Lay Participation in Modern Law: A Comparative Historical Analysis

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In recent decades, the trial jury has become one of the prime exports of American legal culture. Since the 1970s, countries as diverse as Spain, Russia, the Dominican Republic, and South Korea have established criminal trial juries in one form or another. Some of these versions have not only been influenced by the American model, but also by others, such as the German Schöffengericht (mixed court). The new jury systems share a democratic rhetoric, the willingness to involve ordinary
citizens in the workings of the courts to represent “the people”. Oddly this rise in interest in importing lay participation has coincided with a decline at its point of origin, the United States. Unpredictable jury trials in civil cases are best avoided, and the vast majority of civil matters are resolved through settlement or arbitration; most recently, the rate of jury trials in federal civil cases stood at less than one percent. As for criminal trials, plea bargaining has practically swallowed up trial by jury; only about two percent of federal criminal cases result in a jury trial.

The Conference will explore whether this paradoxical fate of the Anglo-American jury has larger implications and historical analogies in other parts of the Western world. As an institution lay judges have, ever since the emergence of professional, legally trained judges in the twelfth century, struggled to find their place in legal systems characterized by the competing demands of popular sovereignty and legal efficiency. Legal systems are growing more and more complex, which may set limits to the usability of lay participants.

On the other hand, the issue of lay participation in the administration of justice often touches the deepest feelings of national legal culture, and any proposal threatening their position may generate heated discussions. Despite its overall decline, the American jury still can pack a surprising constitutional punch—as, for instance, in the recent decision by the U.S. Supreme Court that the mandatory federal sentencing guidelines violate the right to trial by jury—and, at any rate, continues to carry strong symbolic functions, which may also help to explain its spread into new democracies all over the world. Similarly, in the Nordic countries, lay representation is often felt to represent some of the most cherished values of a shared legal past.

These are among the hypotheses that we wish to test with the help of comparative legal historical investigations, from the rise of the modern jury in the early nineteenth century and reaching up to the present. In order to enable the different presentations on this topic to engage with each other in a focused manner, the project will not discuss the medieval and early modern phenomenon of professional lawyers ousting laymen from European judiciaries, described already for instance in J. P. Dawson’s classic *A History of Lay Judges*, without however ruling out the possibility of an introductory contribution on this subject.
How do we define lay participation? Our project concentrates on Anglo-American juries and their continental equivalents, such as the German *Schöffen* and the Nordic *nämn*, rather than on lay persons who hold judicial office, such as justices of the peace in many parts of Europe or judges at courts of limited jurisdiction in the United States.

The modern history of lay participation begins at the French Revolution. The revolutionaries adopted the idea of the English jury, making this “legal transfer” one of the emblems of bourgeois emancipation from the *ancient régime*’s judicial system. Law courts became an important reform target for the revolutionaries, because in the old world the judiciary had been dominated by legal professionals, *noblesse de robe*. In 1840s Germany, the growing political strength of liberalism was mirrored in discussions about the shortcomings of the criminal justice system and, as 1848 approached, the idea of a trial jury emerged in the literature as an important cure to the perceived problems. Historically, the jury was justified by the mythical "Germanic freedom" (*germanische Freiheit*), the nonexistence of any judiciary power above the free German. Ironically, some decades earlier the jury had been criticized as French, an un-German institution the French occupiers had forced upon their German subjects.

The Western world was, however, by no means uniform in adopting juries or similar systems. Consider, for instance, the Nordic countries: Juries were discussed in Denmark, Finland, Norway, and Sweden, but the institution was established only in cases involving freedom of print in Norway and Sweden. In general, pressures to involve lay people in judicial systems were weaker in Scandinavia than in other parts of Europe, possibly because the system of lay participation had been in place and had remained virtually unchanged since the middle ages.

The rise of lay participation is in need of investigation in light of recent developments in comparative legal analysis. The reasons why it was the English model that proved hegemonic are fairly well known, but how far from the original jury did it its continental versions actually wander? What kind of adaptations did the continental law produce that the original common law environment of the jury did not require? And why did certain areas prove resistant to the jury (as did the Nordic countries or certain German
territories) or any lay element in the judiciary (such as large parts of Eastern Europe)? Comparative legal history should cross the English Channel and the Atlantic, discussing the reasons why the representation of laymen has either decreased or increased in judicial systems. How did juries function in practice? Could they respond to the liberal demands that had originally contributed to emergence of the juries?

Lay participation in the administration of justice was part and parcel of a larger development in European procedure. The package consisted of the principles of publicity and orality, which were to replace the old secrecy of written proceedings. The package often also included the replacement of the old inquisitorial procedure by the accusatorial (or adversarial) mode of criminal procedure. Again, different patterns are discernible in different regions, and all parts of the judicial package were not adopted similarly everywhere.

The second large question of the nineteenth century is the “fall” of lay participation in courts. In France, the zenith of the bourgeois jury was short-lived, and the professional judiciary began gradually to increase in significance during the second half of the century – at the cost of lay participants. Similar developments took place in Germany. P.J.A. Feuerbach’s early criticized the jury as an alien institution, unfit for Germans. Even leading Germanists like Georg Beseler, who had no qualms about placing the administration of justice at least partially into the hands of ordinary Germans, in his “Volksrecht und Juristenrecht” of 1843 expressed a preference for Schöffengerichte over Geschworenengerichte. Attempts to develop a modern theory of a mixed court consisting of laymen and professionals (Schöffengericht) appear in the German scholarship and parliamentary discussions soon after the victory of juries (Schwurgerichte) after 1848. In 1850, Schöffengerichte (one professional judge and two lay members, Gerichtsschöffen) were established for petty criminality (Polizeistrafen) in Hanover, and in 1869 in Sachsen and Württemberg for cases of intermediate crime (mittlere Kriminalität). The reforms were inspired by the old dispute of drawing the line between questions of fact and of law, rendering an English type of a jury problematic. The battle lines were now drawn between supporters of juries and mixed courts, respectively. As a compromise, the Gerichtsverfassungsgesetz for the unified German state that entered into force in 1879 followed the Hanoverian model, establishing Schöffengerichte for cases of petty criminality only. From the 1870s, jury proponents
were fighting a losing battle, until *Schöffengerichte* finally completely replaced the jury system in Germany in 1924. *Schöffengerichte* survived the Nazi assumption of power in 1933, as Nazi ideology cast lay participation as a manifestation of the *Volksgeist*. The start of World War II brought an end to all lay participation in German trials, with the exception of the infamous *Volksgerichtshof*. Mixed courts were reintroduced in Germany after the war, with Bavaria even briefly re-establishing jury courts between 1947 and 1950.

The historical connection between liberal ideology and the jury needs a more nuanced treatment than it has received in scholarship so far. How much is the rise of the jury in the early nineteenth century related to liberal politics and to the wish to check the power of professional judges? The position of the judiciary in the ancien regime was so central that it is understandable that the bourgeoisie was eager to secure its positions in the courts by way of juries. However, when representative democracy developed towards the end of the century, it may well be supposed that the importance of the judiciary as a vehicle of state power diminished vis-à-vis the legislature. The three-partite separation of powers and the corresponding “value free” schools of jurisprudence (the exegetical school in France, legal formalism in the United States, and conceptual jurisprudence in Germany) reduced – albeit only on paper – the role of the judge to a mere “mouth of the law”, rendering it less pivotal for rising social groups, such as the working class, to attempt to gain control over it. At the same time, the judiciary continued to play a role in the system of mutual checks and balances, with the judiciary itself being regarded as a check on legislative power, rather than merely as a site of state power in need of being checked by laymen. In the United States, at least, the jury came to be seen as the final step in a series of checks on state power through its extraordinary power of jury nullification, after the judiciary (through the power of dismissal) and, more importantly, the executive (through the exercise of prosecutorial discretion).

The connection between the establishment of representative democracies (earlier in the United States and later in Europe) and the decline of lay participation, however, requires further investigation. After all, as mentioned in the beginning, lay participation continued long after the establishment of representative democracies, while at the same time continuing its decline throughout the twentieth century. Other factors will have to be considered, based on a comparative analysis of the development of the lay element
in Western justice systems. To what extent have internal changes of law within a given justice system, considered by itself and in comparison to other systems, affected the position of lay participants? Has law become simply too complex for laymen? Has law—and the criminal process in particular—become more symbolic, or at least more explicitly, allowing lay participants to (literally) perform the function of “representative of the people” in a piece of legal theatre dominated in fact by state officials? What precisely is the notion of representativeness that underlies the diminished role of lay participants? Do they represent “the people” as a whole, the victim, the victim’s community, or even the accused, or his community? Does this notion of representativeness remain constant over time, or across legal systems?

These attempts to better understand the fall, and diminished role, of lay participation throughout the nineteenth and twentieth centuries, of course, will also have to take account of the recent rise, and in fact the establishment, of lay participation in other legal systems. What exactly are these countries adopting? The jury system in its early form, as a bulwark against state power, and the judiciary in particular, or also against the legislature, or perhaps the executive? In its more recent version, with a much diminished role to play in the administration of a justice apparatus in a state that proceeds on the assumption that its basic legitimacy has been resolved, making effective controls on its power unnecessary, and anachronistic? More pointedly, are these countries adopting the jury as window dressing for their own citizens or as a signalling device to the international community, and the United States in particular, on par with the adoption of apparently ambitious constitutions, a commitment to “the rule of law,” the fight against corruption, and the establishment of other conditions favourable to international investment? Or does the introduction of the reflect a commitment to challenging the fundamental legitimacy of state power in its arguably most pointed manifestation—putting a man on trial for his liberty or property (and in some countries, and not only in the United States, his life) for the violation of a state norm?

To come to grips with the phenomenon of lay participation in its multifaceted complexity—covering different legal systems (civil law vs. common law) as well as different countries within a given legal system (United States vs. England, for instance), not to mention even different types of law within a given country (civil law
vs. criminal law)—and to capture the movement of legal ideas reflected the dissemination of models of lay participation, a broad conceptual approach to comparative legal analysis may be useful. One might ask, for instance, whether the rise and fall, and rise, of certain forms of lay participation reflect shifts in global legal hegemony— to use Ugo Mattei’s terminology— or whether the spread of law participation has a logic of its own. Does the decline of lay participation— whenever and wherever that has occurred— result from similar or different reasons? What relation, for instance, does lay participation bear to the development, and entrenchment, of a legal profession, including not only professional judges, but also lawyers, clerks, and so on? How, if at all, does lay participation figure into a legal system’s ability, not to mention legitimacy, to render judgment on members of ethnic or religious minorities (e.g., German “guest workers” or recent immigrants from former Soviet member states or African colonies)?

A comparative study of lay participants, we believe, will constitute a valuable addition to legal history in general, and to the scholarship of procedural law and legal transplants in the Western world in particular. As these international developments almost unavoidably lead to cultural collisions between different traditions, they call for an increased understanding of their historical roots. Thus, comparative historical studies not only contribute to the academic knowledge of legal history, but may also prove useful for future policy making.