Legality, the Trial Process and the Jury: a Common Lawyer's Perspective on the New Lay Assessor System in Japan

George Mousourakis*

Introductory

As is well known, criminal law has an expository or denunciatory aspect, laying down the limits of acceptable and unacceptable behaviour. But alongside this moral discourse, the system has a constitutional significance: its operations provide the acid test of fairness within society and of the relationship between the individual and the state. In this respect, the importance of a fair trial is advanced as much by its failure as by its success. The trial has great symbolic force, not merely representing the Rule of Law, but metaphorically embodying the ideal of a moral and rational government. Liberal democracy has at its root the categorical opposition of the individual against the state. The system of justice incorporates many of the ideas and values that we hold about that opposition, especially with respect to the rights of the individual as opposed to the state and the balance between authoritarian and libertarian forms of government. Criminal justice is an area in which this

* Associate Professor, University of Auckland, New Zealand; Visiting Research Fellow, University of Freiburg, Germany.

balance is constantly and dramatically demonstrated and in which the rights of the individual should be seen as particularly valuable and inviolable. The enforceable detention of an individual by the state has constitutional significance as it lays down the borderline between state power and the liberty of the citizen. This is done in a formal and dramatized fashion, whether at the police station or in a court of law. The process is not simply concerned with fairness between parties; it is the embodiment of the idea of the Rule of Law itself, for the law is seen as a body of doctrine that not only controls the individual but also the state.

One may say that the trial is an institution which gives the ground rules for arriving at the alternative verdicts "guilty" or "not guilty" which are internally linked to the propositions "A did it" and "A did not do it" of reality. How does the trial procedure arrive at the "truth"? What is the point of the process? The aim of the process is to produce a coherent story or picture of the events and reality under dispute. The trial procedure forms what might be called a "truth certifying procedure". The statement "he/she is guilty" is an internal statement of that procedure and is constituted by it, but that procedure also gives us a warrant for saying that there is a relation to the "A did it" of reality. However the procedure one adopts affects the end result: our knowledge of the truth is inexorably linked with the procedure we adopt for certifying it, which itself determines the outcome. As the examination of different forms of trial process reveals, reality-finding procedures are not necessarily based on the "rational" but can be normative and moral as well. In the case of the trial, then, we may say that the conclusion as to what constitutes the truth comes from the court's view of a complex set

of data that has been filtered through the trial and the normatively justified rules of evidence and procedure. One must be careful not to infer from this that our ordinary notions of rationality and objectivity have no part to play in the process. The view I am considering does not imply that probability, science, expert witnesses and the like have no part to play in the process. Plainly they do. Parts of other truth certifying procedures can be introduced into the trial process. Indeed, they play an important part in it. They do not, however, stand there in their own right but rather as part of the trial process. The ultimate justification for the whole complex is not an "objective scientific" one but is rather a moral and pragmatic and political mix.

In this connection, brief reference should be made to the distinction between the adversarial and inquisitorial systems of legal procedure. The adversarial system is a system where the facts emerge through a formal contest (a 'fight game', as is sometimes said) between the parties concerned, while the judge acts as an impartial umpire. In the inquisitorial system, on the other hand, the truth is revealed by an inquiry into the facts conducted by the judge and the other parties to the process. In this system it is the judge who takes the initiative in conducting the case, leading the investigations, interrogating witnesses and assessing the evidence. Critics of the adversarial system claim that the logic of the adversarial system is incompatible with the task of pursuing the truth. Apart from the abuses to which such a system is prey, this contentious method of trying cases is said to encourage those who participate in the trial process to distort the facts in order to secure victory for the party they support.[1] On the other hand, a common criticism of the inquisitorial system is that it gives the state too much

power. Since it is supposed to be a disinterested search for the truth, the organisational form the institution takes is to be part of the civil service and judges become civil servants trained in the skills of fact finding. This is controlled through a ministry of justice, or something similar, which gives political control of the system. Coupled with the idea of the search as being a rational and objective one, this gives great power to the state and enables other views of the matter to be more easily overridden. As is well known, civil law systems differ from their common law counterparts with respect to legal procedure in that the former place greater responsibility upon the judge for the investigation of the facts,[2] whilst the latter leave it to the parties to gather and produce the factual material upon which adjudication depends. Furthermore, the common law approach tends to place a greater premium on the process by which truth is pursued, sometimes sacrificing truth to preserve the process and the individual rights this is designed to safeguard.[3]

---

1 As J. Frank has remarked, the just settlement of legal disputes presupposes "a legal system in which the courts can and do strive tirelessly to get as close as is humanly possible to the actual facts of courtroom controversies; to treat law as, above all, a fight, surely cannot be the best way to discover the facts." ***Courts on Trial***, Princeton, Princeton University Press, 1973, 102.

2 The relatively greater emphasis on certainty in the Civil law model of legal procedure is traced to the influence of the rationalist Natural Law School, and in particular the rationalist desire to impose a relatively simple order on the rich complexities of life. See M.R. Damaska, "Structures of Authority and Comparative Criminal Procedure", 84 ***Yale Law Journal*** (1975), 480.

3 However, the usual contrast between the adversarial approach of the common law and the inquisitorial approach of the civil law should not be overstated. J.H. Langbein, commenting on German and American systems of civil procedure, remarks that "[A]part from fact-gathering…the lawyers

Commentators agree that the issue of lay participation in the administration of justice cannot be considered in isolation but must be viewed as part of another system, i.e. that of the trial and the fact-finding system as a whole. It is only within this broader context that the role of the jury must be analyzed and evaluated. In this respect, examining the procedural model that prevails in a country is an important prerequisite for understanding and evaluating the form of jury system adopted as well as the rules by which such a system is governed.

The Justice System and the Jury

In common law jurisdictions lay participation in the form of the jury trial has been the hallmark of the justice system for centuries. Legal commentators have described this method of trial as the "the grand bulwark" of citizens' liberties[4], "the lamp that shows that freedom lives".[5]

---

for the parties play major and broadly comparable roles in both the German and American systems. Both are adversary systems of civil procedure. There as here, the lawyers advance partisan positions from first pleadings to final arguments. German litigators suggest legal theories and lines of factual inquiry, they superintend and supplement judicial examination of witnesses, they urge inferences from fact, they discuss and distinguish precedent, they interpret statutes, and they formulate views of the law that further the interests of their clients". According to this author, the chief difference between Civil law and American litigators is that the former are mostly 'law adversaries', while the latter are 'law-and-fact adversaries'. "The German Advantage in Civil Procedure", 52 *University of Chicago Law Review* (1985), 823-824.

4 W. Blackstone, *Commentaries on the Laws of England*, Vol. IV, 1765-1769, 347.

The jury is seen as a symbol of legitimacy for the justice system, providing protection against political interference in trials, or oppressive laws, and guarding the populace against judicial corruption as well as police corruption or overeagerness. The democratic safeguard that the jury is said to represent is summarised in the words "independence", "impartiality" and "representation". Independence is vital to ensure that fair and impartial verdict is reached. It is believed that the judge, as an appointee of the state, can never be truly independent and impartial the way the jury can. It is that independence which can at times result in a jury deciding a case according to its conscience and not the strict letter of the law. Impartiality is associated with the idea that individuals are free to apply their own views when deciding on an issue without restrictions or interference from others. The random selection of the jurors is said to secure this ideal. As the members of the jury represent a broad range of views, with no particular view being prevalent, an impartial verdict is reached by a process of decision-making based on consensus. The principle of impartiality is supported by strict rules that prevent or minimise external influences. Representation, as an essential element in the democratic process, presupposes the ability to ensure that all cognizable citizen groups are included in the jury selection process. Supporters of the jury also contend that the jury is a batter fact finder, basing this proposition upon the common sense of the jury and the collectivity of the relevant decision-making process. Fact-finding in a criminal trial is generally considered a matter of common sense, and the haphazard selection of the jury members from all walks of life creates a tribunal that is at once fresh to the case and experienced in life's

5 P. Devlin, *Trial by Jury*, London, Stevens & Sons, 1956, 164.

realities. Furthermore, the presence of the jury forces the parties to speak plainly and clearly, and the judge to clarify legal and evidentiary intricacies in order to make sure that the court's decision is adequately informed and fully comprehensible. This contributes to the legitimacy and institutional efficacy of the criminal justice system as a system that derives its aims and guiding purposes from the society it serves.

But the jury system is not without its problems and in recent years there has been a slow erosion of the jury trial in some countries with more offences being reclassified as "summary only" offences, i.e. offences to be heard by magistrates sitting alone.[6] Critics of the jury system argue that the jury often lack the requisite level of intelligence; are biased and susceptible to emotional manipulation; are unfamiliar with legal and fact-finding issues; cannot deal with the complexity of the cases confronting them; and are unable to clearly articulate the reasons for their decision. Some opponents of the jury system claim, moreover, that the intricacy of the jury trial procedure is time consuming, expensive and inconvenient for all involved. But probably the most serious challenge to the jury system is the claim that such a system is an obstacle to the establishment of legal certainty. The so-called "perverse" jury verdicts, i.e. verdicts that go against the judge's directions on the

6 Recently, in England, Lord Goldsmith, the government's Attorney General, has been actively pressing forward with the Fraud（Trials Without a Jury）Bill in Parliament, which seeks to abolish jury trials in major criminal fraud trials. The Bill was subject to sharp criticism from both sides of the House of Commons, but passed its second Commons reading in November 2006. The Bill follows the Government's earlier, unsuccessful attempt to pass measures allowing trials without jury in the Criminal Justice Act 2003.

law, are often seized upon as examples of the failure of the jury system. As early as 1875 Forsyth regarded a verdict contrary to law as an attack on the decision of the Parliament introducing "the most unacceptable uncertainty as to our rights and liberties."[7] Given all this, some commentators ask, why have juries? What is wrong with relying entirely on judges who can at least be trained scientifically?

At this point I would like to turn to the familiar picture of the common law trial process as a "fight-game". The key factor of the so-called "game" is the presentation of different coherent pictures of reality. However, considered from a different viewpoint, one may question whether the fight really exists. Studies of plea bargaining, of the part negotiation plays in contested issues, show that much of what goes on in the courtroom has already been settled beforehand by the lawyers and the professionals involved. Studies of the activities of the higher judiciary also show that often extra-court activity and negotiation settles the issue before the stage of the actual "fight". Defence lawyers do not escape from this either for they are also among those for whom too much of a fight might be inconvenient. The drama therefore takes place in an environment characterised by highly formalised patterns of interaction between participants who mainly subscribe to the same legal view of things. What we have is something on the lines of professional wrestling

7 W. Forsyth, *History of Trial by Jury*, 1875, repr. New York, B. Franklin, 1971, at 218. A 'perverse' jury verdict is often attributed not to the jurors' concern about a criminal conviction recorded against the accused but to their concern about the penalty that may be imposed by the judge following conviction. Refusal by a jury to convict has in some circumstances led to a change in the law.

where although there is often no "real" fight, the results being in many cases rigged, this does not detract from its stylised "reality". It is here that the jury fits into the system. The point of the jury is to guard against this stylised fight, to inject a "lay acid" into the system that helps to ensure that the "fight" does not always go its preordained way. One might assert that the jury is an element of lay participation in the system, standing both within and outwith the law. It prevents the closed shop of the legal expert, forcing some demystification of the law as lawyers have to address lay people – it is no longer only expert speaking to expert. Though jurors learn how to be jurors from their experience in the court, their views and actions are also affected by their experience outside the courtroom. If the juror experiences the world outside the jury box not as the calm, consensual and just but as one which is full of conflict and injustice, then that experience is also brought into the court where it can counter the orderly legal consensual view of things and lay bare the contest as real and not artificial or stylised. What this means is that the jury mediates between the law and the people and infuses "non-legal values" into the trial process. It is, in a sense, the conscience of the community, representing current ethical conventions, and, as such, constitutes a constraint on legalism, arbitrariness and bureaucracy.

But how can one respond to the argument that lay participation in the administration of justice is anomalous because it disturbs the basis for objectivity and predictability and therefore conflicts with the principles of the rule of law upon which a liberal society operates? Justice according to the law sets a great premium on legal certainty, the knowledge that there is a fair and just procedure for applying a general rule to a particular case. The requirement for certainty and objectivity

places a stress on the role of the judicial personnel, those who work in the system continually. The emphasis here is on the professionalism and the professional skills of the judiciary. This seems to imply that, in practice, the liberal ideal of "government of laws and not men" becomes the government of a small group. Here we can see the contradiction in a liberal democracy based on the rule of law. For in order that the main moral imperative of that society, "the government of laws and not of men", flourish, another important value, that of participation must, in part, be negated. One can see this in the tension between efficiency and democracy where efficiency, in the shape of speed, reliability and constancy, is seen as continually subverted by the demands of democratic, and therefore inefficient participation. In light of this, it may be argued that it is institutions like the jury which manage this tension in our society, by providing participation within the framework of the rule of law as required by the main moral imperative of the system.

It is submitted, in conclusion, that a certain level of lay participation in the administration of justice is compatible with the criminal justice philosophy that prevails in contemporary liberal democratic societies and is, as noted, appropriate for a society where the rule of law obtains. The introduction of forms of jury system in a number of countries outside the common law family, and most recently in Japan, appears to reinforce the view that, notwithstanding its limitations, lay participation carries the potential of contributing to the improvement of the justice system while at the same time promoting fundamental values upon which democratic societies are founded.[8] It is important to add here, however, that for lay participation to produce its desired effects it must fit into the fabric of the justice system as a whole, as well as into the broader socio-cultural

environment in which the legal system operates.[9]

Japan's Hybrid Jury System: a Critical Overview

The first comprehensive code of criminal procedure in Japan was the Code of Criminal Instruction of 1880. This legislative enactment was modelled largely on the French Code of 1808, although some if its provisions were derived from German law. However, the court system and the procedures provided by this code proved to be difficult to implement in practice and the code was soon replaced by a new one based on the German model. This in turn was superseded by another

8 Countries recognizing some form of lay participation in the administration of justice, mainly in serious criminal cases, include Austria, Belgium, France, Germany, Greece, Italy and Russia.

9 It is important to mention, in this connection, that lay participation systems may differ considerably due to the effects particular socio-cultural environments have on the way such systems are understood and operate. Thus, an imported lay participation model is occasionally ascribed a different, local meaning, when it is rapidly indigenized on account of the host culture's inherent integrative capacity. The absence of substantial differences in the general description of the relevant model between a donor and a host country does not imply that legal reality, or everyday legal and social practice in the two countries, should be considered identical. The legal reality in the host country may be different with respect to the way people（including judges and state officials）understand lay participation and apply the rules surrounding its operation. As this suggests, it is not good sense to use the perspective and framework of one's own legal culture when examining a lay participation model borrowed by a legal system operating within the context of another culture. Such an approach carries the risk of implying the existence of many more similarities than there actually are.

Code in 1922, again reflecting the influence of German jurisprudence. Japan's criminal procedure system was radically reformed in the period that followed the end of the Second World War in 1945 at the instigation of the Allied Powers. Thus, the 1922 Code of Criminal Procedure was thoroughly revised to conform to the new constitutional arrangements requiring due process of law and guaranteeing the right to defence and other related rights. The revised Code of Criminal procedure (the product of cooperation between American advisers and Japanese academics, judges, lawyers and government officials), enacted in 1948, gave the parties a greater degree of initiative in criminal trials and enhanced the procedural rights of the defendant. As a result, Japanese criminal procedure is a hybrid of Continental European, especially German, and American law. However, the general trend of Japanese criminal procedure still reflects a European influence.[10] The American influence is reflected in the gradual adoption of features characteristic of the adversarial system of trial procedure. Although the new procedural code did not immediately transform defence counsels into vigorous advocates for the accused, many criminal defence lawyers today are, by Japanese standards at least, quite assertive in defending the interests of their clients.

Although one of the goals of the post-WWII Constitution and Code of Criminal Procedure drafters was to promote an American style trial system, the Japanese trial remained different from the American trial in important respects. Thus, the principal aim of the Japanese criminal trial

10 The influence of German law is particularly evident in the investigation process and in the emphasis at trial on the importance of written evidence.

is to see that substantive justice is done, whereas in an American trial the objective is to require that the prosecution establish its case beyond a reasonable doubt by following a set of procedural rules designed to protect individual rights. The difference between the two approaches is significant because it means that even if procedural prerequisites have not been fully followed in Japan, a guilty defendant should not be absolved of criminal liability. In addition to that, as in Japan an important aim of the criminal process is the rehabilitation or reform of offenders, too much attention on technical arguments is seen as posing an obstacle to the admission of responsibility – the first step in the rehabilitation process. Furthermore, because of the discretionary functions of the police and the prosecutor, as well as the broader investigative techniques available to them（especially the obtaining of confessions and deriving evidence）, in Japan a great deal of fact gathering takes place before the commencement of the trial. Judges are aware of the discretionary decisions made by the investigators and thus know that the only cases coming to trial are those where the prosecutor is convinced of the defendant's guilt.[11] Moreover, by the time a case gets to trial the investigation process has produced a large amount of evidence in support

11 Judges in Japan tend to give greater weight to the evidence presented by the prosecutor than to that adduced by the defendant. The high regard in which prosecutors are generally held by judges together with the knowledge that a large number of cases have been washed out of the system through discretionary action by police and prosecutors, adds a great deal of credibility to the prosecutor's determination to proceed in a particular case. In addition to that, the requirement that prosecutors not indict unless they have a high degree of confidence in the guilt of the accused adds weight to the indictment and recasts the burden of proof to the accused.

of the prosecutor's case (this would normally include a confession, police reports, physical evidence, expert reports and witness statements, all in written form). Thus, the trial takes on more of the character of a trial by dossier instead of an adversarial procedure (or even an inquest where evidence is presented in court). The use of written evidence, although it has the advantage of speeding up the trial process, does not permit evidence to be adduced in open court, and this dramatically changes the nature of the trial.[12] A further point of divergence between the Japanese and the American and other systems of criminal procedure was that criminal procedure in Japan was conducted without a jury or lay assessors. However, in May 2004 lay participation in the form of a mixed or quasi-jury system was introduced in Japan following the enactment of the *Act Concerning Participation of Lay Assessors in Criminal Trials (Assessor Act)*, which went into effect in May 2009.[13] It is to this important development that this discussion must now turn.

---

12 As this suggests, one of the primary aims of the post WWII reforms, that is to replace trial by dossier with trial by adversary procedure, was to a very large extent not achieved.

13 K. Anderson, Kent & E. Saint, "Japan's Quasi-Jury (Saiban-in) Law: An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials" (2005) 6 (1) *Asian-Pacific Law & Policy Journal*, 234. This is not the first time a form of jury system is introduced in Japan. A *Law on Jury Trial* was enacted in 1923 under the influence of a democratic movement (Taisso Democracy, 1912-1926) but, despite a promising start, it failed to produce its desired effects and was suspended in 1943. That law provided a right to jury trial in a limited range of cases, and in the first several years after its introduction defendants exercised their right to a jury trial fairly often. The law provided for a 12-person jury, utilized a majority voting requirement (not unanimity), and confined the jury to making factual determinations. Although the court could not render a judgment contrary to the verdict, the jury's verdict did not bind the court

The principal objective of the *Assessor Act* is to realize one of the fundamental reforms that was proposed by the Judicial System Reform Council in 2001: to introduce lay participation in trials as a key element in an effort to transform the populace from governed objects to governing subjects. The Act seeks to achieve this objective through the appointment of lay assessors to serve alongside professional judges in designated cases.[14] The *Assessor Act* is a fairly detailed statutory enactment containing over one hundred articles and a set of supplementary provisions that provide for lay participation in cases involving the most severe crimes, that is those incurring the death penalty, life imprisonment, imprisonment with hard labour, or certain cases in which the victim has died.（Art. 2）Mixed panels consisting of professional judges and lay assessors will decide both culpability and

---

as it could repeatedly change the panel until it found one that would render the desired verdict. Despite the early enthusiasm about the Law on Jury Trial, the jury system that was introduced ultimately failed. In 1929, the peak year for jury trials, 143 criminal defendants exercised their right to a trial by jury. However, the popularity of jury trials declined dramatically by 1942, with only two jury trials during that year, and the Japanese suspended the Law on Jury Trial the next year. A number of theories have been offered by scholars seeking to explain the demise of that law. Some propose that it failed because defendants who chose to be tried by jury gave up their right to appeal jury errors of fact, thereby foreclosing an opportunity to reverse convictions or reduce sentences. Others suggest the system failed because juries were merely impotent ornaments of democratic legitimacy as judges could reject their verdicts. A more sociological explanation for the failure provides that the Japanese prefer hierarchy and therefore seek professional rather than peer decision-making, even fearing that juries would rule more severely than judges.

14 The Ministry of Justice specifically avoided using the term "jury"（Baishin-in）and used the term "lay judge"（Saiban-in）instead.

sentence. (Art. 6) These panels will be composed of three judges with six assessors in contested cases or one judge with four assessors in cases where there is "no dispute concerning the facts." (Art. 2) Those who are to serve as assessors will be selected at random from local voter registration lists and, once chosen, will participate in a single case only. (Art. 13) Potential assessors are subject to background checks, and can be disqualified if they have a criminal record, suffer from mental incapacity, or if, in the opinion of the court, they "might not be able to act fairly in a trial." (Arts. 12, 14 and 18) Once a citizen is summoned, service is compulsory except for specified categories of individuals who may apply to be exempted from service if, for example, they are seventy years of age or older, ill, or a student. (Arts. 16 and 112) Under the criminal procedure model adopted in Japan (reflecting, as already noted, the influence of the European, especially German, legal tradition) trials could last months or even years. However, because trials involving lay assessors must be continuous to accommodate the citizens' schedules, Japan's Code of Criminal Procedure had to be revised to allow for speedier continuous trials. Moreover, a section was added to the same Code for new pre-trial procedures that require prosecutors and defence counsel to confer in advance of trial to make substantial disclosures of evidence and to deliver to the court a joint pre-trial brief presenting relevant matters in agreement and specifying the particular factual and legal issues remaining in contention.

After commencement of the trial, the prosecution and defence are required to "endeavour to make trials quick and easy to understand" including giving statements that draw upon the pre-trial clarification procedures (Arts. 51 and 55) Generally speaking, assessors are

authorized to question witnesses, victims, and defendants who have volunteered to testify. (Arts. 56, 57, 58 and 59) The assessors and judges are to come to a decision after they have all participated in deliberations and "express[ed] an opinion." (Art. 66) Acquittal is by majority vote but convictions must also obtain the concurrence of at least one professional judge. (Art. 67) Unlike the U.S. rule for criminal jury trials, both convictions and acquittals are subject to appeal by the government. In the new system, the mixed panels of lay assessors (saiban-in) and professional judges are charged with both judicial fact-finding and sentencing functions. In contrast to the Anglo-American juror, assessors have the authority and power to participate in the trial process as near equals to the professional judges, at least with respect to their assigned roles in fact-finding and sentencing. Lay assessors are permitted to ask questions in trials, albeit generally under the managing hand of the presiding judge. (Arts 56-59) Apart from the requirement of at least one professional judge concurring in convictions, lay assessors and professional judges' votes formally share equal weight in deliberations. (Art. 67)

Several provisions in the Act set out the responsibilities and duties of lay assessors, including compulsory appearance at court sessions (Art. 112), acting fairly, independently, and honestly, and not committing acts that injure the dignity or fairness of the trial. (Arts. 8 and 9) Special emphasis is placed upon the duty of the lay assessors not to reveal "information from the deliberations . . . such as the details that lay assessors are allowed to hear, the opinions and the number of both judges or lay assessors who held these opinions (hereafter 'deliberation secrets')." (Art. 70) Art. 108 (1) stipulates that when lay assessors

leak a deliberation secret or "other secrets learned in their employment" in the course of their service they are subject to a fine of up to ¥500,000 or imprisonment for up to six months. Individuals who served as lay assessors in the past are also subject to imprisonment if they subsequently reveal any secrets for profit, specific deliberation secrets (i.e., opinions shared or vote tallies during deliberations), or "other secrets learned in their employment" (Art. 108 (2)). Former lay assessors are moreover forbidden from sharing "what they thought the weight of sentence should have been or the facts they thought should have been found," even whether they agreed or disagreed with the sentence or facts found by the court. (Art. 108 (6)).

As with other aspects of Japanese law, the lay assessor system combines domestic elements with models and ideas drawn principally from Europe and the United States. The Reform Council, the body charged with the task of reforming the Japanese judicial system, openly recognized that it is important to consider the propriety of introduction of jury trial and lay-judge systems which are adopted in Europe and the United States of America in light of the historical and cultural backgrounds and institutional and cultural conditions of the relevant countries. As a result of this approach to the matter, the final outcome is a unique combination of legal models that does not have an easily comparable international counterpart. In general, one might say that the new Japanese system has more in common with the mixed systems of Continental Europe than with the form of jury system adopted in common law jurisdictions. Commentators observe that Japan's decision to adopt a justice model closer to the Continental European model is unsurprising given its history of defending centralized power.[15] It is submitted that in the

context of Japan's constitutional history and its continental roots, the Assessor Act exists as more of a legislative gift or privilege than a permanent or constitutional right of the people.

Unlike jury systems in common law countries, in which jurors deliberate among themselves and interact with judges only in the courtroom, in Japan the lay and professional judges will consider evidence presented in open court, but will reach a verdict through secret deliberations.[16] Another important difference between the Japanese and common law lay participation systems is that in the former system lay judges will participate not just in convicting or acquitting defendants, but in sentencing the guilty as well. In common law jurisdictions on the other hand, the functions of the judge and the jury are separate and distinct. The tasks of the judge include: instructing the jury on the necessary requirements of the offence that the prosecution must prove and the requirements of any defence that the accused has raised; explaining to the jury the meaning of the various legal terms; controlling the proceedings; and deciding the sentence to be imposed if the accused has

---

15 The Constitution of Japan provides no absolute guarantee in respect of civil rights and liberties; that is to say, it does not restrict the power of either the government or the Diet to make laws with regard to these *privileges*. It can do anything constitutionally to restrict the rights and liberties of the people, provided it first enacts a law to that effect. Consider R. H. Mitchell, ***Justice in Japan***, Honolulu, University of Hawaii Press, 2002, 10.

16 The idea of judges interacting with jurors in secret would make many common law jurists and lawyers cringe, since it renders it impossible to detect and appeal mistaken explanations of law or prejudicial comments regarding the evidence.

been found guilty by the jury.[17] The jury's job is to determine what the facts were and apply the law to these facts to see whether all the requirements of the offence have been proved. If the jury are satisfied beyond reasonable doubt that all these requirements have been established they must convict the accused. Uunlike the unanimity that is usually required for criminal verdicts in a common law jury system, the Japanese lay assessor/judge panels need only a majority to convict.[18] In the United States, the jury verdict is not subject to appeal by the State in criminal prosecution because of double jeopardy protection. Appeals by the defendant are limited in most instances to law, with the findings of facts by the jury given great deference. In most mixed-jury systems, on the other hand, there can be a de novo review of both law and fact. Thus, Japanese appellate courts, review law and fact, and the first appeal sometimes seems like a continuation of the original trial.

Systems involving mixed panels composed of lay and professional judges can be found in many courts in Europe, including France, Germany,

---

17 It rests with the judge to decide, for example, whether a particular piece of evidence is admissible, whether a particular witness may be forced to testify etc.

18 While the law only requires one professional judge to join a majority of lay judges, given that Japanese judges are career bureaucrats who have to work together for much of their careers, the professionals will likely vote as a bloc in all but exceptional cases. Thus, absent open dissent among the professionals, only two out of six lay judges will be needed for a conviction. What would happen if a simple majority is not achieved (i.e., the professional and lay judges split completely, or only one lay judge votes with the professionals)? The law is interestingly silent on this point, but apparently basic principles of criminal procedure dictate that in such cases the defendant is not guilty.

Austria, Italy, Denmark and Greece. In France, the Cour d'assises, the only court in the French criminal system that uses a mixed jury, has jurisdiction over serious crimes, i.e. crimes punishable by a prison term in excess of ten years.[19] The court is made up of three professional judges and nine lay jurors.[20] An eight-to-four majority is required for all decisions regarding culpability or punishment unfavorable to the defendant. As in Japan, in France, jurors are selected at random from the electoral roll.[21] In Germany, the local courts, which have jurisdiction over misdemeanors punishable by up to three years in prison, have mixed juries comprised of one professional judge and two lay jurors. The district courts, which have jurisdiction over serious misdemeanors, capital offenses, and crimes punishable by over three years in prison, have mixed juries comprised of three professional judges and two lay jurors.[22] For the mixed juries in both the local court and the district court, a two-thirds majority is required for any decision of guilt, innocence or punishment. However, unlike the new Japanese system（as

19 See Renée Lettow Lerner, "The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour d'Assises", *University of Illinois Law Review* (2001), 791; Edward A. Tomlinson, "Non-Adversarial Justice: The French Experience", 42 *Maryland Law Review* (1983), 131, 142-43.

20 Jurors must possess French citizenship with full privileges, be between the ages of twenty-three and sixty-one, and be able to read and write. Due to the perceived influence of the local government, lay jurors cannot be civil servants, government ministers, parliamentarians, police or military officials.

21 Potential jurors are screened by a joint committee, from which a final selection list is drawn up.

22 The supreme courts, which consist of five professional judges, have sole jurisdiction over crimes against the State and have no lay jurors.

well as Anglo-American jury systems) terms of service for the majority of European lay participants are not limited to a single trial. For example, in Germany lay assessors serve a fixed term for a number of years with the possibility of re-election. Such an approach can lead to lay judges becoming more experienced in their role. On the other hand, it may be argued that several years of service as a lay judge may create professional stereotypes and lay judges may thus lose the fresh perspective they once had, becoming another formal element in the system. A further difference between the German and Japanese systems is that in the former system are selected not at random from the electoral rolls but by appointment.[23] But the uniqueness of Japan's lay participation system is primarily due to its uncompromising secrecy provision. While many legal systems prohibit jurors from disclosing the identity of other jurors or discussing how votes were cast, most provide exceptions to address possible misconduct.[24] Although the need to maintain secrecy during the course of a trial is relatively easy to understand, the requirement for strict secrecy after the trial has ended

23 Selection by appointment is a method whereby candidates are nominated by officials of an executive authority, representative bodies, citizen or other groups. Once the list of candidates is created and approved by the appropriate body, lay judges are selected from the pool of candidates to serve at a particular trial. In Germany every four years the communities, more precisely their political organizations, make out a list of potential lay assessors twice the number actually needed. The candidates should represent all sections of the population. A board of one professional judge, one administrative officer and ten confidants designated by the public administration, thereupon selects the lay judges from all candidates on the list. It is then determined in advance when relevant court will be in session, before the lay judges are appointed for these sessions by random selection. Every lay assessor shall thereby be in session a total of 12 days.

remains a controversial issue. It is argued that such ex post secrecy is justified by the need to warrant a fair trial by ensuring that participants will be able to exchange views freely, uninhibited by concerns about future exposure.

Among the principal objectives sought by the drafters of the Assessor Act are the improvement of the criminal justice system and, through the encouragement of public understanding of and involvement in the system, the establishment of a more democratic society.[25] With respect to the first objective, it is believed that lay participation will ensure better justice outcomes because the general public's diverse experiences and backgrounds best qualify them to understand the nature and causes of criminal wrongdoing and provide an appropriate response. It is submitted that professional judges may not be able to make a fully informed decision because they hold narrower life experiences, over-represent certain sections of society, and have an institutional bias in favour of the prosecuting agencies. By contrast, lay assessors are said to feel less bound to make judicial decisions against the prosecutors because they lack the judges' elite background and have no personal career stake

---

24 For example, although in England a juror may be held in contempt of court if he/she discusses the jury's deliberations, the English system provides an exception for a juror to speak about an offence alleged to have been committed in relation to the jury.

25 It is important to note here that, although the Act does not seek to emulate the Anglo-American jury system, the latter system embodies those democratic ideals that the Japanese system is seeking to promote. However, while the right to a jury trial in Anglo-American jurisdictions exists as a ***right of the people***, the Japanese lay assessor system exists as a ***legislative privilege*** that the Diet can remove（as it did in 1943）.

in the judicial proceedings. With respect to the second stated objective, namely the creation of a more democratic society, the Judicial Reform Council emphasized that it was incumbent on modern Japanese society to break free of its excessive dependence on government regulation. As Professor Koji Sato, the Council's chairman, remarked, it was time for the Japanese people to learn to live as autonomous individuals, leave behind the way in which they passively depended on regulation from above, and shape the future development of their country from a self-reliant basis. Furthermore, the Judicial Reform Council expressed the hope that the lay assessor system would further democracy in a broader manner by functioning as a political platform to publicize agreement or disagreement with the policy priorities introduced by other political agencies, such as the legislature and the executive.[26]

As many commentators have remarked, while the new lay assessor system is a step in the right direction, a number of problems need be overcome if the system is to have its desired effects.

The unique cultural characteristics of the Japanese society are said to

---

26 The Act expresses this general objective in Article 1, where it is stated that "this legislation seeks to contribute to the promotion of the public's understanding of the judicial system and thereby raise their confidence in it." Moreover, the Supplementary Provisions twice describe the "people" as the "foundation" of the country's judicial system, even asserting that the lay assessor system "will enable the people to adequately fulfil[l] their role as the foundation of the country's judicial system *for the first time*."Finally, Article 3 of the Supplementary Provisions expresses "a belief in the indispensability of having citizens able to participate easily in trials as lay assessors."

pose a considerable challenge to establishing meaningful lay participation in the administration of justice.[27] Besides the fact that the majority of the population is used to being governed without challenging the decisions of those in positions of authority,[28] Japanese culture puts a high premium on group relationships and, in this context, individuals find it difficult to express personal views honestly out of fear not to disturb group harmony or violate generally accepted norms.[29] As group identification furnishes the foundation of an individual's self-esteem, group disapproval or condemnation can be devastating.[30] Furthermore, Japanese thought and culture lays great emphasis on the respect and deference owed to individuals in position of authority based on their social and professional backgrounds.[31] As several scholars have noted, the dominance of hierarchical authoritarianism in Japanese society and culture accounts for the people's preference for trial by 'those above the people', rather than by 'their fellows', and explains their distrust of lay participation in

27 As recognized by the Judicial System Reform Council.

28 Professor Emeritus Kofi Sato, JSRC chairman, stated: "I think we have reached the situation where we have to re-think how human beings should live, that is as 'autonomous individuals'. I feel that the time has come to outgrow this society that passively depends on regulation from above, and to rebuild and form a self-reliant base. The departure point is self-reliance based on the autonomous individual, so we have to prepare a social structure that facilitates this."

29 As in other Asian countries, the concept of harmony is a cornerstone of Japanese culture. A proverb often used by Japanese people reflects the importance of harmony: "The nail that sticks up gets pounded down."

30 Commentators even suggest that group identification and the fear of disapproval provide a powerful deterrent for crime in Japan.

31 This reflects the continuing influence of Confucian ethics on the Japanese society. See N. Kamachi, ***Culture and Customs of Japan***, Greenwood Press, London, 1999, 163-164.

the administration of justice.[32] In a survey conducted in 2006, nearly 80% of the participants said that they would not like to serve as assessors in a criminal trial. A large number of people indicated that they were unsure if they could be neutral or able to express their personal opinions in front of professional judges, or prepared to take responsibility for the court decision.

The special importance of hierarchy, harmony, and group identity in Japanese society and culture furnishes a powerful reason why a mixed jury system will in some respects tend to suppress free jury deliberation and thus undermine the Act's objective of enlarging democracy. As commentators have remarked, despite the emphasis placed by the Assessor Act on the need to protect the lay assessors from the undue influence of their professional counterparts, the present arrangement – with judges leading a discussion voted on by a majority of members – leaves a lot to be desired. Studies suggest that simply increasing the number of lay assessors vis-à-vis the professional judges will not necessarily eliminate undesirable levels of judicial influence. The experiences of Continental European mixed jury systems appear to

---

32 As one commentator has remarked, "People trust judges because they have a special sense of responsibility when adjudicating cases and try to keep their moral standards high in order to ensure impartial trials. Therefore, citizen participation in the judicial process is ultimately not suitable for the Japanese people because citizens would simply prefer to have a judge decide their case rather than their fellow citizens. Scholars disagree on exactly how much weight should be given to the cultural aspect of the failure of the earlier jury system in Japan, but most agree culture played some part." L. W. Kiss, "Reviving the Criminal Jury in Japan", 62 *Law and Contemporay Problems*, (1999), 261, 269-270.

corroborate these concerns. It is submitted that a system requiring unanimity of vote or a minimum two-thirds majority would further free deliberation because it would be necessary to persuade lay assessors not agreeing with the majority opinion. Moreover, according to commentators, a lay participation system like that adopted, for example, in Germany would provide better protection against abuse by professional judges because lay assessors appointed for a number of years would be able to accumulate enough familiarity with legal matters to achieve the self-confidence necessary to disagree with a professional judge. In general, a more knowledgeable jury in a mixed system is crucial to achieving equality between professional and lay judges in the deliberation process. Thus, it is significant that the individuals selected as lay assessors receive pre-trial guidance on the elements of the criminal offence charged and the procedural rules observed by the court as well as explanations on trial rulings. This could potentially reduce the power imbalance between lay assessors and professional judges, help lay assessors comprehend the relevant evidence and make it easier for them to recall and process evidence during final deliberations.

To ensure that the lay assessors carry out their duties and responsibilities in a manner that is not inconsistent with the Act's stated objectives, the deliberation process should become more transparent. Some commentators have gone as far as to suggest that deliberations should be monitored by experts who would observe the professional judges' performance and make sure that they are not unduly dominating the decision-making process. In general, judges must be dedicated to sharing their previously exclusive power to adjudicate and should be trained to allow meaningful participation of lay assessors. In this respect,

it is important that lay assessors be given ample opportunity to express their views and judges do their best to see that such an opportunity arises. To this end it is submitted that one of the lay assessors should be appointed by the presiding judge as leader of the jury. Among the latter's duties should be to meet with each lay assessor privately and solicit his/her position. In this way, it would be more likely that each lay assessor would express himself/herself freely without being unduly influenced by the tendency towards conformity that prevails in society. Furthermore, to ensure meaningful citizen participation and to guard against the professional judges' dominance of the deliberation process, it is important that the jury decision should include a detailed record of the process signed by each individual lay assessor. The need to have a transcript of jury deliberation to ensure the faith of the public and the litigants in the fairness of the system and to retain a record in case of appeal was also recognized by the Judicial System Reform Council. Moreover, a jury instruction clearly stating that jurors are fully independent and free to disagree with the judge's opinion is particularly important.

Since lay participation is a new experience for the Japanese people and, as already noted, one that in some important respects goes against long-established cultural trends, it is important that the public is given ample information about the philosophy and guiding goals of the new system and comes to understand and embrace the citizens' role in the administration of justice and their democratic right and duty to serve as lay assessors. It is thus submitted that a large-scale national educational campaign should be conducted designed to make widely known the significance of this civic service, reduce anxiety, provide positive

reinforcement and encourage participation. This campaign should employ a wide array of methods, such as educational publications and television programmes about the new system and role of lay judges, courthouse visits and instruction by judges to lay assessors on their day of service. Moreover, it is important that the notion of jury service as a civil right and duty be introduced to schoolchildren at an early age. To this end, instructors should be adequately informed and trained and the curriculum adjusted. It is hoped that a successful educational campaign will facilitate the alleviation of the cultural problems noted previously.

The success of the new lay participation system would presuppose, moreover, that Japan take steps to reform its broader justice system, for trial by jury can meet its declared goals only as part of a system that as a whole supports and promotes these goals. As scholars have observed, Japan stands apart from other countries such as Germany, France, Britain and the United States "in the precision of its justice, in its reliance on confessions, and in the intensity and insularity of its processes for obtaining admissions of guilt."[33] Japan's criminal justice system may be described as a finely tuned apparatus designed to enable a conviction. Several pro-police and pro-prosecution characteristics of the system lend support to this "enabling legal environment," such as favourable rules concerning the admissibility of proof, broad powers to arrest and hold suspects, and rules regarding "voluntary investigation".[34] Japanese

33 D. T. Johnson, ***The Japanese Way of Justice***, Oxford, Oxford University Press, 2002, 262.

34 This allows police and prosecutors to process over four-fifths of all suspects on an "at-home" basis and thereby avoid judicial scrutiny of their behavior.

prosecutors and court officials tend to be more concerned about the genuineness and trustworthiness of a confession than the process or means by which it was obtained. Such a determination to arrive at the truth of the matter, despite the process by which this is achieved, may undermine the goal of enlarging democracy by neglecting fundamental democratic principles pertaining to the protection of individual rights. In light of these deeply ingrained institutional features of the Japanese criminal justice system, some commentators have expressed the view that the lay assessor system is utilized too late in the criminal justice process to make a meaningful contribution. It is submitted that, following the establishment of a lay participation system, Japan must be prepared to deal with the systematic changes and problems that such a transformation is likely to bring about. These include the introduction of a degree of uncertainty with respect to trial outcomes, the possibility of 'perverse jury verdicts', a shift of power to trial lawyers and problems relating to the selection and exclusion of jurors. Western legal systems, inspired by distrust for government, tend to strike a balance much closer to individual liberty than the Japanese system. This is not to say that the Japanese people would prefer such an approach, as for most of them the efficiency of their system in terms of crime prevention outweighs other considerations. However, Japan should take seriously the consequences of its move towards a more democratic system in so far as it is recognized that such a system may give priority to the protection of individual rights over the pursuit of truth in litigation.

Concluding Note

The recent introduction of a mixed jury system in Japan is undoubtedly an important step in the direction of increasing citizen participation in the administration of justice. Hopefully, as juries become more inculcated into Japanese society, the new lay assessor system will achieve the same level of success and public support as similarly situated continental European mixed panel systems have enjoyed. With professional judges functioning as a check on the lay assessors (and vice versa), the new system may strike the ideal balance by allowing the government to retain a measure of control over the administration of justice while promoting democracy to a greater extent than it would without the lay participation system. While the introduction of a hybrid jury system represents a significant move in the direction of further democratization of society, Japan should consider those fundamental changes that will enable it to achieve all its declared goals. If the requisite structural reforms are not introduced, Japan's mixed jury system will face serious difficulties, operating as an isolated institution that promotes democracy within a system that in other respects undermines that goal.