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Stephen C. Thaman

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Stephen C. Thaman*

INTRODUCTION

The first courts, perhaps in all societies, were lay courts. These early forms were gradually transformed into what were later called *juries*, or *scabini*, later to be known as *Schöffengerichte* or mixed courts.[1] Both juries and *scabini* had their high and low points. The original juries, prototypes of the investigating grand jury, were tools in the hands of Royal judges to seek out and punish offenders in the provinces.[2] Some of the first *Schöffengerichte* were the German *Vemgerichte* which were secretive, bloodthirsty inquisitorial bodies that sought out criminals and even participated in executing them.[3] The first great wave of reform in the outgoing Middle Ages was a movement against lay participation in the criminal courts. It came with the creation of the essentially political figure of the *judge*, sent in by central authorities to either replace or coopt the local popular courts.[4] On the European Continent the old customary decisionmaking bodies were displaced by judges, representing the dual central powers of the monarchy and the church. The inquisitorial system replaced the primitive adversarial and accusatorial systems which existed in the lay courts.

The second great reform wave, triggered by political unrest in Europe, consisted in a strengthening of the petit trial jury in its birthplace, England, its being made a backbone of the emerging democratic society in the United States,

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[1] For a classic study of ancient Scandinavian lay courts, *see* THORL. GUDM. REPP.,. A HISTORICAL TREATISE ON TRIAL BY JURY, WAGER OF LAW AND OTHER CO-ORDINATE FORENSIC INSTITUTIONS FORMERLY IN USE IN SCANDINAVIA AND ICELAND (1832). For histories of early juries in Britain, *see*: WILLIAM FORSYTH, TRIAL BY JURY (1878); JOHN PHILIP DAWSON, A HISTORY OF LAY JUDGES (1960); THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE. PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800 (1985). On ancient German lay courts, *see* JOHN P. RICHERT, WEST GERMAN LAY JUDGES, 48-53 (1983).

[2] DAWSON, *supra* note 1, at 119.

[3] *Id.* at 99-100.

[4] On this development, *see* A. ESMEIN, A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE: WITH SPECIAL REFERENCE TO FRANCE (1913).

and in a return to lay participation in the form of the jury on the European Continent in the wake of the French Revolution of 1789.[5]

The jury was seen as a bulwark of democracy, as the "palladium of liberty" and a tool in the hands of the insurgent bourgeoisie against absolute monarchy. France introduced trial by jury in 1789, most German States introduced trial by jury after the abortive revolution of 1848 (the Rhine States had had the institution since the time of occupation by Napoleon's armies and had kept it). It was also included in the Code of Criminal Procedure of the German empire in 1871.[6] Russia introduced trial by jury in the great judicial reforms instituted by Tsar Alexander II in 1864[7]and Spain followed in 1872, only to have the institution suspended until 1888, when the institution finally took root and lasted until the Civil War in the 1930's.[8] Most of the Italian States had adopted trial by jury by the end of the 19th Century[9] and almost all other European countries followed.[10]

But these reforms were not only political. Trial by jury was seen as a catalyst in strengthening the principles of orality, immediacy, presumption of innocence, and the evidentiary standard of *intime conviction*, all of which became recognized as indispensable to a civilized criminal procedure.[11]

The next wave of reforms was against the jury, either in the form of the abolition of all lay participation in the criminal trial, or in the transformation of the jury into a "mixed court," where the professional judges would decide all questions of law, fact and sentence along with the "jurors." The model for this was the reborn German *Schöffengericht*, which was introduced in 1818 in Württemberg (2 professional judges and 3 lay assessors) and was included for the trial of lesser crimes in the 1871 German Code of Criminal Procedure. It consisted usually in a court composed of one professional judge and two lay assessors.[12] Supporters of the mixed court invariably called attention to "scandalous acquittals" returned by juries, which they maintained, amounted to "nullification of the law" resulting either from emotion, ignorance or outright

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[5] In general, *see* THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700-1900 (Antonio Padoa Schioppa, ed. 1987).

[6] In general, *see* Peter Landau, *Schwurgerichte und Schöffengerichte in Deutschland im 19. Jahrhundert bis 1870 in* THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY, *supra* note 5, at 241-304.

[7] In general, *see* SAMUEL KUCHEROV, COURTS, LAWYERS AND TRIALS UNDER THE LAST THREE TSARS (1953); FRIEDHELM B. KAISER, DIE RUSSISCHE JUSTIZREFORM VON 1864 (1972).

[8] CARMEN GLEADOW, HISTORY OF TRIAL BY JURY IN THE SPANISH LEGAL SYSTEM 55-177 (2000); JUAN ANTONIO ALEJANDRE, LA JUSTICIA POPULAR EN ESPAÑA 79-221 (1981).

[9] Ennio Amodio, *Giustizia popolare, garantismo e partecipazione*, *in* I GIUDICI SENZA TOGA. ESPERIENZE E PROSPETTIVE DELLA PARTECIPAZIONE POPOLARE AI GIUDIZI PENALI 14-31 (Ennio Amodio, ed. 1979).

[10] For a succinct list of the European and other countries which adopted trial by jury in wake of the French Revolution, *see* Neil Vidmar, *The Jury Elsewhere in the World*, in WORLD JURY SYSTEMS 428-32 (Neil Vidmar, ed. 2000).

[11] Stephen C. Thaman, *Europe's New Jury Systems: The Cases of Spain and Russia*, in WORLD JURY SYSEMS, *supra* note 10, at 319. (2000).

[12] CHRISTOPH RENNIG, DIE ENTSCHEIDUNGSFINDUNG DURCH SCHÖFFEN UND BERUFSRICHTER IN RECHTLICHER UND PSYCHOLOGISCHER SICHT 33-34 (1993).

rebellion. They also asserted that the separation of the trial court into judges of fact (jurors) and judges of the law (judges) was impossible, since it was impossible to separate legal from factual questions. Therefore professional and lay judges should deliberate together and decide all questions of fact and law collegially. They also maintained that trial by jury was impractical in a system where all judgments must be reasoned to facilitate appeals. German supporters of the mixed court also used blatantly chauvinistic arguments in their campaign: the *Schöffengerichte* were an ancient German institution, whereas the jury was an English-French institution with no "folk" roots.[13]

This wave of reform bore fruit in the first half of the 20th Century. The Bolsheviks were the first to abolish jury trial in Russia in 1917 and introduce a German type of mixed court with one professional judge, picked and controlled by the Communist Party, and two "people's assessors."[14] Though the German jury was converted into a mixed court before the rise to power of Hitler, the reforms of 1924 which accomplished this were during a period of wide-spread social unrest and economic depression and were instituted by decree, and not democratically. The classic jury was then abolished by Mussolini's fascist government in 1931, by Franco in Spain in 1939, and finally by the Vichy-Regime in France in 1941. Italy and France maintained a mixed court which was still called an assizes court, whereas Spain got rid of all lay participation.[15]

Current reform trends are equivocal, to say the least. The Soviet mixed court which was nearly universally adopted throughout the Socialist Bloc, still exists in Poland, Hungary, the Czech Republic, Croatia, Ukraine, Belarus and other post-socialist countries but functions now more like the German mixed court since Communist party domination has disappeared. On November 23, 2001, the Russian State Duma voted to eliminate its mixed court entirely in favor of jury courts for the most serious cases (usually aggravated murders) and professional courts for all the rest.[16] Ukraine, Belarus and Kazakhstan proclaim the right to jury trial in their new constitutions but have not taken action to implement this command.[17] The draft code of criminal procedure of all of Estonia, however, proposes an elimination of the mixed court in favor of a professional bench.[18] Only Russia has returned to the classic jury (12 jurors, one professional judge,

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[13] Landau, *supra* note 6, at 292-302.

[14] SAMUEL KUCHEROV. THE ORGANS OF SOVIET ADMINISTRATION OF JUSTICE: THEIR HISTORY AND OPERATION 25-49 (1970)

[15] Stephen C. Thaman, *Europe's New Jury Systems: The Cases of Spain and Russia, in* WORLD JURY SYSTEMS, *supra* note 10, at 324 (note 19).

[16] § 30 UGOLOVNO-PROTSESSUAL'NYY KODEKS ROSSIYSKOY FEDERATSII (Enacted by Russian State Duma on November 22, 2001) [hereafter UPK-RF], approved by the Federation Council, December 5, 2001, all cites from §§ 19-21 Draft Code of Criminal Procedure of The Republic of Estonia (on file with the author).

[17] Art. 14 of the Belarus Constitution and Art. 75(2) of the Constitution of Kazakhstan. Stephen C. Thaman, *Comparative Criminal Law and Enforcement: Russia, in* ENCYCLOPEDIA OF CRIME AND JUSTICE 210 (Joshua Dressler ed., 2001).

[18] UGOLOVNO-PROTSESSUAL'NYY KODEKS ROSSIYSKOY FEDERATSII (2002).

majority verdict, special verdict in the form of a list of questions) in 1993, preliminarily in 9 of its 89 regions and to be extended to the entire country pursuant to the new Code of Criminal Procedure.[19]

Despite opposition from most professors and judges, Spain reintroduced trial by jury in 1995 to implement the command of its 1978, post-Franco, Constitution. The new system, which applies mainly to murder cases (9 jurors, 1 professional judge, 7 votes needed for conviction, question lists),[20] is under attack by the ruling conservative Popular Party which wants to transform it into a mixed court.

In Latin America, which, with the exception of four old-fashioned jury systems grafted on to inquisitorial trial procedures (Brazil, El Salvador, Panama and Nicaragua), knew no lay participation and was still using written inquisitorial procedures abandoned in Europe in the 19th Century, the Argentinian State of Cordoba has introduced a mixed court system and several countries are debating the turn to lay participation.[21] The most interesting reforms, however, have been in Venezuela, which introduced lay participation for the first time in 1999, both in the form of juries for crimes punishable by more than 16 years (Spanish model), and a mixed court of two lay assessors and one professional judge for crimes punishable between four and 16 years, the remainder being handled by single professional judges.[22] On November 12, 2001, however, the Venezuelan legislature eliminated the jury courts.[23]

Is there a move away from lay participation in any countries? Some critics maintain that widespread plea-bargaining in the United States, where less than

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[19] For an in-depth analysis of the Russian jury law and the first year it was in force, *see* Stephen C. Thaman, *The Resurrection of Trial by Jury in Russia*, 31 STAN. J. INT'L L. 61-274 (1995). Cf. § 14 ROSSIYSKAIA FEDERATSIIA. FEDERAL'NYY ZAKON. "O VVEDENII V DEYSTVIE UGOLOVNO-PROTSESSUAL'NOGO KODEKSA ROSSIYSKOY FEDERATSII" (Federal Law of the Russian Federation, "On Implementation of the Code of Criminal Procedure of the Russian Federation)(Enacted by Russian State Duma, November 22, 2001).

[20] For an in-depth analysis of the Spanish jury law and first year it was in force, see Stephen C. Thaman, *Spain Returns to Trial by Jury*, 21 HASTINGS INT'L & COMP. L.R. 241 (1998).

[21] Brazil has had a jury since 1822, GUILHERME DE SOUZA NUCCI. ROTEIRO PRÁTICO DO JÚRI 1 (1997). It is currently composed of seven jurors. § 406-497 CÓDIGO DE PROCESSO PENAL (Flávio Fenógglio Guimarães, ed. 2000). Five person juries exist in Nicaragua and El Salvador and Panama has a seven person jury. EL PROCESO PENAL: ENTRE EL GARANTISMO NORMATIVO Y LA APLICACIÓN INQUISITORIAL 11-22 (1992). In 1998, the Argentinian Province of Córdoba introduced a mixed court composed of three professional judges and two lay assessors. Ricardo Juan Cavallero, *La Constitución de Argentina. La realidad jurídica y un reciente ensayo de tribunal mixto, in* JUICIO POR JURADOS EN EL PROCESO PENAL 52 (Julio B. J. Maier et al. eds. 2000).

[22] §§ 16, 60, 158, 164 Código Orgánico Procesal Penal GACETA OFICIAL. Extraordinario del 23 de enero de 1998 [hereafter COPP-Venezuela-1998]. *See* ERIC LORENZO PÉREZ SARMIENTO, COMENTARIOS AL CÓDIGO ORGÁNICO PROCESAL PENAL (3d. ed, 2000).

[23] LEY NO. 54, LEY DE REFORMA PARCIAL DEL CÓDIGO ORGÁNICO PROCESAL PENAL, GACETA OFICIAL DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA No. 5552 (November 12, 2001) [hereafter, COPP-Venezuela-2001].

10% of all cases are actually tried by juries,[24] and attempted reforms in England or Wales. That would deprive the defendant of the right to ask for trial by jury in "either-way" offenses or in serious fraud cases point in that direction.[25] However, both of these reform efforts have not borne fruit and it appears that the jury will remain in most former Commonwealth countries which currently have it.[26] Reforms aimed at making the jury work more efficiently, to secure a broader participation of the citizenry in the jury process, are always under consideration.[27]

In the next part, I will discuss the inter-related political and procedural reasons for introducing lay participation. Whether to introduce lay participation and the form in which it will be introduced is a political question. It touches upon the vested interests of judges, prosecutors and lawyers as well as the very nature of democratic government. But it also has profound impact on the *procedure* of criminal trials. If it weren't for deficiencies in the way a country conducts its criminal trials there would be no need to transform the system by introducing lay participation.

II. THE POLITICAL NEED FOR LAY PARTICIPATION

A. Historical Arguments

Although the archetypal juries or *scabini* were not democratic institutions in the modern sense, they were customary popular institutions of local control. As Europe turned to the purely professional inquisitorial system, juries in England began to be seen as a vehicle for protecting the right of political and religious speech against attempts by the royal government to suppress it. It was this interpretation of the jury as a democratic institution and a check on royal control that made it part and parcel of the revolutionary programs in late 18th and 19th Century Europe.[28]

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[24] CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE. AN ANALYSIS OF CASES AND CONCEPTS 666 (4th ed., 2000).

[25] Alan Travis, *Lords Kill Straw's Bill to Curb Jury Trials*, GUARDIAN WEEKLY, Jan. 27-Feb. 2, 2000, at 10.

[26] For an accounting of the spread of juries in the British Commonwealth, *see* Vidmar, *The Jury Elsewhere*, *supra* note 10, at 432-42.

[27] *See in general Jury Reform: Making Juries Work. Symposium*, 32 UNIV. OF MICH. J. OF L. REFORM 213 (1999).

[28] *See in general* THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY, *supra* note 5. At a conference entitled "Lay Participation in the Criminal Trial in the 21st Century," which took place at the International Institute for Higher Studies in Criminal Sciences in Siracusa, Italy, in May, 1999, fifty-five representatives from approximately twenty-eight countries formulated a number of theses related to the roles of juries and mixed courts. For the democratic thesis on lay participation, *see* Thesis 1, Appendix. The theses have also been published in Stephen C. Thaman, *Symposium on Prosecuting Transnational Crimes: Cross-Cultural Insights for the Former Soviet Union, in* 27 SYRACUSE J. INT'L L.J. COMMERCE 59 1, 59-65 (2000).

And although it was by and large totalitarian and Fascist governments which abolished the jury in the first half of the Twentieth Century, the democratic governments which continue to have mixed courts (often still calling them "juries") still primarily base their existence on the democratic legitimacy won by juries in the 18th and 19th centuries. Just as in Medieval times, mixed courts and juries have been converted by unjust regimes into weapons of oppression. The Bolshevik "people's courts" with people's assessors, the Nazi *Volksgericht*[29] and the Popular Tribunals on the Republican side during the Spanish Civil War[30] are examples of the perversion of this form of justice, as were the all-white juries in the American South from the Civil War up until the Civil Rights Movement in the 1960's.[31]

The most repressive regimes throughout the rest of human history have always been supported (willingly or grudgingly) by a professional career judiciary without lay participation. Today one need only look at the undemocratic regimes in the Arab and Muslim world, which refuse to allow any lay participation, as an example. The Netherlands stands out as an unusual example of a long democratic country with virtually no tradition of lay participation. Democratic, egalitarian countries can exist without lay participation, but it is difficult for repressive dictatorships to exist *with it*, unless it is deformed into a kangaroo court of yes-sayers. Yet if it is eliminated, and totalitarian tendencies emerge: what is to be done if the institution has been abolished?

The historic political reason for insisting on lay participation it that it is a check on judicial power. It can protect against certain tendencies in a professional judiciary which could undermine a just system of the assessment of criminal responsibility and punishment, such as: (1) possible dependence of the judiciary on organs of the executive branch or on political parties; (2) substantial dependence of the judiciary on public opinion; (3) in a society with serious class, ethnic or social divisions, the judges may belong to the ruling class, the main ethnic group, or to a social elite; (4) the routinization of judging or the case-hardening of judges after long years on the bench; (5) overbureaucratization of the judiciary, reflected, for instance, in judicial decision-making influenced by a desire to rise in the judicial bureaucracy; (6) an excessive judicial formalism in procedure, practice and language.[32]

Even a strong and politically independent judiciary can be over-politicized and too dependent on public opinion (such as state court judges in some of the United States, where if a judge makes an unpopular ruling, which might free someone accused of a notorious crime, they could face a challenge at the next

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[29] *See* Markus Dirk Dubber. *The German Jury and the Metaphysical* Volk: *From Romantic Idealism to Nazi Ideology*, 43 AM. J. OF COMP. LAW 227, 238 (1995).

[30] *See* GLICERIO SÁNCHEZ RECIO, JUSTICIA Y GUERRA EN ESPAÑA, LOS TRIBUNALES POPULARES (1936-1939) (1991).

[31] Albert W. Alshuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*. 61 U. CHI. L. REV. 867, 888-90 (1994).

[32] *See Theses 2, Appendix.*

election)[33] or, even if not dependent on other branches of government or public opinion, it could concentrate excessively on defending its own institutional interests at the expense of other protectable interests. It is in such judiciaries that a kind of institutional and intellectual, if not always class (or racial) elitism can hold its sway.[34]

The strong judiciaries of France, Spain, Italy and Germany were usually vociferous opponents of lay participation. They saw their task as a scientific one, the exercise of which required an advanced legal education which was beyond the ken of the normal lay person.[35] Coupled with this institutional elitism, came a cultivated, erudite and abstruse language, almost like that of a tribe among its members. The judge begins her career, typically, low in the hierarchy, perhaps as investigating magistrate, and then rises within the ranks. One conforms one's practices to that of the judicial class and does not go against accepted dogma. Of course, the longer a person is a judge, the more case-hardened one becomes. One is reluctant to believe a witness who has a certain excuse for having committed a potentially punishable act, because one has heard the story before.

Finally, lay participation in the administration of justice has traditionally been seen as a "right-duty" of a democratic citizenry. It is supposed to serve to legitimate the imposition of criminal punishments in the eyes of the people and educate them to be law-abiding citizens.[36]

B. Application to Japan

1. General Political Purposes of Lay Participation

My remarks relating to Japan are restricted to the type of *mixed court* which could best fit the needs expressed in the report of the Justice System Reform Council (JSRC),[37] for it is clear that the introduction of the classic jury is not yet contemplated. The JSRC is quite cognizant of the pure "political" reasons for introducing the mixed court. Many of the arguments relate to a democratic empowerment of the people in the administration of justice. The report stresses the need for each person to "break out of the consciousness of being a governed object" in order to "become a governing subject, with autonomy and bearing

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[33] *See generally* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. Rev. 759 (1995).

[34] *See* RÜDIGER LAUTMANN, JUSTIZ—DIE STILLE GEWALT 17-19 (1972), who discusses how education, personal relationships and structural hierarchy produce a kind of dependence within the German judiciary.

[35] *See* LAUTMANN, *supra* note 34, at 13, where German judges are called "experts in esoteric science."

[36] Duncan v. Louisiana, 391 U.S. 145 (1968) (Harlan J., dissenting).

[37] JUSTICE SYSTEM REFORM COUNCIL, RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL: FOR A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE 21ST CENTURY. June 12, 2001. Tokyo, Japan (English Internet Text).

social responsibility" which it sees as necessary in "building a free and fair society in mutual cooperation" and restoring "rich creativity and vitality to this country."[38] Justice must "secure a popular base."

> The people, who are the governing subjects and the subjects of rights, must participate in the administration of justice autonomously and meaningfully must make efforts to form and maintain places for rich communication with the legal profession, and must themselves realize and support the justice system for the people.[39]

It is clear that the JSRC wants a form of mixed court in which citizens have autonomy and can affect the outcome of criminal cases, for it also recognizes the importance of their *substantive* contribution: "[I]n order to further reflect the people's sturdy social common sense on the content of trials, a new system shall be introduced for certain serious cases, under which the general public will participate in deciding cases together with judges."[40]

Participation of citizens achieves "a justice system that meets public expectations," which is easier to use and to understand, and more reliable. It should enhance "public trust in the justice systems."[41] This gets out the classical political reasons for lay participation. The system is not easy to understand, perhaps because it is run by an elitist judicial bureaucracy, and it is not considered to be reliable, for some of the aforementioned reasons, which make it difficult for professional judges to fairly render justice in an impartial manner. But the JSRC is concerned also with the effects of lay participation on the professional bench. It desires the intimate interaction between lay and professional judges, and thus the choice of the mixed court, but it also uses language which seems to indicate that it is the lay judges who should serve as the souce of democratic legitimation, and themselves educate the professional judges in order to improve the judiciary's own image:

> For justice to secure a popular base, the legal profession must have won the public trust. The source of this trust lies in the legal profession consciously, and with an open attitude, constructing a desirable system of justice that responds to public expectations. The legal profession must willingly carry this out while being aware of both the importance of accountability to the people and the high responsibility for establishing a better system of justice for the people.[42]

I do not think the JSRC meant this. If lay judges are to be "autonomous" and have a "meaningful" effect on judgments, justice will be rendered *differently* from the way it is under the current system. The judiciary will be accepted by the population not just because lay judges sit with them, but because the trials produce more just results because of lay participation.

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[38] *Id.* at 10.

[39] *Id.* at 15.

[40] *Id.* at 18.

[41] *Id.* at 16.

[42] *Id.*

2. Jurisdiction, Selection and Composition of the Mixed Court

From the viewpoint of the need to ensure the autonomous and meaningful participation by *saiban-in*, it is essential to ensure that the opinions of saiban-in could influence the results of verdicts. In this connection, the number of *saiban-in* is a very important factor.[43]

The more citizens participate in criminal trials, the more the criminal justice system benefits by the aforementioned political goals and the more "autonomous and meaningful" is their participation. This participation can be achieved in two ways: by extending lay participation to all trials for serious and mid-level crimes or by restricting it to serious crimes, but providing for an expanded panel of lay assessors. The first variation is the most common and has been adopted in the cradle of the mixed court, Germany, whose law provides for small mixed courts of one professional judge and two lay assessors in mid-level cases[44] and an expanded panel of 3 professional judges and 2 lay assessors for more serious crimes.[45] Perhaps a superior version is that of Sweden, which gives the lay judges a stronger role, by providing for one professional judge and three lay assessors in the lesser cases and one professional judge and five lay assessors in the more serious ones.[46] The old model of the German Criminal Procedure Code of 1871, which used the mixed court for the mid-level crimes and a classic jury for the most serious crimes,[47] is still followed in Austria,[48] Denmark[49] and Norway.[50] Similar court organization systems were recently altered in Venezuela[51] and Russia.[52]

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[43] *Id.*, at 125. *Saiban-in* is a lay person who sits on the judicial panel.

[44] §§ 24, 25, 29 GERICHTSVERFASSUNGSGESETZ (GVG).

[45] §§ 74, 74d, 76 GVG.

[46] § 3 Code of Judicial Procedure, *see* THE NATIONAL COUNCIL FOR CRIME PREVENTION, THE SWEDISH CODE OF JUDICIAL PROCEDURE. (1985).

[47] Landau, *supra* note 6, at 301-02.

[48] Single judges decide cases punishable by up to 6 months, § 9 STRAFPROZEBORDNUNG [HEREAFTER STPO-AUSTRIA]; a mixed court of two professional judges and two lay assessors handles cases punishable by no more than five years imprisonment, § 10 STPO-AUSTRIA; a jury composed of three professional judges and eight jurors handles cases charging violation of crimes of state security and crimes punishable by life, or from five to ten years. §§ 14, 300 STPO-AUSTRIA.

[49] A mixed court of one professional judge and two lay assessors in cases punishable by less than four years imprisonment. Juries composed of twelve jurors and three professional judges handle more serious cases, § 687.21 Retsplejeloven (Law on Judicial Procedure). *See* Peter Garde, *The Sanish Jury, in* 72 REVUE INTERNATIONALE DE DROIT PENAL 87, 91 (2001).

[50] A mixed court of one professional judge and two lay assessors handles minor cases, and a jury of three professional judges and ten jurors handle the most serious cases. Asbjorn Strandhakken, *Lay Participation in Norway,* 72 REVUE INTERNATIONAL DE DROIT PENAL 225, 230, 236 (2001).

[51] Under the 1998 Code of Criminal Procedure of Venezuela, crimes punishable by four years or less are tried by single judges, those punishable by four to sixteen years were tried by a mixed court composed of one professional judge and two lay assessors and crimes punishable by more than 16 years were tried by a jury of nine presided over by one professional judge. §§ 60-62. CÓDIGO ORGÁNICO PROCESAL PENAL (COPP-Venezuela), GACETA OFICIAL. NO. 5,208. (January 23, 1998), all citations from ERIC LORENZO PÉREZ SARMIENTO, COMENTARIOS AL CÓDIGO ORGÁNICO PROCESAL PENAL (3d. ed, 2000). However, in Fall 2001, the Venezuelan legislator abolished the two-year-old jury system and now Venezuelan law provides for the mixed court to hear all cases punishable by more than four years imprisonment. §§ 64-65 (COPP, as amended Nov. 12, 2001),

The JSRC is leaning, however, towards limiting lay participation to only the most serious crimes.[53] This is the approach taken in most non-Anglo-Saxon jury systems. For instance, juries are virtually limited to murder cases and other very serious crimes in the following countries, in which juries are the only form of lay participation: in Brazil,[54] Spain,[55] Belgium[56] and Russia.[57] and are limited to murder cases and other specified serious crimes The only countries, to my knowledge, in which a mixed court is used for the most serious crimes are France and Italy, which transformed their jury systems into mixed court systems (even maintaining the name), thus allowing the professional judges to deliberate with the lay judges, but maintaining many of the positive aspects of trial by jury.

If Japan wishes to introduce lay participation only for serious crimes, such as capital murder, it might well look to France and Italy as possible models. In both countries the number of lay assessors substantially outnumbers that of the professional bench. In France, nine lay assessors sit with three professional judges[58] and in Italy, one or two professional judges sit with six lay assessors.[59] Since Japan does not have a high crime rate and there will not be a large number of such trials, to guarantee meaningful participation of the population at least six citizens should sit on the mixed court. The JSRC has noted: "From the viewpoint of ensuring the effectiveness of deliberations, the size of the judicial panel should be such that all of the judges and all of the *saiban-in* can engage in thorough

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GACETA OFICIAL 37,322 (Nov. 12, 2001). *See generally*, Stephen C. Thaman, *Latin America's First Modern System of Lay Participation, in* FESTSHRIFT FÜR STEFAN TRECHSEL ZUM 65, GEBURTSTAG 765-79 (2002)

[52] Until July 1, 2002, Russia will continue with a system providing for single judges to hear cases punishable by no more than five years imprisonment, mixed courts composed of one professional judge and two lay assessors to other more serious cases tried in the lower level courts of original jurisdiction, and courts of one professional judge and twelve jurors to hear cases in the higher courts of original jurisdiction (in the nine regions in which jury trial was introduced in 1993). §§ 35, 36 UGOLOVNYY-PROTSESSUAL'NYY KODEKS RSFSR (UPK-RSFSR), *See* UGOLOVNYY-PROTSESSUAL'NYY KODEKS RSFSR S PRILOZHENIAMI (N.M. Kipnis, 2nd ed., 2001). After that, the mixed court was abolished and single judges hear all cases punishable by no more than ten years. Juries or three judge panels hear all other cases, §§ 30-31 UGOLOVNO-PROTSESSUAL'NYY KODEKS ROSSIYSKOY FEDERATSII (Enacted by Russian State Duma, November 23, 2001) (UPK-RF), and the jury will begin its expansion to all 89 subjects of the Russian Federation by January 1, 2003, § 14 Transitional Provisions UPK-RF.

[53] JSRC Report, *supra* note 37 at 126-27.

[54] *See* Art. 5, Sec. XXXVIII. Constitution of the Federative Republic of Brazil (1996).

[55] §§ 1, 2 LEY ORGÁNICA DEL TRIBUNAL DEL JURADO [hereafter LOTJ-Spain] (BOE num. 122, de 23 mayo [RCL 1995, 1515], in LEY DE ENJUICIAMIENTO CRIMINAL Y OTRAS NORMAS PROCESALES (Julio Muerza Esparza, ed., 1998)

[56] Philip Truest, *The Jury in Belgium*, 72 REVUE INTERNATIONAL DE DROIT PENAL 27 (2002).

[57] § 31(3) UPK-RF.

[58] § 296 CODE DE PROCÉDURE PÉNALE (L. no. 57-1426, Dec. 31, 1957) [hereafter CCP-France], see CODE DE PROCÉDURE PÉNALE (Dalloz, 42nd ed., 2001).

[59] § 3 RIORDINAMENTO DEI GIUDIZI DI ASSISE (L. 10 aprile 1951, n. 287; Gazzetta Ufficiale 7 maggio 1951, n. 102).

discussion to reach a conclusion with substantial grounds."[60] The United States Supreme Court has decided that a jury of six, half of the traditional number of twelve, is of sufficient size to "promote adequate deliberation" and allow for participation of a "fair cross-section of the community" in each trial but held that a reduction of the jury to five would be impermissible.[61] The lower the number of lay assessors, the more the professional judge or judges will be able to dominate the discussion and the less diversity one will have on the panel in age, sex, and socio-economic status. Thus to guarantee "autonomous" and "meaningful" participation, and to ensure that the results will be a different, more just and democratic form of justice, the German solution, providing for less lay participation as the seriousness of the crime increases, is to be rejected. For it is the more serious crimes that require a plurality of views and also more democratic and popular legitimation, for more serious penalties will be imposed.

It is sufficient to have one professional judge sitting on a mixed court. Since the JSRC report stresses that the lack of judges contributes to the slowness of justice in Japan,[62] it would be a waste of scarce judicial resources to have more than one judge sit on a case, for it is the judge's primary role to discuss the application of the law to the facts of the case with the lay assessors and not to dominate in the determination of the facts. Indeed, the JSRC has admitted that the current judiciary lacks "abundant, diversified knowledge and experience,"[63] which are so important in fact-finding.

Whatever the ultimate composition of Japan's mixed court, I strongly support the following recommendation of the JSRC report:

> In the new participation system, in principle, all members of the public equally should be given the opportunity to participate in the justice system and should bear the responsibility to do so. Accordingly, with respect to the selection of *saiban-in*, the selection pool should be made up of persons randomly selected from among eligible voters, so that the selection is made fairly from the broad general public. Thereupon, in order to select persons suited to serve on a case as *saiban-in*, appropriate mechanisms should be established to ensure a fair trial by an impartial court (such as systems for disqualification and rejection and for challenges). To provide the opportunity to as many people as possible and to avoid excessive burden on those selected, new *saiban-in* should be selected for each specific case and should be released when they have served for the entire case up through the judgment on it.[64]

Random selection from the voter rolls will ensure a fair cross-section of the community and independence from the political parties or the political establishment. It would avoid the dependence of judicial process on the dominant political party, as occurred in the old "key man" system of picking juries in the

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[60] JSRC Report, *supra* note 37, at 125.

[61] Williams v. Florida, 299 U.S. 78 (1970); Burch v. Louisiana, 441 U.S. 130 (1979).

[62] JSRC Report, *supra* note 37, at 73.

[63] *Id.* at 113.

[64] *Id.* at 126.

United States,[65] the Communist Party controlled selection of lay assessors in the old Soviet Bloc[66] and the party-dominated system of vetting candidates which exists in Germany[67] and other European countries.[68] The new Venezuelan system draws its lay assessors randomly from voting lists,[69] as do the mixed courts in France.[70]

Having lay assessors serve on only one case also will prevent the "case-hardening" but, more importantly, the closeness to the judges and the criminal justice system which occurs when lay assessors sit for as long as four years (as in Germany)[71] and may revolunteer or be re-elected so that they serve for many years and become more like English lay magistrates.[72] This was also the Soviet system and apparently exists in Sweden[73] and other countries. Lay assessors, if picked for only one case, will be more fresh and more independent, and act less like the "nodders" in the former Soviet Union[74] or the "ornaments" as they have been called in Germany[75], Hungary[76] and other countries.[77] More importantly, it will give a broader swath of the Japanese population the chance to participate in the administration of justice, which is one of the major aims of the new system.

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[65] *See* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 963-64 (2d ed., 1992).

[66] Thaman, *Resurrection*, *supra* note 19, at 67.

[67] § 40 GVG-Germany.

[68] For instance, Denmark and Norway. *See* Hiroshi Sato, *Designing the Lay Judge System in Japan*. Originally written for International Symposium "*The Role of the Judiciary in Changing Society*" by the Japanese Association of Sociology of Law, Tokyo, Japan, June 9 and 10, 2001. Also presented at Law and Society Meeting, Budapest, July 4-7, 2001. On file with the author, at 11.

[69] § 155 COPP-Venezuela-2001.

[70] Pursuant to a law of July 28, 1978, the mayor of each commune randomly picks three times the number of prospective lay assessors from voter registration lists as needed by the *cour d'assise*. FRANÇOISE LOMBARD, LES JURÉS. JUSTICE REPRÉSENTATIVE ET REPRÉSENTATIONS DE LA JUSTICE 292 (1998).

[71] German *Schöffen* are elected for four year terms and sit for no more than twelve regular court sessions each year. It should be noted that the committees which select them should strive to include "all groups of the population" in the lists. §§ 42, 43 GVG-Germany.

[72] PÉREZ SARMIENTO, *supra* note 22, at 215, in commenting on the Venezuelan method of selecting lay assessors for just one case, noted that "a lay judge elected for two years, with the unlimited possibility of being re-elected, as occurred in the now disappeared USSR, ends by being professionalized, and converting himself into a political figure."

[73] *See* Christian Diesen, *Lay Judges in Sweden – A Short Introduction*, *in* 72 Revue International de Droit Penal 313, 314 (2002).

[74] Thaman, *Resurrection*, *supra* note 19 at 67.

[75] In Germany the word *Schöffenattrappe* (lay assessor as stage prop) has been used. CHRISTOPH RENNIG, DIE ENTSCHEIDUNGSFINDUNG DURCH SCHÖFFEN UND BERUFSRICHTER IN RECHTLICHER UND PSYCHOLOGISCHER SICHT 273 (1933).

[76] Attila Badó, *Reforming the Hungarian Lay Justice System*, Paper presented at Law and Society Meeting, Budapest, July 4-7, 2001, at 10.

[77] On the reduction of the American jury trial to a systemic "ornament" due to its displacement by plea-bargaining, *see* MIRJAN R.DAMAŠKA, EVIDENCE LAW ADRIFT 128-29 (1997).

Once an annual or biannual list of registered voters has been compiled, those people who are exempt, incompatible or ineligible for service should be eliminated from thė list. Japan may wish to place a lower or higher age-limit on participation than applies to eligibility to vote, i.e. (25-70 years, as in Spain and Russia).[78] The U.S. places generally no age limits, other than being voting age, which is 18. Politicians, lawyers, judges, prosecutors, perhaps priests or doctors, etc. could also be excluded.[79] Finally, convicted felons and those who have already served on a mixed court in, for instance, the last 3 years, could be removed.[80]

I suggest summoning to court twice the number of lay assessors needed before a trial is to begin, according to my suggestion, twelve persons from which to form the panel of six to try the case.[81] It would be good to have a computer program that could at least ensure that an even number of men and women, and a good mix of ages is represented on the panel. Then six should be chosen from the twelve and briefly identify who they are and whether they have any compelling reason not to sit on the particular trial. I believe each side could be given one peremptory challenge,[82] perhaps just to balance the composition of the court, i.e., if there are too many men or too many older persons.[83] Then another person

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[78] *See* Thaman, *Europe's New Jury Systems*, *supra* note 11, at 239.

[79] For instance, *see* Missouri's statute, V.A.M.S. §§ 494.425, 494.430, 494.431. In California and the federal system, however, there are no automatic exclusions of categories of jurors. For instance, *see* 28 U.S.C. § 1865.

[80] Lay assessors may request to be excluded on this ground in Venezuela. § 154 COPP-Venezuela-2001.

[81] In both Russia and Spain, twenty prospective jurors are called from which the twelve Russian and none Spanish jurors are chosen. Thaman, *Europe's New Jury Systems*, *supra* note 11, at 239.

[82] Russia allows two peremptory challenges each for defense and prosecution in its jury cases and Spain four. *Id.* at 239-40. The defendant had three peremptory challenges in England until they were completely eliminated by the Criminal Justice Act of 1988. STEPHEN SEABROOKE & JOHN SPRACK, CRIMINAL EVIDENCE AND PROCEDURE: THE STATUTORY FRAMEWORK 292 (1996).

[83] In the United States there is no right to have a fair cross-section of the community *on each jury*, though some jurisdictions allow a defendant to ask for a new panel on the day of trial if there appears to be a serious absence of one part of the population. LA FAVE & ISRAEL, *supra* note 65, at 964-69. The United States Supreme Court has, however, tried to limit the use of peremptory challenges by the prosecution, Baston v. Kentucky, 476 U.S. 79 (1986), and the defense, Georgia v. McCollum, 505 U.S. 42 (1992), to eliminate especially racial groups from the jury. A report of the English Royal Commission on Criminal Justice suggested procedures for ensuring sufficient participation of racial minorities in juries in which the defendant or victim fears prejudice, ROYAL COMMISSION ON CRIMINAL JUSTICE. REPORT 133-34 (1993), but this suggestion has not been adopted. Critics, however, have pointed out that European mixed courts have often tended to be over-represented by elderly people and men. On Denmark, *see* Garde, *supra* note 49, at 110, on Hungary, *see* Bado, *supra* note 76, at 7. On Lay Participation and Diversity, see Thesis 3, Appendix.

would be drawn by lot. This would be a short procedure,[84] unlike American *voir dire*,[85] yet would provide for a better mix on the panel.

III. THE PROCEDURAL EFFECTS OF LAY PARTICIPATION

A. The Right to a Speedy and Continuous Trial

The JSRC has recognized that "to hold the trial over consecutive days is an almost indispensable precondition when introducing the new popular participation system to the proceedings.[86] If lay assessors are chosen for a number of years and may meet only a certain number of days a year, as in Germany, cases can be continued, interrupted, conducted "piece-meal" or in "instalments."[87] Apparently, this is a serious problem in Japan with cases sitting up to 20 years in the courts without resolution. The longer a trial is stretched out, the more the principles of the oral trial and immediacy suffer. Ideally, Japan should follow the U.S. practice of setting statutory time limits within which a case must be charged and litigated upon pain of dismissal with prejudice[88] and, at the least, insist that trials be held on continuous days until a judgment is rendered.

B. The adversary, oral trial based on the principle of immediacy

The JSRC has recognized that:

> The focus of the problem is centered on how the trial proceedings of truly contested cases can be enriched and vitalized based on the spirit of directness and orality. In particular, in relation to the introduction of the new popular participation system in the trial proceedings, these demands will become even greater in order to secure meaningful participation by the *saiban-in* (lay members of the judicial panel), discussed later. It is the proper manner of criminal trial that, in truly contested cases, both parties actively make allegations and present evidence to clarify the contested issues, in concentrated proceedings, and on that

[84] Jury selection usually lasted no more than one or two hours in the first Russian jury trials, Thaman, *Resurrection*, *supra* note 19, at 97, and anywhere from thirty minutes to, exceptionally a maximum of seven hours, in the first year of Spanish jury cases. Stephen C. Thaman, *Spain Returns to Trial by Jury*, 22 HASTINGS INT'L & COMP. L. REV. 241, 291 (1998).

[85] The author himself defended in a capital murder case in California in 1986 in which it took three months to select a jury to decide just the issue of penalty.

[86] JSRC Report, *supra* note 37, at 56.

[87] MIRJAN R.DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY 52 (1986)

[88] A defendant who is in custody must be charged and arraigned in the trial court within approximately thirty days of arrest in both the federal, 18 U.S.C. § 3161(b), and California courts. § 825, 859b, 739 CAL.PENAL CODE. The trial must commence in the federal courts within another seventy days of this arraignment, 18 U.S.C. § 3161(c)(1), and within sixty days thereof in the California courts. CAL.PENAL CODE § 1049.5. In California, if the prosecutor is not ready for trial, the case may be dismissed once without prejudice and re-charged, triggering the same time periods. If the case is not ready for trial in another ninety days, it must be dismissed.

basis the judges (and the *saiban-in* in the case of proceedings in which the *saiban-in* participate) then form their decisions.[89] (JSRC, 57)

Since the French Revolution, the introduction of lay participation in the form of the classic jury was intended also to serve as a catalyst in increasing the adversary and accusatorial character of the criminal trial and strengthening the principles of orality and immediacy and the presumption of innocence in the evidentiary portion of the trial. Indeed, most of the modern notions of due process, and "rule of law" in criminal procedure, that have gained general international recognition in national constitutions and international human rights conventions, have their origins to a great extent in Anglo-American concepts which developed in the context of an adversarial trial by jury: (l) the presumption of innocence; (2) the privilege against self-incrimination; (3) equality of arms; (4) the right to a public and oral trial; (5) the accusatory principle; and (6) independence of the judge from the executive (investigative agency).[90]

While this has been recognized by proponents of the mixed court, the mixed court has been favored in post-inquisitorial systems because, to them, it better protects the inquisitorial principles of the duty of the court to ascertain the material truth, the necessity to give reasons for all judgments, and the necessity that those judgments be subject to meaningful review.[91]

There is no reason why the Japanese mixed court cannot develop a form of mixed court which can pay heed to all of these important principles.

To preserve the presumption of innocence, none of the mixed court, not even the professional judge, should have access to the investigative dossier.[92] While

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[89] JSRC Report, *supra* note 37, at 57.

[90] For the proposition that French and German reformers, enamored with the Anglo-American jury system, lost sight of the "interdependencies" between that system and the procedural and evidentiary maxims of the adversary system, which were otherwise rejected, *see* Karl H. Kunert, *Some Observations on the Origin and Structure of Evidence Rules under the Common Law System and the Civil Law System of "Free Proof" in the German Code of Criminal Procedure*, 16 BUFF. L. REV. 122, 147 (1967); cf. Ennio Amodio, *Giustizia popolare, garantismo e partecipazione*, *in* I GIUDICI SENZA TOGA. ESPERIENZE E PROSPETTIVE DELLA PARTECIPAZIONE POPOLARE AI GIUDIZI PENALI 13 (Ennio Amodio ed., 1979). *See also* K.J. MITTERMAIER, DAS VOLKSGERICHT IN GESTALT DER SCHWUR-UND SCHOFFENGERICHTE 21 (1866) *and* K.J . MITTERMAIER, ERFAHRUNGEN UBER DIE WIRKSAMKEIT DER SCHWURGERICHTE IN EUROPA UND AMERIKA 667 (1865), who felt the principle of oral and public trials could be effectively implemented only in the form of the classic jury trial. *See also* Thesis 4, Appendix.

[91] Thaman, *Europe's New Jury Systems*, *supra* note 11, at 320. According lo Amodio, *supra* note 90, at 46-48, ITALY CONST. ART. III(I) on makes the reintroduction of the classic jury impossible because it requires reasons to be provided for all judicial decisions.

[92] In the German and Soviet-era mixed courts, the presiding judge decides whether to set the case for trial on the base of his study of the contents of the dossier prepared during the preliminary investigation. § 203 StPO-Germany; § 223-1 UPK-RSFSR. This is also true in the Swedish and Portuguese mixed courts despite the adversarial nature of procedure in those countries. Hans-Heinrich Jescheck, *Grundgedanken der neuen italienischen Strafprodeßordnung in rechtsvergleichender Sicht*, FESTSCRIFT FÜR ARTHUR KAUFMANN ZUM 70, GEBURTSTAG 665 (1993). MITTERMAIER doubted that judges, despite their best effort, could protect themselves from forming an unconscious "preconceived

this is perhaps already the case in Japan, the rule should be strengthened by preventing *any* reading of investigative documents at trial, especially statements of witnesses and defendants, unless they fall under strict exceptions to the requirement of orality and immediacy and the defendant's right to confront the witnesses. Lay judges can only bring their "commonsense" to the adjudicative process if they can *see and hear* the witnesses, determine their credibility and rule accordingly. This has been the approach of the Italian Code of Criminal Procedure of 1988, the Spanish Jury Law of 1995 [93] and the Venezuelan Code of Criminal Procedure of 1998.[94] If the judge is to act as a juror, i.e., decide the case based on "inner conviction" or "free evaluation of the evidence"[95] he or she should be as unprejudiced as the lay judge in relation to the facts of the case. It is the parties who must present the case and the judge and lay assessors who should decide the adequacy of the evidence.

Thus, the "principle of material truth" in the new Japanese system should be re-interpreted to place the burden on the judge to assure the parties are free to present evidence in as broad a manner as possible, bearing in mind the principles of orality, immediacy and the right to confrontation, to the end of ascertaining the truth. The Russian Code of Criminal Procedure and the Spanish Jury Law have used similar language, while maintaining a general principle of truth-

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opinion as to guilt" imbued by study of the dossier of the preliminary investigation. *See* MITTERMAIER, DAS VOLKSGERICHT, *supra* note 90, at 22; MITTERMAIER, ERFAHRUNGEN, *supra* note 90, at 683. Modern views include the cynical contention that German criminal procedure is a Potemkin facade and the trial an orchestrated blessing of the results of the preliminary investigation, *see* Bernd Schunemann, *Reflexionen uber die Zukunft des deutschen Strafverfahrens, in* FESTSCHRIFT FUR GERD PFEIFFER 482-83 (1988); *cf.* Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure*, 121 U. PA. L. REV. 506, 544 (1973). For the cautious assertions that the preliminary study of the file, while strongly influencing the presiding judge, does not make him or her incapable of objectively weighing the trial evidence, see RENNIG, *supra* note 75, at 177, 223, 237. As to whether Continental European systems take the presumption of innocence "somewhat less seriously" due to such trial arrangements, see Mirjan Damaška, *Models of Criminal Procedure*, 51 ZBORNIK PFZ 477, 491 (2001).

[93] In Italy and in Spanish jury trials the investigative dossier is not sent to the trial court. The only pieces of evidence taken during the preliminary investigation which are included in the "trial file" are statements and other items which cannot be repeated at the trial and which are taken in conformance with the rules for anticipated or preconstituted evidence. This means, that the defendant must have had the right to confront the witness at the pre-trial declaration. For Italy, see §§ 392(1), 401(1-3,5), 403 CPP (Italy). For Spain, see § 34, 46.5 LOTJ – supra note 55. For a discussion of the application of this principle in the first Spanish jury trials, *see* Thaman, *Spain Returns*, *supra* note 84, at 328-29.

[94] *See* §§ 338 (para.2), 339 COPP-Venezuela-2001.

[95] In his early writings, *Mittermaier* warned against "declaring legally-educated judges to be jurors" by allowing them to decide by free evaluation of the evidence because this would place too much power into their hands. *See* C.J.A. MITTERMAIER, DAS DEUTSCHE STRAFVERFAHREN 222 (2d ed., 1832).

determination in the criminal trial.[96] Letting a fact-finding judge read the investigative dossier, as is the case in Germany, Russia and other post-inqusitorial countries, cannot help but turn that fact-finder into a quasi-prosecutor. It would deprive the defendant of the effective presumption of innocence, and the lay members of the panel of equality, "autonomy," and the possibility of meaningful participation in the determination of guilt or innocence.[97]

A truly autonomous panel of lay assessors will also bring, as does a classic jury, a greater amount of unpredictability into the criminal trial, but this should be seen as a positive and not a negative fact. I have read that Japanese professional courts return verdicts of guilty in more than 99% of all cases.[98] When this is the case, the adversary system cannot work properly. Only when the result of an adjudication is not set in stone, will the parties-prosecutor, defense and victim-work hard and effectively to gather evidence, present their cases and argue their merits.[99] The passivity of lawyers and prosecutors in a German or Soviet-era mixed court only heightens the suspicion that the outcome is not in doubt in its broad outline.

Exceptions to live testimony, i.e., the reading of statements, should only be permitted when it can be shown that the evidence cannot be repeated in court on the trial date. This would be the case when a witness or victim is old or injured and might die, or is a foreigner who needs to leave the country or a person threatened in an organized crime case. In such a case, the procedure should require a pre-trial deposition in which the defendant and/or his attorney have a right to confront and examine the witness.[100] Statements that do not guarantee the pre-trial right of confrontation should, in principle, not be allowed. This is the approach adopted in Italy, Spain, Venezuela; the *jurisprudence* of the European Court of Human Rights is heading in this direction.[101] It is good reason to insist on short statutory time limits for trial so that the lay assessors will hear all the testimony "live" and in close proximity to the occurrence of the crime.

The statements of defendants should not be read in court unless the defendant was advised of his right to remain silent and his right to counsel and gave up those

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[96] § 15 UPK-RF; § 638 LEY DE ENJUICIAMIENTO CRIMINAL (B.O.E. 1882), [hereafter LECr-Spain], *cites from* LEY DE ENJUICIAMIENTO CRIMINAL Y OTRAS NORMAS PROCESALES (Juli Muerza Esparza ed. 1998).

[97] On the debate about whether to allow German lay assessors access to the investigative file, *see* RENNIG, *supra* note 75, at 146-71.

[98] On so-called "precision justice," *see* K-F Lenz, *Länderbericht Japan*, in DIE BEWEISAUFNAHME IM STRAFVERFAHREN DES AUSLANDS 195 *et seq*. (Walter Perron ed., 1995).

[99] NIKLAS LUHMANN, LEGITIMATION DURCH VERFAHREN 128 (3d ed., 1993).

[100] For modern example of such procedures, see §§ 392, 394, 401 CPP-Italy, § 307 COPP-Venezuela-2001.

[101] *See* Delta v. France, Ser.A. Vol. 191-A, 16 E.H.H.R. 574 (1993); Unterpertinger v. Austria, Ser.A. Vol. 110 (1986). *See also* RJ 1993, No. 1840, 2400, at 2400-01 (Decision of March 5, 1993). For European case law and commentary on this subject, see STEPHEN C. THAMAN, COMPARATIVE CRIMINAL PROCEDURE: A CASEBOOK APPROACH 119-30 (2002).

rights before making the statement (so-called *Miranda* warnings).[102] This is the minimal standard now, in one form or the other, in virtually all Western European countries, and even in Russia, where, historically, the problem of coerced confessions has been a big problem.[103] This should especially be the case if a criminal justice system relies excessively on confessions as proof of guilt. The less the police rely on confessions, the better will be the independent investigation of the case and, arguably, the better the search for truth. Note that the new codes of criminal procedure in Italy and Venezuela require defense counsel to be present during the interrogation for it to be admissible.[104]

Furthermore, the confession of a defendant given during the preliminary investigation, even with counsel being present, should never be cause for depriving him of the right to a full-blown trial, and especially should not deprive him of the right to a trial before *saiban-in* if his case would otherwise qualify therefor.[105] By requiring the presence of a lawyer and proper admonitions of the right to remain silent for confessions to be admissible, not only will investigating officials do a much better job in investigating the physical and testimonial evidence in the case, but the groundwork can be set for a true *alternative* procedure for avoiding trial through an admission of guilt. Letting the police induce a suspect to incriminate himself in order to convict him and sentence him to death or terms of imprisonment raises serious questions in terms of violation of the defendant's right to human dignity and personality.[106] The statement of a suspect-accused should be considered to be exclusively a tool in his or her defense,[107] or, as a bargaining chip to be used in an attempt to negotiate a

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[102] *See* Miranda v. Arizona, 384 U.S. 436 (1966).

[103] *See* Stephen C. Thaman, *Miranda in Comparative Law*, 45 ST. LOUIS U. L.J. 581 (2001).

[104] Although the code allows the police to question suspects to discover leads in investigating the case, this must be in the presence of counsel and the statement itself is *per se* inadmissible in court. The same applies if an accused makes incriminating statements to the judge of the investigation. §§ 63(1), 350 CPP-Italy. For similar language, *see* § 131 COPP-Venezuela-2001. The new Russian code of criminal procedure categorically excludes as inadmissible evidence the, which declares as inadmissible evidence the "declarations of a suspect or accused given during the pretrial proceedings in criminal cases without the presence of a lawyer and not reaffirmed in court." § 75(2)(1) UPK-RF. On a movement in Japan to encourage defendants to remain silent in criminal cases, *see* Takashi Takano, *The Miranda Experience in Japan*, *in* THE JAPANESE ADVERSARY SYSTEM IN CONTEXT 128-39 (Kalcolm K. Feeley: Setsuo Miyazawa eds. 2002).

[105] The JSRC seems to agree with this when it affirms that, since "this system has significance not only with respect to the determination of guilt, but also through the participation of *saiban-in* in determining the sentence, no distinction should be made based on whether the defendant admits or denies the charge." JSRC Report, *supra* note 37, at 126-27.

[106] For a decision of the German Supreme Court emphasizing the importance of letting out-of-custody suspects see a lawyer before even asking them simple incriminating questions in a drunk-driving case, and stressing the protection of his dignity and personality rights, *see* Decision of February 27, 1992, BGHSt 38, 214, 218-22 (1992). For full English text of opinion, see THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 101, at 85, 104-05.

[107] *See* § 65(2) CPP-Italy; § 131 COPP-Venezuela-2001 (sections limiting interrogations to providing information for the defense).

resolution of the case without trial, as in American plea bargaining,[108] or to obtain certain sentencing promises by the judge in the event of a conviction, as is frequently done in Germany.[109] The trend, today, in Europe is to try to save the full-fledged trial only for cases which are really in dispute, and to fashion ways of consensually resolving those which aren't with abbreviated procedures, guilty pleas or stipulations to the accusatory pleadings.[110]

I agree that both professional and lay judges should be able to ask questions, but only after the witnesses and defendant, if he or she testifies, has already been questioned by prosecutor and defense. And as the parties become more proficient as advocates, the fewer questions the judges will have to pose and the more they can concentrate on listening to the evidence. In all systems lay assessors may ask questions and the new Russian and Spanish jury systems allow this for jurors as well.[111]

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[108] In the last analysis, a plea of guilty is a confession: but one that is given voluntarily and constitutes full proof of the elements of the charged offense.

[109] For over twenty years now, German courts have been engaged in "confession bargaining," which usually consists in discussions between defense counsel and prosecutor regarding charges, and defense counsel and the court regarding limiting the severity of the sentence, if the defendant makes a confession in court, thereby simplifying the proof of the charges and saving the court precious time. This procedure, called *Absprachen* or "deals" has been approved by the German Supreme Court on a number of occasions. *See* Decision of August 28, 1997, BGHSt 43,195, and Decision of June 10, 1998, NStZ 1999, 92, at 93-94. For English translations of relevant parts of these decisions, *see* THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 101, at 145-52. In general, *see* Joachim Herrmann, *Bargaining Justice, a Bargain for German Criminal Justice?*. 53 U. PITT. L. REV. 755 (1992); Thomas Weigend. *Eine Prozeßordnung für abgesprochene Urteile?. Anmerkungen zu den Entscheidungen BGHSt 43, 195 und BGH, NStZ 1999, 92.* 1999 NStZ 57 et *seq*. On whether Japan's system of rewarding pre-trial confessions with release from pretrial detention or lenient sentences is really a form of plea-bargaining, *see* David T. Johnson, *Plea Bargaining in Japan*, *in* the JAPANESE SYSTEM, *supra* note 104, at 140-64.

[110] In support of a two-procedure system, a full trial for contested cases and consensual procedures for unconstested, *see* Klaus Tiedemann, *13 Thesen zu einem modernen menschenrechtsorientierten Strafprozeß*, 1992 ZEITSCHRIFT FÜR RECHTSPOLITIK 107, 108-09; Thomas Weigend, *Die Reform des Strafverfahrens. Europäische und deutsche Tendenzen und Probleme*, 104 ZStW 486, 493-501 (1992); Claus Roxin, *Über die Reform des deutschen Strafprozeßrechts*, *in* FESTSCHRIFT FÜR GERD JAUCH ZUM 65. GEBURTSTAG 190 (1990). The JSRC Report seems to be looking this way as well. JSRC Report, *supra* note 37, at 57-58. For a more critical view, *see* Albin Eser, *Funktionswandel von Prozeßmaximen* 104 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 361, 373 (1992). For a compendium of cases and statutes reflecting modern expedited, abbreviated and consensual forms of criminal procedure, *see* THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 101, at 141-63.

[111] This is the procedure adopted in both the new Russian and Spanish jury courts. Thaman, *Europe's New Jury Systems*, *supra* note 11, at 335. The Germany, lay assessors also have a right to ask questions. § 240(2) StPO-Germany. There is a move in the U.S. to expand the right of jurors to ask questions and make them more active in general. *See* B. Michael Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries*, 68 IND. L.J. 1229 (1993).

C. Evaluating the Evidence and Deciding the Question of Guilt

If the Japanese mixed court is to gain the confidence of the Japanese people the procedures for deciding the guilt question should be as transparent as is possible, without violating the confidentiality of deliberations on factual issues, for it is the facts which are the most difficult aspects of any trial, not the law. A shortcoming of the German mixed court is the secrecy of the entire interaction between professional and lay judges. At no time in a German trial is it possible to determine whether the professional judge correctly explained the law to the lay assessors or whether he misstated it, perhaps to influence the lay judges to convict. The lay assessors are strictly prohibited from speaking about any of what was said in deliberations and they are prohibited from writing the judgment or even issuing a separate opinion. Of course, the presiding professional judge must write a reasoned judgment to justify the decision, but commentators and criminologists have stressed that the purported reasons for reaching the decision are not always the actual reasons the mixed court decided as it did. They are the reasons the professional judge know will withstand appellate challenge.[112]

The procedure of a public summation by the professional judge and instructions to the jury on the law and the methods of deliberation before the mixed court retires to deliberate should make the mixed court more acceptable to the public by making its workings more transparent, and will also bolster the independence of the *saiban-in* by giving them the principles of law with which they will work and reminding them of their independence and autonomy.[113] The French system comes the closest, to my knowledge, to this model in the context of a mixed court. The presiding judge summarizes the arguments of prosecutor and defense,[114] and then prepares a question list which contains the important questions of fact which the court will have to decide in order to correctly apply the tenets of law contained in the instructions.[115]

The question list, unlike an Anglo-American verdict, includes questions going to the existence of each material fact needed to prove the elements of the charged crime and which relate to any sentencing-enhancing elements of aggravation, or sentence-mitigating excuses or justifications: such as, in the case

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[112] *Damaška* notes that the professional judge must "guess" as to why the lay assessors arrived at their decision, and that this system of "guesswork" "shifts the emphasis from factors that caused the fact finders' decision to arguments that provide rational support for it and demonstrate its correctness." He continues: "the primary duty of the tribunal is to show that its factual findings have a firm basis in evidence adduced and a solid support in canons of valid reasoning. . .to provide reasons for a verdict is to justify it in terms of conventions that govern the validity of judicial proof." DAMAŠKA, EVIDENCE LAW "DRIFT, *supra* note 77, at 42-43.

[113] *See* Damaška, *Evidentiary Barriers*, *supra* note 92, at 544: "The absence in the continental system of the requirement that lay judges be formally instructed on proof-sufficiency for conviction tends to reduce the difference between professional and lay adjudicators in their attitudes toward conviction. In contrast, the a priori, formal instruction on proof-sufficiency given to the common law jury by the judge may subtly increase these dissonant attitudes."

[114] § 347 CPP-France.

[115] §§ 348-349 CPP-France.

of murder, heat of passion, diminished mental capacity, self-defense, etc. This was the verdict form adopted by European jury systems in the 19th century and it enables the professional judge to craft a reasoned judgment for it includes the logic of the lay court's analysis of the defendant's guilt or lack thereof.[116] The French mixed court has maintained this system, which preserves the independence of the lay court but maintains the transparency of the verdict procedure. The prosecution and defense in Russia and Spain's new jury systems also have the chance to comment on the questions or the judge's instructions and suggest changes.[117] Such a system would prevent the formulation of judgment-reasons *after the fact* and contribute to the legitimacy of the Japanese *saiban-in* system.

Instructions should also include an indication to the *saiban-in* that they are indeed independent and equal judges along with the professional judge and should not hesitate to disagree with the professional judge if they believe he or she has assessed the facts incorrectly. For example, the instruction given by the French presiding judge before deliberations:

> The law does not demand of judges an accounting of the means by which you were convinced; nor does it prescribe rules according to which the completeness or the sufficiency of evidence can be determined; it requires that you reflect in silence and with careful thought in order to determine, in the sincerity of your consciences, what impression has been made upon your reasoning by the evidence adduced against the defendant and the means of his defense. The law asks only one question which sums up your entire duty. Do you have an "inner conviction.[118]

With such a system, I do not believe one needs to engage in the fiction, as is done by the German and other mixed court systems, that the lay assessors are equal to the judge in deciding questions of law. Venezuela has rejected this and says that the lay assessors in its mixed courts only decide questions of fact.[119] But the *saiban-in* should *apply the law* as determined by the judge, to the facts in answering the court's questions.[120]

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[116] On the question list in the new Russian and Spanish jury systems, *see* Stephen C. Thaman, *The Separation of Questions of Law and Fact in the New Russian and Spanish Jury Verdicts*, *in* THE JUDICIAL ROLE IN CRIMINAL PROCEEDINGS 51-63 (Sean Doran & John D. Jackson, eds. 2000). On questions lists in modern and the pre-1917 Russian jury trial, *see* Stephan C. Thaman, *Questions of Law and Fact in Russian Jury Trials: The Practice of the Cassational Courts Under the Jury Laws of 1864 and 1993*, 73 REVUE INTERNATIONALE DU DROIT PÉNAL 415-50 (2001). On the German question list in its 19th Century jury system, *see* HUGO MEYER, THAT- UND RECHTSFRAGE IM GESCHWORENENGERICHT, INSBESONDERE IN DER FRAGESTELLUNG AN DIE GESCHWORENEN. Berlin (1860).

[117] § 53 LOTJ-Spain; § 338 UPK-RF.

[118] § 353 CPP-France

[119] § 162 COPP-Venezuela-2001; *see* ERIC LORENZO PÉREZ SARMIENTO. COMENTARIOS AL CÓDIGO ORGÁNICO PROCESAL PENAL 215 (2000).

[120] This has been done for centuries by juries in the United States and United Kingdom. Enlightenment thinkers such as Montesequieu and Beccaria insisted that laws should be simple and

Another benefit of having question lists and a public recitation of the principles of law that will be applied, is that it will facilitate the writing of the judgment, especially in the event that the professional judge is in the minority. The court must be bound by the answers to the questions contained in the question list and the rendition of the law by the court. Only within these limits may it construct the reasons for the judgment.[121] This will prevent a professional judge who has been outvoted by the lay judges, from intentionally building in errors in the appreciation of the evidence in the judgment so that it will be reversed in cassation appeal. It was suspected that this occurred in the famous *Monika Weimar* case in Germany.[122] If there is fear that the *saiban-in* could nullify the law, as happens occasionally in American cases[123] and is permitted in Russian jury cases to a degree,[124] the legislator could provide that contradictory answers on the question list, i.e., a verdict of not guilty after questions indicating the elements of the crime had been proved, must be corrected before the verdict is accepted. This is the approach of the Spanish jury system.[125]

In deliberations, I believe the verdict should reflect the vote as to each question, e.g., 7-0, 6-1, 4-3, etc.[126] There should also be a final question of guilt as well. Normally, I have no heartfelt objections to majority verdicts, as exist in all mixed court and non-Anglo-Saxon jury systems. In a court with one professional judge and six *saiban-in*, the professional judge, who votes last, can be a tie-breaker if the vote is 3-3 up to that point on any particular question. A qualified majority, say of 5 of the 7 votes should also be considered to better protect the presumption of innocence and in recognition of the fallibility of human evidence. This is the approach of the Spanish jury system and the French mixed court.[127]

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understood by all. *See* LUIGI FERRAJOLI, DIRITTO E RAGIONE: TEORIA DEL GARANTISMO PENALE 99, 162 (note 10) (5th ed. 1998).

[121] This procedure is typical for Continental European jury systems. For discussions of the interrelation between question lists and the formulation of the judgment by the professional judge after a jury verdict, *see generally* Thaman, *The Separation of Questions of Law and Fact*, *supra* note 116, *and* Thaman, *Questions of Law and Fact in Russian Jury Trials*, *supra* note 116.

[122] For an English translation of the German Supreme Court's decision in the *Weimar* case and discussion, *see* THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 101, at 202-08.

[123] *See* Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149 (1997).

[124] Thaman, *Resurrection*, *supra* note 19, at 114-15.

[125] § 63(1)(d) Ley Organica del Tribunal del Jurado, B.O.E., 1995, 122 (amended by Ley Organica, B.O.E., 1995, 275) [hereinafter LOTJ-Spàin].

[126] This is required in the Russian jury system, § 343(9) UPK-RF and in the short-lived Venezuelan jury system. § 177 COPP-Venezuela-1998. The Spanish jury system requires only a notation as to whether the vote was unanimous or by a majority. § 61(1)(b-c) LOTJ-Spain.

[127] In Spain, seven of the nine jurors must agree for a guilty verdict, or the resolution of any question to the detriment of the defendant. §§ 59(1), 60(2) LOTJ-Spain. In the French mixed court, eight of the twelve members of the court, which is composed of nine lay assessors and three professional judges, must agree to answer any question to the detriment of the defendant in the trial in the first instance. The appellate mixed court, which consists of three professional judges and twelve

With a court of one professional judge and six *saiban-in*, the JSRC's desire that a decision unfavorable to the defendant should not be reached by a majority of the lay judges or professional judges alone[128] can still be implemented. Here we must look to jury systems for guidance. The professional judge or judges in virtually all jury systems have two options for nullifying what they think are unfounded convictions. They may either grant a motion for a directed verdict of acquittal before the case is submitted to the jury for deliberation, or vacate the verdict of guilty and either enter a directed verdict of not guilty or set the case for trial before another jury.[129] All systems protect against unwarranted *convictions* in such a way. Thus, in Japan's new mixed court, the professional judge should have the power to entertain a motion for a directed verdict of acquittal after all of the evidence has been received, or to enter an acquittal or order a new trial even if the six lay assessors unanimously vote to convict.

Although I believe majority verdicts should be allowed, I think the mixed court should strive to reach a unanimous verdict for a determinate period of time, say, three hours. If they are not able to do this, then they may take a vote to achieve a majority verdict. The jury is required to attempt to reach a unanimous verdict for at least three hours in Russia,[130] and two hours in England and Wales.[131] Such a rule will will encourage discussion among the members of the court and protect the opinion of each lay member, for "the voice of only one person, if it is sincere and righteous, should be listened to seriously."[132] Even if a qualified majority is required for conviction, or questions adverse to the defendant, 3 or 4 of the 7 votes should be enough to decide on acquittal or questions favorable to the defendant. This approach has been taken in the Spanish jury system.[133]

I also believe that the minority should be able to draft a dissenting opinion to express its disagreement with the majority. This is allowed in the new Venezuelan mixed court.[134] This will ensure more transparency in the procedure and prevent manipulation of the lay judges by the professional judge. It will also allow a professional judge to explain how he differs with the majority if he is outvoted rather than resorting to torpedoing the decision of the court as was suspected in the German *Weimar* case. In Finland, the lay assessors themselves write the judgment if they have outvoted the professional judge.[135] The new

lay assessors, must decide questions detrimental to the defendant by at least 10 votes. §§ 296, 359 Code de Procédure Pénale (hereafter, CPP-France).

[128] JSRC Report, *supra* note 37, at 124.

[129] FED. R. CRIM. P. 29.

[130] § 343(1) UPK-RF

[131] SEABROOKE & SPRACK, *supra* note 82, at 317.

[132] JSRC Report, *supra* note 37, at 12.

[133] For instance, while seven of the nine votes is required for conviction or decisions adverse to the defendant, five votes is sufficient for acquittal or the resolution of issues in his or her favor. §§ 59(1), 60(2) LOTJ-Spain.

[134] § 362 COPP-Venezuela-2001.

[135] Conversation with Finnish Professor Heiki Pihlajamäki, in Siracusa, Italy (May 1999).

Japanese system could provide that the clerk of the court or a neutral lawyer help the *saiban-in* formulate the judgment, after the question list has been answered, in the event that the professional judge is in the minority. The Spanish jury system requires juries to provide succinct reasons for their verdicts and allows the secretary of the court, who is a trained lawyer, to help them in their formulation.[136] But this should not be necessary, for a professional judge need only refer to the facts found true and the law in writing a judgment, even if outvoted.

D. *The Determination of Punishment*

The JSRC clearly wants the *saiban-in* to be involved in setting punishment[137] and this is as it should be, especially if they are to be involved in capital cases. Historically, juries have tended to acquit to avoid imposing what they felt were unjust punishments[138] and the European jury systems began involving the jurors in sentencing just to avoid such "scandalous acquittals."[139] The new Russian jury may, for instance, recommend lenience, which before the moratorium on the Death Penalty meant that the death penalty could not be imposed. Now it means the sentence, which is still imposed by a professional judge, may not exceed certain limits, or may even be set below the minimum statutory punishment.[140] The jury in Denmark[141] and Norway[142] is also involved in sentencing, as are the lay assessors in all mixed court systems.

The important thing here, is that the decision on sentence be separated from the decision on guilt, as is done in capital sentencing in the United States. Evidence about the defendant's past criminal record or good or bad things in his life which might influence the *magnitude of sentence* but which are clearly inadmissible and prejudicial (either to the defense or the prosecution) in deciding the question of guilt, should be left until after the answering of the questions related to guilt.[143] This would require re-opening the taking of evidence, more relaxed rules of evidence and could apply as is the case in the U.S.

In capital cases, a vote for imposition of the death penalty should be unanimous.[144] France also imposes a higher majority requirement for imposing

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[136] §§ 61(1)(d), (2) LOTJ-Spain.

[137] JSRC Report, *supra* note 37, at 126-27.

[138] GREEN, VERDICT, *supra* note 1, at 62.

[139] In France, a law of March 5, 1932, allowed the jury to sit with the court in assessing punishment, to eliminate *acquittements scandaleux* caused by jurors who feared the defendant would suffer an unjust sentence. LOMBARD, *supra* note 70, at 273.

[140] § 349 UPK-RF.

[141] § 906a Law on Judicial Procedure, *cited* in Eva Smith, in this volume.

[142] Strandbakken, *supra* note 50, at 242.

[143] For years German reformers have been pushing for just such a bifurcated procedure in the German mixed courts. *See* Roxin, *Über die Reform*, *supra* note 110, at 197-98.

[144] While unanimous verdicts are not constitutionally required in normal cases, Apodaca v. Oregon, 406 U.S. 404 (1972), they are mandatory in death penalty cases in the U.S. The new Russian Code of Criminal Procedure also requires a unanimous vote in capital cases, § 301(4) UPK-RF, even

life imprisonment, 8 of the 12 votes instead of a mere majority of 7, and then 10 of 12 votes if the case is heard by the mixed court on appeal.[145] If a lesser sentence is involved, I believe that a majority vote is sufficient. If it is not achieved for the maximum punishment, then the court should vote on lesser punishments until a majority is reached. This is the French approach.[146]

E. Appeals of Judgments of the Mixed Court

I believe that the only way to guarantee that the *saiban-in* will be autonomous in their participation and that the verdicts they reach will be respected is to disallow appeals of acquittals. Although jury acquittals may not be appealed in England[147] and the U.S., they may be appealed in Russia and Spain and other European countries, and mixed court judgments of acquittal may be appealed in nearly all countries.[148] If this is too radical a solution, I would minimally provide that acquittals could not be appealed if six or seven of the court votes for acquittal. Thus, if all six of the *saiban-in* or the professional judge and five *saiban-in* vote for acquittal, that judgment would be final. This would prevent cases like the German *Weimar* case, where error can be built into the case by the professional judge to facilitate an appeal of an acquittal if she is outvoted. It would also prevent large scale reversals of acquittals on specious grounds by the Supreme Court, as occur regularly following acquittals in Russia's jury courts and following a "scandalous" but in my opinion error-free acquittal in the Spanish *Otegi* case in 1997.[149]

If this solution is not acceptable, Japan could provide for a mixed court to handle the appeal of mixed court cases. This solution has been adopted in Italy and France. If the defendant was again acquitted, that acquittal would be final. I prefer the first solution, however.

Regarding the appeals of guilty judgments, I believe they should always be subject to appeal on errors of law and, to a limited extent, on questions of fact. The short-lived Venezuelan jury system does not allow a convicted suspect to question the factual basis of a judgment if he was convicted by a unanimous jury, but does if the verdict was only by majority vote.[150] This is an interesting innovation which strengthens the principle of the presumption of innocence.

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though there is currently a moratorium on imposition of the death penalty in Russia, a condition for its entry into the Council of Europe.

[145] § 359 CPP-France.

[146] § 362 CPP-France. On the role of lay judges in evaluating the evidence, deciding guilt and imposing punishment, *see* Thesis 5, Appendix.

[147] Richard Hatchard, *Criminal Procedure in England and Wales in* COMPARATIVE CRIMINAL PROCEDURE 204 (Richard Hatchard et al ed., 1996).

[148] § 572 CPP-France.

[149] Thaman, *Europe's New Jury System, supra*, note 22 at 348-51.

[150] § 454 COPP-Venezuela-1998.

IV. CONCLUSION

By introducing lay participation into its criminal courts, Japan has taken a step which will enrich the quality of the justice they provide and the quality of democratic life of the citizens who participate as *saiban-in*. Their participation will also humanize the courts and make the judges, prosecutors and lawyers work harder, be more critical of the evidence that they deal with, and speak in language that is understandable to all. Especially criminal law should not be made complicated by a professional bureaucracy who sees itself as guided only by scientific exactitude or material truth. If the law is complicated and beyond the comprehension of the citizens, it would violate due process for us to punish them for its violation.

Although Japan has elected not to reintroduce a classic jury, the mixed court can combine many of the benefits of the jury, while avoiding many of the pitfalls of a classic jury system as exists in the United States. The suggestions I have made are all consistent with statements by the JSRC, desiring autonomous, meaningful participation of the people which will make a difference in the way cases are tried and decided. Many mixed court systems in which the professional judges are too powerful, the lay assessors too politically handpicked, or the system designed to avoid them ever making an actual impact on the final decision, do not allow such autonomous, meaningful or effective participation. Their lay assessors are called, derisively, "nodders" or "ornaments." They are tolerated by the professional judiciary only because of the democratic legitimation they lend to a system otherwise functioning exactly as it would without them. This does not have to be the case and the JSRC knows this, as is evidenced by its suggestions for random selection and participation in only a single case, etc. In fact, a successful modern, more democratic system of mixed courts, will give new luster to this form of courts which has been criticized by proponents of the classic jury and proponents of purely professional courts alike. Japan can provide this example and provide a model for other countries in Europe, Asia, Africa or Latin America, when they discuss the issue of lay participation. A strong independent mixed court will also silent critics who claim the Japanese deference to authority will ensure that the presence of *saiban-in* will not in any way change the outcome of criminal cases in Japan.

APPENDIX

THESES ON LAY PARTICIPATION

Results of the conference "Lay Participation in the Criminal Trial in the XXIst Century," International Institute of Higher Studies in the Criminal Sciences," May 26-29, 1999, Siracusa, Italy. Reprinted in Stephen C. Thaman, Symposium on Prosecuting Transnational Crimes: Cross-Cultural Insights for the Former Soviet Union, 27 SYRACUSE J. INT'L L.; COMMERCE 59-65 (2002).

I. LAY PARTICIPATION AS A DEMOCRATIC INSTITUTION

Lay participation in the affairs of state is the foundation of a democratic society. Just as the participation of laypersons is unquestioned in the legislative and executive branches of government in a democratic society, in many countries it has played an important part in the administration of justice as well.

In countries making the transition to democracy, legal reformers should therefore consider how lay participation could serve to achieve the universal goals of criminal procedure in a democratic society, that is, the ascertainment of the truth of the charge so as to ensure the conviction of the guilty and the exoneration of the innocent, the respect of the human dignity of the accused and the victim in the criminal trial, the protection of society, restorative justice, the resolution of conflict and rehabilitation and reintegration of offenders.

In doing so, such countries should look to the experiences of other countries as well as to their own legal history and tradition in assessing the proper role for lay participation in the administration of criminal justice. Although the economic cost of introducing lay participation is a valid consideration, legislators should be careful to not use this factor as an excuse for postponing otherwise necessary and useful reforms.

II. LAY PARTICIPATION AS A CHECK ON JUDICIAL POWER

Popular participation in the administration of criminal justice can protect against certain tendencies in a professional judiciary which could undermine a just system of the assessment of criminal responsibility and punishment, such as:

(1) possible dependence of the judiciary on organs of the executive branch or on political parties;

(2) undue dependence of the judiciary on public opinion;

(3) in a society with serious class, ethnic or social divisions, the fact that judges may belong to the ruling class, the main ethnic group or to a social elite;

(4) the routinization of judging or the case-hardening of judges after long years on the bench;

(5) overbureaucratization of the judiciary, reflected, for instance, in judicial decision-making influenced by a desire to rise in the judicial bureaucracy;

(6) an excessive judicial formalism in procedure, practice and language.

III. LAY PARTICIPATION AND DIVERSITY

Multi-cultural or multi-ethnic countries may want to introduce lay participation to provide for a fair cross-section of the community in judicial decision-making. Precautions must be taken, however, to prevent culture-based, race-based, gender-based or ethnicity-based decision-making resulting in injustice.

IV. LAY PARTICIPATION AND THE REFORM OF CRIMINAL PROCEDURE

The introduction of lay participation may be a helpful catalyst in increasing the adversary and accusatorial character of the criminal trial and strengthening the principles of orality and immediacy and the presumption of innocence in the evidentiary portion of the trial

V. LAY PARTICIPATION IN DECIDING GUILT AND SENTENCE IN THE CRIMINAL TRIAL

Determination of the question of guilt and assessment of the need for and the magnitude of punishment is not simply a legal question, but involves moral and other societal issues. In reforming criminal procedure, legislatures may consider lay participation in the determination of guilt and the imposition of sentence, taking into consideration the nature of the charged crime and the magnitude of the threatened punishments.

In countries which require that reasons be given for decisions in criminal cases, legislators considering the introduction of lay participation in the form of a jury which deliberates independent from the professional bench could choose to use carefully drafted special verdicts or question lists, the answers to which reveal the factual findings and applications of the law necessary for the professional bench to draft a reasoned judgment.

VI. LAY PARTICIPATION AND JUDICIAL REVIEW

Judicial reformers should consider lay participation in courts of appeal especially where questions of fact are reviewed *de novo*.

All guilty judgments by courts with lay participation should be subject to a review of legal errors by a higher court.

VII. LAY PARTICIPATION AND FORMS OF CONSENSUAL, ABBREVIATED AND SIMPLIFIED CRIMINAL PROCEDURE

To relieve the overburdening of the criminal courts, legislatures may seek to introduce alternative consensual, abbreviated or simplified procedures to resolve cases. Lay participation in the form of a jury or an expanded mixed court could be reserved for the most serious cases, or those which cannot be resolved using the alternative procedures, and may even facilitate the functioning of such procedures.

VIII. LAY PARTICIPATION AND THE SUBSTANTIVE CRIMINAL LAW

When a legislature contemplates introducing juries or mixed courts for the trial of criminal cases, it should carefully consider which substantive crimes should be subject to their jurisdiction. The more intensive forms of lay participation should usually be reserved for the trial of serious crimes punishable by lengthy prison terms.