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BEACONS OF DEMOCRACY?  
A WORLDWIDE EXPLORATION OF THE RELATIONSHIP  
BETWEEN DEMOCRACY AND LAY PARTICIPATION IN  
CRIMINAL CASES

SANJA KUTNJAK IVKOVIĆ & VALERIE P. HANS\*

ABSTRACT

*Theorists have long associated the jury system and other forms of lay legal decision-making with democracy, hypothesizing that public participation in decision-making roles promotes democratic impulses and strengthens democratic forms of government. Yet even countries with non-democratic forms of government include a role for lay participation in legal decision-making. This study uses a global lay participation database to examine the relationships between a country's inclusion of lay people as legal decision-makers and its political characteristics. We find robust, statistically significant correlations between the presence of lay participation in the country and the extent of the country's democratic elements. The relationships between democracy and lay participation are strongest for the institution of the jury; they are attenuated in countries that use lay judges in mixed courts, another common form of lay participation.*

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## INTRODUCTION

Theorists regularly associate participation of lay people in legal decision-making with democracy, an association explored empirically in this article. Citizens untrained in law participate in several different ways in legal systems around the world, including serving as jurors, lay judges in mixed courts or mixed tribunals, lay magistrates or justices of the peace, and members of lay courts.<sup>1</sup> The English lord Sir Patrick Devlin long ago wrote that one of the first objectives of a tyrant in government would be “to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject’s freedom in the hands of twelve of his countrymen.”<sup>2</sup> In the United States, the Founders likewise saw the jury as a democratic body that had the power to check the government’s application and enforcement of the law through its verdicts in individual cases.<sup>3</sup> The jury trial right belonged to the community, which directly determined the moral blameworthiness of its citizens.<sup>4</sup> Citizen participation as decision-makers in the legal system is a form of direct democracy; it engages citizens in public affairs and makes them responsible for the outcomes.<sup>5</sup>

Perhaps the best-known arguments about the links between democracy and lay participation came from the French writer Alexis de Tocqueville. In *Democracy in America*, composed after a tour of the United States in the early 1800s, he claimed that the American jury system was a key contributor to democracy.<sup>6</sup> He noted that when legal decisions are made by fellow citizens, rather than professional judges, they are more likely to be accepted by the public.<sup>7</sup> The legitimacy of the verdict, as well as the legal system as a whole, is enhanced.

1. Valerie P. Hans, Hiroshi Fukurai, Sanja Kutnjak Ivković & Jai Park, *Global Juries: A Plan for Research*, in *THE PSYCHOLOGY OF JURIES: CURRENT KNOWLEDGE AND A RESEARCH AGENDA FOR THE FUTURE* 131, 132–35 (Margaret Bull Kovera ed., 2017) (describing different types of lay participation in legal decision-making).

2. PATRICK DEVLIN, *TRIAL BY JURY* 164 (1956).

3. SUJA A. THOMAS, *THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES* 62–69 (2016) (describing the original role of juries as envisioned by the Founders).

4. LAURA I. APPELMAN, *DEFENDING THE JURY: CRIME, COMMUNITY, AND THE CONSTITUTION* 45 (2015). Supporting the claim that the jury trial right belongs to the community, rather than exclusively to the defendant, is the fact that just four states give the defendants an absolute right to waive jury trial. The federal government (FED. R. CRIM. P. 23) and thirty states require both the consent of the court and the prosecution; another sixteen states require the consent of the court for a jury trial waiver. See Evan Hall, *The House Always Wins: Systemic Disadvantage for Criminal Defendants and the Case against the Prosecutorial Veto*, 102 *CORNELL L. REV.* 1717, 1722–23 fig.1 (2017).

5. John D. Jackson & Nikolay P. Kovalev, *Lay Adjudication and Human Rights in Europe*, 13 *COLUM. J. EUROPEAN L.* 83, 90 (2006).

6. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (J.-P. Mayer ed., George Lawrence trans., Anchor Books, 1969) (1835).

7. *Id.*

But even more significant from Tocqueville's perspective was that democracy was strengthened by the experience of serving as a juror.<sup>8</sup> By participating in legal decision-making, jurors learned from the example of the professional judge and gained the knowledge, skills, and experience that are required of citizens in a democracy. Jurors were educated about the law from the judge and then worked together to apply that law and resolve the dispute before them. Thus, in his view, the jury system served as a "free school" that trained its citizens in the practice of self-governance.<sup>9</sup> Nancy Marder has elaborated in powerful detail about the transformation process that occurs when ordinary citizens are enlisted as jurors.<sup>10</sup>

Other writers have drawn attention to the democratizing effects of different approaches to lay legal decision-making. In addition to jury service, Marijke Malsch emphasizes the importance of participation by lay judges, who serve as representatives of the community in the courtroom.<sup>11</sup> Malsch observes that knowledge about the system gained through that role can be spread throughout communities; therefore, discussions about the justice system are more likely to be based on the realities of the trials.<sup>12</sup> She also points out the necessity of transparent language when lay decision-makers are present: "Most lay adjudicators are not masters of legal language, so the professional judges, defense lawyers and prosecutors would be forced to use colloquial language to a greater degree than in a situation where the tribunal consists of professionals only."<sup>13</sup>

In an article comparing the decisions of lay and professional magistrates in England, Shari Seidman Diamond points out the "assumption that greater legitimacy may flow from decisions handed down by judges who appear to represent the community rather than by those who are viewed as instruments of the formal authority structure."<sup>14</sup> And, speaking about justices of the peace, Doris Marie Provine observes that "[n]onlawyer judges still bring to mind the amateur's independence from central and professional controls, informality in proceedings, and local democracy in the disposition of law."<sup>15</sup>

8. *Id.*

9. Albert W. Dzur, *Democracy's "Free School": Tocqueville and Lieber on the Value of the Jury*, 38 POL. THEORY 603, 603 (2010) (analyzing the jury's role in educating the public about the law).

10. See generally NANCY S. MARDER, *THE POWER OF THE JURY: TRANSFORMING CITIZENS INTO JURORS* (2022).

11. MARIJKE MALSCH, *DEMOCRACY IN THE COURTS: LAY PARTICIPATION IN EUROPEAN CRIMINAL JUSTICE SYSTEMS* 2 (2019).

12. *Id.* at 2.

13. *Id.* at 3.

14. Shari Seidman Diamond, *Revising Images of Public Punitiveness: Sentencing by Lay and Professional English Magistrates*, 15 LAW & SOC. INQUIRY 191, 194 (1990).

15. DORIS MARIE PROVINE, *JUDGING CREDENTIALS: NONLAWYER JUDGES AND THE POLITICS OF PROFESSIONALISM* xii (1986).

She notes the “fundamental rationale” for lay legal decision-making: “it brings judicial power closer to the citizenry and thereby legitimizes the exercise of state power through courts.”<sup>16</sup>

Many of these democratizing arguments have been advanced as justifications for introducing new forms of lay participation in law. Japan’s 1923 Jury Act allowed Japanese citizens to participate directly as factfinders in the justice system and was driven by a strong democratic movement across the country.<sup>17</sup> Subsequently, however, an increased societal shift toward militarism and fascism undermined the strength of Japan’s jury system, and it fell into disuse.<sup>18</sup> The legislative intent behind the more recent introduction in Japan of *Saiban-in seido*, a mixed court system of lay and professional judges, was to promote the public’s understanding and confidence in the justice system.<sup>19</sup> Dmitri Vanoverbeke and Hiroshi Fukurai point to how some Japanese lay judges engage in activism following their service as encouraging evidence that service as lay judges has raised civic engagement and political awareness; they express hope that it is contributing to better functioning of the democratic system of government.<sup>20</sup>

The democratization efforts in South Africa following the dismantling of apartheid in the 1990s were wide-ranging and included not only the administrative and legislative branches but also the judiciary.<sup>21</sup> One of the most significant, from the perspective of Jeremy Seekings and Christina Murray, was the appointment of lay assessors in many lower courts across South Africa.<sup>22</sup> Seekings and Murray concluded from their study of the post-apartheid introduction of lay assessors in South Africa that “the reintroduction of lay participation in the courts can be seen in terms of democratizing this corner of the South African state.”<sup>23</sup>

Argentina’s recent introduction of lay legal decision-making, first with lay judges in mixed courts in the province of Córdoba, and later with jury

16. *Id.* at xv.

17. Lester W. Kiss, *Reviving the Criminal Jury in Japan*, in *WORLD JURY SYSTEMS* 353, 360–61 (Neil Vidmar ed., 2000).

18. *Id.* at 361.

19. Dmitri Vanoverbeke & Hiroshi Fukurai, *Lay Participation in the Criminal Trial in Japan: A Decade of Activity and Its Sociopolitical Consequences*, in *JURIES, LAY JUDGES, AND MIXED COURTS: A GLOBAL PERSPECTIVE* 69, 69 (Sanja Kutnjak Ivković, Shari Seidman Diamond, Valerie P. Hans & Nancy S. Marder, eds., 2021) (describing purposes of the lay judge system).

20. *Id.* at 78–83 (describing increased political activism of former *Saiban-in*).

21. JEREMY SEEKINGS WITH CHRISTINA MURRAY, *LAY ASSESSORS IN SOUTH AFRICA’S MAGISTRATES’ COURTS I* (1998), <http://www.cls.uct.ac.za/usr/lrg/publications/LayAssessors.pdf>.

22. *Id.* at 1–2 (“The appointment of lay assessors who were more representative of the population of South Africa would, it was reasoned, go some way to restoring the legitimacy of the judiciary.”).

23. *Id.* at 2; see also Milton Seligson, *Lay Participation in South Africa from Apartheid to Majority Rule*, 72 *REVUE INTERNATIONALE DE DROIT PÉNAL [RIDP]* 273, 273 (2001) (Fr.) (connecting lay participation to democratization of South Africa).

systems in multiple provinces, was also motivated by desires for change that, “through a more democratic approach, offered a potential way to reconnect with citizens.”<sup>24</sup> Low confidence in the justice system in Argentina, combined with strong citizen support for democracy, helps to explain why lay participation in legal decision-making has the potential to increase trust and confidence in line with the democratic values that most Argentines embrace.<sup>25</sup>

Thus, we can observe the important role for the idea of democracy, whether it is justifying an existing system of lay legal decision-making or arguing for a new opportunity for citizen engagement in legal factfinding. To be sure, the ways that *democracy* and *democratization* are deployed in these varied contexts and connected to lay participation are not uniform. Democracy is a complex normative concept, capable of multiple interpretations.<sup>26</sup> Moreover, the connections between democracy and lay participation are sometimes (but not always) considered to be causal—for example, that democratic impulses fuel the introduction of new systems of lay legal decision-making, or that service as a lay factfinder promotes skills necessary for a citizen in a democracy. Other times, lay legal decision-making is characterized as a clear manifestation of popular self-government, without an assertion that one causes the other.

## I. PREVIOUS RESEARCH EXAMINING LAY PARTICIPATION IN LAW AND DEMOCRACY

In attempting to examine the connections between a society’s democratic features and the prevalence of lay participation in its legal systems, we discovered only a handful of previous efforts relevant to our project. Much previous research on lay participation has focused on its operation within individual countries; although the research approaches are varied, comparative work is rare.<sup>27</sup>

24. Vanina Almeida, Denise Bakrokar, Mariana Bilinski, Natali Chizik, Andrés Harfuch, Andrea Ortiz, Sidonie Porterie, Aldana Romano & Shari Seidman Diamond, *The Rise of the Jury in Argentina: Evolution in Real Time*, in JURIES, LAY JUDGES, AND MIXED COURTS: A GLOBAL PERSPECTIVE, *supra* note 19, at 25, 26.

25. *Id.* at 27.

26. Matthew A. Shapiro, *Democracy, Civil Litigation, and the Nature of Non-representative Institutions*, 109 CORNELL L. REV. (forthcoming 2023) (examining multiple interpretations of democracy as a normative concept in debates over the democratic defense of civil litigation).

27. Hans et al., *supra* note 1, at 150–51 (observing the modest amount of empirical research about systems of lay participation in law). Notable exceptions include WORLD JURY SYSTEMS (Neil Vidmar ed., 2000) (including chapters reporting case studies of juries in different countries); Stephen C. Thaman, *The Idea of the Conference*, 72 RIDP 19, 19 (2001) (describing international conference of lawyers, judges, and scholars to examine the role of lay decision-making in criminal cases); Stefan Voigt, *The Effects of Lay Participation in Courts – A Cross-Country Analysis*, 25 EUROPEAN J. POL. ECON. 327 (2009) (reporting an empirical analysis of lay participation in a number of countries); Jackson & Kovalev,

Stefan Voigt has undertaken the most relevant study to date.<sup>28</sup> Voigt assembled a database of eighty countries, categorizing their societal characteristics as well as obtaining information about their history of lay participation in their legal systems.<sup>29</sup> He examined whether the presence of lay participation was associated with greater judicial independence, less judicial corruption, and more efficient, effective government. He found that countries with a history of lay participation were also ones with somewhat greater judicial independence and less judicial corruption, although he cautioned that the effects were modest.<sup>30</sup> However, he did not find significant relationships between lay participation and government efficiency.<sup>31</sup> He noted that lay participation “is correlated with better performance in [specific] dimensions, albeit often not very significantly.”<sup>32</sup>

Another notable and relevant project examined the relationship between European countries’ use of lay participation and their protection of human rights.<sup>33</sup> John D. Jackson and Nikolay P. Kovalev examined the different models of lay participation that Council of Europe countries use and found that the different models were capable of fulfilling human rights norms.<sup>34</sup> The authors concluded that some countries’ lay participation systems were better at incorporating a representative group of citizens and better at ensuring the parties’ right to a fair trial and a reasoned decision.<sup>35</sup>

Although extant research does not examine societal characteristics and lay participation as we do here, there is an impressive body of research analyzing the links between service as a juror and civic engagement. Recall Tocqueville’s assertions about the democratizing effects of jury service on citizenship.<sup>36</sup> In an innovative set of studies that examined voting patterns before and after citizens served on a jury, John Gastil and colleagues discovered that jury service led to an increased likelihood of voting,

*supra* note 5 (analyzing lay participation in European countries); John D. Jackson & Nikolai P. Kovalev, *Lay Adjudication in Europe: The Rise and Fall of the Traditional Jury*, 6 OÑATI SOCIO-LEGAL SERIES 368 (2016) (analyzing lay participation in European countries); Sanja Kutnjak Ivković & Valerie P. Hans, *A Worldwide Perspective on Lay Participation*, in JURIES, LAY JUDGES, AND MIXED COURTS: A GLOBAL PERSPECTIVE, *supra* note 19, at 323, 325-27 (describing an empirical analysis of the presence of different forms of lay participation in 195 countries).

28. *See* Voigt, *supra* note 27.

29. *Id.* at 330.

30. *Id.* at 333.

31. *Id.* at 334-35.

32. *Id.* at 331 (referring to significant relationships between lay participation and political rights, civil liberties, and democratization).

33. Jackson & Kovalev, *supra* note 5.

34. *Id.* at 100 (noting that the diverse models of lay participation are “each capable of guaranteeing an independent and impartial tribunal and a fair trial”).

35. *See id.* at 121.

36. TOCQUEVILLE, *supra* note 6.

supporting the claim that lay participation leads to greater citizen involvement.<sup>37</sup> In addition, and also supporting claims that lay participation leads to greater legitimacy for the legal system, there is substantial evidence that those who participate as jurors come away from their experiences as legal factfinders with dramatically more favorable attitudes toward the legal system.<sup>38</sup>

### A. Methodology

The purpose of this article is to empirically test the potential link between the level of democracy and the presence of lay participation in criminal trials. To do so, we expanded a global lay participation database that we had created previously.<sup>39</sup> The development of that database was described in an earlier book chapter.<sup>40</sup> However, in the current article, we offer sufficient detail about the database's development to put the results about the links between democracy and lay participation in context.

### B. Countries included in the Database

The United Nations provides the list of 193 member states or countries.<sup>41</sup> In addition, we included two other entities—Hong Kong and Taiwan—in our analyses. Hong Kong, a Special Administrative Region of the People's Republic of China, tends to operate relatively independently from mainland China. Accordingly, its legal system tends to be independent and distinctive from the Chinese legal system.<sup>42</sup> The issue of whether Taiwan

37. See JOHN GASTIL, E. PIERRE DEESS, PHILIP J. WEISER & CINDY SIMMONS, *THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION* 46–47 (2010) [hereinafter *JURY AND DEMOCRACY*] (finding that low-frequency voters who served as jurors in criminal cases were more likely to vote in later elections); John Gastil, E. Pierre Deess, Philip J. Weiser & Jordan Meade, *Jury Service and Electoral Participation: A Test of the Participation Hypothesis*, 70 J. POL. 351, 358–60 (2008) [hereinafter *Jury Service*] (analyzing the effect of deliberation on jurors' subsequent voting); John Gastil, E. Pierre Deess & Philip J. Weiser, *Civic Awakening in the Jury Room: A Test of the Connection Between Jury Deliberation and Political Participation*, 64 J. POL. 585, 586 (2002) [hereinafter *Civic Awakening*] (examining whether jurors deliberating and reaching a verdict affected the likelihood of voting in subsequent elections); Valerie P. Hans, John Gastil & Traci Feller, *Deliberative Democracy and the American Civil Jury*, 11 J. EMPIRICAL LEGAL STUD. 697, 710–12 (2014) (finding that jurors who sat on twelve-person civil juries required to be unanimous were more likely to vote after serving).

38. Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, in *VERDICT: ASSESSING THE CIVIL JURY* 282, 285 (Robert E. Litan ed., 1993).

39. Kutnjak Ivković & Hans, *supra* note 27, at 327–32 (describing the creation of the global database of lay participation).

40. *Id.*

41. *Member States*, UNITED NATIONS, <https://www.un.org/en/about-us/member-states> [<https://perma.cc/HX4B-LEP6>].

42. LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL, AND CULTURAL ENCYCLOPEDIA 661–65 (Herbert M. Kritzer ed., 2002) (describing Hong Kong's legal system).



or the Republic of China is an independent country or part of the People's Republic of China is debatable.<sup>43</sup> Although Taiwan has been recognized as an independent country by several UN member states, Taiwan has no official status in the UN.<sup>44</sup> To make it easier for the reader to follow, we refer to all 193 countries and 2 entities as “countries,” although this may not be completely legally accurate.

### *C. Lay Participation Sources*

Lay participation can exist at the courts of different levels of the government, from the provincial and county courts to the state and federal courts. Because our unit of our analysis is a country, we assume that the country utilizes lay participation if ordinary citizens take part in decision-making procedures at the courts of any level or any region. Furthermore, if different regional units or different levels of the court system use different forms of lay participation, we assume that the country incorporates all of these forms of lay participation into its criminal justice system. So, for example, a country that uses both juries and mixed courts would be included in both sets of analyses.

Similarly to previous comparative studies on lay participation,<sup>45</sup> we sought to obtain the information about the forms of lay participation and their characteristics via several surveys, including surveys of legal advisors in the foreign embassies in the United States, foreign lawyers enrolled as graduate students in Cornell Law School and Harvard Law School, lay judges attending the European Day of Lay Judges, and scholars in comparative criminal procedure or lay participation.<sup>46</sup> Over a twelve-year period (2007-2019), we carried out four sweeps of the survey.<sup>47</sup> In the end, 186 respondents participated in our surveys (55 from the embassy survey, 23 from the student survey, 14 from the lay judge survey, 94 from the expert survey).<sup>48</sup> The questionnaire, originally developed in English and subsequently translated into Spanish, asked about whether the country uses lay participation, and, if so, which form of lay participation was used. There were follow-up questions asking for details about each form of lay

43. See, e.g., Fatma Khaled, *Which Countries Recognize Taiwan Independence? Pelosi Trip Sparks Question*, NEWSWEEK (Aug. 5, 2022, 3:59 PM), <https://www.newsweek.com/which-countries-recognize-taiwan-independence-pelosi-trip-sparks-question-1731428>.

44. See *id.* (reporting that as of April 2022, thirteen countries “recognize Taiwan as an independent country”).

45. See, e.g., Neil Vidmar, *Juries and Lay Assessors in the Commonwealth: A Contemporary Survey*, 13 CRIM. L.F. 385 (2002); Jackson & Kovalev, *supra* note 5; Jackson & Kovalev, *supra* note 27.

46. Kutnjak Ivković & Hans, *supra* note 27, at 328.

47. *Id.*

48. *Id.*

participation. The questions used in this article assess whether the country utilizes lay participation, whether the country uses the jury, and whether the country uses mixed courts of lay and professional judges. Possible answers were “yes” and “no.”

The respondents in our survey provided information about lay participation in ninety-eight countries.<sup>49</sup> Because our surveys captured the information about lay participation in about one-half of the total number of countries on our list, we relied on library and legal research to supplement the database and to obtain information about lay participation in the remaining countries. First, we relied on previous comparative surveys of lay participation carried out by Vidmar in 2002,<sup>50</sup> Voigt in 2009,<sup>51</sup> and Jackson and Kovalev in 2006 and 2016<sup>52</sup> as sources of information. These surveys provided information about lay participation in fifty-two additional countries.<sup>53</sup> Second, to complete our database and collect information for about sixty countries, we conducted Internet searches using English terms illustrative of different forms of lay participation (e.g., “jury,” “lay assessors,” “lay courts,” “lay magistrates”).<sup>54</sup> Our primary legal sources were *Globalex* (program run by the Hauser Global Law School Program at New York University School of Law), *Nations’ Encyclopedia*, *Wikipedia*, and Kritzer’s 2002 *Legal Systems of the World* encyclopedia.<sup>55</sup>

Our data collection approach relied on sources that covered a period of approximately two decades. In the process, we relied on the most recent source possible (e.g., Jackson and Kovalev’s survey from 2016 instead of 2006) or the most complete data source.<sup>56</sup> A limitation of our data collection efforts is that the information about lay participation in each country relies on the accuracy of the sources providing the information, be they lay judges, experts on lay participation, legal documents, or database sources. To counterbalance this potential bias, we sought to obtain information from more than one source and checked the accuracy of the information we found. When there were multiple responses on our surveys from the same country (as was the case in forty-four percent of the countries), we checked the accuracy of the information provided. In three-quarters of these cases, the

49. *Id.*

50. Vidmar, *supra* note 45.

51. Voigt, *supra* note 27.

52. Jackson & Kovalev, *supra* note 5; Jackson & Kovalev, *supra* note 27.

53. Kutnjak Ivković & Hans, *supra* note 27, at 329.

54. *Id.*

55. LEGAL SYSTEMS OF THE WORLD, *supra* note 42; GLOBALEX, <https://www.nyulawglobal.org/globalex/>; NATIONS ENCYCLOPEDIA, <https://www.nationsencyclopedia.com/>; WIKIPEDIA, <https://www.wikipedia.org/>.

56. See description of data collection in Kutnjak Ivković & Hans, *supra* note 27, at 329–30.

respondents agreed about the information.<sup>57</sup> In the overwhelming majority of the countries with disagreement (ninety percent), we were able to confirm the answers by comparing the information about lay participation in our surveys with the information contained in extant literature.<sup>58</sup> Similarly, in the countries in which we primarily relied on library and legal research, we were able to use more than one source in about one-half of the countries (thirty-nine out of eighty).<sup>59</sup>

In our prior work, we found that 125 out of 195 countries, or sixty-four percent, use lay persons as decision-makers in criminal cases.<sup>60</sup> In addition, we reported that there is heterogeneity in the proportion of countries that use lay participation across the continents and across legal traditions. Juries are used in fifty-six countries, or twenty-nine percent, and mixed courts of lay and professional judges are used in seventy-one countries, or thirty-six percent.<sup>61</sup> A smaller number of countries incorporate lay magistrates (thirteen countries, or 6.7%) or lay courts (twenty countries, or 10.3%).<sup>62</sup> Because the number of countries that use either lay magistrates or lay courts is comparatively modest, we did not separately analyze the correlations between these forms of lay participation and democracy measures.

#### *D. Measures of Democracy*

To assess the relationship between a country's lay participation and its political characteristics, we drew on a number of sources that measure these features. Recognizing that these sources all have certain limitations in fully capturing societal characteristics, we relied on multiple and overlapping measures.

## II. GLOBAL DEMOCRACY MEASURES

To measure the characteristics of the political regime in each country, we added specific measures to the database, relying on several existing data sources. The first is the *polity score* by the Integrated Network for Societal

57. *Id.*

58. For example, we confirmed information obtained in the surveys with information about lay participation in Vidmar, *supra* note 45; Voigt, *supra* note 27; Jackson & Kovalev, *supra* note 5; and Jackson & Kovalev, *supra* note 27.

59. Ivković & Hans, *supra* note 27, at 330.

60. *Id.* at 334.

61. *Id.* at 338 tbl.16.5.

62. *Id.*

Conflict Research.<sup>63</sup> Polity5—the fifth version of the survey—is described by the Network as “annual, cross-national, time-series and polity-case formats coding democratic and autocratic ‘patterns of authority’ and regime changes in all independent countries with total population greater than 500,000 in 2018.”<sup>64</sup> Polity5 measures political regime characteristics and, based on the established criteria, assigns a score to each country with more than 500,000 inhabitants from -10 meaning “strongly autocratic” or “fully institutionalized autocracy” to +10 meaning “strongly democratic” or “fully institutionalized democracy.”<sup>65</sup> Polity5 also scores countries for foreign interruption or occupation (a score of -66), state failure or anarchy (a score of -77), and a transitional government (-88).<sup>66</sup> We used the most recent scores available (2016 to 2018). Out of 195 countries on our list, the Polity5 scores were available for 156 countries, or eighty percent.

The *regime-type score* is a condensed version of the Polity5 score.<sup>67</sup> It reclassifies countries based on their original Polity5 score into five categories: “institutionalized [or strong] democracy” (Polity5 scores +6 to +10); “an uninstitutionalized, or ‘weak,’ democratic regime” (Polity5 scores 1 to 5); “an uninstitutionalized, or ‘weak,’ autocratic regime” (Polity5 scores -5 to 0); “an institutionalized [or strong] autocratic regime” (Polity5 scores -6 to -10); and a “state failure” (Polity5 scores of -77).<sup>68</sup>

The Democracy Index, created by the Economic Intelligence Unit, “provides a snapshot of the state of democracy worldwide for 165 independent states and two territories.”<sup>69</sup> The *democracy index* takes into account several elements: electoral process and pluralism, civil liberties, the functioning of the government, political participation, and political culture.<sup>70</sup> The democracy index can range from zero to ten, with ten being best.<sup>71</sup> The scores obtained on these elements then determine the country’s overall score, which also varies from one to ten. Based on the country’s overall score, countries are classified into one of the four categories of *democracy types*:

63. *INSCR Data Page*, CTR. FOR SYSTEMIC PEACE, <http://www.systemicpeace.org/inscrdata.html> [<https://perma.cc/CUR9-M6JC>].

64. *Id.*

65. MONTY G. MARSHALL & TED ROBERT GURR, *POLITY5: POLITICAL REGIME CHARACTERISTICS AND TRANSITIONS, 1800-2018: DATASET USERS’ MANUAL* (2020), <http://www.systemicpeace.org/inscr/p5manualv2018.pdf>; MONTY G. MARSHALL & GABRIELLE ELZINGA-MARSHALL, *GLOBAL REPORT 2017: CONFLICT, GOVERNANCE, AND STATE FRAGILITY* 29 (2017), <http://www.systemicpeace.org/vlibrary/GlobalReport2017.pdf>.

66. MARSHALL & ELZINGA-MARSHALL, *supra* note 65, at 31 fig.13.

67. *Id.* at 53.

68. *Id.*

69. THE ECONOMIST INTELLIGENCE UNIT, *DEMOCRACY INDEX 2018: ME TOO? POLITICAL PARTICIPATION, PROTEST AND DEMOCRACY 2* (2019), <https://www.eiu.com/n/democracy-index-2018/>.

70. *Id.*

71. *Id.* at 3.

“full democracy,” “flawed democracy,” “hybrid regime,” and “authoritarian regime.”<sup>72</sup> To keep these categories ordered in the same direction as other variables in this group, we reverse coded them into 1 = authoritarian regime, 2 = hybrid regime, 3 = flawed democracy, and 4 = full democracy. We used the 2018 democracy index, which provided data for 166 countries or eighty-five percent of the countries on our list.

#### A. *Judicial Independence Sources*

*Judicial independence*, “the ability and duty of a judge to decide each case according to an objective evaluation and application of the law, without the influence of outside factors,” is a critical element of an institutionalized democracy.<sup>73</sup> The measure of judicial independence used in the current project comes from the 2019 Global Competitiveness Report of the World Economic Forum. Judicial independence is measured by a survey question about the perceived independence of the judiciary (“In your country, how independent is the judicial system from influences of the government, individuals, or companies?”).<sup>74</sup> Possible answers range from 1 (“not independent at all”) to 7 (“entirely independent”). We used the 2018-2019 or most recent data available for each country. These scores were available for 141 countries, or seventy-three percent of the countries on our list.<sup>75</sup>

#### B. *Government Adherence to Political Rights and Civil Liberties Sources*

The nonprofit research institute Freedom House assesses the extent of political rights and civil liberties in 210 countries and territories.<sup>76</sup> We used the 2019 edition.<sup>77</sup> The *political rights* score includes assessments of the electoral process, political pluralism and political participation, and functioning of the government.<sup>78</sup> The *civil liberties* score combines responses to questions about freedom of expression and belief (including

72. *Id.* at 2.

73. *Testimony of Robert C. Leuba: Program Review and Investigations Committee Public Hearing*, CONN. JUD. BRANCH (Oct. 10, 2000), <https://www.jud.ct.gov/external/news/press036.html>.

74. KLAUS SCHWAB, WORLD ECON. F., *THE GLOBAL COMPETITIVENESS REPORT* 615 (2019), [https://www3.weforum.org/docs/WEF\\_TheGlobalCompetitivenessReport2019.pdf](https://www3.weforum.org/docs/WEF_TheGlobalCompetitivenessReport2019.pdf).

75. *Id.* at 637–38.

76. *Countries and Territories: Global Freedom Scores*, FREEDOM HOUSE, <https://freedomhouse.org/countries/nations-transit/scores> [<https://perma.cc/DJ8W-RRFA>] (last visited Jan. 1, 2023).

77. *See generally* FREEDOM HOUSE, *FREEDOM IN THE WORLD 2019 METHODOLOGY* (2019), [https://freedomhouse.org/sites/default/files/2020-02/Methodology\\_FIW\\_2019\\_for\\_website.pdf](https://freedomhouse.org/sites/default/files/2020-02/Methodology_FIW_2019_for_website.pdf).

78. *Freedom in the World Research Methodology*, FREEDOM HOUSE, <https://freedomhouse.org/reports/freedom-world/freedom-world-research-methodology> [<https://perma.cc/DZS7-FTZ5>].

independent media), associational and organizational rights, personal autonomy and individual rights, and rule of law (including independent judiciary).<sup>79</sup> The score for political rights could vary from zero to forty, while the score for civil liberties could vary from zero to sixty, for a global or total score of up to 100. Both political rights and civil liberties scores were available for all 195 countries on our list.<sup>80</sup>

*Voice and accountability*, measured by the World Bank's Quality of Governance indicators, "captures perceptions of the extent to which a country's citizens are able to participate in selecting their government, as well as freedom of expression, freedom of association, and a free media."<sup>81</sup> In other words, it combines estimates of the extent of citizens' rights and freedom of media, with the extent of citizen participation in the selection of the government. The voice and accountability indicators range from -2.5 ("weak") to +2.5 ("strong").<sup>82</sup> We used the indicators for 2020. The indicators were available for all 195 countries in our study.

*Freedom of the press* is a separate category in the World Economic Forum's 2019 Global Competitiveness Report.<sup>83</sup> It measures "the level of freedom available to journalists"<sup>84</sup> and it also incorporates assessments of acts of violence against journalists. The score ranges from 0 ("good") to 100 ("very bad").<sup>85</sup> As this measure is turned in the opposite direction from all of the other measures of political rights and civil liberties, we will call this measure *restrictions of free press*, rather than freedom of the press. We used the indicator for 2019.<sup>86</sup> This indicator was available for 140 countries on our list or seventy-two percent.<sup>87</sup>

*The rule of law*, the principle that the government and its agents must adhere to the laws of the country, is closely linked with democracy.<sup>88</sup> We measured the rule of law with a Worldwide Governance indicator;<sup>89</sup> that is, "capturing perceptions of the extent to which agents have confidence in and

79. *Id.*

80. *Id.*

81. THE WORLD BANK, WORLDWIDE GOVERNANCE INDICATORS: VOICE AND ACCOUNTABILITY (2022) <http://info.worldbank.org/governance/wgi/Home/Documents>.

82. Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *The Worldwide Governance Indicators Methodology and Analytical Issues* 12 (World Bank, Policy Research Working Paper No. 5430, 2010), <https://ssrn.com/abstract=1682130>.

83. SCHWAB, *supra* note 74.

84. *Id.* at 615.

85. *Id.*

86. *Id.*

87. *Id.*

88. Claire Gardner, *Democracy and the Rule of Law*, WM. & MARY L. SCH. (Aug. 13, 2021) <https://law.wm.edu/academics/intellectuallife/researchcenters/postconflictjustice/internships/internship-blogs/2021/claire-gardner/democracy-and-the-rule-of-law.php>.

89. Kaufmann et al., *supra* note 82.

abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence.”<sup>90</sup> Governance indicators range from -2.5 (“weak”) to +2.5 (“strong”). We used the indicators for 2020. The rule of law indicator was available for all 195 countries in our study.

### C. Government Stability Sources

A government’s *political stability* is measured with the World Bank’s Quality of Governance indicator, which assesses political stability and the absence of violence or terrorism.<sup>91</sup> This measure “captur[es] perceptions of the likelihood that the government will be destabilized or overthrown by unconstitutional or violent means, including politically motivated violence and terrorism.”<sup>92</sup> Governance indicators range from -2.5 (“weak”) to +2.5 (“strong”). We used the indicators for 2020. The government political stability and absence of violence or terrorism measure was available for all 195 countries in our study.

### D. Public Corruption Sources

Public-sector *corruption* is negatively associated with democracy. Indeed, using the Economist Intelligence Unit measures of democracy (i.e., free and fair elections, strong and independent institutions, political rights, civil rights), an analysis by Transparency International, the global organization against corruption, shows that there is a strong negative relationship between the quality of democracy and the perceived extent of corruption in a country.<sup>93</sup> Delia Ferreira Rubio, Chair of Transparency International, explained the results: “[o]ur research makes a clear link between having a healthy democracy and successfully fighting public sector corruption. Corruption is much more likely to flourish where democratic foundations are weak and, as we have seen in many countries, where undemocratic and populist politicians can use it to their advantage.”<sup>94</sup> Transparency International further explains that “[c]orruption chips away at democracy to produce a vicious cycle, where corruption undermines democratic institutions and, in turn, weak institutions are less able to control corruption.”<sup>95</sup> In our study, we use the country scores on the

90. *Id.* at 4.

91. *Id.*

92. *Id.*

93. *How Corruption Weakens Democracy*, TRANSPARENCY INT’L (Jan. 29, 2019), <https://www.transparency.org/en/news/cpi-2018-global-analysis>.

94. *Id.*

95. *Id.*

2016 Transparency International Corruption Perceptions Index.<sup>96</sup> Country scores could range from 0 (“highly corrupt”) to 100 (“very clean”).<sup>97</sup> We found the country scores for 175 countries, or ninety percent of the countries on our list.

Another public corruption measure is the Quality of Governance indicator called *control of corruption*.<sup>98</sup> This measure “captur[es] perceptions of the extent to which public power is exercised for private gain, including both petty and grand forms of corruption, as well as capture of the state by elites and private interests.”<sup>99</sup> The corruption control indicator ranges from -2.5 (“weak”) to +2.5 (“strong”). We used the indicators for 2020. The control of corruption indicator was available for all 195 countries in our study.

### III. ANALYTICAL PLAN

We first assess the link between the global democracy scores and the use of lay participation. The next step in our analysis is to explore whether certain elements of democracy, such as judicial independence, political rights, civil liberties, and governmental stability are related to the existence of lay participation in the country. Finally, we test the link between public corruption and the use of lay participation.

One issue that we face is that many of the measures of democracy and democratic elements are correlated; that is, related to one another. Because of these multicollinearity<sup>100</sup> issues—the fact that independent variables are strongly correlated—we cannot include more than one measure simultaneously in regression models. Instead, we utilize Spearman’s correlation<sup>101</sup> coefficients, a nonparametric statistical test of association between continuous or ordinal variables, to assess the link between a country’s use of lay participation and specific measures of democracy.

96. TRANSPARENCY INT’L, CORRUPTION PERCEPTIONS INDEX (2016), <https://www.transparency.org/en/cpi/2016>.

97. *Id.*

98. Kaufmann et al., *supra* note 82, at 4.

99. *Id.*

100. *See generally* MICHAEL PATRICK ALLEN, UNDERSTANDING REGRESSION ANALYSIS 176–80 (1997) (explaining multicollinearity).

101. *See generally* Patrick Schober, Christa Boer & Lothar A. Schwarte, *Correlation Coefficients: Appropriate Use and Interpretation*, 126 ANESTHESIA & ANALGESIA 1763 (2018) (explaining Spearman rank correlation).



### A. Results

#### 1. Global Democracy Measures and Lay Participation

Table 1 contains bivariate Spearman correlation coefficients between lay participation in legal decision-making and the Polity5 measure of democracy. The results show that the overall existence of lay participation is positively and significantly related to the Polity5 score. Similarly, the mean differences in the Polity5 score between the countries with and without lay participation were statistically significant (Figure 1). In other words, countries with greater democratization are also more likely to have lay participation than countries with lesser democratization are. When the Polity5 score was used to regroup the countries into four categories to create *regime type* categories, the results show that the regime type is also positively but no longer statistically significantly correlated with lay participation. We also used the *democracy index* score to assess its relationship with the existence of lay participation. Countries that are higher on the democracy index are somewhat more likely to incorporate lay participation into their courtrooms; however, although the relationship is positive, it falls short of statistical significance. When the countries were regrouped into four categories of *democracy types*, these democracy types were not significantly correlated with lay participation.

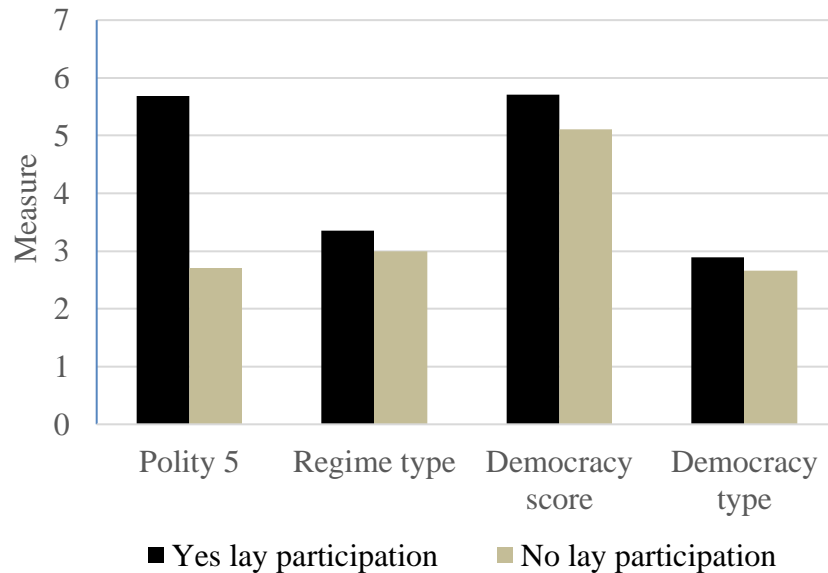
Table 1: Bivariate Spearman's Correlation and *t*-Test for Mean Differences of Global Democracy Measures and Lay Participation/Juries/Mixed Tribunals

	Any lay participation		Juries		Mixed tribunals	
	$r_s$	$t$ (Fig. 1)	$r_s$	$t$ (Fig. 2)	$r_s$	$t$ (Fig. 3)
<i>Polity5 score</i>	.212**	2.94**	.115	2.72**	.195*	2.54*
<i>Regime type</i>	.152	1.95	.211**	3.38**	.043	0.60
<i>Democracy score</i>	.139	1.74	.176*	2.28*	.118	1.53
<i>Democracy type</i>	.106	1.46	.153*	2.09*	.110	1.40

Note.  $r_s$  = Spearman's rank-order correlation;  $t$  =  $t$ -test for mean differences.

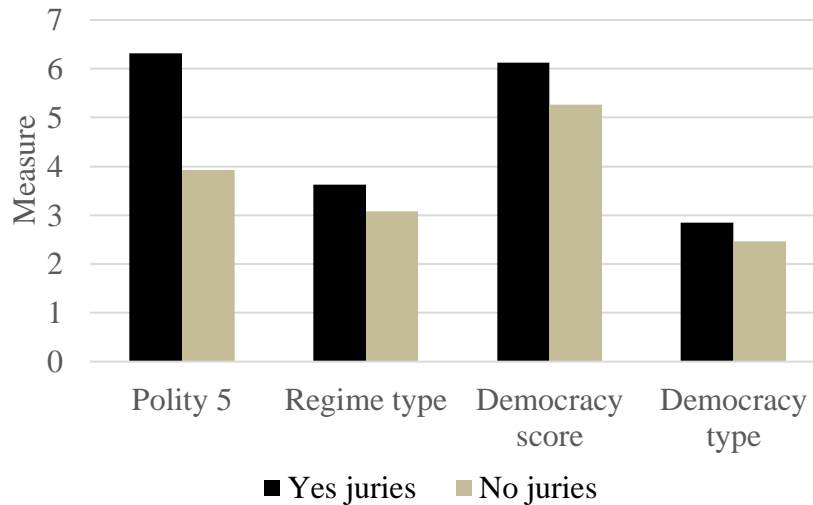
\*  $p < .05$ ; \*\*  $p < .01$ ; \*\*\*  $p < .001$

Figure 1: Means for Global Democracy Measures in Countries with and without Any Lay Participation



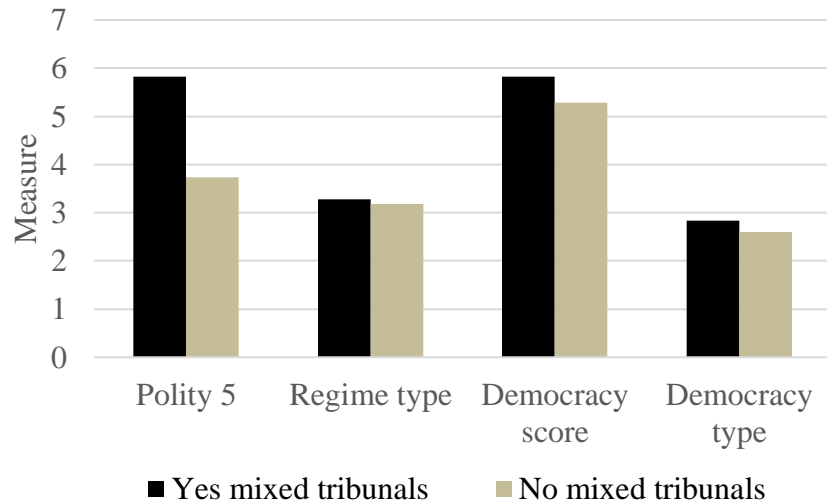
We performed the same type of analysis between a country's democracy scores and the presence of a jury system (Table 1). While the original Polity5 score was not significantly correlated to the use of juries in Spearman's rank-order correlation, the mean differences in Polity5 between the countries with and without the juries were statistically significant (Figure 2), suggesting that countries with higher democracy scores are more likely to have a jury system than countries with lower democracy scores. Similarly, the regime type, democracy index score, and democracy types are all positively and significantly related to the presence of the jury in the country. Based on these correlations (Table 1) and the differences in mean values (Figure 2), we conclude that juries are more likely to be found in countries with more democratic characteristics than in countries with fewer such characteristics.

Figure 2: Means for Global Democracy Measures in Countries with and without Juries



Repeating the analyses for countries with and without mixed tribunals (Table 1), we find that the original Polity5 score is significantly correlated with the presence of mixed tribunals; there is a statistically significant mean difference in Polity5 scores between the countries with and without mixed tribunals (Figure 3). However, other global measures of democracy are not statistically significantly related to the existence of mixed tribunals. These results, presented in Table 1 and Figure 3, indicate that the presence of mixed tribunals in a country is also related to the democratic characteristics of a country, but only when the overall Polity5 measure is used.

Figure 3: Means for Global Democracy Measures in Countries with and without Mixed Tribunals



In sum, a country's level of democracy is related to the overall presence of lay participation and to the use of the two most common types of lay participation—juries and mixed courts. How strong the relationship is between democracy and lay participation depends, as this section documents, on the specific measures used to determine the country's democratic nature.

## 2. Judicial Independence and Lay Participation

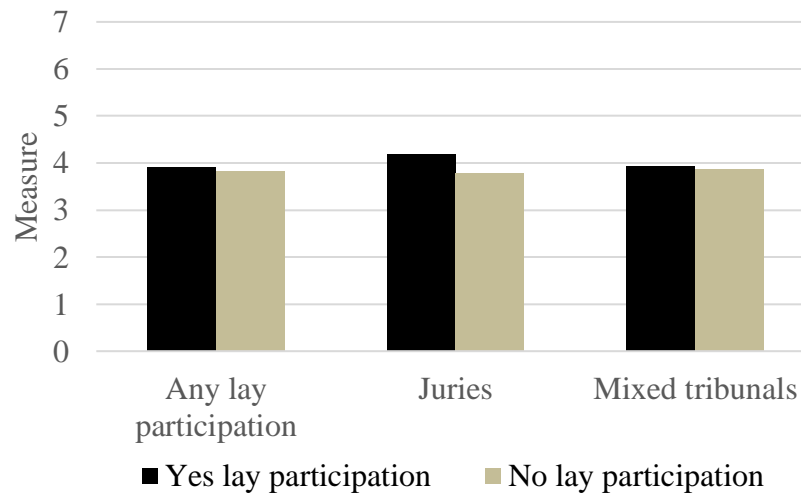
The next step in our analyses is the exploration of whether the perceived independence of professional judges is related to the use of lay participation in the country (Table 2). Perhaps surprisingly, the results indicate that *judicial independence* is not significantly related to the overall use of lay participation in the country, to the use of juries, or to the use of mixed tribunals (Table 2 and Figure 4).

Table 2: Bivariate Spearman's Correlation and *t*-Test for Mean Differences of Judicial Independence and Lay Participation/Juries/Mixed Tribunals

	Spearman's correlation	<i>t</i> -test for mean differences (Figure 4)
Any lay participation	.037	.58
Juries	.149	1.73
Mixed tribunals	.016	.31

Note. \*  $p < .05$ ; \*\*  $p < .01$ ; \*\*\*  $p < .001$

Figure 4: Means for Judicial Independence in Countries with and without Any Lay Participation/Juries/Mixed Tribunals



### 3. Political Rights, Civil Liberties, Rule of Law, and Lay Participation

We next examine the relationship between the use of lay participation and a country's commitment to political rights and civil liberties. Table 3 shows that, regardless of what measures of political rights or civil liberties are taken into account, they are related to the overall existence of lay participation in the country (Table 3 and Figure 5), and the jury (Table 3 and Figure 6). Compared to the countries with lower scores on political rights and civil liberties, countries with higher scores on political rights and civil

liberties are more likely to use lay participation and to use juries. In contrast, the use of mixed tribunals is significantly related to just one political and civil right—freedom of the press (Table 3 and Figure 7).

Table 3: Bivariate Spearman's Correlation and *t*-Test for Mean Differences of Political Rights/Civil Liberties and Lay Participation/Juries/Mixed Tribunals

	Any lay participation		Juries		Mixed tribunals	
	$r_s$	$t$ (Fig. 5)	$r_s$	$t$ (Fig. 6)	$r_s$	$t$ (Fig. 7)
<i>Global freedom score</i>	.194**	2.68**	.235**	3.72***	.089	1.16
<i>Political rights</i>	.166**	2.22*	.228**	3.51**	.067	0.81
<i>Civil liberties</i>	.204**	2.85**	.238**	3.50**	.096	1.26
<i>Voice and accountability</i>	.194**	2.68**	.235**	3.82***	.086	1.08
<i>Restrictions on the press</i>	-.266**	-2.83**	-.219**	-2.35*	-.223**	-2.21*
<i>Rule of law</i>	.097	1.48	.109	1.81	.102	1.43

*Note.*  $r_s$  = Spearman's rank-order correlation;  $t$  = *t*-test for mean differences. Because of different scales, voice and accountability and rule of law are not shown in Figures 5–7.

\*  $p < .05$ ; \*\*  $p < .01$ ; \*\*\*  $p < .001$

Figure 5: Means for Political Rights/Civil Liberties in Countries with and without Any Lay Participation

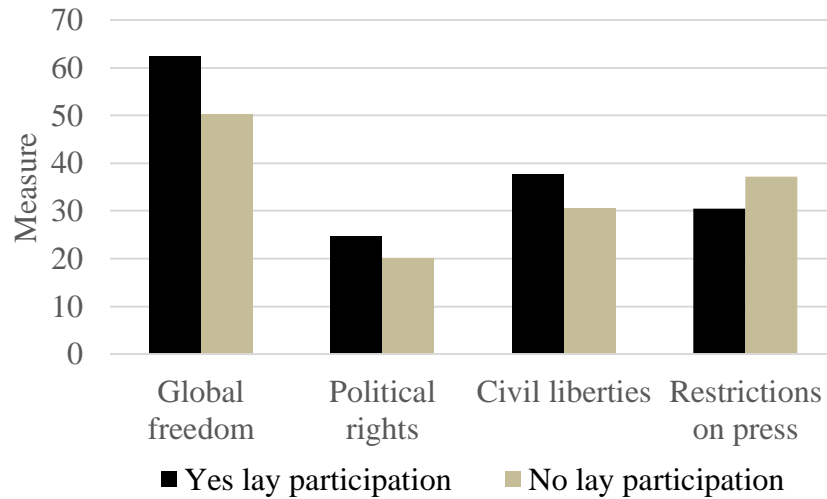


Figure 6: Means for Political Rights/Civil Liberties in Countries with and without Juries

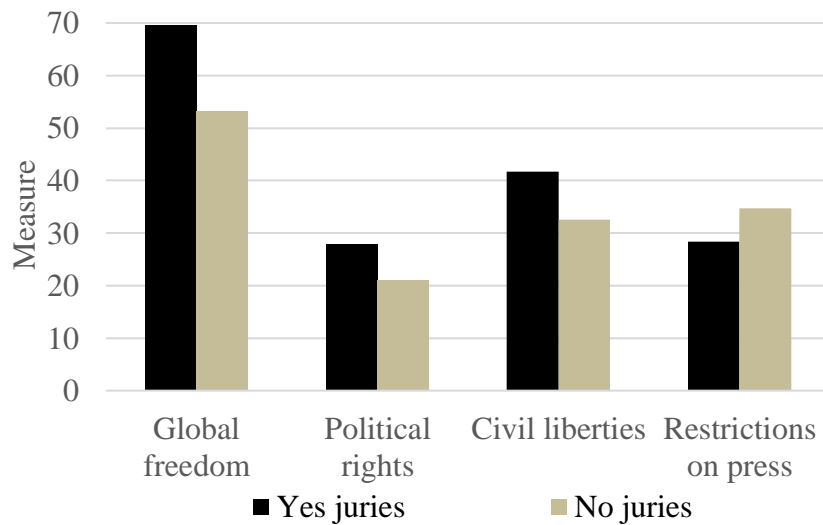
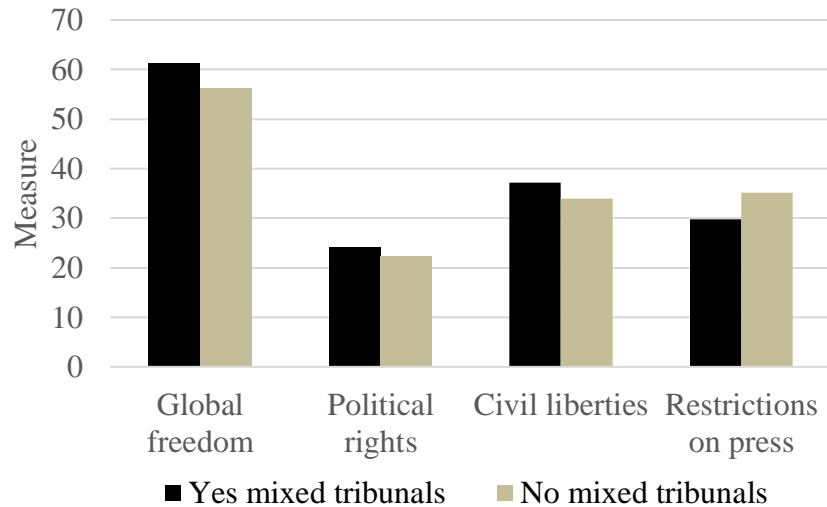


Figure 7: Means for Political Rights/Civil Liberties in Countries with and without Mixed Tribunals



Although the *rule of law* is closely associated with political rights and civil liberties, it is a distinct concept that implies that the government is adhering to the law, even when the government's laws may not be providing extensive rights to its citizens.<sup>102</sup> Surprisingly, the results show that stricter adherence to the rule of law is unrelated to the existence of lay participation overall; it is also unrelated to the use of juries and the use of mixed tribunals (Table 3 and Figures 5–7).

### III. POLITICAL STABILITY AND LAY PARTICIPATION

The next step in the analysis explores the relationship between a country's use of lay participation and its *political stability*, including an absence of political violence and terrorism (Table 4 and Figure 8). The results show that political stability and the presence of lay participation are positively related; countries that seem to be more politically stable also tend to be more likely to have lay participation in their criminal trials than

102. Correlation coefficients between the rule of law and various measures of political rights/civil liberties indicate strong relationships, but they are not as strong as the relationships among the various measures of political rights/civil liberties. Thus, the rule of law appears to operate somewhat differently than other political rights and civil liberties.



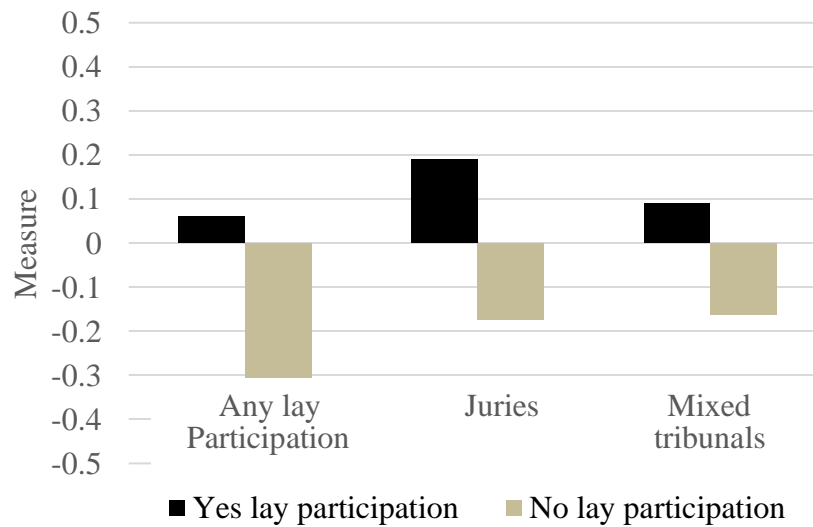
countries that are less politically stable. Similarly, countries that tend to be more politically stable are also more likely to have juries (Table 4 and Figure 8). However, the relationship between the country's use of mixed tribunals and its political stability is not statistically significant (Table 4 and Figure 8).

Table 4: Bivariate Spearman's Correlation and *t*-Test for Mean Differences of Political Stability and Lay Participation/Juries/Mixed Tribunals

	Spearman's correlation	<i>t</i> -test for mean differences (Figure 8)
Any lay participation	.187**	2.56*
Juries	.164**	2.40*
Mixed tribunals	.134	1.77

\*  $p < .05$ ; \*\*  $p < .01$ ; \*\*\*  $p < .001$

Figure 8: Means for Political Stability in Countries with and without Any Lay Participation/Juries/Mixed Tribunals



#### IV. Public Corruption and Lay Participation

Finally, we analyzed the relationship between measures of public-sector corruption and the existence of lay participation (Table 5 and Figure 9). Higher scores on the *corruption* measures indicate “cleaner” societies; that is, societies more likely to have lower levels of public corruption. The results show that the use of any form of lay participation is not significantly related to public corruption (Table 5 and Figure 9). However, the use of juries is statistically significantly related to measures of public corruption (Table 5 and Figure 9). By contrast, the existence of mixed tribunals shows no relationship to measures of public corruption (Table 5 and Figure 9). Thus, juries are more likely to be found in countries with lower levels of public corruption than in countries with higher levels of public corruption.

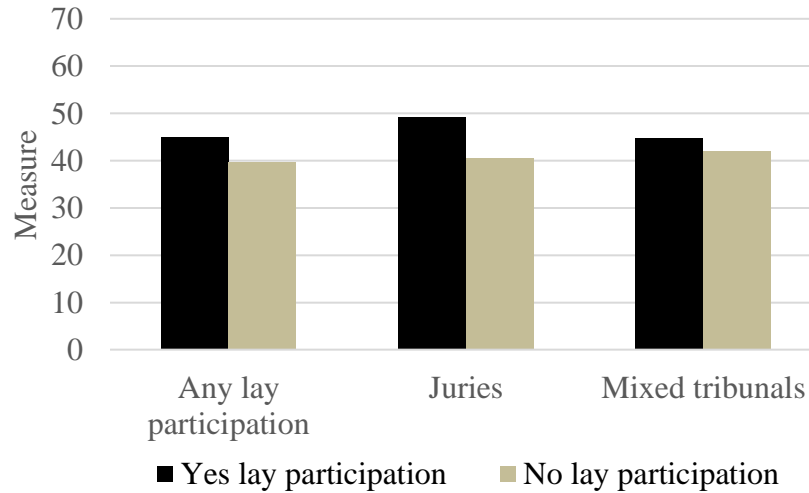
Table 5: Bivariate Spearman’s Correlation and *t*-Test for Mean Differences of Public Corruption and Lay Participation

	Any lay participation		Juries		Mixed tribunals	
	$r_s$	$t$ (Fig. 9)	$r_s$	$t$ (Fig. 9)	$r_s$	$t$ (Fig. 9)
<i>Corruption perceptions index</i>	.108	1.79	.162*	2.64*	.062	.91
<i>Corruption control</i>	.122	1.70	.146*	2.16*	.111	1.50

*Note.*  $r_s$  = Spearman’s rank-order correlation;  $t$  = *t*-test for mean differences. Higher scores indicate lower levels of corruption. Because of different scales, corruption control is not shown in Figure 9.

\*  $p < .05$ ; \*\*  $p < .01$ ; \*\*\*  $p < .001$

Figure 9: Means for Public Corruption in Countries with and without Any Lay Participation/Juries/Mixed Tribunals



#### CONCLUSION

In her study of the link between democracy and lay participation in European countries, Marijke Malsch argued that

[t]he democratic argument is *the strongest and the most often expressed reason for lay participation*: citizens should be able to take part in the trial of cases as representatives of the population at large. Deciding cases should not be the task of only a small elite, and everyone should at least have a chance of being appointed a member of the jury or to be called to act as a lay judge.<sup>103</sup>

Such a powerful argument of the effect of democratization is frequently used to justify the introduction of lay participation. Indeed, in a number of countries—including Argentina,<sup>104</sup> Georgia,<sup>105</sup> Japan,<sup>106</sup> South Africa,<sup>107</sup>

103. MALSCH, *supra* note 11, at 2 (emphasis added).

104. Almeida et al., *supra* note 24, at 26.

105. Nikolai Kovalev & Giorgi Meladze, *Trial by Jury in Georgia: A Catalyst for Evolving Independent Courts*, in JURIES, LAY JUDGES, AND MIXED COURTS: A GLOBAL PERSPECTIVE, *supra* note 19, at 261, 262.

106. Vanoverbeke & Fukurai, *supra* note 19, at 69 (describing purposes of the lay judge system).

107. SEEKINGS & MURRAY, *supra* note 21, at 2; Seligson, *supra* note 23, at 273.

South Korea,<sup>108</sup> and Spain<sup>109</sup>—the introduction of lay participation in the last three decades has been envisioned and promoted as a tool of democratization. Further evidence of the potential link between democratization and lay participation may be found in John Jackson’s exploration of the relationship between the decline in democratization and the withering of lay participation in some of these same countries.<sup>110</sup> Jackson argued that the lay participation systems established in the nineteenth century “waned as the authoritarian rule in Germany, Italy, Portugal, Russia, Spain, and elsewhere took hold [during the twentieth century].”<sup>111</sup> Beyond these examples of individual countries, previous research was unclear about whether a global and systematic link existed between a country’s democracy level and the presence of lay participation in the country.

The purpose of this article is to empirically test whether democratization and lay participation are indeed as closely related as examples from these countries would seem to suggest. Our results vividly demonstrate that lay participation and democratization tend to be related. When we explored the relationship between global measures of country democratization and the existence of lay participation, we found that countries exhibiting characteristics associated with a greater degree of democratization are also more likely to have lay participation in their criminal justice systems than the countries with lesser degree of democratization. To be sure, some of the measures of democratization are not related to the existence of any form of lay participation in general and are related only to the existence of the jury. Nonetheless, the predominant measure of global democratization—the polity score—“the most widely used resource for monitoring regime change and studying the effects of regime authority”<sup>112</sup>—shows a positive relationship with the existence of the lay participation in general, the use of juries, and the use of mixed tribunals, thus supporting the argument about the relationship between democratization and lay participation.

Democracy is a complex phenomenon that incorporates assessments about control of the state powers, ways in which citizens participate in the functioning of the society, and the extent to which there is a balance among

108. Jaihyun Park, *The Korean Jury System*, in JURIES, LAY JUDGES, AND MIXED COURTS: A GLOBAL PERSPECTIVE, *supra* note 19, at 88, 90.

109. Stephen C. Thaman, *Europe’s New Jury Systems: The Cases of Spain and Russia*, in WORLD JURY SYSTEMS 319, 324 (Neil Vidmar ed., 2000).

110. John D. Jackson, *The Case for a Hybrid Jury in Europe*, in JURIES, LAY JUDGES, AND MIXED COURTS: A GLOBAL PERSPECTIVE, *supra* note 19, at 304, 306.

111. *Id.*

112. MARSHALL & GURR, *supra* note 65, at 1.

different groups within the society.<sup>113</sup> Therefore, the project also explored whether some elements of democracy are more closely related to lay participation than others. As democratic countries need to develop rules and procedures guaranteeing protection of citizens' rights and establishing equality,<sup>114</sup> we paid close attention to the measures assessing the degree of protection of the citizens' political rights and civil liberties. Regardless of which of the five measures of political rights and civil liberties were employed, the results uniformly indicate a close relationship between the strength with which these rights and liberties are protected in a country and the existence of lay participation in general, particularly jury use. Lay participation could be viewed as a legitimate mechanism through which citizens could achieve the protection of their political rights and civil liberties in a way that the community may see as more independent and trustworthy than the trials by professional judges.

Another measure of democratization explored in this project is the adherence to the rule of law. Claire Darner argued that

[a] democratic state under the Rule of Law is a state where citizens elect their own leaders, and the government itself is bound by the law, while also helping to ensure that the law is respected among the citizens of the state. Democracy cannot exist without the Rule of Law.<sup>115</sup>

Yet, our results suggest that the extent of the country's adherence to the rule of law is not directly related to the existence of lay participation, neither in general nor in the context of juries or mixed tribunals. These counterintuitive results could be a consequence of the measure we used. In particular, our measure of the rule of law included a wide net of "perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence."<sup>116</sup> It is quite possible that whether the country will introduce lay participation in its criminal courts is not linked as much to this broad concept of adherence to the law in all aspects of state activities as it is related to a more specific aspect—the existence and application of the legal rules protecting citizens' political rights and civil liberties. The rule of law may provide general protections to the citizens and open avenues in which citizens can contest the legality of certain legal rules and activities by governmental officials. Yet

113. MALSCH, *supra* note 11, at 20.

114. *Id.*

115. Gardner, *supra* note 88.

116. Kaufmann et al., *supra* note 82, at 4.

the existence and enforcement of very specific rights may be more closely aligned with the core of lay participation.

Similarly, we expected that having decision-makers perceived to be unbiased—be it free of political influence (i.e., judicial independence)<sup>117</sup> or reluctant to accept illegal gain (i.e., corruption)<sup>118</sup>— would also resonate with the existence of lay participation in the country. However, our results show that only the existence of the jury is negatively associated with corruption,<sup>119</sup> while the existence of overall lay participation and the presence of mixed tribunals in a country are not associated with an independent judiciary or corruption. Although somewhat surprising, our findings are similar to Voigt’s conclusions of his empirical research showing that lay participation’s effects on judicial independence and judicial corruption “seem to be rather weak.”<sup>120</sup>

Our analyses reveal a substantial difference in the way the two forms of lay participation—juries and mixed tribunals—are related to democracy. In particular, the existence of the jury<sup>121</sup> is associated with all but two measures of democracy (twelve out of fourteen), while the existence of mixed tribunals<sup>122</sup> is linked with only a handful of these measures (two out of fourteen). Our findings are in sync with Voigt’s results based on a smaller number of countries<sup>123</sup> and demonstrate that juries seem to be much more strongly and consistently associated with the existence of democratic regimes than mixed tribunals are.

It is notable that results differed for juries and mixed tribunals. These findings could be partly explained by the nature of these two forms of lay participation. The jury’s independence, contrasted with the mixed court in which lay judges decide in collaboration with professional judges, may provide a more potent check on corruption. A number of scholars have pointed to the ease with which professional judges can dominate a mixed tribunal that includes lay judges, by virtue of the professional judges’ experience and greater legal knowledge.<sup>124</sup> The citizens in juries make decisions independently of the professional judges<sup>125</sup> and, hence, may

117. *Id.*

118. TRANSPARENCY INT’L, *supra* note 93.

119. Voigt, *supra* note 27, at 333 (“Trial by jury does not have any effect on judicial corruption . . .”).

120. *Id.*

121. Kutnjak Ivković & Hans, *supra* note 27.

122. *Id.*

123. See Voigt, *supra* note 27, at 331 tbl.1 (showing stronger relationship between democracy measures and juries than democracy measures and lay assessors, justices of the peace, or lay magistrates).

124. See, e.g., Sanja Kutnjak Ivković, *Ears of the Deaf: The Theory and Reality of Lay Judges in Mixed Tribunals*, 90 CHI.-KENT L. REV. 1031, 1061 (2015).

125. Kutnjak Ivković & Hans, *supra* note 27.

require a greater degree of protection by the more stable democratic regimes. In contrast, citizens in mixed tribunals make decisions jointly with professional judges<sup>126</sup> and may be more directly exposed to potential state influence.

One question we cannot answer in the current project is whether the relationship between democracy and lay legal decision-making is causal. We can only show that a relationship exists, or does not exist, between these measures of democracy and the presence of lay participation in the legal system of a country. It is possible that some features of a government—for example, political stability—make it possible to have a functioning, flourishing lay participation system. Research showing the effects of jurors' participation on subsequent voting<sup>127</sup> and on perceptions of enhanced legitimacy of a country's government and legal systems<sup>128</sup> suggest the ways in which jury participation promotes democratic self-governance. If the relationship is a causal one, it might be bidirectional. Democratic, stable governments provide more rights to the citizens, including the right to be a juror or lay judge. Then, participation of lay persons as legal decision-makers (particularly as jurors, trusted to decide independently) may lead citizens to use other opportunities to influence the government—like voting—thus enhancing the quality of democracy.

In conclusion, our results support the argument that lay participation and democracy are related. While this relationship is positive, suggesting that lay participation is more likely to be housed in democratic countries, the nature of this relationship is complex. The relationship indicates that lay participation is generally more closely aligned with the protection of citizens' basic rights and liberties than with judicial independence and the absence of corruption. However, the effect is not identical across the two forms of lay participation. While mixed tribunals tend to be very loosely associated with democracy, the jury system seems to be closer to achieving the ideal of a shining beacon of democracy.

126. *Id.*

127. *See, e.g.*, JURY AND DEMOCRACY, *supra* note 37, at 46–47; *Jury Service*, *supra* note 37; *Civic Awakening*, *supra* note 37; Hans et al., *supra* note 37, at 710–12.

128. Diamond, *supra* note 38, at 285 (describing increased positive regard for jury systems following jury service). More positive views of judges and courts have also been found in other countries following their introduction of lay participation in legal decision-making. *See, e.g.*, María Inés Bergoglio, *Twelve Years of Mixed Tribunals in Argentina*, in JURIES, LAY JUDGES, AND MIXED COURTS: A GLOBAL PERSPECTIVE, *supra* note 19, at 47, 61 tbl.3.4 (showing greater confidence in judges after the introduction of a mixed court system in Cordoba, Argentina); MARÍA SIDONIE PORTERIE, ALDANA ROMANO & VALERIE P. HANS, EL JURADO NEUQUINO: EL COMIENZO DEL JURADO CLÁSICO EN LA ARGENTINA 76–77 (2021) (showing more positive regard for and confidence in the jury system, the courts, the government, and the police following service as a juror).