Let the People Judge:
The Introduction of the Jury System in Japan in Comparative Perspective
(Chapter 1)

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Introduction

Most industrialized countries in the West have had some form of civic participation in their court trials for centuries. Historians trace the origins of the English jury back to the Norman era (Lloyd-Bostock and Thomas 1999; Malsch 2009). The American colonies inherited this legacy, and the right to criminal trial by jury is stipulated in the 1789 U.S. Constitution (Article 3). Trial by jury is deeply embedded in the histories of other countries that rely on the English “common law” tradition, such as Australia, Canada, and New Zealand. Among continental or “civil law” systems as well, early forms of lay judge participation in Germany have been traced back to the eighth century, and in France, to the thirteenth century (Dawson 1960). Lay judge participation is also longstanding in other civil law countries, including Scandinavia, Switzerland, Belgium, Italy, and Brazil, among others.

Not all countries have such long traditions of lay participation in their criminal trials, however. Another longstanding tradition is to leave the task of verdict and sentencing decisions entirely in the hands of professional judges. Yet the last few decades have seen a wave of countries around the world introducing lay judge or jury systems in place of professional judge-dominated trial proceedings. Among the industrialized democracies, Spain, Japan, and South Korea introduced lay judge systems in 1995, 2004, and 2007, respectively. Moreover, in the Republic of China (Taiwan), both major political parties have introduced competing legislative proposals to achieve this reform. Outside of the developed world, Russia, Ukraine, Georgia, Azerbaijan, Kazakhstan, Uzbekistan, Thailand, Bolivia, the People’s Republic of China, and parts of Argentina have established some kind
of lay participation since the 1990s (Fukurai et al. 2010: iii-vi). The inclusion of lay judges in court proceedings represents a potentially major shift in the theory and practice of the delivery of justice, one of the core functions of the modern state.

Lay judge systems are a distinctive institution in democratic societies. Most contemporary democracies only offer citizens the opportunity to participate indirectly in policymaking. Voting, for instance, is about electing public officials who will, in turn, make policy; it does not allow citizens to engage in policymaking per se. Similarly, petitions and protests also allow citizens to exert pressure on elected officials, but here again the citizens do not make actual policy. In contrast, serving as a lay judge offers a rare opportunity for the average citizen to make consequential decisions directly (Gastil et al. 2010: 19).

However, allowing greater public input into criminal proceedings also entails a considerable amount of risk for the state. First, lay judges may have different bases than professional judges for deciding whether the accused is guilty or not guilty or what sentence might be appropriate. Therefore, lay judges’ decisions may undermine the practices and norms that professional judges have created and adhered to for decades, and that citizens have come to expect. Especially in countries that lack a long history of jury trials, this may, in turn, erode public trust in the justice system. Second, a more empowered and civic-minded citizenry may also cause headaches for policymakers. Indeed, since the introduction of the “saiban-in” (lay judge) system in Japan, some of the ex-lay judges have formed a movement to oppose the death penalty.1

1 “‘Imamo Sozetsuna Kattoto Juatsu,’ [‘An Unbelievable Amount of Self-Doubt and Pressure,’]” MSN
Why, despite these risks, did several countries recently decide to introduce a lay judge system? In particular, why would highly successful advanced industrialized democracies whose criminal trials had traditionally been dominated by professional judges choose to incorporate lay judges into their criminal trial proceedings beginning in the 1990s? And what accounts for the variation in the new lay judge systems? These are the main questions posed in this book.

It should be noted at the outset that the term “jury” is typically reserved for the Anglo-American lay judge system. “Lay judge” is a generic term for the institution in both common law and civil law systems. Thus, in the remainder of the book, the term “jury” or “pure” jury will refer to lay judge systems of the Anglo-American tradition, while the “lay judge system” will refer more generally to systems of public participation in criminal trials.

**The History of Lay Judge Systems**

The Western world has seen a long history of lay participation in trials. The practice can be traced at least to ancient Greece, where citizens took part not only in legislating and administrating but also judging (Jackson and Kovalev 2006/2007). Aristotle argued that in a democracy, “all men should sit in judgment, or that judges selected out of all should judge in all matters, or in most, or in the greatest and most important,”2 and that one of the key roles of the democratic citizen was to “share in the

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2 Aristotle, *Politics* [cite].

administration of justice.”

In an influential recent article, Glaeser and Schleifer (2001) claim that countries with common law systems, such as the United Kingdom, are characterized by jury systems, while those with civil law systems, such as France, typically lack juries. This difference, they have argued, accounts for the higher economic growth rates in countries that adopt common law systems than in those with civil law systems. As historians and comparative legal scholars have pointed out, however, the claim that civil law countries lack juries is only half true. While most civil law countries do lack “juries” in the Anglo-American sense, many of these countries do have a system of lay participation in trials, and often those that have at least long a history as the English jury.

Indeed, according to Dawson (1960: ch. 2), evidence of lay judge systems in Germany and France can be found as early as the seventh century, where it was used as a way to address the shortage of professional judges during Merovingian rule. Local notables with knowledge of law and prestige, at times elected, were summoned to make rulings. The system was institutionalized further by Charlemagne, who put in a place a system in which the central authority would appoint local law-finders, usually seven, who were given the authority to rule on less important matters. These law-finders were usually drawn from great landowners.

This system remained in place and came to be known in France as the assise, in which simpler cases were ruled by a single judge and more complicated or controversial cases would be brought before an assembly of law-finders. However, while this system endured in many parts of France until 1789, it was used for an increasingly narrower scope
of cases. The growing influence of canon law, and subsequently Roman law over France led to the growing professionalization of the legal profession, in turn reducing the need for lay judges.

The Schöffen in Germany is said to have survived better than its French counterpart (Dawson 1960), although as in France, the reception of canon law, then subsequently Roman law, promoted the professionalization of the legal field, and, in turn, a gradual decline in the institution of lay judges.

The origins of the English jury have become a subject of considerable debate in recent decades. The classic view on this question is the one advanced by the German legal historian Heinrich Brunner, in his book Die Entstehung der Schwurgerichte (Berlin: Weidmann, 1871), pointed to the Norman Conquest, and the ensuing efforts to compile the Domesday Book, as the catalyst that introduced the jury into England. Locals were called in to provide information to the Normans to assist them in compiling the Book (Dawson 1960; Macnair 1999). In this view, jurors in England served more as witnesses, while the lay jurors on the continent served a more judicial function. But this view has increasingly come under dispute, as scholars have pointed to evidence of the existence of juries in England before 1066 (Dawson 1960: 119-120; Macnair 1999: 542). They have also found little evidence for the use of lay judges in Normandy, where the system allegedly was transplanted from (Turner 1968). But regardless of whether they see the source of the English jury as French or English, scholars generally agree on the important role played by Henri II, who, in 1166, institutionalized the jury “as a standard feature of certain criminal and civil proceedings” (Dawson 1960: 121). The UK retained the “pure” jury system
and subsequently exported it to its colonies, although in different forms in different parts of the world (Vidmar 2000; Vogler 2001). Thus, the U.S., Canada, Australia, and New Zealand today have pure juries, as does Hong Kong. Other former British colonies, such as India and South Africa, cancelled their juries after independence precisely due to their connection with colonial rule.

On the continent, Napoleon played a key role in reviving and expanding the modern jury, not only in France but elsewhere in continental Europe as well (Hans and Germain 2011). Under Napoleon, France adopted a new penal code in 1891 that provided for jury trials. The system adopted was close to the English jury, with professional and lay judges playing separate roles (ibid). As Napoleon expanded across Europe, he also transplanted the institution of the jury in the occupied areas (Langbein 1981), and the nineteenth century saw a wave of European countries formally adopting lay judge systems. Belgium, for instance, saw the introduction of a jury system under Napoleon while it was still ruled by the Netherlands, and it has had a system of lay participation since independence in 1831 (Malsch 2009). Similarly, Napoleon introduced the jury in parts of Germany, and the German Reich constitution of 1849, for instance, stipulated for jury trials for more serious offenses (Casper and Ziesel 1972). In 1850, the Kingdom of Hanover innovated the modern German lay judge system as we know it today, with lay judges sitting alongside professional judges, and the system quickly spread to other parts of Europe, including France, as well.³ Portugal introduced the jury in 1830; Greece began to

³ After the introduction of the Napoleonic Criminal Code, the French lay judge system underwent a number of reforms that strengthened the power of professional judges, ultimately resulting in the reforms during Vichy France in 1942 that saw the introduction of a German-style system (Vidmar 2000; Hans
experiment with a jury in 1834, and its 1844 constitution guaranteed trial by jury (Vidmar 2000). Austria, also influenced by French practice, adopted a lay judge system in 1850, and formally in 1869, and most Eastern European states retained the system after the fall of the Austro-Hungarian empire (Vidmar 2000; Bobeck 2015). The lay judge systems in Eastern Europe thus typically predate communist rule (Leib 2007). Scandinavian countries formally introduced lay judge systems during the late nineteenth century as well, although as scholars have noted, the origins of Scandinavian lay judge systems go back much farther; some have argued that the Scandinavian lay judge system to have served as the model for the medieval English jury (Turner 1968). Most of these systems that were introduced during the nineteenth century have survived to this day, with varying degrees of modification. Even Spain experimented with the jury on and off during the nineteenth century (Vidmar 2000).

In contrast to the common law countries that typically adopt “pure” juries, civil law countries in continental Europe typically adopt “mixed” juries of the French and German traditions. Thus, Belgium, Austria, the Czech Republic, Denmark, Finland, Greece, Hungary, Italy, Norway, Poland, Portugal, Sweden all adopt some form of the “mixed” jury system (Leib 2007; Malsch 2009).

By the early 1990s, then, the overwhelming majority of industrialized democracies had some form of lay participation in criminal trials. The exceptions were very few; these include the East Asian democracies (Japan and South Korea), Spain, and the Netherlands; and German systems are not the same. For instance, one major difference is that lay judges in Germany serve a fixed term (typically five years), while French lay jurors only sit on one case. See Jackson and Kovalev (2006/2007).
Taiwan and Mexico, which would soon become democracies, also did not have systems of lay participation at the time of democratization. The Netherlands briefly had a jury system during the French occupation (1811-13), but it was cancelled shortly after the end of occupied rule (Malsch 2009). Turkey also lacks a system of lay participation (Jackson and Kovalev 2006/2007).

**Lay Judge Systems in Post-Developmental States**

Why would power-holding state elites of advanced industrialized democracies ever decide to introduce a lay judge system? Even more puzzling, several of the recent cases of adopting lay judge systems are also cases of so-called “developmental states”: Japan, South Korea, and Spain, and partially also Taiwan. In developmental states, legal-rational bureaucracies are traditionally been especially strong, and therefore presumably would greatly resist efforts to introduce direct lay participation in policymaking. Why do we see the introduction of lay judge systems even in these states?

Developmental states prioritize rapid industrialization over citizen input or transparency. These countries have typically been known as “strong states” with high levels of autonomy and capacity in relation to civil society (e.g. Zysman 1983; Amsden 1989; Wade 1991; Etchemendy 2004). Scholars disagree over the precise role that developmental state institutions played in spurring rapid industrialization in these countries (e.g. Johnson 1982; Samuels 1987; Okimoto 1988; Woo-Cumings 1999). Nevertheless, they do agree that developmental states are typically characterized by a cohesive, meritocratic bureaucracy; a tolerance for vague legislative wording which endows state
agents with broad discretion; a preference for strong intervention in the economy; and strong restrictions on labor union activities and other civil liberties for the sake of rapid industrialization. Neither power-sharing with civil society nor transparency is a hallmark of developmental states, to put it mildly.

Given this list of characteristics, it is not a coincidence that developmental states usually emerge under authoritarian, rather than democratic, regimes. Soon after independence, South Korea fell into dictatorship, and it remained under military rule until 1987. Spain was ruled by a dictatorship from the 1930s until the mid-1970s, and Taiwan until 1996. Japan’s developmental state also began under authoritarian rule during the prewar era. But developmental states can persist even under democratic regime types.

In particular, Japan, South Korea, and Spain had achieved both democratic regimes and considerable industrialization by the time that their lay judge systems were introduced, and Taiwan has achieved those goals as well. Therefore, today we can term them “post-developmental states.” However, reflecting their developmental state heritage, these countries generally have not exhibited great enthusiasm either for delegating policymaking to the average citizen or for enhancing transparency. While many of their restrictions on civil liberties were lifted after democratization, various important obstacles to citizen input nevertheless survived. For instance, even after its democratization in the wake of World War II, Japan continued to impose high barriers against the legal incorporation of voluntary associations, thus limiting the expansion of large-scale advocacy groups (Pekkanen 2006). Similarly, Encarnación (2003) points to how post-Franco Spain achieved democratic consolidation as an elite project, despite Spain’s weak civil society. Spain’s nonprofit
sector is only slightly larger than Japan’s; for instance, a recent study estimates that those engaged in nonprofit organizations comprised 4.3% of the total Spanish workforce, compared to 4.2% in Japan (Solomon and Sokolowski 2004). These are much smaller figures compared to those of most “early-developer” states, for instance, 14.4% in the Netherlands, 9.8% in the U.S., or 8.5% in the U.K. (ibid). Moreover, despite South Korea’s reputation as a home to vibrant social movements, its nonprofit sector is actually very small even compared to Japan; as of 2004, the nonprofit workforce comprised a mere 2.4% of the total workforce (ibid).

Developmental states are typically also laggards in terms of transparency. As Ginsburg (2009) notes, limiting societal input into the policymaking process typically goes hand-in-hand with broad bureaucratic discretion and limited transparency. Japan, South Korea, and Taiwan had neither freedom of information legislation nor an administrative procedure law until the late 1990s; as of writing, Spain still does not have a freedom of information act.12 Moreover, regulations in Japan, Korea, and Taiwan long kept the membership of the private bar artificially small, thus limiting the number of lawsuits, and most crucially lawsuits against the government (Ginsburg 2006). That none of these countries had systems of lay input into criminal trials from the 1940s until the 1990s also is indicative of the restrictions that developmental states impose on direct citizen access to the levers of power.13

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13 As will be discussed more later on, Japan and Spain did have some fleeting experiences with lay judge systems during the prewar period.
Nevertheless, in a seemingly major break from their developmental state heritage that jealously guards professional bureaucratic discretion and information, Japan, South Korea, and Spain introduced lay judge systems during the 1990s and 2000s, and as of 2015, Taiwan was engaged in serious discussion towards that end. Why?

**The Configuration of Different Lay Judge Systems**

Thus far, this chapter has focused on the puzzle of why states, and especially “post-developmental states” with weak traditions of power-sharing and transparency, would choose to reform their judicial systems to invite citizens to share in the task of judicial decisionmaking. But this would not be a puzzle if the reforms were merely cosmetic. Therefore, it is necessary to investigate the specific institutional choices that countries have made. The more nuanced puzzle that the book addresses is to explain the variations in the design of the new lay judge systems. Lay judge systems can come in many different forms and guises. In particular, this book seeks to explain the different extents to which new lay judge systems in Japan, South Korea, Spain, and the proposed systems in Taiwan actually constrain the power of professional judges. Indeed, the extent to which countries impose constraints upon professional judges may be viewed as the single most significant measure of the extent to which countries have broken from the preexisting system, in which professional judges had monopoly power over verdicts and sentencing. In short, the question is the following: how much genuine change is represented by the reforms, and why might some of these countries have decided for greater change than others?

The extent of constraints that lay judge systems place upon professional judges
may be conceptualized along six dimensions: 1) the scope of cases that are subject to lay judge trial; 2) whether or not professional judges have the authority to decide which cases should include or exclude lay judges; 3) whether or not the lay judges deliberate separately from professional judges; 4) whether or not the decisions of lay judges are binding on professional judges; 5) the relative number of lay and professional judges; 6) whether lay judges merely determine the verdict or both the verdict and sentence. Lay judge systems are “strongest,” i.e. exert greater constraints over professional judges if if the scope of cases on which jurors may serve is broader; professional judges have no discretion over which cases should be ruled by lay judge trial; if the lay judges deliberate in isolation from professional judges; if their numbers are smaller; and if the decisions of lay judges are binding.

Let us consider these six criteria in more detail. First, there is the matter of scope. Virtually no country stipulates that lay judges serve on all criminal trials; the scope of crimes for which lay judges may serve on trials may be broad or narrow. Ceteris paribus, the broader the scope of cases on which juries may serve, the greater the constraints on the power of professional judges, and vice versa. As will be seen later, Spain, for instance, allows for jury trials not only for violent crimes but also some categories of white collar crimes; in contrast, lay judges in Japan do not serve on white-collar crimes.

Second, where professional judges have the discretion to rule which cases should be decided by lay judges and which by professional judges, this much diminishes the power of lay judges. In such countries, professional judges may choose to hand only the most trivial cases to lay judges, while jealously guarding jurisdiction over the more “important”
Third, another major distinction among the world’s lay judge systems has to do with whether lay judges deliberate together with professional judges or separately from them. Jurors in the Anglo-American tradition typically deliberate and make rulings separately from professional judges, whereas in “mixed” jury systems of the civil law tradition, the lay judges typically deliberate and rule with professional judges. The distinction is important because social-psychological studies of juries and of small group deliberation typically find that when lower status individuals are placed in the same group with higher-status individuals, the former tend to participate less actively than the latter. Moreover, less trained individuals tend to participate less than more trained individuals (e.g. Kaplan and Martín 1999; Bliesener 2006). Thus, ceteris paribus, lay judges should enjoy greater autonomy from the views of professional judges when they deliberate separately, and they should be more strongly influenced by the views of professional judges when they deliberate together.

Fourth, very importantly, the decisions of lay judges may or may not be binding on professional judges. In countries such as the U.S., the decisions of jurors are binding on professional judges, but in others, such as South Korea, the decisions of jurors are merely advisory and do not legally constrain the professional judges in any way. The influence of lay judges is obviously greater in systems where their decisions are binding on professional judges. However, this does not mean that lay judges have no influence over professional judges in systems where their decisions are merely advisory. For instance, professional judges may feel social pressure to respect lay judges’ viewpoints. Nevertheless, there is a
qualitative difference in the power of lay judges between systems where their rulings are legally binding on professional judges and those where they are not.

A fifth dimension by which lay judge systems may be distinguished has to do with the number of lay judges that are empaneled for a trial. There is great cross-national variation in the number of lay judges. In some countries, such as Austria or Germany, only two or three lay judges sit on a trial, while in others, such as Scotland, there are fifteen (Leib 2007). There is an intriguing disconnect between academic theory and political actors’ conventional wisdom on this point. Political actors often believe that *ceteris paribus*, the larger the number of lay judges that serve on a trial, the more influence they may wield over professional judges. Indeed, as will be shown in Chapter 4, the Japanese Liberal Democratic Party (LDP) sought to limit the number of lay judges on the belief that this would serve to preserve the power of professional vis-à-vis lay judges, whereas the Clean Government Party pushed for a larger number of lay judges from the belief that this would mark a more significant break from the existing professional judge system. However, the social-psychological research on juries, and on small-group deliberation more generally, actually suggests that participation tends to be greater and the influence of higher-status individuals (such as professional judges) more limited in smaller groups than in larger ones (e.g. Moscovici 1985; Chud and Berman 2000; Devine et al. 2001).

Sixth, lay judge systems may also vary in their jurisdiction. In some cases they focus only on the basic verdict of guilt or innocence; in others, they also make decisions about sentencing. Typically, in Anglo-American systems, jurors rule solely on guilty/not guilty and not on sentence; in civil law systems, by contrast, lay jurors rule both on
guilty/not guilty and the sentence.

Lay judge systems also vary across other dimensions that are important, but less relevant to the question of the relative power of lay judges versus professional judges. For instance, defendants may or may not have the choice to opt out of a lay judge trial. In some countries, such as prewar Japan or present-day South Korea, defendants could request to be tried by lay judges. In others, such as the U.S., Spain, or present-day Japan, defendants who are accused of certain classes of crimes must be tried before a panel of lay judges. Different lay judge systems also have different decision rules; for instance, some countries, such as the U.S. and Canada, require unanimity among lay judges, while others, such as Japan or the proposed Taiwanese system, require a simple majority (Leib 2007). These are important institutional differences, but again, the relative power of professional and lay judges is not clearly affected by them, so this study devotes less attention to explaining why they came about.

Among the six criteria for differentiating lay judge systems that have been highlighted here, the two that are most important in shaping the power of lay judges vis-à-vis professional judges are whether the professional judges have the discretion to determine which cases should be ruled by lay judges, and whether decisions of the lay judges are binding on the professional judges. Even if the lay judge institution appears robust in other respects, it is fundamentally weak if the professional judges can simply

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14 In the prewar Japanese system, these requests legally had to be honored (Tokyo Bar Association 1992). In the present-day South Korean system, professional judges have the authority to deny these requests (Park 525).

15 At least one professional judge must agree with the majority. Act on Criminal Trials with Participation of Saiban-in.
ignore lay judge rulings or can relegate lay judges only to the “less important” cases. Thus, this study devotes special attention to explaining the decisions countries made on whether (1) professional judges would have the authority to rule on whether a given case should incorporate lay judges; and (2) the rulings by lay judges would be binding on the professional judges.

**Four Countries in Comparative Perspective**

As noted above, during the 1990s and 2000s, a number of “post-developmental state” democracies that had conspicuously lacked systems of lay participation for many decades introduced such systems: Spain, Japan, and South Korea. In addition, Taiwan moved gradually towards the introducing of such a system, but its legislature still had not passed the reform as of 2015. These four countries form the heart of the empirical analysis of this book.

Other countries also introduced or re-introduced lay participation during this period, including Belarus, China, Kazakhstan, Russia, Thailand, Ukraine, and Uzbekistan (Fukurai et al. 2010). However, since these countries are neither advanced industrialized states nor full-fledged democracies, the political dynamics through which lay judge systems come to be adopted should be fundamentally different than those seen in Japan, Spain, South Korea, and Taiwan. Therefore, this study does not aim to explain their choices.

Among the aforementioned four post-developmental state democracies, Japan in particular offers an especially useful case for examining the conditions under which lay judge systems may be brought into being. First, among the four countries, Japan has the
longest history of democracy, having been a full-fledged democracy soon after 1945. Japan is thus a “second-wave” democracy, to use Huntington’s term, as opposed to South Korea, Spain, and Taiwan, all of which are “third wave” democracies (Huntington 1993). Spain’s democratization did not occur until the mid-1970s; South Korea in the mid-1980s; and Taiwan in the mid-1990s. Japan’s history of democracy is thus more than thirty years longer than those of the other three countries. This also means that Japan has had the longest history of democracy without lay judge trials, which shows that the introduction of democracy does not necessarily lead to lay participation. In addition, the longer timespan of Japanese democracy without lay participation in criminal trials allowed professional judges to become much more entrenched compared to their counterparts in the other three countries. This makes Japan a particularly puzzling case; why, despite its longer history of trials by professional judges under a democratic regime, did Japan break away from its existing system and delegate power to lay judges in the mid-2000s?

Moreover, Japan’s long history of one-party rule also makes it a particularly puzzling case. The LDP has been in power for most of the period since 1995, except for some very brief interruptions. The LDP’s long dominance has caused the judicial branch effectively to become part of the LDP’s ruling apparatus (Ramseyer and Rosenbluth 1993; Ramseyer 2001). Thus the ruling LDP might be thought to have little reason to attempt to reform the judiciary. Yet the LDP was in power in 2004, at the time of the judicial system reforms that brought in lay participation.

South Korea, Spain, and Taiwan’s democratic regimes started several decades after Japan’s, and they have been marked by much more competitive party systems and frequent
alternations of power. Since democratization, Spain has seen four alternations of the party in power (1982, 1996, 2004, and 2011); South Korea has seen two alternations in power (1997 and 2007); Taiwan has also seen two (2000 and 2008). These three cases are thus more “normal” democracies than Japan, yet given their developmental state traditions, their decisions (or in the case of Taiwan, possible upcoming decision) to break with the tradition of professional judges’ monopoly of legal decisionmaking are also puzzling and therefore deserving of close attention.

Due to the above-mentioned case selection considerations, Japan is the case that is covered most extensively in the empirical chapters of this book. Spain and South Korea also receive due attention. In addition, the book provides extensive analysis of the political dynamics driving the different reform proposals in a country which did not fully introduce such a system during the period under study: Taiwan.

A key advantage of comparing these four countries is that they present considerable variation in the extent to which their lay judge systems constrain the power of professional judges. The systems are summarized in Table 1 below:

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<th>Spain</th>
<th>Japan</th>
<th>South Korea</th>
<th>Taiwan</th>
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<tr>
<td>Professional judge authority over which cases to be tried by lay</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Number of lay/professional judges</td>
<td>Lay judges deliberate separately from professional judges?</td>
<td>Lay judge decisions binding?</td>
<td>Lay judges rule both on verdict and sentence?</td>
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<tr>
<td>9 lay, 1 professional</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
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</tr>
<tr>
<td>6 lay, 3 professional</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td></td>
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<tr>
<td>5, 7, or 9 lay, 3 professional</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>5 lay, 3 professional</td>
<td>Yes</td>
<td>Yes</td>
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Of the four countries, the Spanish system, introduced in 1995, represents the most extensive transfer of power from professional to lay judges. In the reformed Spanish system, professional judges have no authority to rule on which cases should be decided solely by professional judges and which by a lay jury. Instead, the empaneling of a jury is required for a relatively broad range of cases, including not only murder and homicide but also robbery and trespassing of dwelling (Thaman 1997). Some categories of white-collar crimes, such as “crimes against honor” are also subject to a jury trial (ibid). Following the French model, nine jurors sit on a trial versus only one professional judge (Thaman 1997: 25; Jimeno-Bulnes 2004). The Spanish jury deliberates separately from professional judges (Thaman 1999; Jimeno-Bulnes 2004). The jurors require five votes to acquit and seven to convict, the professional judge does not have a vote, and their decisions are binding on the professional judges. The jurors rule on verdict and not sentence although they may recommend a suspended sentence (Thaman 1997). Unlike many lay judges

\footnote{The French lay judge system has since moved from a nine-juror system to a six-juror system (cite?).}
systems, the Spanish jury is required to present a reason for their verdict (Leib 2007).

Second, Japan introduced a system in 2004 that represented a significant transfer of power out of the hands of professional judges, but not as significant as in Spain. Like Spain, there is a list of crimes for which lay judges must be empaneled, and this is not subject to professional judges’ discretion. But the list of such crimes is limited to serious criminal offenses, such as murder, arson, burglary, and kidnapping. “Lesser” offenses such as robbery are not included, which makes the scope of cases narrower than in Spain; white-collar crimes such as bribery are also not subject to a lay judge trial. Six lay judges (saiban-in) deliberate collectively alongside three professional judges. The decision is by simple majority vote, provided that at least one professional judge agrees with the ruling. The collective decision of lay and professional judges is binding for both verdict and sentence.

Third, South Korea’s system, introduced in 2007, imposes weaker constraints on professional judges compared to Spain and Japan. Upon petition of the defendant, South Korea’s professional judges are given the power to rule for or against a jury trial for a set list of offenses. The list is shorter than Spain’s but longer than Japan’s and, notably includes cases of bribery. Five, seven, or nine lay judges preside alongside three professional judges, depending on the severity of the crime (Park 2010). But one wonders why a defendant would ever petition for a jury, because even when they are empaneled, the jurors’ decisions are merely advisory and do not formally constrain the professional judges. In other words,

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17 The more serious felony cases that may result in capital punishment or life imprisonment have nine jurors; other felony cases are run with seven jurors; and cases in which the defendant plead guilty are presided by five jurors (Park 2010: 554).
the professional judges may simply reject the jury’s decision and replace it with their own. South Korea’s jurors do deliberate separately from professional judges in determining guilty or not guilty, but professional judges may enter into the lay judges’ discussion if a majority of the jurors concur, or if the jury cannot reach a unanimous verdict (ibid). In addition, if the jury finds the defendant guilty, it deliberates together with professional judges to determine the appropriate sentence. Thus, the Korean lay judge system has aspects of both “pure” and “mixed” juries. Depending on the case, five, seven, or nine judges preside alongside three professional judges on more serious criminal offenses, such as murder, attempted murder, and manslaughter (Park 2010).  

Fourth, Taiwan requires a separate discussion. As noted earlier, unlike Japan, South Korea, or Spain, as of 2015, Taiwan has not formally introduced a lay judge system. But Taiwan has introduced a provisional pilot system, known as the “lay observer” system. This system imposes the weakest constraints of all four countries. The scope of cases to be heard by lay judges is relatively narrow; only offenses that are punishable by death penalty or life sentence require a lay judge court. Unlike in South Korea, defendants may not choose whether or not to be tried by lay judges. Five lay judges serve alongside three professional judges (Huang and Lin 2013). Deliberation is somewhere in between a “pure” Anglo-American jury and a continental “mixed” jury in that professional judges participate in discussion with the lay judges, but the professional judges are not allowed to express

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21 Takeda (2014) notes that the percentage of cases that have been indicted has declined markedly since the introduction of the lay judge system, and that careful screening by the prosecution to only indict the “most likely guilty” cases has allowed the Japanese courts to maintain their high conviction rates. On the other hand, the available evidence suggests that the decline in indicted cases had actually begun prior to the introduction of the lay judge system.
their opinions until the lay judges have completed their work. Most importantly, in Taiwan, as in South Korea, the decision of the lay judges is not binding on the professional judges.

In sum, there is great variation in the systems adopted by the four countries. Spain’s jury system imposes the greatest constraints on the power of professional judges, and South Korea’s system and Taiwan’s pilot system impose the weakest constraints. While professional judges in South Korea and Taiwan may feel normative pressure to rule in accordance with the lay judges’ viewpoints, they have no legal obligation to do so. Finally, the constraints imposed by Japan’s lay judge system are somewhere in between those bookend cases; the lay judges deliberate collectively with the professional judges, subjecting the former to potential influence by the latter, but the collective decision of the lay and professional judges is binding.

**Impact of Change**

At this point, the reader may wonder if even the stronger reforms in these countries, such as Japan’s new system, are merely important procedurally, or if they have real substantive impact over trial outcomes. Since these systems are relatively new, it is difficult to come to a definitive judgment on this matter. Nevertheless, evidence from the case of Japan suggests that it has already begun to bring about real change, both in terms of sentencing patterns and its impact on those who have served as lay judges.

Three years after the *saiban-in* system became fully functional, the Supreme Court of Japan released a report (General Secretariat of the Supreme Court of Japan 2012)
assessing the new system. This report compares trials overseen solely by professional judges (April 2008-March 2012) against those overseen by the combination of lay and professional judges (April 2009-May 2012). The cases overseen solely by professional judges include both cases of crimes that are not covered by the lay judge system and cases that were appealed from the lower courts to the higher courts. Thus, such cases may not necessarily be the ideal baseline against which to compare with the lay judge trials. Nevertheless, the results are revealing.

The report finds that over the first three years of the saiban-in system, forty-four out of 7,754 defendants were found innocent under the new regime, for a conviction rate of 99.4%. Thus, the traditional Japanese pattern of exceedingly high conviction rates has remained largely unchanged.

However, there are subtle but significant changes in sentencing patterns. Overall, there appears to have been a slight lightening of sentences under the new system (Yamamoto 2015).

First, the Supreme Court’s report found that many cases by the mixed lay and professional bench ended in lesser sentences than had been requested by the prosecution (5.8% of mixed bench, versus 2.1% of trials solely overseen by professional judges). On the other hand, professional judges acting on their own passed down a slightly higher percentage of heavier sentences than had been requested by the prosecution. The professional judges on their own decided for heavier sentences 0.9% of the time, while the mixed bench decided for heavier sentences only 0.2% of the time. The overall variance in sentences has also grown since the introduction of the lay judge trial (Foote 2014; Takamori
Second, an even more notable change is that a much larger percentage of sentences by the mixture of lay and professional judges delivered sentences with probation than those solely by professional judges: 55.7% to 35.8%. The Supreme Court’s report speculated that “perhaps lay judges were more interested in encouraging the accused to return to normal social life [compared to professional judges]” (ibid: 23). The mixed bench of lay and professional judges also handed down suspended sentences more often than the professional judges acting on their own (15.6% and 13.0%, respectively). Thus, after three years, the lay judges have already begun to make some mark on the patterns of sentencing in Japan.

The percentage of cases appealed to higher courts was roughly the same for both lay judge trials and trials only by professional judges, at 34.5% and 34.3%, respectively (ibid 114). Of the cases that have been appealed, the courts have largely chosen to respect the rulings of lay judges; during the first three years, the higher courts overturned a much lower percentage of lower court rulings by the mixed bench lay and professional judges than of lower court rulings made solely by professional judges (6.6% and 17.6%, respectively). Thus, although some of the overturned mixed bench rulings have attracted much media attention (e.g. Kawana 2015), the overall evidence seems to suggest that the higher courts have preferred to defer to the collective judgements of lay and professional judges.

Another potentially significant impact of the lay judge system may be via its influence on the decision-making of prosecutors. Defense lawyers and police have told
journalists that the prosecution seems to have become more careful in pressing charges, often choosing to indict for lesser crimes than they otherwise might have done under the old system of purely professional judge trials (e.g. Takeda 2014). While the evidence is still speculative, it would not be surprising if the prosecutors have in fact become more careful in choosing which charges to bring.

What about the impact of new system on those who have served as lay judges? As will be seen later in more detail, an influential line of justification for jury trials suggests that juries serve as a “school for democracy” that enables citizens to learn to deliberate with their fellow-citizens.

The report by the Supreme Court finds that over the first three years, 95.5% of former lay judges surveyed indicated that serving as a lay judge either was a “very good experience” or a “good experience” (General Secretariat of the Supreme Court of Japan 2012: 120). The figure has been largely consistent over the three years. This is despite the fact that a majority of citizens had not initially looked forward to serving as a lay judge; over the first three years, 52.5% of those who served either “had very much not wanted to serve” or “had not wanted to serve” (ibid). These findings parallel those of studies of jurors in the U.S., who also typically do not look forward to serving (Guinther 1998) but come out of the experience with a sense of learning (Diamond 1993).

One former Japanese lay judge noted: “Normally I do not even watch the news

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21 Takeda (2014) notes that the percentage of cases that have been indicted has declined markedly since the introduction of the lay judge system, and that careful screening by the prosecution to only indict the “most likely guilty” cases has allowed the Japanese courts to maintain their high conviction rates. On the other hand, the available evidence suggests that the decline in indicted cases had actually begun prior to the introduction of the lay judge system.
or read the newspaper. But serving as a lay judge was a great experience because it has made me more interested in the real world… I would like my child to have an opportunity to serve, too” (General Secretariat of the Supreme Court of Japan 2012: 121). “[Serving as a juror] exposed me to a very different world to the one I had been accustomed to…. The experience made me think a lot more about what I, as a member of society, could do to reduce crime” (ibid).

One driver of the positive impressions of the lay judges in the new system seems to be the perception that the deliberations with professional judges were congenial. About three-quarters of survey respondents indicated that they felt comfortable speaking up (ibid: 79), and more than seventy percent that believed that the issues had been sufficiently discussed (ibid: 80).

Thus, far from a superficial change in institutions, the lay judge system in Japan indeed appears to be having real effects, in line with Tocqueville’s views.

There is also some data on the South Korean case. In South Korea, defendants must petition the courts for a jury trial, and so far, the professional judges have liberally exercised their right to reject defendants’ petitions for a jury trial. (Recall that this is not an option for professional judges in Japan.) Choi (2013: 12) reports that during the first five years after the introduction of the new Korean system, fewer than half, or 38.2%, of the defendants’ petitions for their cases to be decided by a jury were accepted by the professional judges. As a result, the number of jury trials has still be fairly small, with only 574 jury cases over the first four years (Min 2012), or an average of 143.5 cases a year. As far as the effect of the jury on trial outcomes, between January 2008 and October 2010,
the conviction rate for jury trials in South Korea was 71.5%, as opposed to 77.7% for trials involving only professional judges (Kim et al., 2013; N=323). This difference in verdicts may seem greater than the minute difference that was observed in the Japanese case, but it cannot necessarily be said that Korean lay judges are more lenient than professional judges on the basis of these statistics, since the professional judges decide whether or not lay judges should be included in a given trial. There is a potential problem of endogeneity here; the professional judges may be more likely to agree to include lay judges in the process when they believe the prosecution’s case is weaker. But there is stronger evidence for the idea of different tendencies of professional judges and laypersons in the finding of Kim et al. (2013) that between January 2008 and October 2010, jurors and judges (who, recall, deliberate separately in the Korean system) reached the same verdict in 91.4% of cases. When the jurors and professional judges disagreed, the professional judges were typically more likely to declare the defendant guilty. More research is needed on the impact of the Korean reforms.

**Explaining the Reforms**

*Judicial Politics and the Jury*

How might we explain the reforms instituted in the four countries under study? Judicial politics is a growing field of study in political science. The bulk of studies that have been conducted are in the subfield of American politics. American politics scholars

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22 This finding parallels that of Eisenberg et al. (2005), which also finds that judges have a lower conviction threshold than jurors. In contrast, Bliesener (2005) reports that in Germany, lay judges often favor harsher sentences than professional judges.
have debated whether the courts make decisions based more on “legal,” “attitudinal,” or “strategic” considerations (e.g. Segal and Spaeth 1993; 2002); how courts set the policy agenda (e.g. Perry 1991; McGwire and Caldeira 1993; Black and Owens 2009); the relationship between lower and higher courts (e.g. Songer et al. 1994); and inter-branch relations (e.g. Bergara et al. 2003; Harvey and Friedman 2006; Clark 2009). These are important topics, but quite far afield from the question that is being posed in this study.

On the jury specifically, there is a small American politics literature on the effects of jury service on political participation and civic-mindedness (e.g. Gastil et al. 2002; Gastil and Weiser 2006; Gastil et al. 2008; Gastil et al. 2010; Bloeser et al. 2012). A recent study by Bowler et al. (2014) explores the determinants of jury summons response rates. But the question of how to institutionally structure a jury system is a non-issue in the U.S., which has had a long tradition of trial by jury that goes back for centuries and where the jury system is taken largely for granted.

There also exists a small but growing body of research on judicial politics in the field of comparative politics. So far, this field has focused primarily on the issue of judicial independence, both on its determinants and consequences (e.g. Ramseyer 2001; Iaryczower et al. 2002; Herron and Randazzo 2003; Helmke 2002; 2005; Popova 2010; 2012). A smaller literature examines the lobbying of courts (e.g. Giles and Lancaster 1989; Hoover and den Dulk 2004; Iaryczower et al. 2006; Arrington 2014). Political science research on juries outside the U.S. has been very rare (for one exception see Doheny and O’Neill 2010). Despite the growing importance and broad diffusion of the institution of the jury in recent decades, comparative politics scholars have largely
overlooked the question of the conditions under which juries become introduced, and the factors that drive the configuration of new jury systems. This book seeks to fill this gap in the political science literature.

Beyond political science, there is a vibrant and growing literature in the field of sociology of law and comparative law on the rapid diffusion of juries across international borders. These is large body of work that examines the new lay judge systems in East Asia, including single-country studies of Japan (e.g. Weber 2009; Corey and Hans 2010; Fukurai 2011), South Korea (e.g. Cho 2008; Lee 2009; Park 2010; Choi 2013), and Taiwan (Huang and Lin 2013), as well as comparative studies of China and Japan (e.g. Fukurai and Wang 2011), Korea and Japan (e.g. Fukurai 2012), and across Asia more broadly (Fukurai et al. 2010). Scholars have also explored the new jury systems in post-Communist Eastern Europe and the former Soviet Union (Thaman 1995; Kovalev 2010; Kovalev and Suleymenova 2010; Sheryn 2010); Spain (Thaman 1997). Studies have also examined emerging systems in Latin America, such as sub-national efforts in Argentina (Bergoglio 2003; Hendler 2005), on-going efforts in Mexico (Fukurai et al. 2009), or the aborted effort in Venezuela (Thaman 2002). Scholars have also studied the suspension of lay judge systems in India (Ramnath 2013), or judges’ efforts to effectively undermine jury verdicts in Russia (Thaman 2007). These studies provide valuable information on the contextual factors that led to the introduction of lay judge systems in each of those countries, as well as detailed information on the precise design of the new systems. They also provide explicit or implicit causal hypotheses, some of which will be detailed below (see, for instance, Hans 2008). But since these studies have not been undertaken by political
scientists, they have not sufficiently assessed the political factors that may promote or delay the introduction lay judge systems and shape the configuration of those systems, let alone doing so via a systematic cross-national comparative study.

Explaining the Adoption and Design of New Lay Judge Systems

Why do countries introduce lay judge systems that impose greater or lesser constraints upon professional judges? The existing literature suggests at least five potential explanations: international diffusion, the configuration of existing legal systems, rising public distrust of the judiciary, the desire to promote civic education, and ruling party discontent towards professional judges. I argue that although these explanations may be partially valid, none is sufficient to explain the observed variation in the cases of Japan, South Korea, Spain, and Taiwan.

(1) International Diffusion

At the broadest level, the new lay judge systems introduced since the 1990s may be understood as cases of international policy diffusion. In the field of comparative law, diffusion is referred to as “legal transplant” (e.g. Watson 1974; Langer 2004). According to the policy diffusion point of view, the tradition of citizen participation in criminal trials which originated in the early-developer states has now spread to many other states, whether by processes of competition, learning, or emulation (Simmons, Dobbin, and Garrett 2006).

The adoption of lay judge systems by many states in recent decades no doubt reflects processes of international diffusion, and this will be documented in the empirical
chapters that follow. Indeed, policymakers in all four countries closely studied the configuration and operation of existing lay judge systems in other industrialized countries. However, the mere fact that such diffusion processes exist does not offer a causal explanation for the different configurations of lay judge institutions across the four post-developmental state democracies that form the core focus of this research. There are certainly international precedents for the various specific choices that Spain, Japan and South Korea have made, but the overall systems that they have built are unique. Why did different post-developmental states adopt different configurations of lay judge systems? Why was Spain’s reform the strongest, followed by Japan, with South Korea and Taiwan’s pilot system representing almost a cosmetic change? Therefore, simply to point to the fact of international diffusion is insufficient. These variations in the institutional design of lay judge systems require a separate explanation.

(2) Path-Dependency: Common Law vs. Civil Law Systems

A second possible hypothesis to explain the variation relates to path-dependency (Pierson 2004). Legal systems around the world are typically categorized as belonging to either the “common law” or the “civil law” tradition. At the broadest level, civil law traditions (which typically stem from continental European legal systems such as those of Germany or France) generally rely more heavily on a codified set of laws, whereas common law traditions (which typically stem from British precedents) view judicial decisions, or case laws, as the main source of laws (Dainow 1967). In civil law systems, laws are typically developed through scholarly analysis, which, in turn, gives high prestige
to legal scholars. In contrast, in common law systems, legal codes are developed through practitioners (Dammer and Albanese 2013: ch. 3).

It is possible that the variation in the lay judge systems that different countries adopt may be driven by the historical legacies of the countries’ existing legal systems. As noted earlier, “pure” juries are typically associated with Anglo-American common law systems, while “mixed” juries are often found in countries that adopt the civil law system. Thus, one might expect that countries with legal systems that are strongly influenced by the common law tradition may adopt “pure” juries of the Anglo-American heritage, while countries with legal systems that build on the civil law tradition may adopt “mixed” juries that are commonly seen in continental Europe.

The distinction between civil and common law systems obviously constrains the possibilities of judicial reform in important ways. However, as it happens, the four countries that this study focuses on are all typically categorized as “civil law systems,” yet they adopted quite different designs of lay judge systems. Differences in legal traditions thus fail to offer a convincing explanation for why these countries adopted different lay judge systems, with Spain and South Korea adopting systems closer to the Anglo-American tradition, e.g. with juries deliberating separately from professional judges, versus Japan and Taiwan adopting “mixed” systems that are closer to the continental legal tradition. In fact, Japan’s basic criminal procedures law is actually closer to the American tradition than its homologues in Korea and Taiwan, because Japan’s system was

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23 It is important to note to overemphasize the difference between civil and common law systems. Scholars of comparative law have noted the growing convergence between civil and common law systems, with codified law playing a growing role in common law countries such as Britain and the US., while the importance of case law has grown in countries with civil law traditions (Husa 2004).
subjected to extensive reforms under the U.S. occupation (e.g. Shiomi 1975). Given this background, from a path dependency perspective it would not have been surprising if Japan had adopted a system that was closer to the American jury system. Yet this was not what happened. Thus, the institutional configuration of the existing legal system does not appear to determine the type of lay judge system that is adopted.

(3) Public Discontent Towards the Judicial System

A third possible explanation is rising public discontent against professional judges. Public disgruntlement vis-à-vis professional judges may push policymakers to introduce a lay judge system in order to restore confidence and legitimacy in the judicial system.

Public discontent towards the judicial system is often cited as an important determinant for the introduction of lay judge systems in South Korea, and also for the emergence of the issue onto the policy agenda in Taiwan (Cho 2008; Huang and Lin 2013; Lee 2009).24 For instance, Cho (2008) argues that public disgust towards judicial corruption was the main factor driving the introduction of the jury system in South Korea. As will be shown in Chapter 6, a series of judicial scandals also led the Ma Ying-jeou Administration in Taiwan to launch efforts to introduce the “lay observer system.” In a survey conducted in Taiwan in 2011, 56.1% of respondents indicated that they saw the decisions of Taiwanese courts to be either “unjust” or “very unjust” (Huang and Lin 2013).

Indeed, as noted earlier, many existing studies argue that serving on juries often

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24 Even when the reforms are driven by rising public distrust, this does not necessarily lead the public to demand the introduction of a lay judge system; the introduction may be an elite-led process that emerges out of concern over heightened public trust of the judicial system, as in Taiwan. Indeed, Huang and Lin (2013) characterize the introduction of Taiwan’s lay judge system as “top-down.”
enhances public trust in the courts. Countries that rely on lay judges gradually develop a large pool of people who have some familiarity with the justice system. By contrast, in the US, a recent study estimates that 37.6% of citizens are likely to serve on juries at some point in their lives (Center for Jury Studies n.d.). In Australia as well, which has had a jury system since British colonial rule, a recent study shows that 14.5% of respondents have had this experience (Horan 2005: 134). And in general, the effect of this greater information about the justice system has been found to be greater public legitimacy. Studies of the U.S. case consistently find that individuals with jury experience exhibit higher levels of trust in the justice system than those without such experience (e.g. Wenzel et al. 2003; Doughterty et al. 2006; Benesh 2006). Wenzel et al. (2003: 194) argue, “By having been a part of the administration of justice, jurors will presumably be more inclined to defend the system as impartial and honest.” Benesh (2006) argues that jurors are likely to exhibit high levels of trust in the courts because they typically have a high level of control over outcomes while having relatively low stakes. By contrast, a survey by the Japan Legal Support Center finds that as of 2008, just before Japan’s lay judge system was introduced, 92.8% of respondents had never even seen a trial in person (Japan Legal Support Center 2008).

It may well be that lay judge systems may help to enhance trust in the justice system. But low levels of trust in justice systems do not offer a convincing explanation as to why countries introduce lay judge systems when they do, or why they may design their new lay judge systems in the way that they do. The lack of faith in the justice system in Taiwan and South Korea is a longstanding phenomenon dating back to their authoritarian periods, but while South Korea introduced its lay judge system in the mid-2000s, Taiwan
still has not. Even in South Korea, where distrust of professional judges was high, Park (2010: 543), who conducts careful analysis of the introduction of the jury system, argues that the political process leading up to the institution of the system was much more of a top-down process driven by “progressive judges and scholars” rather than by mass action by society-at-large. In Taiwan as well, public discontent may have propelled the introduction of a lay judge system onto the policy agenda, but it has not yet caused the government to fully introduce such a system.

The empirical record, moreover, shows that lay judge systems have also been adopted in the absence of heightened public distrust of professional judges. In Japan, for instance, throughout the postwar era courts and judges have enjoyed among the highest levels of trust of any Japanese public institutions. According to the Japanese General Social Surveys, trust in the courts consistently exceeded 90% during the early- to mid-2000s, when the introduction of the lay judge system was under debate (Shishido and Iwai 2010). These high levels of public trust far exceeded levels of trust in national legislators, which typically hover between 30 to 40%, or the bureaucracy, which are generally between 50 and 60% (ibid). Declining levels of trust in the judiciary also appears not to have played a key role in the introduction of the jury in Spain either (Thaman 1997; Jimeno-Bulnes 2004).

Furthermore, to introduce a jury system as a means of appealing to public opinion also entails considerable risks because such systems impose burdens on citizens and therefore may become unpopular. A survey conducted shortly after the Japanese system was passed by parliament showed that 70% of citizens either “did not want to serve” or
“did not want to serve very much” (Cabinet Office of Japan 2005). The introduction and operation of jury systems may also cost substantial sums of money. Thus, there is a risk that the introduction of lay judge systems may undermine, rather than boost, the popularity of existing governments.

(4) Civic Education

Fourth, policymakers may introduce lay judge systems as a means of civic education. Numerous studies of the American jury have found that the experience of serving as a juror generally enhances the civic-mindedness of citizens and makes them more aware of various social and political issues (e.g. Diamond 1993; Gastil et al. 2003). Diamond (1993), for instance, finds that almost 70% of both trial and non-trial jurors in the U.S. indicated that they learned something positive or factual while serving as jurors. Gastil et al. (2003) find, also based on U.S. surveys, that the experience of deliberating as jurors helps to increase jurors’ political self-efficacy, and, in turn, voter turnout. From this perspective, the jury serves as a venue for civic education; and some policymakers may be eager to promote such education, particularly in new democracies.

Perhaps the best-known proponent of the idea that the jury offers an opportunity for civic education is the 19th century French philosopher Alexis de Tocqueville. In his classic work Democracy in America (1835; 2000), Tocqueville argues that the jury provides opportunities for the citizenry to acquire new knowledge and to broaden their horizons:

The jury serves incredibly to form the judgment and to augment the natural enlightenment of the people. There, in my opinion, is its greatest advantage. One ought to consider it as a school, free of charge and always open, where each juror comes to be instructed in his rights, where he enters into daily
communication with the most instructed and most enlightened members of the elevated classes, where the laws are taught to him in a practical manner and are put within reach of his intelligence by the efforts of the attorneys, the advice of the judge, and the very passions of the parties. (ibid: 262).

This, he contends, is because:

The jury teaches each man not to recoil before responsibility for his own acts – a virile disposition without which there is no political virtue. It vests each citizen with a sort of magistracy; it makes all feel that they have duties toward society to fulfill and that they enter into its government. In forcing men to occupy themselves with something other than their own affairs, it combats individual selfishness, which is like the blight of societies (ibid).

Tocqueville continues:

I do not know if the jury is useful to those who have lawsuits, but I am sure that it is very useful to those who judge them. I regard it as one of the most efficacious means society can make use of for the education of the people (ibid).

Tocqueville’s view of the jury strongly echoes his view of voluntary associations. As is well known, Tocqueville pointed to voluntary associations as an important “school for democracy” where citizens could also learn to deliberate collectively and to become enlightened to serve as responsible members of a democratic society. Here, Tocqueville extends this logic to an institution where participation is involuntary.25

But as will be shown more extensively in the next chapter, the empirical record the idea that citizens may learn from each other through deliberation and become more active, enlightened citizens has been mixed. In an important study, Mutz (2002) finds that when faced with competing arguments, individuals may often become “confused” and to withdraw from public life rather than learn from disparate views and being energized to

25 For a discussion of the civic educational effects of involuntary participation, see Kage (2011).
participate. Moreover, policymakers, especially those in developmental states, may not always want to foster a more civic-minded citizenry. Indeed, a more civic-minded citizenry may in fact cause headaches for policymakers. For instance, since the introduction of the “saiban-in” (lay judge) system in Japan, some of the ex-lay judges have formed a movement to oppose the death penalty. In sum, although proponents of lay judge systems often laud their effects in terms of civic education, from an empirical perspective, why policymakers would want to pursue civic education is not immediately obvious.

(5) Ruling Party Discontent vis-à-vis Judicial Branch

A fifth possible hypothesis is that ruling parties introduce lay judge systems as a means of imposing greater political control over what they perceive as an out-of-control judiciary. The “fire alarm” view of bureaucratic oversight suggests that legislators may often prefer to design systems that would enable the public to report on bureaucratic abuses. Fire alarm systems are often less costly and enable legislators to claim credit more efficiently than so-called “police patrol”-type oversight (McCubbins and Schwartz 1984). Indeed, courts are an ideal venue for legislators to impose “fire alarm,” rather than “police patrol,” oversight. For instance, there are fifty district courts in Japan, over two hundred branches of district courts, fifty family courts, and over two hundred branches of family courts. These courts are served by more than three thousand professional judges (Supreme Court of Japan n.d.). Given these numbers, maintaining “police patrol”

oversight over all of these courts and judges would be quite labor-intensive. Keeping close tabs on the performance of all of the courts and judges not only would require an enormous amount of resources, but for the most part, politicians would receive little credit for all of their effort. A lay judge system, on the other hand, could be seen as delegating the task of monitoring the justice system to the citizens. Such a system not only enables citizens to report to politicians of irregularities, but it also gives politicians the opportunity to claim credit for addressing those irregularities.

In fact, Alexis de Tocqueville also argued that one of the benefits of a jury system was precisely that it would serve as a means of checking the potentially oligarchic tendencies of an elite corps of legal professionals. Indeed, Tocqueville cautions:

> As you introduce jurors into affairs, you can diminish the number of judges without inconvenience, which is a great advantage. When judges are very numerous… [t]he ambition of judges is therefore continually panting, and it naturally makes them depend on the majority or on the man who names them to vacant posts: one then advances in the courts as one gains ranks in an army. This state of things is entirely contrary to the good administration of justice and to the intention of the legislator (ibid: 259).

Tocqueville’s general argument has been amplified by many more contemporary thinkers, including advocates of deliberative democracy such as Jürgen Habermas.

It is important to note a slight tension between this argument for lay participation and the earlier argument offered by Tocqueville on the benefits of the jury as a “school for democracy.” The “school for democracy” argument stemmed from the rather elitist point of view that average citizens would learn from their exposure to well-conducted trial proceedings. This “fire alarm” argument, by contrast, rests on a distrust of professional
judges rather than a desire to educate the average citizen. It assumes that if left to their own devices, judges may begin to pursue their own agendas with little regard to the general will. From this perspective, the jury serves as a correcting force that keeps professional judges from undermining the regime’s fundamental principle of democracy.

However, the empirical evidence in favor of the argument that ruling parties may install lay judge systems as a check against professional judges is thin. For instance, there is little evidence to suggest that the ruling LDP has been discontented with the professional judges. On the contrary, Japan’s courts have a symbiotic relationship with the long-ruling party and have developed a reputation for timidity in ruling against the LDP (e.g. Ramseyer 1994; Helmke and Rosenbluth 2009; for a contrary view see Upham 2011).29 If, as Ramseyer (2001) suggests, the Japanese judiciary closely monitors itself, then there is no need for politicians to install a fire alarm. Yet in Japan, a lay judge system was introduced. Moreover, as will be detailed much more fully in the empirical chapters of the book, while the LDP never overtly opposed the introduction of a lay judge system, it consistently tried to keep the reforms as cosmetic as possible, and to preserve the power of professional judges as much as it could. The LDP’s position reveals strong faith in, rather than distrust of, the existing professional justice system. Much the same pattern is evident in the conservative parties of Spain, South Korea, and Taiwan. Furthermore, as will be detailed in Chapter 2, the leftist parties that promote lay judge systems tend to view them not as a means of keeping tabs on individual public servants, but rather as a lever for much broader cultural change.

29 Makihara (2006) argues that the reluctance of the Japanese justice system to challenge politicians was motivated by a desire to pre-empt political interference in the judiciary.
In sum, neither rising public distrust of the justice system, nor the configuration of existing legal systems, nor the desire for civic education, nor growing discontent towards the judicial branch on the part of the ruling party, offers a satisfying and cross-nationally valid account either of the introduction of lay judge systems across post-developmental states or the configuration of those systems. International diffusion is part of the story, but it is at best a partial explanation; diffusion per se does not account for the form of diffusion. The book thus sketches out an alternative theoretical argument.

**Overview of Argument**

This book advances a new explanation that focuses on partisan dynamics in post-developmental states. In particular, it argues that the introduction of lay judge systems are typically driven by what Herbert Kitschelt terms “left-libertarian” parties: parties that are ideologically committed to the use of public participation to constrain state abuses of power. Meanwhile, rightist and old-left parties should be ideologically uninterested in, or even hostile to such reforms. *Ceteris paribus*, in post-developmental democracies, the stronger left-libertarian parties are vis-à-vis conservative parties are in terms of their current or expected future political power, the more likely that lay judge systems will be introduced. Moreover, the stronger left-libertarian parties are vis-à-vis conservative parties, the stronger the constraints upon professional judges under the new lay judge systems. The theoretical basis for this explanation will be fleshed out in further detail in the next chapter.

This emphasis on the role of leftist parties also illuminates why some developed
democracies that lack lay judge systems may \textit{not} choose to introduce lay judge systems. In countries with histories of strong leftist rule, the judicial branch becomes inextricably entwined with the ruling party. In general, leftist parties are more likely to initiate proposals to introduce lay judge systems, and to push for systems that impose stronger constraints upon professional judges. This is not to say that conservative parties will never initiate such efforts, but that leftist parties are typically more likely than conservative parties to push for such systems. But if the leftist party develops a close relationship with the judicial branch, this should defuse the enthusiasm of the former to push for measures that would undermine the power of professional judges. Conservative parties, on the other hand, are typically also ideologically disinclined to advocate policies, such as the introduction of lay judge systems, that expand the input of the general public over policy decisions. In such cases, there is likely to be no effort by any party, whether on the left or on the right, to push for an introduction of a lay judge system. Mexico, which has a history of long-term rule by a leftist party, the Partido Revolucionario Institucional (PRI), exemplifies such a case.

The insight that left-right partisan dynamics and partisan differences are key to understanding the design of new lay judge systems has several broader implications for the field of comparative politics. First, judicial politics is not a \textit{sui generis} field of public life that requires a totally different analytical paradigm. While judicial politics is certainly a highly technical and professionalized realm of politics, it is nevertheless driven by partisan ideological dynamics. This insight of the importance of ideology also highlights the possibility that politicians, who are acting on ideology rather than expertise, may at times
advocate particular institutional designs on the basis of wrong assumptions about their likely effects. For instance, as will be detailed later on, the LDP advocated a system with fewer, rather than larger, numbers of lay judges, due to the belief that this would help to preserve the power of professional judges, despite the fact that the scholarly literature finds to the contrary. In short, because of the important role of ideology here, we should not assume that political parties’ judicial reforms will achieve the results they are hoping for.

Second, ideological reforms made in the service of “democracy” may not be a response to real public demands. The influence of the public over whether or not lay judge systems become instituted is at most indirect. High levels of distrust vis-à-vis professional judges do not necessarily lead to the introduction of lay judge systems, while countries with exceedingly high levels of trust in professional judges may nevertheless introduce these systems. This insight has implications for the implementation of lay judge systems once these systems are introduced. Since they are often not a response to a concrete mass public demand, nascent lay judge systems may encounter difficulties in mobilizing people to serve.

Third, the book also suggests that although scholars have documented the many similarities among developmental states, post-developmental states may exhibit considerable degree of policy variation, depending upon partisan configuration. Thus, Japan, Spain, South Korea, and Taiwan “democratized” their judicial systems to quite varying degrees despite their common heritage as a relatively centralized and coherent states. Developmental states that have achieved development do not uniformly evolve into “early-developer” states, nor do they uniformly remain developmentalist; having
achieved their mission, different post-developmental states take on very different trajectories, depending on the relative strengths of different parties that are present at the time. In short, countries’ pasts do not entirely shape their futures.

**Plan of the Book**

The book will proceed as follows. Chapter 2 elaborates on the novel theoretical framework that was sketched above: the importance of partisan dynamics to explain the timing and configuration of new lay judge systems in post-developmental states. Chapter 3 begins to test the empirical validity of the theoretical argument presented in Chapter 2 by conducting detailed process-tracing of the introduction of the *saiban-in* system in Japan. Chapter 4 further tests the theory through content analysis of deliberations over the reform in the Japanese national Diet. Chapter 5 offers in-depth process tracing of the case of Taiwan. Chapter 6 presents further case studies from Spain and South Korea. Chapter 7 summarizes and concludes.