Rule of Law: Civic Perspectives

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Rule of law: Top down versus bottom up
The rule of law: a “top down” approach

- Focuses on interpretation and application of the rule of law by world leaders and elites
  - Asserted in the Universal Declaration of Human Rights (“Human rights should be protected by the rule of law.”)
  - Has appeared in the Declaration of the General Assembly of the United Nations, and in many other UN pronouncements and programs
- Examines how the rule of law operates as a technique for facilitating – or obstructing – local and global priorities and policies
My talk takes a “bottom-up” approach to the rule of law

• Examines how ordinary citizens think about the rule of law
• Examines how ordinary citizens apply law when they participate directly in legal decision making
• Describes the impact of public participation in law
  • On the individuals who participate
  • On the legal system
  • On civil society
• Raises a different yet complementary set of questions about what we mean when we talk about the rule of law
Illustration: Farré case from Argentina
Diversity around the globe in use of lay citizens to engage in legal decision making

• Juries
• Lay judges in mixed tribunals
• Lay magistrates
• Lay courts
Current picture of public participation in legal decision making

• Declining use in some Western countries
  • The “vanishing trial” in the USA

• Yet, at the same time, in Asia and elsewhere, countries have introduced public participation in legal decision making
  • Has occurred at democratizing moments
  • Stimulated by desires to increase legitimacy of the courts
Lay citizens in mixed courts and other roles in Thailand

- Juvenile and Family Court
- Labor Court
- Intellectual Property and International Trade Court
- Mediation/Conciliation Center

(photo and information from Napakamol Havanond)
South Korea, advisory jury trial
(introduced 2008)
Saiban-in seido (mixed court), Japan
(introduced 2009)
Taiwan: Mock tribunal with lay and professional judges (July 2014)
What difference does it make to have juries or lay judges instead of professional judges decide criminal cases?
50 years of empirical research on public participation in legal decision making

• Research has examined decision making using multiple approaches
  • Post-trial interviews with decision makers
  • Observations of trials
  • Questionnaires given to professional and lay judges, attorneys, jurors
  • Mock trial experiments
Cornell Law School
Bookshelves of research on juries and lay judges!
Public participation and civil society

• **Educational benefits** – the experience teaches citizens about the legal system

• **Legitimacy benefits** – public involvement helps to legitimize the outcomes

• **Transparency benefits** – direct participation by citizens opens up the legal decision making process to public view

• **Fact finding benefits** – judgments are able to reflect the public’s diversity of perspectives, experiences, knowledge
Impact of public participation on those who serve: Educational and legitimizing effects
Positive reaction to advisory jury system in South Korea

• Fully 63% of jurors who served in the advisory jury system in that country reported more positive feelings after jury service; 2% felt more negatively

• Court in Taipei set up mock jury option for those who wanted to volunteer for jury service
Japan’s lay judges are also very positive about their experience

- Japan’s lay judges are often **active participants** at trial, questioning witnesses directly.
- Many lay judges participate in the regular **press conferences** that follow the trials.
- **94% of the lay judges reported that their service was a “good experience”** (4% had a negative experience, and the remaining 1% were neutral).
USA

US jurors are more positive about the courts and the jury system after their jury service

- National survey of more than 8,000 jurors found 63% were more favorable about the jury system after serving
- Those who serve as jurors are more likely to see the courts as fair and just
Jury service and democratic participation

The Jury and Democracy Project:

• Studied jury service and voting records of more than 13,000 American jurors in different cities
• Found that people who were infrequent voters and deliberated on a criminal jury were *more likely to vote in the next election*
Neuquén, Argentina: jurors’ evaluations of their experiences following the first set of trials
Societal and legal system effects of public participation: Transparency, education, legitimacy
Transparency is promoted when public participates

• Trial procedures and rules of evidence must take into account the lay factfinders
• Trials are more accessible and proceedings more understandable
• More news coverage
Educational efforts in Japan: Ads, movies, mock trials, and manga
Impact on public knowledge, attitudes

Supreme Court of Japan survey

• Trials and the justice system have become more familiar (increasing from 9% to 68%)
• Trial processes and content are more comprehensible (6% to 45%)
• Criminal trials are faster (from 3% to 48%)
• Fairness of outcomes perceived no differently
What about factfinding? Are lay judges and jurors competent decision makers?
In a word, yes.

• In mixed courts, the agreement rate between lay judges and professional judges is high

• Judges agree with and support the substantial majority of jury verdicts

• Research (my own and others) finds the most significant predictor of verdicts is the strength of the evidence presented at the trial
Are there problems with public participation? Of course! But there are also empirically-supported remedies

• Reluctance to serve
  • address through campaigns, education, selection process

• Potential bias
  • address through selection process, instructions

• Complex evidence
  • address through evidence presentation, techniques to enhance understanding

• Comprehension of the law
  • address through plain language, repetition
Conclusion

Public participation in legal decision making contributes significantly to civil society and the rule of law

• Ensures greater transparency
• Educates people about the rule of law and its application
• Leads to more civic engagement
• Promotes legitimacy