

Lay Participation in Criminal Justice^a

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I will discuss the concept of lay – that is, non-professional – participation in criminal court procedure. First, I will review various means of lay participation in world criminal justice systems and summarize variant features of these many systems. Second, I will discuss analysis and benefits of lay participation in the criminal process as drawn from current academic literature. Finally, I conclude with my assessment that the benefits of lay participation in the criminal process are so significant that citizens should seek the opportunity to participate and that no government should forgo the benefits of lay participation.

Introduction

I speak to you in my context as an American judge, formerly an American prosecutor and defense lawyer before becoming a judge. Thousands of criminal jury trials are held in the United States every year, but those cases which go to trial are themselves only a small fraction of all criminal cases. Most criminal cases are resolved by plea negotiations because the parties and lawyers know the likely result from a jury trial on the facts of their case. Predictability makes most cases susceptible of evaluation and negotiated plea.

But in all criminal cases, the *right to a jury trial* has a determinative impact on the outcome, even if no trial is held. The likely outcome of such a trial is the lodestar by which all decisions are made to take a case to trial or negotiate a plea. It is only when the outcome is reasonably in doubt that the prosecution and defense cannot make a decision as to the outcome that trial is held.

Significant safeguards ensure that no defendant is disadvantaged in a negotiated plea. These safeguards include the public nature of all the proceedings and documents and the unfettered access of citizens and the press to the process; the defendant's complete access to the information developed by the prosecution and investigators; the right of the defendant to the assistance of counsel (including capable counsel appointed at government expense if the defendant is too poor to retain an attorney); a lengthy plea agreement document; a searching colloquy between the judge and defendant in the presence of counsel to ensure that the agreement and its consequences are understood, that there is a factual basis for the plea, and that the defendant is competent and acting freely; and readily available direct appellate and collateral review to give careful scrutiny to the process. Those safeguards are essential to the perspective from which I speak.

Models

There are many models for lay participation in the criminal process. Two are in use in the United States – the use of a grand jury to make charging decisions – and the use of the trial

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jury to decide guilt. But other nations have many other ways for citizens to participate in criminal justice.

Grand Jury

A grand jury is “[a] body of (often 23) people who are chosen to sit permanently for at least a month—and sometimes a year—and who, in ex parte proceedings, decide whether to issue indictments. If the grand jury decides that evidence is strong enough to hold a suspect for trial, it returns a bill of indictment (a *true bill*) charging the suspect with a specific crime.”¹ The grand jury serves two functions: “One is a screening function; the grand jury evaluates evidence supporting possible charges and returns an indictment only in those cases in which the evidence amounts to at least probable cause. The other is an investigatorial function; the grand jury sometimes develops information that is of value in determining whether grounds for a charge exist and—perhaps incidentally—in proving that charge at the defendant's later criminal trial.”²

The Japanese have bodies with a similar function in their criminal system called Prosecution Review Commissions. These commissions have eleven lay participants that review the prosecutor’s decision to prosecute or not.³ The Prosecution Review Commission’s decision is not, however, binding and cannot initiate charges, but may only review them.⁴

Private Prosecution Model

All citizens in Spain, whether or not they are the victim of the crime, may initiate a prosecution against another person.⁵ The option of private prosecution arose in Spain because of a corrupted and understaffed public prosecution system. Private prosecution is allowed for all major and minor crimes except for those under the jurisdiction of the military or those involving minors. Some criticisms of the system are that defendants may have to face two prosecutions instead of one – the private and public – and that the system is vulnerable to manipulation for political and financial purposes.

Mixed Tribunals

Mixed adjudicating tribunals are very popular in Europe and differ from the jury system in that the lay participants collaborate with professional judges to reach a verdict, rather than just getting instructions from the professional judge and making an independent decision. In Germany, the classic Schöffengericht has a panel of one professional judge and two lay

¹ Black’s Law Dictionary (8th ed. 2004) (citations omitted).

² FRANK W. MILLER ET AL., CASES AND MATERIALS ON CRIMINAL JUSTICE ADMINISTRATION 546 (3d ed. 1986).

³ Kent Anderson & Mark Nolan, *Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (Saiban-in Seido) from Domestic Historical and International Psychological Perspectives*, 37 VAND. J. TRANSNAT’L L. 935, 965 (2004).

⁴ Joseph J. Kodner, *Re-Introducing Lay Participation to Japanese Criminal Cases: An Awkward Yet Necessary Step*, 2 WASH. U. GLOBAL STUD. L. REV. 231, 236 (2003).

⁵ Julio Perez Gil, *Private Interests Seeking Punishment: Prosecution Brought by Private Individuals and Groups in Spain*, 25 LAW & POLICY 151(2003).

assessors.⁶ The French collaborative court model, *cour d' assises*, is a variation. During deliberation, the three professional judges collaborate with the nine *jurés*, but then the jury votes secretly.⁷ Several European countries have adopted some variation or combination of the French and/or German systems.⁸ Mixed tribunals are also seen outside of Europe in such countries as China.⁹ Most countries that use mixed adjudicating tribunals attempt to give the lay judges the same rights and access to information as professional judges.¹⁰ In almost all countries with a mixed tribunal, no matter how much the system attempts to equalize the lay and professional judges, there are reports that professional judges exert too much influence.¹¹

Pure Lay Judge Model

A pure lay judge system has been instituted in a handful of countries to try minor cases.¹² In the United States, these are often justice courts or magistrate courts. These lay judges may sit by themselves, or with clerks of the court who may provide guidance.¹³ When assisted, the lay judges usually have broader jurisdiction, but when sitting independently, their jurisdiction is usually limited.¹⁴

Other Non Law Trained Judges

There are other systems which use non-law trained judges. One of these is the expert assessor system in which two or three specialists in certain fields work collaboratively with professional judges in complex criminal cases.¹⁵ These lay participants have special training outside of the field of law, and participate to help professional judges understand a complex issue more fully. Countries including Croatia, France, Germany, Iceland, the Netherlands, and Norway have some variation of this system in place.¹⁶

Other Non Adjudication Systems Using Lay Persons

There are many new developments using lay participants. Many of these arise out of the movements for therapeutic or restorative justice, and some are modeled on traditional dispute resolution systems prevalent in the culture. These systems may express some dissatisfaction with the social utility of adjudication in terms of legal rights, as they often require holistic

⁶ John D. Jackson & Nikolay P. Kovalev, *Lay Adjudication and Human Rights in Europe*, 13 COLUM. J. EUR. L. 83, 97 (2006).

⁷ *Id.* at 97–98.

⁸ Sanja Kutnjak Ivkovic, *An Inside View: Professional Judges' and Lay Judges' Support for Mixed Tribunals*, 25 LAW & POLICY 93, 94 (2003); Jackson & Kovalev, *supra* note 6, at 98; Stephan Machura, *Fairness, Justice, and Legitimacy: Experiences of People's Judges in South Russia*, 25 LAW & POLICY 123 (2003).

⁹ Liling Yue, *The Lay Assessor System in China*, 72 INT. R. OF PENAL LAW 51 (2001).

¹⁰ Jackson & Kovalev, *supra* note 6, at 109.

¹¹ John D. Jackson, *Making Juries Accountable*, 50 AM. J. COMP. L. 477, 515 (2002); Yue, *supra* note 9, at 55–56.

¹² Jackson & Kovalev *supra* note 6, at 99.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 98–99.

¹⁶ *Id.*; Marijke Malsch, *Lay Participation in the Netherlands Criminal Law System*, 1–2, paper presented at the International Society for the Reform of Criminal Law, The Hague (2003).

consideration of non-legal concerns such as victim restitution, offender rehabilitation, relationship restructuring, and the interests of the community at large.

Youth Offender Panels are the new primary sentencing method for 10-17 year olds pleading guilty and convicted for the first time in England and Wales. These panels consist of at least two community volunteers and a professional member.¹⁷ The United States uses similar resolution methods in juvenile settings, but beyond sentencing these juvenile resolution models may replace admission of guilt with broader expressions of remorse and inter-personal reconciliation.

The Netherlands uses an *Echt-Recht* conference to involve defendants, victims, and their relatives to come up with the appropriate compensation.¹⁸ Everyone participates on a voluntary basis. The program is only available to a defendant who admits the alleged wrong.¹⁹ All participants have the opportunity to discuss their feelings about what happened and why and to come up with solutions to restore the relationships that were damaged and make restitution.²⁰ “It appears that 95% of participants in these conferences is satisfied with the procedures and the outcomes.”²¹ New Zealand also has something similar called Family Group Conferencing.²²

All these methods of resolution involve lay persons and give them a voice in an outcome that would otherwise be determined by a law trained judge. These methods echo the rising popularity of arbitration by persons trained in the subject matter such as banking or construction, and mediation conducted by neutrals of all backgrounds.

The Adjudicating Jury

Adjudicating juries are “alive and mostly well in Australia, Canada, England and Wales, Northern Ireland, the Republic of Ireland, New Zealand, Scotland, the United States and at least 46 other countries and dependencies around the globe.”²³ Of course, these jury systems vary, from system to system in many ways. Generally, a jury is “[a] group of persons selected according to law and given the power to decide questions of fact and return a verdict in the case submitted to them.”²⁴

In the common law jury system, jurors serve an independent role as fact-finders: they observe the proceedings take place before them; receive directions from a professional judge; secretly deliberate without input from the professional judge; and present a verdict based on their finding of fact. The professional judge decides any legal issues.²⁵

¹⁷ Adam Crawford, *Involving Lay People in Criminal Justice*, 3 CRIMINOLOGY AND PUBLIC POLICY 101 (2004).

¹⁸ Malsch *supra* note 16, at 5.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 6.

²² *Id.*

²³ NEIL VIDMAR, *WORLD JURY SYSTEMS* 3 (2000).

²⁴ Black’s Law Dictionary (8th ed. 2004).

²⁵ Jackson & Kovalev, *supra* note 6, at 95–96.

In the civil law jury systems, specifically in continental Europe, judges have a more active role in the process generally and this extends to jury trials.²⁶ “Legislation has in many cases given judges the right to ask juries to reconsider their verdicts and sometimes to send a case for trial before a different jury when they disagreed with the juries' verdict, especially where the jury is disposed to convict the accused.”²⁷

Juries may include anywhere from six to fifteen lay jurors. Which criminal cases will be heard by a jury varies from country to country and is usually defined by the seriousness of the crime.

Jurors are often selected randomly from the general population, but there are a few exceptions to that. Whether preemptory challenges against the selection of particular jurors are allowed varies by country, as well as by whom they can be made, i.e. the prosecution, the defense, or the professional judges. In Canada, the impartiality of the jurors is determined by two lay person triers.²⁸

Traditionally a verdict in the common law system must be unanimous, but the continental European system never required unanimity.²⁹ Many common law systems have now abandoned the unanimity requirement as well.³⁰

Variable Factors

These different models show us the variable factors that can be used in a lay participation system, which can be suited to the culture of the country and the needs of the times. “[P]olitical culture and tradition are important influences on the jury.”³¹ There are many factors which may be evaluated in light of political and cultural traditions.

- Will lay participants be involved in the prosecution decision, and if so, as a reviewing or initiating and investigating body?
- Will lay participants be involved in the determination of guilt, sentence or both?³²
- What type and seriousness of crimes will be heard by jury?³³
- Will the jurors be observers or active participants by questioning and directing the order of proof?³⁴
- What will be the size of the jury?³⁵

²⁶ Jackson, *supra* note 11, at 518.

²⁷ *Id.*

²⁸ VIDMAR, *supra* note 23, at 215.

²⁹ Jackson, *supra* note 11, at 518.

³⁰ *Id.*

³¹ VIDMAR, *supra* note 23, at 13.

³² *Id.* at 31.

³³ *See e.g., id.* at 7.

³⁴ *Id.* at 17.

³⁵ *Id.* at 26, 30.

- Will a decision be rendered by a unanimous jury or by a majority – and if so, what degree of majority?³⁶
- What rules will be used to ensure the jury will be representative?³⁷
- Is the jury subject to challenges for cause; what causes will justify striking a juror; who may make such challenges; and how will challenges be decided?³⁸
- Are challenges without cause (peremptory challenges) permitted and by whom, and will there be limitations on the use of these discretionary challenges to prevent racial or gender bias?³⁹
- Will “standby” privileges be permitted allowing a party to defer a prospective juror to later consideration?⁴⁰
- What protections will be afforded the jury from media intrusion and reporting, during trial and in post trial inquiries of the jury?⁴¹
- From which geographical area will a jury be drawn and what grounds will justify a change of venue?⁴²
- Will stays of proceedings be permitted to allow public sentiment to moderate before trial is conducted?⁴³
- What level of information will the parties have about prospective jurors and how much access will be permitted jury consultants?⁴⁴
- What is the balance of supervision by the court versus independence of the jury?⁴⁵

This last factor may be the most significant in a civil law tradition. In civil law settings, most testimony is taken in narrative form, rather than by direct and cross examination; the court controls the order of presentation; rules of evidence are not in place; and trial proceedings may be subject to de novo style review rather than deferential review on the record. Implementation of lay participation in a civil law system must consider these traditions.

To some extent, this tradition of judicial control is reflected in almost all common law countries which use an adjudicating jury because they *require* the judge to summarize and

³⁶ VIDMAR, *supra* note 23, at 26, 31.

³⁷ *Id.* at 28.

³⁸ *Id.* at 32.

³⁹ *Id.* at 34.

⁴⁰ *Id.* at 36.

⁴¹ *Id.*

⁴² *Id.* at 40.

⁴³ *Id.*

⁴⁴ *Id.* at 41.

⁴⁵ *Id.*

comment on the evidence. The only countries without this requirement are Scotland, which permits it, and state courts in the United States which generally do not permit it.

Other mechanisms for judicial control, affecting the balance of power with the jury, include having the form of the verdict require more information than a binary declaration of guilt or innocence; the power of the judge to grant a directed verdict, a motion for new trial or dismiss the case; the judge's power to control evidence admission and expert testimony; and appellate review of jury verdicts.

General Recommendations for Lay Adjudicating Juries

After comparative review of these many systems of lay participation, the commentators suggest that general recommendations can be made:

- The jury should be directed on the law in open court, but should adjudicate privately. This ensures the independence of their decision.
- Where lay judges and professionals participate jointly, they should have access to the same information and the same voting rights and opportunities to ask questions.
- Jurors should be chosen randomly from a wide community.
- “[W]ell-resourced public education programs on the rights and duties of lay adjudicators” empower jurors and the jury system.⁴⁶
- Lay adjudicators should not be “tainted by prejudicial or untested information in the [prosecution] dossier;” that is, evidentiary constraints are necessary to protect the jurors’ decision making resources.
- “A number of jurisdictions have resorted to strategies such as the use of special juries, challenges, venue change in the case of particularly sensitive trials, and judicial instruction and control over the admissibility of particularly prejudicial information.”⁴⁷
- “A number of jurisdictions have been considering whether to abolish the unanimity rule in order to override the views of ‘rogue’ jurors and prevent hung juries.”⁴⁸ This also reduces concerns about individual juror bias.

Certainly, any system can benefit from refinement and adjustment as times and needs change. But to some extent, the reviews and recommendations reflect an excessive focus on theoretical perfection of a justice system model. They are so focused on internal examination of the jury system that the essential merits of the system may be overlooked. While a system of

⁴⁶ Jackson & Kovalev, *supra* note 6, at 123

⁴⁷ Jackson, *supra* note 11, at 480.

⁴⁸ *Id.* at 481.

professional administrators may be *theoretically* subject to less uncertainty than a system with lay participation, a system of professionals lacks the substantial benefits of lay participation. And any system, including the system of professional adjudicators, is subject to its own frailties.

Benefits of Lay Participation

Many sense that lay participation is fundamental to democracy. “Citizen participation reportedly promotes the democratic quality of justice, incorporating public ideas about justice and fairness into trial court decisions.”⁴⁹ Lay participants essentially humanize the system by virtue of their presence.

One of the most often cited reasons for lay participation is to “give citizens a meaningful role in the administration of justice”⁵⁰ In Japan, the Reform council sought to improve the sense of relationship between citizens and the judicial system.

Foremost, [Japan’s] Reform Council wants citizens to participate in criminal proceedings in a ‘meaningful’ and ‘autonomous’ manner. . . . Similarly, the Reform Council believes that greater transparency within the judiciary will create the connection between the citizens of Japan and the legal process that is presently lacking.⁵¹

There are two threads to this perceived need for connection between system and citizens. The first thread is citizen education. “First is the idea that if citizens are called for duty, they will learn about and become interested in the judicial system. In turn, with a more educated and involved public, the norms and operations of the judicial system will be brought to the attention of the citizens.”⁵² Another benefit from the interface between citizens and system is that the legal system “will be viewed as responsive to and reflective of the needs of general society.”⁵³ Because lay participants are intimately involved in large numbers, the legal system is benefited by hearing from participants who are not victims or offenders. This citizen-to-system flow of information is perceived to have potential breadth beyond the judiciary. Japan implemented its system in hopes that it would be “a political forum to voice consent or dissent with those norms devised in other political forums such as Parliament.”⁵⁴

Surveys have shown that “lay participation will expand citizens’ understanding of [their] legal system and give ordinary people a feeling of inclusion and confidence in the judicial system.” “[L]ay participants themselves may learn firsthand about the fairness of the courts by observing their own and their fellow citizens’ treatment by professional members of mixed tribunals.” In fact, one study found that “citizens who served as jurors seem to have a more positive opinion about the criminal justice system and the courts than citizens who came in contact with the criminal justice system in other ways, such as involvement as a party or a witness.”⁵⁵

⁴⁹ Valerie P. Hans, *Introduction: Lay Participation in Legal Decision Making*, 25 LAW & POLICY 83, 83 (Apr. 2003).

⁵⁰ Jackson & Kovalev, *supra* note 6, at 83, 84.

⁵¹ Kodner, *supra* note 4, at 240-41.

⁵² Anderson & Nolan, *supra* note 3, at 943.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Ivkovic, *supra* note 8, at 100 (citing Diamond, Shari S. (1993) *What Jurors Think: Expectations and Reactions of*

One writer argues “the most cogent reason for lay participation in judicial matters is the belief that it will produce better justice.”

There are two intertwined threads to this argument. First is the notion that laypeople have a wide range of practical experiences and background and, therefore, are best placed to understand and appreciate a defendant's criminality and the appropriate response. The second thread is that professional judges are less capable decision makers in certain situations because they hold narrower life experiences, are disconnected from popular society, over-represent certain segments of society, and either have or develop an institutional bias in favor of the prosecution or the state.⁵⁶

This objective that “the sound social common sense of the public [be] reflected more directly in trial decisions”⁵⁷ is amplified by the participation of many lay adjudicators, rather than limited numbers. They “open up decision-making to a greater variety of perspectives and community voices, and . . . may be better able to satisfy the public that there has not been a risk of objective bias.”⁵⁸

This perception of “better justice” from lay adjudicators is reflected in public opinion polls.

Approximately three out of four respondents . . . considered the jury to be a fairer decision maker than a professional judge. The respondents also regarded the jury as not only more fair, but also more accurate, less biased, and more representative of minorities than the professional judge. Overall, the respondents showed an overwhelming support for the jury system: 97% of the respondents viewed the jury system as “somewhat” or “very” important as a national institution. Similarly, eight out of ten respondents evaluated the right to a jury trial as “extremely important,” and the remaining respondents rated this right as “important.”⁵⁹

Benefits from Disadvantages

Some of the apparent disadvantages of the lay participation models are *required* for the system to be most beneficial and are outweighed by those benefits. For example, the random nature of assignment is inconvenient to participants, and introduces unpredictability for the judge, lawyers and defendant. But that random selection truly demonstrates the democratic nature of the process. Random selection signifies that virtually every citizen is deemed qualified, and obligated to serve.

Citizens Who Serve as Jurors, IN VERDICT: ASSESSING THE CIVIL JURY SYSTEM (ed. R. E. Litan. Washington, D.C.: The Brookings Institution).

⁵⁶ Anderson & Nolan, *supra* note 3, at 941–42.

⁵⁷ Kodner, *supra* note 4, at 240–41.

⁵⁸ Jackson & Kovalev, *supra* note 6, at 92.

⁵⁹ Ivkovic, *supra* note 8, at 98.

Another apparently disadvantageous feature is the involuntary nature of the service. But this again prevents improper self de-selection from service, ensuring the representative composition and impartiality of the decision makers.

The use of lay participants means that they cannot be required to serve for long terms and do not develop expertise, but this prevents undue accumulation of power. This entrustment of power to a changing group of citizens is a continual reminder of the source of governmental power and responsibility.

The use of lay adjudicators requires that a trial start, continue uninterrupted and finish in a single stream of consecutive days. This is less convenient than a segmented proceeding conducted by the judge, because a jury trial requires counsel, witnesses, the judge and jurors be present at one time. But this seemingly challenging scheduling issue has benefits. The *trial start date* is a deadline that motivates agreements in cases where the outcome can be predicted. The *unitary nature* of trial ensures that evidence is prepared and developed before the trial starts, protecting the defendant from recurrent government attempts to patch up its case. The *unitary nature of trial presented to lay adjudicators* ensures that the evidence is a relatively cohesive unit, presented in a manner that is comprehensible to the average citizen. This enables all citizens to understand—and review if desired—the events of a trial because they are in the record in a comprehensive comprehensible package.

Who is benefited when lay participants are involved in criminal processes?

- The defendant – ensuring he is adjudicated by peers, not by an impersonal state.
- The criminal justice system – ensuring that it is ultimately accountable to the public.
- The public – because the jury is a filter through which the ultimate decision must pass – and thus a check on power entrusted to investigators, prosecutors, and judges.
- The government – developing citizen involvement and support and protecting the government from unpopular decisions.
- The judge – protecting her from unpopular decisions.
- The jurors – letting them participate in the criminal process.

Lay participation is not ineffective even when rarely exercised. Less than one per cent of those accused in Scotland are tried before a jury. Of all trials in Scotland, juries heard nearly 8%. In the United States, between 2 and 10% of criminal cases are tried to a jury. That is however, the majority of cases which go to trial. It is the *right* to the jury trial that is valuable. The *right* creates the benefit. The knowledge that a jury will decide a case motivates prosecutors to bring charges that can be sustained by common sense, and motivates defendants to make plea arrangements, thus limiting the number of trials which must be held.

Lay participation in the criminal process is an important demonstration of citizen authority over the ultimate power of the state. On that principle alone, lay participation is justified—and in government's own self interest. Government can enrich allegiance and support by facilitating lay participation in the criminal process. Citizenship is improved by the investment and sense of ownership that is obtained by lay participants.

Just like every other ownership that enriches life—education, family, club memberships, proficiency in the sports or in the arts—lay participation in criminal process requires inconvenient responsibility and will generate complaints and criticisms. But just as we would not forsake these other life activities, we know that lay participation in the criminal process has net benefits. The opportunity and responsibility for lay participation in the criminal process will enrich the lives of citizens and the position of the state.

Every citizen has the right to seek office in the legislative or executive branches of government, even running for the highest offices. Lay participation in the judicial branch is even more accessible, because no special qualifications are needed and the opportunities come to everyone, without the need to campaign or participate in elections. The opportunity of lay participation puts citizens in control of the most fundamental decisions affecting individual freedom, and is a powerful expression of the rights and responsibilities of citizenship.

A study of the experience of lay assessors in South Russia concluded that the assessors' experience made them critical of shortcomings in the legal system. "When asked about reform measures, they mentioned that the personnel of the courts should be better qualified, that the courts should receive a higher budget, and that there was a need for better equipment."

But they also felt that the judges and processes were fair and that they were treated fairly. The experiences of citizen participants can invest them in the judicial system even when they see its shortcomings, so long as they are treated fairly. This study concluded, as do I: "If democracy needs to have roots in a society and is more than a technique to confirm political elites, it calls for public participation in the administration . . . of law."⁶⁰

⁶⁰ Machura, *supra* note 8, at 146.