

## Civil Justice: Lay Judges in the EU Countries

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## 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

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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. American criminal juries are well researched, to be followed by US civil juries. Beyond that, research is few and far between.

In recent years, attempts have been made to broaden the horizon with comparative work.<sup>1</sup> Juries worldwide, mainly in the states influenced by English law, have been systematically studied (Vidmar, ed., 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 been already provided (Jackson and Kovalev 2006/2007). This article attempts to contribute by focussing on *civil justice*. There is little known about lay participation in civil justice in Europe, more specifically, the European Union member states. The civil side proves much more difficult to research as already 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 which is characteristic of codified law, especially when observing 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<sup>2</sup>.

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 typically trained lawyers. For example at the German Federal Labour Court where employers and unions are represented by trusted legal experts as lay judges. Even though lay judges usually receive monetary compensation for their time and e.g. travel expenses, which sometimes are generous, they are not professional judges whose careers revolve around court work.

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<sup>1</sup> 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.

<sup>2</sup> 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.

This article reports new research attempting to fill the gap in knowledge of lay justice in civil cases in European countries. First, reasons given for lay participation in the administration of justice are presented, then the principal forms it can take. After the research method is introduced, an overview on the spectrum of forms in civil justice within the EU member states is provided. The conclusion summarizes the existing forms and relates them to the commonly discussed reasons to have lay participation in the courts.

## 2. Why lay participation?

In the literature and in political discussions a number of reasons are cited in favour of lay participation in general<sup>3</sup>.

### 2.1. *Democracy-related arguments*

Lay judges reflect the principle of democratic rule. It is not enough for voters to send representatives to parliament (Kulscár 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 at the courts. After all, this is where the laws are applied. The argument is relevant to areas of 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, of demands for efficiency, of the press, of weblogs, 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 belonging to the upper half of society would sit in judgment of the lower half, which they would not know. Where a legal system features lay judges there is at least a higher chance that life experiences of a broader spectrum of the population come into play.

These arguments around profession and class may find special support in civil cases. Most judges never experience the struggles of the small 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 systematically side 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 habitus when applying for a position as judge. The advantage of 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 aspects like, – as an ethnic minority lawyer told the author – feeling comfortable at a required formal lunch. At least in principle, the use of lay judges involves a wider social spectrum of people into the work of the courts.

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<sup>3</sup> Machura 2006 with more literature; Lieber 2008, p. 11-13; Jackson and Kovalev 2006/2007, p. 87-93 discuss democracy and human rights in relation to lay participation in criminal justice.

### 2.3. Lay judges may contribute area-specific knowledge

In a typical constellation a professional judge collaborates with lay judges, each group of decision makers knowledgeable in their respective areas. Even if a professional judge specializes in a certain area of law, her knowledge of social practice is behind that of the actors themselves. For this reason, many countries employ lay judges who contribute area-specific knowledge and daily direct experience of the field of specialization. A legally trained professional judge may know the 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 first-hand experience with the subject matter. 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 can be cited as 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 superior and more rounded court decision can be expected. 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*)<sup>4</sup>. This function does not depend on a specific type of case and therefore equally applies to civil 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, good citizens<sup>5</sup>. Similarly, in the Soviet bloc countries of the 20<sup>th</sup> 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 pro-

<sup>4</sup> E.g. Diesen 1999, p. 5. 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).

<sup>5</sup> "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 1835/2013, Chapter XVI, Part II, not paginated). The point has recently been highlighted again by American jury scholars Marder and Hans 2015, p. 800-801.

selytizes. Lay judges may report to their colleagues, family and friends about their experience. They may share their learnings 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 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 forming of legal policies (*political function*). The discussion of aspects of civil law is widespread in those organizations which 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.

At least when speaking from German experience, the *multiplication and the political function* rarely materialize (Machura 2006, 2011). However, empirical research provides support for all the other functions (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
<b>Lay judges only</b>	Single lay judge	Panel of lay judges
<b>Combination of lay and professional judges</b>		Jury (professional judge presiding) Mixed court
<b>Professional judges only</b>	Single professional judge	Panel of professional judges

In order to provide an overview, Table 1 distinguishes lay participation forms, first distinguishing 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 lines of jurisdiction have already been drawn out. These criteria apply to most trials at courts of first instance. As a

consequence, they may also see lay judges acting as single decision maker.<sup>6</sup> In Spain, e.g., Justices of the Peace deal with “minor” civil disputes (Lieber 2010, p. 89). The lay mediator employed in several German provinces to address neighbourhood disputes is also in evidence (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 may also supervise insolvency administrators (Lennertz 2012, 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<sup>7</sup>. Typically, however, in Continental European countries are mixed tribunals of professional and lay judges. Here, the presiding judge is invariably a professional judge. The German labour courts are examples, but mixed courts are also found in the chambers for commercial cases at German regional courts and for agricultural disputes at the German county and province courts (Baumann and Lieber 2012, 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). Features of a civil jury can be outlined as follows: 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 as if they had no prior knowledge at all. The setting makes the jury the most time-consuming and expensive form of lay participation. Partially 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 big advantage of mixed courts and panels of lay judges is their low cost compared to juries. They do not require long juror selection procedures (as in the case of US juries), and involve a smaller number of lay judges who will typically sit for a longer period hearing 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. Consequentially, mixed courts can be assigned many more cases. The lay magistrates in England and Wales can be joined in the deliberation room

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<sup>6</sup> 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 proximity judges with an income. Candidates also need to have a legal education/considerable legal practice and the proximity judges are very similar to professional judges (Zwickel 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.” From January 2015 onwards, the proximity judges were set to change significantly (Zwickel 2013).

<sup>7</sup> Notably with the exception of the Alsace, Lorraine, and Moselle provinces where mixed commercial courts can be found (Kunzler 2008, p. 1).

by a legally trained law clerk. In a mixed court, lay and professional judges take all decisions together, including on procedural matters. Even the lay judges at mixed courts or all-lay adjudicator courts are typically – but not always<sup>8</sup> – gathering experience through years of participation in court. However, panels of judges are vulnerable to one specific problem – with the notable exception of the jury: 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. This is supported by several studies (overview in 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 in to 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 in order to facilitate the proceedings, provide the 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 knowhow which goes with years of trial experience. Social status also matters for juries (Lempert 2015, 845). Within a jury, members with legal education or 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 favourably view expert lay judges (e.g. Görlitz 1970, 306). On a recent German lawyer congress, a wider use of honorary commercial court judges as experts was – though 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).

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<sup>8</sup> Jackson and Kovalev 2006/2007, p. 106 mention countries where in criminal cases lay adjudicators are summoned for one case.

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. Further sources were identified. Interest groups like the European Union of Judges in Commercial Matters, or for labour courts 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). Additional information was obtained through searches on the internet using key word combinations such as "country" and "lay judge".

In the end, there often were several sources available for a specific country, not necessarily all addressing 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 <sup>1,2</sup>
Belgium	Commercial courts, mixed <sup>3</sup> and single judges <sup>4</sup> / social (labour) courts, mixed <sup>4,5</sup>
Bulgaria	Mixed tribunal in matters of guardianship and custody <sup>2,6</sup>
Czech Republik	Mixed tribunal <sup>7</sup>
Cyprus	None <sup>7</sup> (at all)
Denmark	Labour courts, mixed <sup>5</sup>
Estonia	None in civil justice <sup>8</sup>
Finland	Labour courts, mixed <sup>5</sup> / family cases, mixed <sup>9</sup> / commercial courts and insurance courts, mixed <sup>10</sup>
France	Lay arbitrators <sup>11</sup> / commercial courts <sup>10</sup> / agricultural courts <sup>12</sup> / labour court: initial trial only lay judges representing employers and workers, if no agreement: continuing as mixed court / ( <i>juge de proximité</i> ) <sup>10</sup>
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) <sup>1</sup>
Ireland	Jury <sup>13</sup>
Italy	Justices of the Peace <sup>10</sup> / honorary single judges <sup>10</sup> / agricultural cases and youth court mixed <sup>14</sup>
Latvia	None in civil justice <sup>7</sup>
Lithuania	None <sup>15</sup> (at all)
Luxembourg	Arbitrage courts, mixed <sup>10</sup> / labour courts, mixed <sup>5</sup>
Malta	None <sup>16</sup> in civil justice
Netherlands	None <sup>17</sup> (at all)
Poland	Mixed tribunal <sup>7</sup>
Portugal	Arbitrage courts, as single lay judge or tribunal of lay judges <sup>18</sup>
Romania	Advisory lay judges in labour and insurance cases <sup>19</sup>
Slovakia	None <sup>7</sup> in civil justice
Slovenia	Mixed tribunal <sup>7</sup> / labour courts, mixed <sup>5</sup>
Spain	Justices of the Peace
Sweden	Mixed tribunal <sup>7</sup>
United Kingdom	Labour courts <sup>5</sup> and other courts <sup>20</sup> : 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 Malta (n.d.)
- 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

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
(Croatia)	Belgium	France	Ireland	Austria
Cyprus	France	Portugal	UK	Belgium
Estonia	Germany	UK		Bulgaria
Greece	Italy			Czech Republik
Latvia	Portugal			Denmark
Lithuania	Spain			Finland
Malta				France
Netherlands				Germany
Slovakia				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 used some form of lay participation in their civil justice system. Only eight out of 27 member states seemed to have no lay judges in civil procedures at that time. Croatia entered the EU in 2013 as 28th state, and also does not seem to use lay participation in civil courts<sup>9</sup>.

Tables 2 and 3 demonstrate 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 spectrum 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 permitted in most civil damages cases, though less commonly held". In the Irish

<sup>9</sup> Early after liberation from the Axis powers, lay participation in civil courts had been introduced and later courts with expert lay judges, among them commercial courts (Kutnjak Ivkovich 1999, p. 136, 150). Following independence from Yugoslavia, lay participation in civil cases seems to have continued in Croatia. 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.).

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 and the decision regularly being made against a jury trial (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 cited as 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 the United States (Hans 2008, p. 282). Lempert (2015, 840-843) arrives at the conclusion that despite “jury horror stories”, the decision making of US civil juries is reasonable. Deliberating separate 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<sup>10</sup>. 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, the choice of institution in nine countries – Austria, Belgium, Denmark, Finland, France, Germany, Luxembourg, Slovenia and the UK – follows the idea 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<sup>11</sup>. Supplementing professional with lay judges and thus facilitating deliberation is implemented in 16 states with mixed courts (Table 3).

## 6. Conclusion

Little has been known about lay participation in civil justice in EU countries. The research conducted for this article finds that the majority of countries employs lay judges in one form or the other, most prominently in mixed courts and in specialised courts which require special expertise. Eight reasons to have lay participation in courts, and also in civil justice, have been identified: 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

<sup>10</sup> Gerding 2007, p. 284, 414. As late as 2015, the Scottish Court of Session Bench has decided that jurors before their deliberation will be informed about the usual damages awarded by judges and juries (Jones 2015).

<sup>11</sup> 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.

employment of lay judges in civil cases. Overwhelmingly, lay persons work in panels of judges, be they all-lay judge tribunals, juries, or mixed courts. Allowing a 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, injects the life experience and views of a larger spectrum of society into the dealings of the courts, beyond what professional judges contribute. In several countries, this will also take the form of 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 a good deal of 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 the idea of lay participation<sup>12</sup>. However, without further investigation, presumably in the form of case studies, it cannot be said how much lay judges take part in general political discussions to influence the law. Apart from this political aspect, the very forms by which lay participation is institutionalized already point out which objectives are to be achieved.

We have only dealt with lay participation in civil cases. It is possible that some information is still missing and more instances can be added to the list. Still, the research clearly 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<sup>13</sup>, Russia (arbitrage courts<sup>14</sup>), and Norway (Domstol Administrationen n.d.). EU member Estonia, for example, has lay judges in criminal courts only (Cain 2011b, p. 140-141). Indeed, of the nine European Union member states that according to this study had no lay participation in civil justice (see Table 3), only three according to Jackson and Kovalev (2006/2007, p. 94) also had no lay participation in criminal courts. They were 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<sup>15</sup>. Furthermore, citizen judges also work in administrative courts, in countries in which those exist separately from courts of general jurisdiction<sup>16</sup>, and in at least one example in constitutional courts<sup>17</sup>.

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

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<sup>12</sup> Regrettably, studies outside of the US are very rare. In Germany, they date back quite some time: Kaupen 1972, p. 561; Kaupen 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.

<sup>13</sup> Switzerland has a very large segment of lay judges and justices of the peace/mediators, which also deals with civil justice, including labour and commercial courts. Judges in courts of first instance are typically non-lawyers (Cain 2010b, 103).

<sup>14</sup> Pashchenko 2002. 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 request of a party on grounds of either case complexity or special knowledge is granted by the court.

<sup>15</sup> Jackson and Kovalev 2006, p. 83, 93-94. They included Luxembourg, which has mixed courts in labor and arbitration cases (see Table 2 in this article).

<sup>16</sup> For Germany: Machura 2006, Machura 2007. The German social courts, dealing with welfare-related disputes, can be seen as a type of administrative courts. Lay assessors at these are discussed in: Großmann 1978 and Pauli 1999. Military courts would be another variety of administrative courts where they do not sit on criminal cases.

<sup>17</sup> E.g. in the German Province of Brandenburg.

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