

LAY JUDGES AND LABOR COURTS: A QUESTION OF LEGITIMACY

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I. INTRODUCTION

This Article looks at lay judges in first instance labor courts in five European countries: France, Germany, Great Britain (not the United Kingdom because the arrangements in Northern Ireland are slightly different), Ireland, and Sweden. This interest is prompted by two main developments that have raised the significance of judicial means for resolving individual rights disputes. First, the period since the 1970s has seen a major increase in the volume and impact of individual statutory employment rights, partly as a result of national employment legislation and partly emanating from the legislative activity of the European Union in the employment sphere, as all five countries covered here are E.U. Member States. Second, traditionally the protection of individual employees at the workplace and the resolution of grievances was one of the key roles exercised by trade unions in these countries. During the last half century, however, there has been a substantial decline in trade union density in all these countries, with the exception of Sweden where the decline has been relatively small.¹ This has been paralleled, although not directly, by a fall in the coverage of the workforce by collective agreements, and in particular those concluded at the industry level.² These two factors taken together

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1. AMSTERDAM INSTITUTE FOR ADVANCED LABOUR STUDIES, Jelle Visser, *ICTWSS Database on Institutional Characteristics of Trade Unions, Wage Setting, State Intervention and Social Pacts*, Amsterdam, <http://www.uva-aias.net/208> (last visited Dec. 8, 2013).

2. In the United Kingdom, for example, there is broad alignment between collective agreement coverage and union density. In France, despite low union density, collective bargaining coverage is over 90%. This is due to the continued application of industry bargaining and the extension of industry level agreements to non-signatory employers through administrative processes. See SUSAN CORBY & PETE BURGESS, *ADJUDICATING EMPLOYMENT RIGHTS: A CROSS-NATIONAL APPROACH* (forthcoming 2014).

have generated an upsurge in individual cases brought to the courts and tribunals.³

In some countries, for instance the Netherlands, Portugal, Spain, and Italy, such individual employment rights cases go to the “ordinary” civil courts. In the five countries covered here, however, there are specialized institutions for resolving individual employment rights disputes. They are known generically as labor courts (although there are country specific names which we sometimes use). Moreover, not only do these five countries have labor courts, but these courts have a mixed composition of professional judges and lay judges; the status and role of the latter are our focus.⁴ Thus, we do not cover other differences in these labor courts that do not relate to lay judges (for example, varying access arrangements such as the requirement for prehearing conciliation in Germany⁵ and France,⁶ the payment of court fees in Great Britain and France, or the often complex routes through quasi-judicial forums found in Ireland.⁷) Here, we look solely at lay judges.

We define lay judges as decision makers in a judicial process who are appointed through a range of procedures on the basis of their knowledge and experience of the world of employment, but who are not required to be legally qualified. We mostly use the generic term “lay judge,” but sometimes we use the country specific title. For example, in France lay judges are called *prud’hommes* (literally “good men”) or *conseillers*; in Germany they are called “*ehrenamtliche Richter*” (literally judges with posts “held in honor” rather than remunerated), while in Great Britain they are variously referred to as lay members, nonlegal members, or wing members. All these terms have symbolic implications.

Although there are considerable national differences in the historical routes through which lay judges have come to occupy these roles, one *current* rationale for the presence of lay judges in labor courts is that they contribute to the legitimacy of adjudication. As we explore below, this has many facets. While cross-country comparisons of the extent to which lay judges provide legitimacy are difficult, we argue that it is possible to offer

3. Research in the United Kingdom has found an association between falling union density and the greater use of litigation. See, e.g., Simon Burgess et al., *Explaining the Growth in the Number of Applications to Industrial Tribunals 1972–1997* (Emp. Rel. Res. Series 10, Dep’t Trade & Indus. 2000).

4. In some countries, such as New Zealand and South Africa, there are labor courts without lay judges, only a professional judge.

5. See PETER BADER ET AL., *DIE EHRENAMTLICHEN RICHTERINNEN UND RICHTER IN DER ARBEITS-UND SOZIALGERICHTSBARKEIT* [LAY JUDGES IN LABOR AND SOCIAL JURISDICTION] (13th ed. 2012) (Ger.).

6. See DANIEL BOULMIER, *CONSEIL DE PRUD’HOMMES* [THE EMPLOYMENT TRIBUNAL] (2011) (Fr.).

7. See MAURICE CASHELL, *A HISTORY OF THE RIGHTS COMMISSIONER SERVICE 1970–2010* (Labor Relations Commission ed., 2011); Anthony Kerr & Cathal McGreal, *Practice and Procedure in Employment Law*, in *EMPLOYMENT LAW* (Maeve Regan ed., 2009).

some comparisons, albeit tentatively, and subject to the criteria adopted for defining legitimacy.

Turning to the structure of this Article, having examined the rationale for lay judges and outlined our methodology, we provide a brief overview of labor court arrangements in the five countries covered. Next, we consider three different aspects of legitimacy, drawing on the approach of Novitz and Syrpis.⁸ Finally, having discussed whether one can compare across countries, we make some concluding observations.

II. THE RATIONALE FOR LAY JUDGES

The use of lay judges in employment matters is not a new phenomenon. In Britain, from the fourteenth century until the twentieth century, magistrates, who were often lay people, were responsible for enforcing employment contracts.⁹ Currently, when first instance federal courts in the United States hear employment discrimination cases, there is often a jury as well as a professional judge. Such juries, drawn from the population, provide a diversity of viewpoints and a means of interjecting community norms into judicial proceedings. Essentially, the judge and jury have separate roles. The jury decides the facts and the professional judge sets out the relevant law. This separation is reinforced by the fact that the jury retires separately without the professional judge.

In many labor courts, there are lay judges, (often termed an industrial jury in Great Britain), but the structure is tripartite, literally “three parties.” The lay judges represent the two sides of industry: employer and employee representatives, and they sit with a third party who is normally a legally qualified person. Unlike the “ordinary” courts, in labor courts the lay judges and the legally qualified judge all retire together and all decide both fact and law.

In Great Britain, lay judges sit with professional judges in some types of cases only and, where they do so, the overwhelming majority of decisions are unanimous. For example, Selwyn said that 96% of decisions were unanimous, and a survey by Corby and Latreille in found that more than 70% of all British professional judges reported all their decisions had

8. Tonia Novitz & Phil Syrpis, *Assessing Legitimate Structures for the Making of Transnational Labor Law: The Durability of Corporatism*, 35 *IND. L.J.* 367 (2006). This adapts earlier work by Walker. See Neil Walker, *The White Paper in Constitutional Context* (Working Paper No. 01/2001, 2001), available at http://www.researchgate.net/publication/5015354_The_White_Paper_in_Constitutional_Context; Jean Monnet, *Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance* 33 (Working Paper No. 6/01, RSC, 2001), available at <http://www.eui.eu/Documents/RSCAS/Research/OnlineSymposia/Weiler.pdf>.

9. DOUGLAS HAY & PAUL CRAVEN, *MASTERS, SERVANTS AND MAGISTRATES IN BRITAIN AND THE EMPIRE, 1562–955* (2004).

been unanimous in the previous year, with a further 21% recalling only a single majority decision.¹⁰

In Sweden, 85% of all the labor court judgments were unanimous according to the Chief Judge in 2002, and the proportion of unanimous decisions has risen over the past decade.¹¹ In Germany, dissents are not announced, but a similar degree of unanimity appears to exist.¹² France has a bipartite system with employer and employee representatives, and a professional judge is brought in only to break a tie if they do not agree. For much of the period from the early-1980s until 2001, the proportion of cases that resulted in a tie-break hearing varied between 10% and 14%, and from 1988 to 1997 between 10% and 12%. Since then, there has been a steady rise in this rate, and between 2007 and 2011 it was approximately 18–20% against a background of considerable regional variation.¹³ This increase has been attributed to changes in the type of cases, with more cases prompted by economic terminations that, in France, are seen as less amenable to bipartisan consensus.

The fact that so many decisions are unanimous may make the decisions more acceptable to the parties than a split decision, but what is the explanation for this unanimity in the large majority of cases? One explanation is that, despite the fact that all the judges are equal, in practice, the legally qualified judge dominates in tripartite labor courts. The professional judge chairs the hearings and thus controls the proceedings, and hearings are held in a court concerned with the adjudication of increasingly complex legal entitlements set out in statute and interpreted in case law; this is a context to which legally qualified persons, unlike lay judges, are accustomed. Furthermore, this view is supported by research outside the employment sphere; where lay judges sit with legally qualified judges, the former are marginalized, especially where the law is complex.¹⁴

10. NORMAN SELWYN, *SELWYN'S LAW OF EMPLOYMENT* 10 (15th ed. 2008). Selwyn does not provide any source for the figure that he quotes. Susan Corby & Paul L. Latreille, *Survey Evidence: ET and EAT Judges and Lay Members* (2011), available at <http://www2.gre.ac.uk/about/schools/business/research/centres/weru/publications> (last visited Dec. 16, 2013).

11. MICHAËL KOCH, REPORT TO TENTH MEETING OF EUROPEAN LABOUR COURT JUDGES 3 (2002); Interview with Michaël Koch, Chief Judge of the Labor Court (Arbetsdomstolen), Stockholm, Sweden (Mar. 28, 2012).

12. BADER ET AL., *supra* note 5, at 4 (noting a figure of 90% unanimity, as reported by judicial trainees for the bench, who attend labor court deliberations).

13. MINISTÈRE DE LA JUSTICE [MINISTRY OF JUSTICE], *Statistique judiciaires: Activité des conseils de prud'hommes-Données détaillées—Cumul France entière, 1983–2011* [Judicial Statistics: Activity of Employment Tribunals—Detailed Breakdown, Cumulative, All-France 1983–2011], <http://www.justice.gouv.fr/statistiques.html> (last visited Dec. 1, 2013).

14. See, e.g., Sanja Kutnjak Ivković, *Lay Participation in Decision Making: A Croatian Perspective Mixed Tribunals*, 36 HOWARD J. CRIM. JUST. 406 (1997) (in respect of Croatian criminal appeals); Nick Wikely & Richard Young, *The Marginalisation of Lay Members in Social Security Appeal Tribunals*, 2 J. SOC. WELFARE & FAM. L. 127 (1992) (in respect of British social security appeals).

Research pointing to professional judge domination outside the employment sphere does not necessarily translate to labor courts, but even were it to do so, it would not explain unanimity in France's bipartite labor court, i.e., a court with lay judges only. In France at the end of nineteenth century, "bourses du travail" attempted to impose a *mandat impératif* to oblige worker lay judges always to vote in favor of the worker by establishing a "committee of vigilance" to oversee lay judges from the workers' side. Hepple notes that this had the opposite effect and met with resistance from the judges.¹⁵ The *mandat impératif* was, in fact, prohibited in 1907. Lay judges' disinclination to accept a binding mandate may also have been tactical: in 1905, scope had been introduced for a judge to rule in the event of a tie. If worker-elected judges always voted for the employee's cause, and the employer did the opposite, then this would have led to nearly all cases ultimately being taken out of the hands of the lay judges and decided by a professional judge.

We submit that a more persuasive explanation is that, having secured their role through a procedure that legitimizes their status as representatives of their "side," lay judges subsequently saw themselves as impartial and objective, and open to persuasion and argument during deliberations, in part to sustain and legitimate the existing bipartite structure. French lay judges' practice of compromise and a common interpretation of legal standards are not unique. In Great Britain, for example, a senior judge commented on the fact that the lay judges approach their work objectively and judicially and not as partisan representatives of employer or employee as the case may be.¹⁶ In Germany, Höland noted: "The vast majority of the professional judges, presiding [over] the chambers of the court, appreciate explicitly the expertise and the work life experience of the lay judges."¹⁷

15. Bob Hepple, *Labour Courts: Some Comparative Perspectives*, 41 CURRENT LEGAL PROBS. 169, 182 (1988).

16. Nicolas Browne-Wilkinson, *The Role of the Employment Appeal Tribunal in the 1980s*, 11 INDUS. L.J. 69 (1982). Although this comment applies to lay judges in Great Britain's appellate labor court, (the Employment Appeal Tribunal (EAT)), there are no grounds for distinguishing between British lay judges at first and second instance, especially as many lay judges at the EAT were formerly lay judges at first instance.

17. Armin Höland, *Fairness Control of Dismissals by Labour Courts—Legal conceptions and Practical Effects* (July 2007), <http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1002&context=soceuro>. Höland draws on an empirical survey of labor court practice. See also ARMIN HÖLAND ET AL., KÜNDIGUNGSPRAXIS UND KÜNDIGUNGSSCHUTZ IM ARBEITSVERHÄLTNIS [PROTECTION AND PRACTICE IN TERMINATING THE EMPLOYMENT RELATIONSHIP] 219 (2007) (Ger.), for full results of the survey of professional judges' opinions about the role of lay judges. A survey of lay judges' views was not included in this study, in contrast to a preceding survey conducted in 1981, in which the unanimity of the court was attributed by the authors, in part, to passivity on the side of the lay members, although both professional judges and lay members gave a positive account of lay members' contribution. See JOSEF FALKE ET AL., KÜNDIGUNGSPRAXIS UND KÜNDIGUNGSSCHUTZ IN DER BUNDESREPUBLIK DEUTSCHLAND [DISMISSAL PRACTICE AND DISMISSAL PROTECTION IN THE FEDERAL REPUBLIC OF GERMANY] (1981) (Ger.).

In short, given that lay judges and professional judges have the same role in adjudicating fact and law, and given that a very large percentage of decisions are unanimous, the contribution of lay members cannot be discerned from considering the decisions themselves, i.e., the outcome. So what do lay people add to decision making in employment cases? There is some evidence to suggest that lay members contribute to the *process*. In a survey in 2011 of professional and lay judges in Britain's labor courts, 31% of legally qualified judges said they had "often" materially altered a lay judge's initial views on liability, with 63% saying they had done so "sometimes." For their part, 12% of lay judges said they had "often" materially altered a professional judge's initial views on liability, with 70% having done so "sometimes." Accordingly, the lay judges and the professional judge may often start from different positions, but after further scrutiny of the evidence before them, and further discussion and debate, in the vast majority of cases a unanimous decision is reached.

This contribution to the decision making process relates to procedural justice. The legitimacy of the way the decision is reached and the 2011 survey mentioned above found that the majority of British professional judges (55%) and lay judges (98%) broadly agreed with the statement that "a three person tribunal is likely to have greater legitimacy for parties than a judge sitting alone."¹⁸

III. LEGITIMACY UNPICKED

Legitimacy, however, is a complex concept, often intertwined with procedural justice. The Oxford Thesaurus likens legitimacy to justice, fairness, credibility, and acceptability.¹⁹

There are a number of conceptual frameworks for addressing the legitimacy of the decision-making process. Theories of procedural justice focus primarily on *perceptions* of decision-making procedures from the standpoint of those affected by these decisions. There is a body of research on citizens' perceptions of the fairness of judicial processes in country-specific or locality-specific situations.²⁰ To date, however, we have not found *comparative* empirical research dealing specifically with judicial processes, but rather only of decision making, for instance, by managers. Such comparative research has used survey evidence, with some work exploring the relationship between perceptions of fairness and broader conceptualizations of national cultures, sometimes using simulations

18. See Corby & Latreille, *supra* note 10, at 17.

19. LAWRENCE URDANG, THE OXFORD THESAURUS (1997).

20. For example, Tyler looked at perceptions of procedural justice in respect of the Chicago police and courts. See Tom R. Tyler, *What Is Procedural Justice—Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 L. & SOC. REV. 103 (1988).

instead of real events.²¹ This Article argues that lay judges in the employment sphere are not limited to providing legitimacy principally because, like virtually all the claimants and respondents, they are non-lawyers. They also provide legitimacy because they have expertise: they enable adjudication to be carried out by persons with knowledge and experience of the workplace, and of employment more broadly, which the professional judge does not normally possess. Research that included interviews with those representing claimants and respondents in Britain's labor courts supports this view. A typical comment was that at least there was someone there who could "appreciate things" from a workplace perspective.²² Accordingly, lay judges' legitimacy draws on a concept not only of peer-based adjudication, but also adjudication by persons who have acquired expertise and gained tacit knowledge. In this context, the distinctions developed by Novitz and Syrpis allow a more nuanced approach that can be productively applied to the employment adjudication context.

Novitz and Syrpis consider legitimacy from the perspective of the *making* of transnational labor law. They maintain that legitimacy has three inter-related aspects: performance legitimacy, regime legitimacy, and polity legitimacy.²³ This Article uses the typology of Novitz and Syrpis as an analytical framework for considering labor law *adjudication*. We adopt this typology because we consider that it is a useful heuristic device that enables us to differentiate between a number of aspects of legitimacy, and in particular those pertaining both to the immediate situation and to wider contexts.

According to Novitz and Syrpis, performance legitimacy "relates to the ability of any political entity to deliver policy goals"²⁴: efficiency-based arguments are decisive. This, however, raises the question of how efficiency is to be operationalized and, in the context of this Article, how and by whom the contribution of lay judges is to be evaluated. In our context, performance legitimacy might be held to be a function of the extent to which lay judges' workplace experience is utilized, the development of their expertise and its application in an adjudicative process. Performance legitimacy is, in principle, ascertainable, and possibly measurable, by looking at outputs. Effective and "good" decisions can be accepted by the parties; "poor" decisions, in which expertise has not been brought to bear,

21. Joel Brockner et al., *Culture and Procedural Justice: The Influence of Power Distance on Reactions to Voice*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 300 (2001).

22. Susan Corby & Paul L. Latreille, *Interviews with Stakeholders* (2011), available at <http://www2.gre.ac.uk/about/schools/business/research/centres/weru/publications>.

23. See Monnet, *supra* note 8; Walker, *supra* note 8.

24. Novitz & Syrpis, *supra* note 8, at 369.

can be rejected, either through avoidance of the system (cases not brought to labor courts) or through high levels of appeals.

Regime legitimacy for Novitz and Syrpis refers to the nature of the organizational structure and the representative capacity and accountability of participants. Applied to the employment context, one yardstick would be ease of access to the system and speed of decision making, issues that we do not deal with here (but which might be relevant to attraction to/avoidance of the system). A further aspect is that of transparent selection and the representativeness, in a broad sense, of lay judges. Transparent selection would underpin acceptance that methods for choosing lay judges were readily understandable and understood and accepted by participants. The issue of representativeness and accountability is a complex one. For example, should lay judges be representative of and accountable to the parties who nominate them (often organizations that embrace only a minority of the working population and of employers), and how does this relate to the extent that they reflect the wider population (in terms of interests, attitudes, and demographic characteristics)? While there may be an aspiration for the body of professional judges to be more socially diverse, this is not a defining characteristic of an ability to apply the law. However, if one aspect of the regime legitimacy of *lay* judges is their representativeness, as well as their expertise, then this could be relevant in an evaluation of their legitimacy.

Finally, polity legitimacy, for Novitz and Syrpis, is an umbrella term that relates to the extent to which an entity "meets certain minimum conditions of political community."²⁵ Applied to labor courts, one yardstick might be the extent to which labor courts with lay judges echo the social or economic arrangements in the country concerned. This is a much more difficult notion to operationalize, given that it is highly diffuse, by its nature relativistic and, in view of the political and industrial relations background of most polities, contested. At the same time, it is also likely to be an extremely significant variable, as it embodies deeply held cultural assumptions about what is appropriate and inappropriate.²⁶

IV. METHODOLOGY

Before considering our findings, we outline our methodology. The five countries studied are all in Western Europe, all are members of the European Union and are thus subject to E.U. employment legislation, and all have labor courts with lay judges. These countries exhibit different

25. *See id.*

26. These perhaps become more evident when major institutional change is proposed or implemented.

approaches toward lay judges' selection, training, and deployment and indeed represent different European models: Nordic (Sweden), Continental (Germany), Latin (France), and Anglophone (Great Britain and Ireland). They do not, however, represent an exhaustive list of countries that have labor courts with lay judges.²⁷

This study of labor courts is primarily based on desk research drawing on official materials, statutes, handbooks, and legal commentaries in English, French, and German. In addition, face-to-face interviews with six stakeholders were held in Ireland (heads of the main judicial bodies, members, public officials, and an employer representative); ten stakeholders in Sweden (professional and lay judges, lawyers, and public officials) and in Germany, face-to-face interviews were conducted with three Federal Labor Court judges. In Great Britain, one of the authors has extensive experience as both a participant (lay judge) and observer of its first instance and second instance labor courts. The interview material was mainly used to elucidate and clarify institutional practice in order to allow for institutional comparison, which is the main focus in this Article. Further research is needed on the practice of key actors.

V. LAY JUDGES IN LABOR COURTS

A. *Constitution*

All the countries examined here divide lay judges into an employee and employer side and such lay judges provide a workplace perspective that can be distinguished from the legal perspective of the professional judge. This aside, there are substantial differences in how first instance labor courts are constituted. Germany's are tripartite, i.e., a legally qualified judge and equal numbers of employer and employee lay judges, as is Ireland's Employment Appeal Tribunal (EAT) that, paradoxically, is mainly a first instance labor court.²⁸

In Sweden, unusually, the tripartite labor courts include a labor market expert as well as professional judges as their independent third party, plus as in other countries in this Article, equal numbers of employer and employee lay judges. Unusually, also in Sweden, only labor market actors, which are trade unions and employers' associations/employers who are

27. For example, Belgium, Denmark, Finland, and Luxembourg all have labor courts with lay judges, as do some ex-Soviet countries, such as Slovenia.

28. Other first instance complaints may be adjudicated by a single nonlegally qualified adjudicator, a Rights Commissioner, or the Equality Tribunal. Ireland, however, is on the cusp of radical change. The EAT is set to be abolished and all adjudication at first instance would be by a single, nonlegally qualified adjudicator with appeals *de novo* to a tripartite labor court. See RICHARD BRUTON, BLUEPRINT TO DELIVER A WORLD-CLASS WORKPLACE RELATIONS SERVICE (2012).

party to a collective agreement, and the Discrimination Ombudsman (where it is an employment matter) have access to the labor court.²⁹ Swedish workers not supported by a labor market actor have to go to the district court.

In Great Britain, the labor court (employment tribunal) deals with most labor issues,³⁰ but only some of them are heard on a tripartite basis. Over the past two decades, the government has been whittling away the role of lay judges by requiring an increasing number of types of complaint to be heard by the professional judge alone. Although the professional judge has discretion to opt for a tripartite labor court subject to certain statutory criteria, in practice the professional judge now sits with lay judges only essentially in discrimination cases.³¹ Finally, in France, as noted above, cases are heard in first-instance labor courts by equal numbers of employer and employee members (*prud'hommes*) without a professional judge: a bipartite system. A professional judge is only brought in as a tiebreaker if an agreement cannot be reached.

Figure 1: *Adjudication in First Instance Labor Courts*³²



With regard to appeals, Sweden's Labor Court is the first and the only court for cases that begin there, as there is no appeal from it on any ground. If a case begins in the civil court, which as noted above occurs where a claimant is not supported by a labor market actor, then appeal is to the Labor Court, giving the lay judges nominated by the social partners a key role in determining the eventual outcome.

29. In Sweden, many employment rights, including working hours, are set out in collective agreements, whereas in Great Britain, for instance, there is legislation.

30. Essentially, in Great Britain, contract issues and personal injury claims are heard by the "ordinary" civil courts.

31. As an illustration of the dimension of "polity legitimacy," some of our interviewees for this study in Germany were astounded that the professional judge, not the legislature, could decide the composition of the labor court.

32. In Great Britain, the default position is that some types of complaint are heard by the labor court constituted on a unipartite basis, while some types of complaints (essentially discrimination complaints) are heard in the labor court constituted on a tripartite basis. In Ireland, complaints relating to the same set of circumstances are heard in different adjudicative bodies, some constituted on a unipartite basis and one constituted on a tripartite basis.

Germany also has an autonomous employment adjudication system. It is tripartite at every level: after a first instance decision by the tripartite local labor court, an appeal can be made to the relevant regional (*Land*) court on fact and law in a range of prescribed circumstances, including if the sum at issue exceeds a certain amount (€600 at the time of writing); if the issue centers on termination; or if the first instance court is of the view that the case is “of fundamental significance.” A further appeal, on a point of law only, can be made to the tripartite Federal Labor Court.³³

In Great Britain, appeals on a point of law go from the first instance labor court to the Employment Appeal Tribunal (EAT) where from 2013 the default position is unipartite, a professional judge alone.³⁴ After this first level of appeal, further appeals can be made on points of law to the Court of Appeal³⁵ and the Supreme Court, but these are “ordinary” appellate courts staffed exclusively by professional judges.

In France, an appeal can be made *de novo* if the amount at issue exceeds €4,000 (taking each claim separately, not the aggregate). The appeal is to the social chamber of the court of appeal, which is staffed only by professional judges. A further appeal on a point of law can be made to court of *cassation*, a general court also only staffed by professional judges.³⁶

Ireland has a complex system, not only at first instance, but also for appeals. In the main, appeals on individual rights disputes ultimately go to the “ordinary” courts, where professional judges sit without lay judges. Thus, appeals from the first instance labor court (EAT) go to the Circuit Court on fact and law under the unfair dismissal and maternity protection legislation. Ireland, however, has another appellate body: the Labor Court. The Labor Court is tripartite, but the independent member is not required to be legally qualified. As well as hearing collective issues at first instance, it provides the first level of appeal from decisions of a Rights Commissioner or the Equality Tribunal. Further appeals from the Labor Court go to the High Court on a point of law.³⁷

33. See R. DENDORFER, DAS ARBEITSGERICHTSVERFAHREN [THE LABOR COURT PROCEDURE] 67, 77 (2011) (Ger.).

34. Enterprise and Regulatory Reform Act, 2013, c. 24 (Eng.). Previously, where there was tripartite composition at the first instance labor court, there was tripartite composition at the EAT.

35. Three of the Court of Appeal judges at the time of writing were formerly presidents of the EAT and are often, but not always, one of the three judges sitting on an employment case.

36. MINISTÈRE DES AFFAIRES SOCIALES, DU TRAVAIL ET DE LA SOLIDARITÉ, [MINISTRY OF LABOR AND SOCIAL AFFAIRS], *Le Conseil de Prud'hommes [The Employment Tribunal]* 94 (2002) (Fr.).

37. CORBY & BURGESS, *supra* note 2.

B. Regime Legitimacy

1. The Role of Worker and Employer Organizations

After this brief overview, we now return to our central concern: the legitimacy provided by lay judges, dealing first with regime legitimacy, which relates to transparent selection, representativeness, and accountability.

Direct nomination by trade unions and employer associations remains the norm outside of Great Britain, although the extent to which the state has an over-riding voice varies. In Ireland, public officials automatically accept nominations from a wide variety of labor market participants for Ireland's first instance tripartite labor court, confusingly called the Employment Appeal Tribunal (EAT). In France, public officials also automatically accept those lay judges put forward by worker and employer organizations, of which there is a wide range, but these lay judges have only been put forward by the worker and employer organizations after all-member elections in which trade unions compete against each other, as do the employer organizations. Elections are held every five years by a complex system of proportional representation based on a list system.³⁸

In Germany, the final decision on appointment to labor courts is made by public officials. Organizations may compete, principally on the employee side, as no particular employee organization has an institutional privilege, provided it meets certain statutory criteria, but also there are criteria relating to the characteristics of nominees. If there are more nominations than places, public officials from the Labor and Justice Ministries in *Land* governments then scrutinize the nominating organizations, considering, for instance, number of members and collective bargaining activity (number of agreements). Officials are not bound by the original lists provided by each organization and may ask for more nominations, for example, to ensure that minorities and/or the social and economic structure of the district are appropriately reflected in the composition of the court. This includes an appropriate balance of different employees (skilled, unskilled, white-collar) and employer (large, small)

38. JACKY RICHARD & ALEXANDRE PASCAL, POUR LE RENFORCEMENT DE LA LÉGITIMITÉ DE L'INSTITUTION PRUD'HOMALE: QUELLE FORME DE DÉSIGNATION DES CONSEILLERS PRUD'HOMMES? [STRENGTHENING THE LEGITIMACY OF LAY PARTICIPATION: HOW SHOULD LAY JUDGES BE APPOINTED?] (Rapport au Ministre du Travail, de la Solidarité et de la Fonction Publique, 2010), available at http://www.travail-emploi-sante.gouv.fr/IMG/pdf/VF_rapport_200510__2_.pdf (Fr.) The elections are a test of the relative strength of the trade unions each of whom encourage their members to vote for their slate.

types. As a rule, however, public officials appoint in order of the lists from nominating organizations without further ado.³⁹

In Sweden, worker and employer organizations do not compete. There are entitlements laid down in statute. Sweden's labor court, in addition to the professional judges and the labor market experts, has a panel of seven trade union side members and seven employer side members.⁴⁰ The union panel comprises four lay judges drawn from the main trade union confederation (LO), two from the professional employees' confederation (TCO), and one from the professional associations' confederation (SACO). The employer panel comprises four drawn from the main employers' confederation (SN), one each from the associations for local authorities and for county councils, and one to represent the state as employer.⁴¹ In addition, each judge has three stand-ins or deputies. All these social partner organizations "recommend" to the employment ministry, but in practice the "recommendations" are accepted.

Unlike the other countries covered in this Article, Britain's social partners have not played a part in the selection of lay judges to Great Britain's labor courts for over a decade. Since 1999, lay judges have nominated themselves to the employee or employer panel.⁴² This is not to say that self-nomination does not take place outside Great Britain, but it is typically behind an institutional veil, through internal search or self-promotion, and individuals do not submit applications directly to appointing authorities. Also in Great Britain, self nominees are assessed by formal selection processes which draw on a conventional human resources repertoire (competency frameworks, job requirements, formal interviews) overseen by the Judicial Appointments Commission; there is virtually no involvement of the social partners in this selection, which is conducted by human resources consultants assisted by professional judges.⁴³

Great Britain's system for the selection of lay judges has no institutional parallel in other countries with lay judges. In France, Germany, Ireland, and Sweden, the institutional bearers of expertise, the worker and employer organizations, assess potential lay judges either informally or formally through proxy indicators such as employment

39. See BADER ET AL., *supra* note 5, at 38. The existence of multiple unions derives from German constitutional provisions on the freedom of association.

40. ARBETSDOMSTOLEN [LABOR COURT], *Välkommen till Arbetsdomstolens hemsida* [Presentation of the Swedish Labor Court], <http://www.arbetsdomstolen.se> (last visited Dec. 16, 2013) (Swed.).

41. *Id.*

42. This has sometimes proved problematic where managers who are also union members nominate themselves to the employee panel. See DEPARTMENT OF TRADE AND INDUSTRY, EMPLOYMENT TRIBUNALS: LAY MEMBER RECRUITMENT EXERCISE 2002: EVALUATION SUMMARY (2003).

43. See *id.*

relations experience. Somewhat paradoxically, however, although in Great Britain worker and employer organizations do not play a part in the nomination and selection of lay judges, tripartism has not been totally obliterated: the final stage is appointment by the Minister, who only appoints after consulting with organizations representative of employers and employees, although in practice this is a formality.⁴⁴ There is no such consultation, however, when British lay judges are reappointed after their three-year term, a reappointment that is virtually automatic until the age of seventy.

The extent to which worker and employer organizations have a key role in the selection and appointment of lay members is one aspect of regime legitimacy, although one that is open to challenge should these systems be seen to be vulnerable to “insiderism,” where strong organizations gain institutional privileges. Another aspect is accountability. In none of the countries reviewed here, however, is there any identifiable attempt by nominating or electing employer/union bodies either to suggest an approach to those who “represent” them, or to obtain feedback from them. In fact, evidence from France, for example, suggests that lay judges are very concerned to assert their independence from their organizational roots and act as judges, not representatives.⁴⁵

2. The Wider Population

One criterion for regime legitimacy might be deemed the extent to which lay judges are representative of the worker and employer organizations. Another is the extent to which they represent the wider population, for instance, in respect of gender and ethnicity.

In Germany, legislation regulating all types of courts states that women and men must be “appropriately represented,” but there is disagreement amongst commentators, as well as differing *Land* level legislation, on how this should be interpreted. Bader et al., for example, note that to reflect the proportion of women in the workforce, 45% would be appropriate.⁴⁶ The proportion of female lay judges in North-Rhine Westphalia in 2012 was 24%⁴⁷ and, as noted above, public officials

44. Employment Tribunals (Constitution and Rules of Procedure) Regulations, 2004, S.I. 2004/1861, reg. 8 (Gr. Brit.).

45. See, e.g., Boulmier, *supra* note 6, at 205.

46. See BADER ET AL., *supra* note 5, at 42.

47. NRW *Justiz in Zahlen: Ehrenamtliche Richterinnen und Richter [Justice in Figure: Lay Judges]*, http://www.jm.nrw.de/Gerichte_Behoerden/zahlen_fakten/statistiken/Ehrenamtliche_Richter.pdf (2012); see also BADER ET AL., *supra* note 5 (discussing the proportion of women in the workforce).

virtually never reject worker and employer organizations' nominations in practice on any grounds, including diversity.⁴⁸

In France, organizations putting forward lists for election must seek to achieve an improved gender balance by reducing the gap between the proportion of women elected and their proportion of the relevant electorate. The proportion of women lay judges has risen considerably recently, and 28.4% of all *conseillers* were women in 2008, although this is still less than the proportion of women working in France.⁴⁹ By section, the proportion ranged from 21.5% in industry to 38.1% in "miscellaneous activities."⁵⁰

In Great Britain, not only gender but also ethnicity are considered specifically in the recruitment of lay judges. The Judicial Appointments Commission (JAC) is enjoined to widen the membership of the judiciary in terms of diversity; statistics are noted and tests for admission as a lay judge are checked for disparate impact.⁵¹ A survey conducted in 2011 found that 44% of Britain's lay judges were female and 6% were from black or minority ethnic (BME) groups, approaching a reflection of the gender and ethnicity of the wider working population.⁵² It is worth noting that the increase in women and BME persons as lay judges dates back to 1999 when self-nomination superseded nomination by worker and employer organizations, suggesting that social representativeness appears to be at odds with institutional nomination/appointment.

As to the nature of employment in the relevant area, this is a consideration in Germany only where public officials can in theory (but do not in practice) reject nominations of employer and worker lay judges if they do not reflect the social and economic structure of the locality.

48. Interview undertaken as part of ESRC RES-000-22-4154. Interview with three German Federal Labor Court judges together—a professional judge, a worker lay judge, and an employer lay judge, Erfurt, Germany (July 15, 2011) (names redacted as promised before interview).

49. *Report on Equality Between Women and Men 2010*, COM (2009) 694 final (Dec. 2009), available at <http://ec.europa.eu/social/BlobServlet?docId=4613&langId=en>.

50. MINISTÈRE DU TRAVAIL, DES RELATIONS SOCIALES, DE LA FAMILLE, DE LA SOLIDARITÉ ET DE LA VILLE. *Chiffres-clés de l'égalité entre les femmes et les hommes, 2009 [Key Data on Equality Between Men and Women, 2009]*, at 15 (Ministère du Travail, des Relations Sociales, de la Famille, de la Solidarité et de la Ville, 2010) (Fr.).

51. The government's focus on diversity is illustrated by the establishment of the Advisory Panel on Judicial Diversity in 2009 chaired by Baroness Neuberger and the subsequent formation of a Judicial Diversity Taskforce to take forward its recommendations.

52. Corby & Latreille, *supra* note 18. For the latest statistics on the gender and ethnic composition of Great Britain's labor force, see U.K. NATIONAL STATISTICS, <http://www.statistics.gov.uk/hub/index.html> (last visited Dec. 1, 2013).

C. Performance Legitimacy

1. Workplace Experience

Performance legitimacy relates to some measure of effective output, and we have already noted that lay judges inject an employment relations and workplace perspective, often of a complex and tacit kind, complementing the legal perspective of the judge. Such a workplace perspective arguably helps ensure that legal decisions take account of context, and thus lay judges add to the performance legitimacy of labor courts by enabling “better”—that is, more well-founded decisions—to be made. Associated with this, it is also arguable that, given the knowledge that lay judges are meant to bring to bear, their performance legitimacy (as well as, possibly, regime legitimacy) would be enhanced the more closely their workplace experience mirrors that of the disputing parties, and a number of systems of labor jurisdiction make formal provision for just this. In practice, there is spectrum ranging from countries with a sector-based chamber system, as in France, to Great Britain, where precise matching has been discouraged.

In France, the bipartite labor courts comprise lay judges who are elected by the two sides of industry in five autonomous sections: industry, commerce and private services, agriculture, managers, and a general section. The labor courts are organized territorially and “to ensure that best account is taken of social and economic realities,” each of the 210 labor courts are divided into the same five occupational sections that were used in the electoral process and the lay judges then sit in the appropriate section.⁵³ In general, this form of matching is a good deal weaker than it might appear: the categories are very broad and many cases go to the “general” chamber. One of the functions of the chamber system is simply to break down caseloads into manageable proportions, albeit on a sectoral basis rather than simply allocation by geography.

Germany’s first instance labor courts, also organized territorially, may establish specialist chambers (*Fachkammer*) to match lay judge expertise to the workplace of the parties. However, in practice this happens in only a few courts in the largest towns (principally Berlin) for either an industry/sector such as the public sector and construction, or for specific occupational groups, such as technical staff. In Ireland’s EAT, there is no formal chamber system, but some matching between lay judges’ knowledge

53. MINISTÈRE DES AFFAIRES SOCIALES, *supra* note 36.

and a case may be undertaken informally by the listings officer.⁵⁴ In Sweden's labor court, matching takes place in certain circumstances: if the case concerns the application of a collective agreement, the employer/employee members are chosen from the sector of the labor market in which the dispute arises, conflicts of interest apart.⁵⁵

In Britain's labor courts, as noted above, the matching of the lay judge's workplace experience to the parties' type of workplace is discouraged. Over forty years ago, the Royal Commission recommended that "the lay judges sitting in a case are, if possible, not connected with the industry in which the dispute has arisen."⁵⁶ More recently, a labor court hearing a case of sex discrimination in a police authority included a lay judge selected because he was an equal opportunities adviser employed in another police authority. The appellate court ruled, however, that was undesirable as lay judges might be informed more by their own knowledge than by the facts and evidence relevant to the particular case.⁵⁷

2. Training and Appraisal

Another aspect of performance legitimacy is the extent to which lay judges receive training, since it can be argued that training contributes to lay judges' effectiveness in the decision making process and thus raises the performance legitimacy of the bodies on which they sit. Of course, this depends on the quality of training and whether training actually improves performance, an issue that could be gauged by an appraisal of courtroom behavior and judge-craft.⁵⁸

Bearing in mind these caveats, there is no simple correlation between the provision of training and support for lay judges and the approach to nomination and appointment. The more individualistic British system, where lay judges self-nominate, shifts the onus for training to the state, which pays lay judges who attend the training, such training being normally provided by the professional judges. This is also essentially the position in France, where lay judges are put forward by worker and employer organizations after election by their members. Training is financed by the state and carried out by an authorized organization. In Ireland, which is

54. Interview with the following three people together: Kate O'Mahony (Chair, Employment Appeals Tribunal), Peter O'Leary (Vice-Chair, Employment Appeals Tribunal), David Small (Secretary, Employment Appeals Tribunal), Dublin, June 28, 2011.

55. In Sweden, many matters that are statutorily regulated in other countries, such as working time and a minimum wage, are regulated by collective agreements.

56. ROYAL COMMISSION ON TRADE UNIONS AND EMPLOYERS' ASSOCIATIONS, 1865-1968 (CHAIRMAN LORD DONOVAN) REPORT, PRESENTED TO PARLIAMENT, at 158 (June 1968).

57. *Halford v. Sharples & Ors*, [1992] I.C.R. 146 (Gr. Brit.).

58. In Great Britain, there is a formal system for a regional judge to appraise and observe professional judges in the courtroom, but there is no formal system in respect of the lay judges.

also characterized by social partner nominations, training for EAT members is provided by the EAT itself and members may also receive some support from their nominating organizations.

In Germany, where trade union and employer bodies nominate lay judges, there is no general statutory obligation on the state to provide preparatory or ongoing training for lay judges, nor any custom and practice. As a rule, trade unions and employer associations provide training, with some financial support from *Land* governments. The usual amount appears to be 75% of the training costs, but this varies from region to region.⁵⁹ Employees who are lay judges have an entitlement to reasonable, and usually paid, time off for training conducted by trade unions, while the German association for labor court judges holds events and circulates information. In Sweden, according to the former Chair of the Labor Court, “no training of law and procedure is given to lay judges. It is up to the professional judges, primarily the chairman, to explain matters of law and procedure,”⁶⁰ although many of the lay judges, particularly on the union side, are legally trained.⁶¹

As to appraisal, there is no system of appraisal of the lay members in any of the countries studied by the professional judges or by the nominating or appointing bodies.

D. Polity Legitimacy

Polity legitimacy is the most general of the categories used by Novitz and Syrpis. It provides for a consideration not only of the institutions' members, but also the context in which they are embedded. A polity enjoys legitimacy to the extent that “its putative members treat it as a significant point of reference within their political identity.”⁶² Applied here, this “reference” might be seen in the extent to which the labor court's composition reflects that country's broader social and economic context, and is therefore consonant with the values and perceptions of employees and industrial relations actors. As such, the substance of polity legitimacy could vary substantially between different national systems and, potentially, as between actors within the same system. Polity legitimacy is, therefore, a contested concept. Evidence to attempt to ascertain it would have to consider both support for the system, as well as responses to proposals for change or challenges, and the origins of adjudication systems. Of necessity, these issues can be addressed only briefly in the context of this Article.

59. BADER ET AL., *supra* note 5, at 115.

60. KOCH, *supra* note 11.

61. Interview with Koch *supra* note 11 and interview with Margareta Zanden, worker lay judge, Stockholm, Sweden (Mar. 30, 2012).

62. See Novitz & Syrpis, *supra* note 8; Walker, *supra* note 8.

One approach is to consider the industrial relations context. Does the nomination/election of lay judges through union and employer organizations in France, Germany, Ireland, and Sweden reflect the fact that those countries have a higher organizational density than Great Britain, where lay judges self-nominate? The short answer is “no.” Of the countries considered here, only Sweden has a higher union density than Great Britain. Accordingly, at first sight a labor court constituted with employer and employee members nominated by the worker and employer organizations seems anomalous in many countries. For example, in France, union density is less than 8%⁶³ and the issue of representativeness in France has surfaced from time to time around debates over the legitimacy of lay judges elected via trade unions.⁶⁴ Turning, however, to industrial relations arrangements more broadly, there is an association between the degree of embeddedness of collective institutions (including for workplace representation, the significance of collective agreements, either direct or via extension), tripartite bodies, and the presence of employer and employee nominees on bodies that resolve individual employment rights disputes. For example, Germany, Ireland, France, and Sweden have a greater density of tripartite (and in France also some bipartite) arrangements in other areas of employment and social regulation and governance, albeit with major differences between them.⁶⁵ This perspective would, however, still require that these arrangements are broadly supported and seen as reflective of “encompassing” institutions, to borrow Olson’s term,⁶⁶ and not viewed as capture by insiders.

Another approach to polity legitimacy and conceptualizing the country’s social and economic framework is the “varieties of capitalism” theory. Although space precludes a full discussion, this theory essentially posits that there are “complementarities” between firms’ strategic choices, industrial relations arrangements, vocational training, corporate governance, and employer and employee associations with two broad economic models. In coordinated market economies, coordination problems between economic actors are resolved by non-market methods, while in liberal

63. Union density figures for the countries covered here are taken from OECD, *Trade Union Density*, http://stats.oecd.org/Index.aspx?DataSetCode=UN_DEN (last visited Dec. 1, 2013).

64. Laurent Willemez, *Le sens d’une élection et les frontières de la justice: Les controverses autour des élections prud’homale [The Logic of an Election and the Frontiers of Justice: Controversies over Elections for Lay Judge Positions in Employment Tribunals]*, in HÉLÈNE MICHEL & LAURENT WILLEMEZ, *LA JUSTICE AU RISQUE DES PROFANES [JUSTICE AT RISK FROM THE LAYPERSON]* 15–30 (2007) (Fr.).

65. Marian Schaapman & Robbert van het Kaar, EIRO, *Social Partners and Social Security Systems*, <http://www.eurofound.europa.eu/eiro/2005/09/study/tn0509103s.html> (last updated Feb. 20, 2007).

66. MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* 47 (1982).

market economies these problems are resolved through competitive and contract-based inter-firm relations.⁶⁷

Arguably, the current self-nomination of nonlegal members in Great Britain is consonant with its liberal market economy and weakened collectivism, as is the fact that in many cases professional judges sit alone without employer/employee lay judges. Similarly, Germany's and Sweden's tripartism display "organizational fit" with their coordinated market economies as worker and employer organizations have important roles in the selection and nomination of lay judges, who adjudicate on virtually all except procedural matters. Ireland, however, does not fit this typology easily. First, it has tripartite employment rights adjudicative institutions, with nominations by worker and employer organizations. Second, although it has concluded a series of national social partnership agreements lasting approximately three years in duration (the last one being the Transitional Agreement concluded in late 2008), it is generally classified as a liberal market economy.⁶⁸

Interestingly, only in Great Britain, a liberal market economy, has the presence of lay judges in labor courts been radically reduced by government. In France there have been questions about lay judges, but they have been directed mainly at the selection mechanisms for lay judges, not at their role. Prompted by the low turnout in elections for lay judges (26% on the union side and 31% on the employer side), a government commissioned report has proposed options for changes to the electoral system: simplifying the voting procedure by abolishing voting by section; appointing trade union side lay judges according to the representativeness of the unions; or electing lay judges from an electoral college.⁶⁹

In Germany, a coordinated market economy, such questioning of the virtues of having lay judges, particularly on the Federal Labor Court, has been voiced only tentatively by the main employers' association, the BDA. Even then, the BDA has not held to an entirely consistent position over the

67. The classic exposition is the *Introduction, in* VARIETIES OF CAPITALISM (Peter A. Hall & David Soskice eds., 2001); see also *BEYOND VARIETIES OF CAPITALISM: CONFLICT, CONTRADICTIONS, AND COMPLEMENTARITIES IN THE EUROPEAN ECONOMY* (Bob Hancké, Martin Rhones & Mark Thatcher eds., 2007) (offering critiques and refinements); *DEBATING VARIETIES OF CAPITALISM: A READER* (Bob Hancké ed., 2009).

68. See TIM HASTINGS, BRIAN SHEEHAN & PADRAIG YEATES, *SAVING THE FUTURE: HOW SOCIAL PARTNERSHIP SHAPED IRELAND'S ECONOMIC SUCCESS* (2007); Ferdinand Von Prondzynski, *Ireland: Between Centralization and the Market (1992)*, in *INDUSTRIAL RELATIONS IN THE NEW EUROPE* (Anthony Ferner & Richard Hyman eds., 2009); William K. Roche & Paul Teague, *Firms and Innovative Conflict Management Systems in Ireland*, 49 *BRIT. J. INDUS. REL.* 436 (2011); *Ireland: Industrial Relations Profile* (Queen's University Management School Working Paper Series, Working Paper No: MS_WPS_MAN_09_7, Eurofound, 2013), available at <http://www.eurofound.europa.eu/eiro/country/ireland.pdf>.

69. RICHARD & PASCAL, *supra* note 38.

years, despite its central role in the system.⁷⁰ On the one hand, in the past the BDA has argued for the merging of social and labor courts into a single jurisdiction (possibly even extending to full merger of all the civil courts, which would effectively eliminate lay judges). On the other hand, it currently supports the retention of separate courts with a tripartite composition at all levels, possibly reflecting the recrudescence of social partnership in more recent years.⁷¹ Moreover, a proposal made by some jurists in the mid-2000s to convert appellate courts into professional judge-only bodies garnered little support and was dropped by *Land* justice ministers. Accordingly, German labor courts remain autonomous and tripartite at all levels.

In Sweden, there was some discussion about whether the labor court, normally constituted to hear each case with seven members (two professional judges, one labor market expert and two lay judges drawn from unions and two lay judges drawn from employers), was the appropriate forum for employment discrimination issues. This was because some female members of parliament felt that the four social partner judges in the labor court, who could outvote the three neutrals, might have an interest in preserving the status quo and thus the perpetuation of male advantage in the workplace. It was then agreed that while employment discrimination issues would continue to be heard in the labor court, it could be composed of only one union side lay judge and only one employer side lay judge, plus the three neutrals (the two professional judges and the labor market expert) so that the neutrals could not be outvoted.⁷²

A further approach to conceptualizing the country's social and economic framework for polity legitimacy purposes is to consider the legal context and whether the bedrock is one of the principal legal families: the civil law tradition (with French, German, and Nordic variants) and the English common law tradition.⁷³ Again, Ireland does not fit this typology. It is a common law country, but the composition of its tripartite courts has not been altered. Thus, it can be distinguished from Great Britain, the other

70. See SANDRA SAWALL, DIE ENTWICKLUNG DER ARBEITSGERICHTSBARKEIT [THE DEVELOPMENT OF LABOR JURISDICTION] (2007) (Ger.).

71. Interview with Herr Roland Wolf, Head of Department for Employment and Collective Bargaining Law, Bundesverband deutscher Arbeitgeberverbände (BDA), Berlin (Apr. 26, 2013). This is also evidenced by a joint proposal in 2011 from the national trade union confederation and the BDA to stabilize aspects of the collective bargaining system through statutory means.

72. Interview with Gunilla Upmark, Labor Market Expert on the Arbetsdomstolen and Parliamentary Adviser (Mar. 28, 2012). This composition in discrimination cases is permissive, not mandatory.

73. KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW (Tony Weir trans., 3d ed. 1997); Simon Deakin, Priya Lele & Mathias M. Siems, *The Evolution of Labour Law: Calibrating and Comparing Regulatory Regimes*, 146 INT'L LAB. REV. 133, 133 (2007).

common law country here, where tripartism in the latter's adjudicative institutions has been significantly attenuated.

E. Discussion

To summarize our empirical data, labor court decisions in the main are unanimous in all the countries covered here, irrespective of how lay judges are selected, trained, and deployed. In France, lay judges are elected and a professional judge is only brought in at first instance when the lay judges disagree. In Sweden, access to the Labor Court is limited to employers, unions, and the discrimination ombudsman. Ireland uniquely has a complex system of employment rights adjudication, and in one appellate tripartite forum even the independent member is not required to be legally qualified. Germany is unique in that it has an autonomous, tripartite labor court system up to the highest level. Lastly, Great Britain has very many characteristics that distinguish it from all its neighbors: lay judges self-nominate, with the worker and employer organizations neither nominating, electing, nor selecting them; lay judge applications are assessed by a third party (not the worker and employer organizations) applying conventional human resources techniques, and most importantly, government has step by step reduced the range of cases on which lay judges adjudicate.

We have argued that although there is a high level of unanimity in outcomes, the main contribution of lay judges is to provide legitimacy to the decision making process. We also sought to break down the notion of legitimacy, using the conceptual schema suggested by Novitz and Syrpis. Accordingly, we have divided legitimacy into performance legitimacy, regime legitimacy, and polity legitimacy. Can one argue, however, that the presence of lay judges in labor courts in some countries generates more legitimacy than in other countries?

First, on performance legitimacy, as noted above, in none of the countries covered are lay judges formally appraised by either professional judges or any other body, so appraisal cannot be used to rate performance legitimacy.⁷⁴ A criterion that could be adopted, however, is the extent to which lay judges can utilize their employment experience; arguably the more closely this experience matches the labor market sector where the dispute arose, the more effective their performance should be (other things being equal). As we have seen, there is considerable variation between

74. There is anecdotal evidence that in egregious instances, the professional judge informally suggests that a lay judge not be reappointed. Furthermore, in Great Britain, for example, the Chief Justice has power to remove lay judges from office, but the present authors do not know of any instance of that power being used. *See* Employment Tribunals Act, 1996, c. 17, § 5b (Eng.).

countries in the extent of matching, but it is not evident how the effect of matching on performance could be gauged.

Another criterion of performance legitimacy is training, on the—possibly questionable—assumption that lay judges come to “better” decisions the more training they have received. In all the countries covered here, apart from Sweden, lay judges officially receive training, but the authors know of no assessment of how or whether training improves performance or of the quality of training of lay judges, and this is an area meriting further research.

Performance legitimacy ultimately relies on some quantitative measure of the acceptability of decisions by those to which they apply. However, there are great difficulties in developing such a quantitative measure, although some tentative conclusions can be drawn. One important yardstick, possibly the most revealing of the acceptability of court decisions to participants and their vulnerability to challenge due to error, might be the number of appeals from decisions in which lay judges have been involved. This, however, is complicated by the fact that there is no appeal from the Swedish Labor Court, and elsewhere the grounds of appeal vary. For instance, in Great Britain an appeal can only be made on a point of law. In France and Germany, an appeal at the first appellate level can be made on fact and law where, *inter alia*, there is a specified amount at issue. Moreover, in Great Britain and France an appellant must pay a fee,⁷⁵ but the amount differs; it is substantially higher in Great Britain. Accordingly, achieving a consistent measure across countries is beset by serious problems of comparability.

In the absence of such an “objective” measure, one is left with the acceptability of decisions by claimants and defendants. This is a complex area, as it involves disentangling satisfaction with outcomes from views of the fairness of the process, that is a procedural justice perspective, and there is some debate about whether this can be done rigorously.⁷⁶ At present, as noted above, there is a dearth of comparative empirical research that might begin to address the issue of how claimants and respondents cross-nationally view the judicial process.

As to regime legitimacy, one criterion that could be adopted is the representativeness of lay judges in terms of the extent to which they are typical of workers or employers. All the countries considered here, except

75. In Germany, the loser pays the court fee at both first instance and appellate levels. [ZIVILPROZESSORDNUNG] [ZPO] [CODE OF CIVIL PROCEDURE], as amended Oct. 20, 2013, § 91 (Ger.).

76. *See, e.g.*, MARK PETERS ET AL., FINDINGS FROM THE SURVEY OF EMPLOYMENT TRIBUNAL APPLICATIONS 2008, at 87–88 (Department of Business, Innovations and Skills ed., 2010) (reporting survey finding that satisfaction with the adjudicative system was strongly associated with a favorable outcome). *Cf.* Tyler, *supra* note 20 (opining that citizens distinguish between procedural issues and outcomes).

Great Britain with its system of self-nomination, would rate highly because nominations are made by the social partners. However, if the criterion is shifted to that of reflecting the gender and ethnicity of workers, then Great Britain's labor courts have higher legitimacy. This is because in Great Britain, there is an emphasis on ensuring that lay judges reflect the gender and ethnicity of the population as a whole, but elsewhere such emphasis is muted. Other characteristics of workers, however, such as age or level of income, are disregarded in all the countries considered here.

If the criterion of regime legitimacy is the type of industry in the area, then Germany has potentially higher legitimacy because German public officials, at least in theory, can reject nominations of employer and worker lay judges if they do not reflect the social and economic structure of the locality. Otherwise, key characteristics of employers relevant to the social and economic structure, such as company size, are not taken into account in the countries examined here.

A further potential criterion of regime legitimacy is the perceptions of users, the dominant approach for procedural justice theories. A comparison would have to be drawn between parties' perceptions where the case is decided by the professional judge alone, compared to perceptions where a case is decided by both a professional judge and lay judges. Such a comparison could only be carried out in Great Britain, due to the fact that similar cases can be adjudicated by employment tribunals with differing compositions.

As to polity legitimacy, this may be engendered *prima facie* if actors perceive concordance between different institutions, but research is needed into actors' perceptions. Meanwhile it should be noted that there is a degree of fit between the labor courts and the wider industrial relations context of each of the countries covered here, as there is between the labor courts and the varieties of capitalism typology (coordinated economies and liberal market economies), Ireland apart.

VI. CONCLUSIONS

To conclude, this Article has demonstrated the considerable differences between countries in how lay judges in labor courts are selected and deployed. Moreover, although Novitz and Syrpis offer a richer conceptual framework for addressing issues of legitimacy than the narrower focus of some procedural justice research, a number of challenges remain, in particular in terms of operationalizing and measuring legitimacy in a robust and quantitative way cross-nationally.

Why should we want to compare the legitimacy of different countries' judicial arrangements, even if it were possible? We maintain that the

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legitimacy of mechanisms for resolving individual rights disputes is part of a wider perspective on the extent to which employment systems generate conflict, the extent to which this is individual and collective, and the institutions that exist to enable such conflicts to be resolved. Given the widespread decline of collective means for resolving disputes at the workplace, the legitimacy of institutions dealing with individual rights disputes is becoming increasingly salient.

