 332) in criminal and civil courts, as well as occasionally in administrative courts and other types of courts. Yet, until recently, there was little systematic evidence about the range of forms of lay participation utilized in the courtrooms around the globe.

In this article, we provide an overview of lay participation in the administration of justice in the member states of the European Union. This article concentrates on state courts—both criminal and civil courts—and does not cover private tribunals, private mediators, or private arbitration courts. The task is complicated because information is often hard to come by. The description of the court may be provided in a local language that the authors do not speak, and there could be a discrepancy between what is listed in the country's legal documents and what is actually implemented. We strive to provide the most accurate information we could find. To that end, this article draws on several empirical studies:

- 1) An overview on lay judges in civil courts in EU countries (Machura 2016a). The study depicted the situation in 2011 and, for the present article, we tracked the more recent changes using generally available sources and contacts within the European lay judge associations, as well as Jérémy Boulanger-Bonnelly's (2023) global overview on civil lay judges.
- 2) The worldwide survey of lay participation in criminal justice conducted by Sanja Kutnjak Ivković and Valerie Hans (2021) and other sources on criminal courts.

### **Rationale for the inclusion of lay participation in the administration of justice**

Various reasons are given for lay participation in the administration of justice (Machura 2016a). Foremost among them is the idea of democratic representation in a major branch of the state, which is beneficial because lay decision-makers bring in the views and life experiences of everyday citizens. Lay participation allows citizens to apply their local knowledge and sense of justice in deciding disputes, as well as enables them to weigh in as the state deals with the crimes occurring in their community. Another key argument is that lay participation provides an opportunity for the case to be decided by a panel of decision-makers. Incorporating both professional and lay judges in mixed courts allows for a panel discussion (Rennig 1993, 589). On the one hand, the professional judge needs to explain the law and the decision alternatives to the lay judges; on the other hand, lay judges can contribute the fresh approach of everyday citizens to the group deliberations. Furthermore, professional judges, usually highly educated, employed by the state, and reasonably well paid, are often socially distanced from everyday citizens whose cases they decide. Bringing in lay judges as decision-makers in the courtrooms bridges this gap. Next, lay judges, who can be recruited from a much wider social background, have a greater variation in life experience than professional judges do. In addition, some countries employ expert lay judges who can provide specialized knowledge (e.g., Croatia, Germany). In other variations, lay judges are chosen to represent certain social interest groups, such as employer and union representatives in labor courts.

## Definitions and forms of lay participation

Most authors define lay judges as legal decision-makers who do not make their living by judging. They typically receive a modest stipend intended to defray travel expenses. Alternatively, some would define lay judges by their absence of legal education. However, lay judges may by coincidence have legal training, and some legal professionals may volunteer their time to serve as lay participants.

This article uses the term “professional judge” when referring to judges who are legally trained and receive their main income from working as a judge (e.g., Kutnjak Ivković, 1999). By contrast, lay judges are people who typically have no systematic training and practice in legal decision-making and who do not receive their main source of income working as a judge (e.g., Kutnjak Ivković, 1999).

Stemming from the Old Greek “laikos”, the word “lay” means “of the people.” Lay judges may represent:

1. The citizenry in general, usually as an expression of the principle of democratic participation in state affairs;
2. Specific social groups, such as employer and employee representatives in labor courts;
3. Citizens who may bring in special professional experience/expertise. For example, Austrian administrative courts sometimes add a lay judge with specialized knowledge to the panel.

The second and third categories frequently overlap. For example, employer representatives in labor tribunals will often be from the human resources departments of large organisations, and employee representatives will often have labor law training from their workers’ unions.

Table 1: Principal court forms

	Single decision maker	Group of decision makers
<b>Lay judges only</b>	Single lay judge	Panel of lay judges
<b>Lay and professional judges</b>		Jury (professional judge presides over the trial, but jury makes its decision separately)  Mixed court (professional judge and lay judges make legal decisions jointly)
<b>Professional judges only</b>	Single professional judge	Panel of professional judges

Source: Machura 2016a, 241.

Table 1 shows the principal constellations of court decision-makers. Lay judges could preside as a single judge, serve in lay judges’ panels side-by-side with other lay judges, or serve in mixed tribunals side-by-

side with professional judges or in a jury side-by-side with other jurors with a professional judge presiding over the trials.

Some courts are exclusively staffed with lay decision-makers who act either as a single judge or as a panel (Table 1). Although the former is now increasingly rare, at least some German Provinces (*Länder*) employ lay mediators (*Schiedspersonen*) to deal with low-level conflicts such as neighbourhood disputes or minor misdemeanours. Panels of lay judges are also found in the French labor court of first instance (Burgess et al. 2017, 55) and in commercial courts in most French provinces.

Finally, most states employ only professional judges for some types of cases or courts. European single judges typically serve in civil or criminal courts of first instance, while panels of professional judges typically serve in the appellate courts, particularly those dealing with high-level appeals.

Of special significance for our overview are courts in which the task of judging is shouldered by both lay and professional judges, as is the case in jury trials and in trials by mixed courts. In jury trials, at least one key decision (guilt, liability) is left exclusively to lay decision-makers. Other decisions, including those of a procedural nature concerning the management of the trial, or those concerning the taking of evidence, are left to professional judges, one of whom presides over the trial. In contrast, a mixed court typically involves all its members – lay or professional – in all decision-making, such as decision-making about the admissibility of evidence, culpability, and sanction/award. Although all members of the court—both professional judges and lay judges—have equal rights and their votes carry the same weight, mixed courts are invariably presided over by a professional judge. This setup tends to give the professional judge a dominant position. The extent of their dominance depends on whether they support their lay colleagues or whether they leverage the power imbalance rooted in their legal training and greater familiarity with judging (Klaus 1972; Machura 2001a; Kutnjak Ivković 2015).

Sociologists of law have analyzed the dynamics in mixed courts using insights from the Relational Model of Authority and Status Characteristics Theory. According to the Relational Model of Authority in Groups (Tyler and Lind 1992), people value being treated fairly by the group's leader. Research confirms that lay judges work best in a mixed court if the professional judge values them as members with equal rights and systematically supports their contribution by encouraging an open discussion, listening to their arguments, and by providing explanations (Machura 2001a, 2001b, 2007). According to Status Characteristics Theory, the influence of members of a task-related group depends on the perceived quality of the contributions they can make (Kutnjak Ivković 1999). In a mixed court, Status Characteristics Theory suggests that presiding professional judges are in a favored position because of their legal education and experience (Kutnjak Ivković 1995, 132; 1999). If professional and lay judges in a mixed court think that the lay persons cannot contribute well, lay participation will be less effective. Accordingly, in the mixed courts in which lay assessors have special expertise, their influence tends to be higher and they are more respected by professional judges than they are in regular mixed courts (Machura 2016b, 277).

### **Lay judges in almost all countries and in all court branches**

Almost all European Union countries employ lay judges in one form or another (Tables 2 and 3). This section provides an overview of forms of lay participation in criminal courts and civil courts. It also briefly mentions other branches of the courts.

Table 2: Forms of lay participation in criminal courts in EU countries

<b>No lay participation in criminal justice</b>	<b>Single lay judge / mediator in criminal justice</b>	<b>Panel of lay judges in criminal justice</b>	<b>Professional judge(s) and lay jury in criminal justice</b>	<b>Mixed tribunal in criminal justice</b>
<b>(6)</b>	<b>(2)</b>	<b>(0)</b>	<b>(5)</b>	<b>(18)</b>
Cyprus	Germany	No example known	Austria	Austria
Latvia	(Spain)		Ireland	Belgium
Lithuania			Malta	Bulgaria
Luxembourg			Spain	Croatia
Netherlands			Sweden	Czech Republic
Romania				Denmark
				Estonia
				Finland
				France
				Germany
				Greece
				Hungary
				Italy
				Poland
				Portugal
				Slovak Republic
				Slovenia
				Sweden

Note: Spain in parentheses in the second column as it is currently abolishing the justice of the peace.

Table 3: Forms of lay participation in civil courts in EU countries

<b>No lay participation in civil justice</b>	<b>Single lay judge / mediator in civil justice</b>	<b>Panel of lay judges in civil justice</b>	<b>Professional judge, lay jury in civil justice</b>	<b>Mixed tribunal in civil justice</b>
<b>(8)</b>	<b>(5)</b>	<b>(1)</b>	<b>(2)</b>	<b>(16)</b>
Croatia	Belgium	France	Ireland	Austria
Estonia	France		Sweden	Belgium
Greece	Germany			Bulgaria
Latvia	Portugal			Cyprus
Lithuania	(Spain)			Czech Republic
Netherlands				Denmark
Romania				Finland
Slovak Republic				France
				Germany
				Hungary
				Italy
				Luxembourg
				Malta
				Poland
				Slovenia
				Sweden

Note: Spain in parantheses as it is currently abolishing the justice of the peace.

Table 2 reveals a predominance of mixed courts in lay participation in criminal courts in EU countries. Many countries inherited their mixed court from the time they belonged to the Austrian Empire. Others created or retained it under the influence of German legal culture, in which mixed courts historically formed a compromise between radical democratic reform and the interest of the prevailing conservative state representatives. In East-European countries, particularly those under strict Soviet control, there were mixed courts, though for different political reasons: lay and professional judges were to keep one another in check to allow party control from above. However, the historic roots of mixed tribunals are less relevant today. Rather, what keeps legal institutions alive is a mixture of usefulness and a general acceptance of the institution. In particular, having a few lay judges join the professional judge(s) at the bench does not dramatically increase the court expenses, but it substantially improves (the appearance of) public legitimacy. Another beneficial feature of mixed tribunals is that they can be applied to a large number of cases without substantially increasing the costs or substantially lowering the pace of the proceedings.

In some countries, mixed courts dealing with the most serious crimes still retain the title “jury”, like in France (Germain 2021) and Portugal (Jackson and Kovalev 2006, 95), or in Germany where just the name *Schwurgericht* survived. The traditional common law form of the criminal jury, however, has had varied fortunes in Europe. On the one hand, according to Jimeno-Bulnes (2021, 121), the jury is now accepted in Spain. Nonetheless, its application has been curtailed after it initially had a broader jurisdiction upon its introduction in 1996. On the other hand, Belgium has witnessed prolonged political efforts to reduce the role of its traditional jury (Germain 2021). In a particularly imaginative move, the 12 jurors since 2016 have to deliberate with three professional judges on culpability, whose participation “is deemed to be passive, as they do not vote on the verdict, only the jurors do” (Germain 2021, 228). It has become a mixed court. The same applies to the Danish jury, as jurors and professional judges deliberate together, but, unlike in a traditional mixed court, judges and jurors in Danish courtrooms vote separately. A two-thirds majority of the jurors and a simple majority of the professional judges must agree in their decision to convict the defendant (Leib 2008, 640).

EU countries rarely rely on single lay judges in criminal cases. We found their use in some German provinces in cases involving lay mediators. The Spanish Justice of the Peace, another example of a single lay judge, has already lost most judicial powers in criminal and civil justice and is about to be abolished (Galarreta 2023). There is no European Union example of panels made up exclusively of lay judges who hear and decide criminal cases.

As Table 3 demonstrates, mixed courts are also the most prevalent form of lay participation in civil justice across the EU countries. For example, German labor courts are mixed courts, and expert lay judges sit on special tribunals hearing agricultural cases.

In Cyprus, lay judges participate in a mixed court but seem to have no voting rights. Employer and employee representatives in the industrial disputes tribunals and representatives of tenants and landlords’ associations in the rent control tribunals have only a “purely consultative role” (Supreme Court, Republic of Cyprus 2018).

Unlike the criminal jury, the civil jury has only survived in Ireland (Citizen’s Information 2021) and Sweden (Hans 2023). Even in these two countries, the civil jury hears only a limited type of cases. For example,



juries hear defamation cases in Ireland (Citizen's Information 2021) and press cases in Sweden (Wikipedia 2023).

Several countries rely upon lay people as single decision-makers (Table 3). In addition to the aforementioned German lay mediators, there are also "social judges" in Portugal (Nascimento 2011, 1). These lay judges deal "in minor courts" with "educational guardianship and child protection" (Nascimento 2011, 1). In French commercial courts, cases can be heard by one lay judge, "if the parties so elect" (Standing International Forum of Commercial Courts 2023).

France is the only EU country in which groups of lay judges decide civil disputes without the presence of a professional judge. Three lay judges hear cases in the commercial court (Standing International Forum of Commercial Courts 2023). Lay judges are the decision-makers in French labor courts of first instance, with varying composition.

Lay judges also occasionally appear in other branches of the judiciary. For example, Sweden, Austria, and Germany employ honorary administrative court judges in mixed tribunals. Lay judges sit on the constitutional court of the German province of Brandenburg (Cain and Lieber 2023, 14-15). In its disciplinary panels, the German military also relies on mixed courts with side judges representing the community of soldiers. It is similar for military courts in Cyprus (Supreme Court Republic of Cyprus 2018). France, Germany, and Slovenia rely on mixed tribunals to decide welfare law cases.

### **Factors influencing the rise and fall of lay participation**

Observers of lay participation in Europe and worldwide have identified certain factors associated with the blossoming and withdrawal of lay participation. They can be categorized as follows:

- Attempts at the democratization of state and society have led to increased lay participation;
- Economic crises and emergency situations have been used as pretexts to reduce lay participation;
- The re-design of the court system has led to changes in lay participation, sometimes expanding it and other times constricting it;
- Specific criticisms of aspects of the work of the courts may create the conditions for reduction of lay participation in law.

Most existing lay participation today has its roots in the historical situation of the 19<sup>th</sup> century, when authoritarian state powers were curbed and a liberal, democratic rule-of-law system was introduced. Monarchic power was constitutionalized, and courts gained more independence from the government. Recent examples of the expansion of lay participation include Argentina (Almeida et al. 2021; Bergoglio 2021), where legal reformers hoped that the introduction of trial by jury would increase the legitimacy of the judicial system. In Japan and South Korea, the introduction of mixed courts marked at the same time an attempt to mobilize the public for participation in the affairs of the state, a realization that the state had to modernise, and an attempt to reform a socially isolated judiciary (Vanoverbeke and Fukurai 2021; Park 2021).

Kutnjak Ivković and Hans (2023) analyzed democratic characteristics of the countries of the world and the extent to which the countries relied on lay legal decision-making in their criminal justice systems. The

authors' correlational analyses revealed statistically significant links between the strength of a country's democratic features and its use of lay participation; the links were especially strong for use of the jury as a form of lay participation. Kutnjak Ivković and Hans (2023) point out, however, that the correlations between democracy and lay participation alone cannot speak to the causal relationship between them. Jury participation might strengthen democracy, as Gastil and his colleagues (2010) argue, but on the other hand, a democratic form of government may simply be more hospitable to the use of juries.

That times of crises can be used to push through sweeping changes is historically illustrated by the abolishment of the German jury at the height of the German hyperinflation crisis in 1923. In Poland today, some observers argue that the government is actively trying to minimize lay participation (Cain 2016). The same populist government is also in conflict with the European Commission for abolishing the independence of the judiciary. Lay participation has been "systematically limited" since the 1990s and now stands at less than 0.6% of Polish criminal proceedings (Małolepszy and Głuchowski 2018, 89, 100). In the running-up to the European Network of Associations of Lay Judges (ENALJ) meeting 2023, a Polish lay judge representative reported that the COVID crisis was being used as a pretext for further cuts in lay participation, many of which are still in effect after the general application of safety measures has been lifted in other areas of life (Kwiatkowski 2023).

The re-design of the justice system may also affect lay participation. The French *juges de proximité* came about as part of a drive to get justice closer to the citizens and initially included non-lawyers experienced in law. However, the special court for neighbourhood disputes dissolved and instead the task of providing justice "close to citizens" is distributed more widely across courts and their actors (Zwickel 2017; on the "magistrate exercising on a temporary basis": Ministère de la Justice n.d.). In 2007, a court reform in Denmark led to an appeal against decisions of the jury at the municipal courts going forward to a jury at the High Court. Thus, Danish juries, which are more like mixed courts, are involved on two levels of criminal courts (Tamm 2015, 153).

At other times, changes to lay participation follow public criticism of specific aspects of the work of the courts. Two examples from two countries show how feminist organisations take opposing views in relation to removing rape cases from the remit of lay participation. On the one hand, in Scotland (as part of the UK no longer in the EU), the conviction rate for all crime is about 88%, but only 43% for rape and attempted rape (BBC 2023). Rape Crisis Scotland, a campaign group, called for the abolition of jury trials in rape cases because jurors believe in "rape myths." These are misunderstandings of how female victims react. Under political pressure from scandals elsewhere, the Scottish Government announced a draft bill to introduce a sexual offenses court for rape cases and to run a pilot program to conduct those trials without juries. The move ignited fierce resistance from defense lawyers (BBC 2023). At the time of this writing, an increasing number of Scottish law firms declared they will boycott the trial (Scottish Solicitors Bar Association, 18 March 2023). It will be, indeed, eagerly awaited if professional judges are less affected by "rape myths" than lay judges and the cases result in higher conviction rates. On the other hand, in France, feminist campaigners drew conclusions that were opposite to their Scottish counterparts. A political decision was made to take the rape cases, which make up about one-half of the cases heard by juries, away from the jury (Fiorini 2023). A special rape court was created, consisting of five professional judges. Feminist organisations oppose the change because they see sexual crimes against women as a social problem, and lay participation has a role in educating citizens. In an experiment over three years, rape cases were heard by a new all-professional judge court. Appeals from the jury court (the French mixed

court to be precise) were fewer than from the new all-professional judge court, presumably because the proceeding in front of lay judges gives the impression of being more thorough (Fiorini 2023).

## Conclusion

In sum, “the lay judge is a citizen of Europe” (Machura 2016a, 249). Currently, only four EU countries – Latvia, Lithuania, Romania, and The Netherlands -- have no lay participation in criminal and civil trials. In other countries, lay participation is not only utilized, but it is widespread, including for example, Austria, Finland, Germany, France, and Sweden. The main form of lay participation in the EU countries is the mixed court: a panel of professional and lay judges presided over by a professional judge which makes decisions together. Single lay judges or lay mediators, and all-lay judge panels, have become a rarity in Europe. Similarly, the classic jury is not used often, particularly in civil cases.

The sands of lay participation are constantly shifting. At the ENALJ conference 2023, the representative of Sweden reported improvements to the work of lay judges in his country, while a Finnish spokesperson expected difficult times ahead with a new government. European countries could certainly do more to allow their citizens an active role in the administration of justice. Occasionally, lay judges need more rights in mixed tribunals to participate fully. In Cyprus, it would be a good start to grant them voting rights. Certainly, EU countries could employ lay judges more widely across the different branches of the courts, either as representatives of the citizenry, or for their special expertise. Overall, whereas lay participation waxes and wanes, on the whole, it forms a constituent part of European legal culture.

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