

A study on the Ways of Participation of People in West German, Swiss, French, the U. S. A. and Japanese Judicial (Criminal) Proceedings

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I.

In most modern countries, the participation of people in the judicial proceedings has two systems. One is the jury system, and the other is the lay judge system. The former has long prevailed mainly in Anglo American Judicial System, and the latter in Germany. The Japanese Jury System, based on Napoleonic and Anglo-American Laws, imported in 1923, was entirely abolished in 1943 during World War II. The effect of that system in Japan had been regarded as questionable.

The chief reason for this was that the jury system was considered to disturb the effective proceedings of the court. The fact is, however, the participation in the judicial proceedings has prevailed all over the world, because judicial proceedings should not be independent of the people's will.

1. The Jury in West Germany

In West Germany it is called "Trial joined by the lay judge"; it is made up of a professional judge and a lay judge elected by the people, though there is a certain difference between a jury in the local court and a jury in the state court.

In West Germany private prosecution is available, as a means of participation in judicial proceedings. This is a system whereby the injured can prosecute in place of the public prosecutor. This is, however, confined to petty offenses. This private prosecution is quite different from the Japanese Semi-Public Prosecution System, which deals only with the crime committed by the special public officers who work as the judge, public prosecutor, police, and the assistants of all of them. The proceedings are conducted through an advocate appointed by the court. The German System is also different from the Japanese Inquest

of Prosecution System, which cannot force the public prosecutor but merely advises the reconsideration of his decision as to whether to prosecute or not.

2. The Swiss Lay Judge System

The Swiss Lay Judge is elected from among the citizens. He should be registered beforehand as the applicant. The lay judge is reelected every 7 years.⁽¹⁾ The lay judge, in co-operation with the professional judges, decides the case. This means that the common citizens can take part in the jurisdiction.

3. The French Jury System

The jury court is held only when the defendant claims his protection in order to testify to his innocence, then the jury court starts, hearing the witness, and collecting the proofs. The jury system is generally exceptional, but the jury system has an important meaning; the defendant should be given the chance to be protected by the citizens.

This also means that common citizens take part in the judicial procedure.

4. The American System

The Jury should always be held when a case is tried. The jury is held not only in the trial, but also in the public prosecution. The latter case is called a "grand jury". While the petty jury decides whether the defendant is guilty or not, the grand jury decides whether the suspect should be prosecuted or not.⁽²⁾ The petty jury is called a "trial jury". The grand jury system was abolished in the United Kingdom in 1933 which follows Anglo-American Law. But in the U. S. A., this system is still available, which is legislated as a means of exercising the fundamental right of human protection under the Federal Constitution, so the grand jury system can not be abolished. Most of the states in the U. S. A. wish to give up this system because it takes too much time and the ordinary citizens are not always fit for the investigation of crimes. In some of the states in America, the grand jury system is actually abolished though the Federal Constitution demands it as necessary.⁽³⁾ As for the problem concerning whether the jury system will disturb the fairness of justice, the U. S. A. has a system of previous check upon the juror candidate with a test of his intelligence

and common sense. Briefly, the German Private Prosecution System substitutes for the American Grand Jury System. And both the German and Swiss Lay Judge Systems seem to be a transfiguration of the American Trial Jury System.

II.

In West Germany, "*Schöffengericht*" means the jury system in a broad sense. In the trial or the decision of the criminal cases which belong to the authorization of the court,⁽⁴⁾ if the case can not be judged by the local court judge alone, the local court sends it to the jury system.⁽⁵⁾ The jury court consists of the local court judge (as the presiding Judge) and 2 jurors.⁽⁶⁾ The apprentice judge can not preside over the case within one year of his appointment to his rank.⁽⁷⁾ When the public prosecutor requests the increase of the professional judges of the local court, the court must obey him. The request has not effect in the cases of higher courts.⁽⁸⁾ The elected jurors can equally exercise the vote and join the decision just as well as the local judge.⁽⁹⁾ The decision can be made without an oral trial.⁽¹⁰⁾ The work of the jurorship is an honourable one. The jurors are restricted only to German citizens. The self-governing body prepares the eligible list of jurors every 2 years. The list is not available unless it has obtained the approval by the representatives of the body. The eligible list has the applicants' names, birth place, date of birth and profession. The list is exhibited in the self-governing body for a week. The time of the entry shall be previously published. The applicants shall be recommended. 5 members from a population of 500; 6 from more than 500 population shall be recommended as candidates. In other cases, 2 per 200 population shall be recommended. The number of jurors and professional judges is as follows: in the local criminal court (*Amtsgericht, Schöffengericht*), 1 judge to 2 jurors,⁽¹¹⁾ in the state large criminal court (*Grösse Strafkammer*), 3 judges to 2 jurors, in the jury court (*Schwurgericht*), 3 judges to 6 jurors.⁽¹²⁾ Juror means lay judge. This means that the entry of the trial by the citizens increases in number according to the kind of lawsuit. The Swiss Jury System is regarded to be very rigid but recommendable.⁽¹³⁾ Because, according to some of Swiss lawyers, the ordinary trial is set before the jury trial; the jurors are elected immediately by the citizen and can examine the defendant as to whether he is responsible for the crime. On the contrary, the criminal court can question the important criminal punishment.⁽¹⁴⁾

The defendant can choose either the jury court or the ordinary court while the trial proceeds.⁽¹⁵⁾ It means that the number of jurors varies according to the kind of lawsuit. The voting needs $\frac{2}{3}$ or more.⁽¹⁶⁾ Against the judgement by the jury court the appeal can be raised to the Special Supreme Court. The Special Supreme Court consists of the President, Vice President of the federal court, and 5 oldest members who belong to the federal court. The public prosecutors and the criminal court officials, whether already appointed or not, cannot become jurors. In Swiss jury system there are not only professional judges and lay judges but also ordinary jurors elected by citizens, thus checking the arbitrary decision by the national institution, namely professional judges alone. In France, the qualifications of juror ship are rigidly regulated. Jurors are expected to read and write French and be over 30 years of age.⁽¹⁷⁾ They must have all the rights both in public and civil. They should be from such sentences as a felony or imprisonment extending over a month, and a fine extending over 500 new Franc for a misdemeanor.⁽¹⁸⁾ Those who are now charged or condemned in criminal law cannot become jurors.⁽¹⁹⁾ The following persons shall be excluded from the duties of jurorship: 1. the governmental and local community officials who are temporarily deprived of the right exercising their public duty. 2. Dismissed officials. 3. Lower ranked executive officials who are prohibited from exercising their official duties. 4. A person sentenced for a bankruptcy who cannot restore his rights. 5. A person who is deprived of the qualification to be a juror because of his having refused it without reasonable cause. 6. A person who is sentenced as a man without self-control. 7. A person in a mental hospital suffering from mental disease prescribed by law.⁽²⁰⁾ The governmental supreme members, ex. President, Vice President, Parliament Member, judge, public prosecutor, police officer are not compatible with jurorship.⁽²¹⁾ Similar principles to the above mentioned can be seen in American Law.⁽²²⁾ But, in U. S. A., the restriction as to the qualification for jurorship does not extend to a person who has committed a misdemeanour.

III.

From the above-mentioned materials, I conclude: the jury system should be revived. But, it should be limited in criminal proceedings only. The grand jury should not be adopted in Japan, If the trial jury should be adopted in Japan in the

future, the members should be elected directly by the people. The eligible list need not exclude those who got through with their penalty. The exclusion of the criminals who have committed a crime within three years, should be necessary, especially in case of political crime, felony, as well as the crimes concerning business, enterprise. The reason for this is: those who have committed the crimes just mentioned are hardly expected to have sufficient power of judging others guilty or not. The constitution of the jury should be such that one professional judge will be the presiding judge and more than two jurors present at the court. The judge decides the sentence based on the report by the jurors. He decides the degree of the punishment only. Jurors only decide whether the defendant is guilty or not guilty. Jurors should have the right to refuse jurorship. The defendant can choose either the ordinary court or the jury court. The lay judge should not be admitted, for the present. We must remember the fact that the Japanese Family Court Mediation Committee System does not always represent the various classes of people, and that the Commitly System was a device of introducing the European idea of people's participation in judicial business. We have, thus, an unfortunate example already. So it might be naturally considered as almost impossible for us to have entirely well-qualified lay judge in our country. The grand jury System should not be admitted either for the similar reason to the above, and particularly because of the importance of the criminal cases which the grand jury naturally has to deal with. But, people are the representative of sovereignty. Sovereignty shall be exercised by the people. Judicial (criminal) proceeding is also a kind of operation of sovereignty. Because judicial proceeding belongs to the judiciary which is a part of sovereignty. Then while a lay man has not such a legal experience as a lawyer does, he sometimes has a good common sense which is free from professional sense. Though the good common sense may not always be appropriate to investigate the crime professionally, it may be convenient to judge whether the defendant is responsible or not. For these two reasons, West German System has informative character. So it will be profitable for us to accept the jury system and have the two kinds of jurors in the future. One is a lay judge, and the other is a common juror who is selected at random from among the people enlisted as the inhabitants. In this case, the questionable person previously mentioned should be excluded. If we choose a lay judge from among the legally experienced persons;

a retired university professor, a retired administrative officer, etc., we can avoid the danger of a local boss' monopolizing judicial position. If we choose a juror from among the common citizens at random, it will be unnecessary to adopt the voting election system. By allotting to a lay judge the role to try and judge a case in cooperation with the professional judge, and by giving the verdict right to the juror, we shall be able to mediate the two conflicting objects and then let the amateur keep the legal, fair, and impartial joining in the judicial proceeding. And to allow a professional judge to try the case at the appelant court will protect the defendant's being punished erroneously by the amateurs' misjudgement.⁽²³⁾

Notes and References

- (1) *Viel geehrter Univ. Prof. Dr. Hans Walder (Kriminalisch-prozessische Seminalität, Juristische Fakultät, Universität Bern)*
- (2) M. CHERIF BASSLOUNI: CRIMINAL LAW AND ITS PROCESSES, CHARLES C THOMAS. PUBLISHER, SPRINGFIELD, ILLINOIS, U. S. A., 1969, p. 449
- (3) *ibid.* M. CHERIF BASSLOUNI: CRIMINAL LAW AND ITS PROCESSES, p. 449, p. 455
- (4) *Th. Kleinknecht, H. Müller, L. Reitberger, etc.: KMR, Kommentar zur Strafprozessordnung und zum Gerichts-verfassungs-u. Ordnungswidrigkeitengesetz, 6. Auflage, Band 2, Fachverlag Dr. N. Stoytscheff-Darmstadt, 1966 S. 30: GVG § 28, Kern-Roxin: Strafverfahrensrecht, 11 Auflage, C. H. Beck, München 1972, S. 32*
- (5) a. a. O.
- (6) *op. cit.* KMR Kommentar, S. 30: GVG § 29 (1), cf. in Schwurgericht 3: 6, in Grosse Strafkammer (LG) 3: 2 (§ 76 GVG (1)) Viel geehrter Dr. Römer (Kriminalisch-prozessische Seminalität, Juristische Fakultät, Universität Heidelberg)
- (7) *ibid.* KMR Kommentar, S. 30: GVG § 29(1)
- (8) *ibid.* KMR Kommentar, S. 30: GVG § 29(2)
- (9) *op. cit.* Kern-Roxin: Strafverfahrensrecht, S. 31,

In Germany, there are two kinds of lay judges. One is the "Schöffen", and the other is the "Geschworen". Schöffen has the same right as a professional judge. And the Geschworen has a different duty from a professional judge. Geschworen is a lay judge who is appointed in "Schwurgericht" which decides a capital crime. He must decide only whether the defendant is responsible or not. Then, his duty is similar to that of an Anglo-American juror.

(10) op. cit. KMR Kommentar, S. 32, GVG § 30(1)

(11) The (local court) *Amtsgericht* is competent in the action for the following cases: private prosecution, the offense to be condemned as 6 month imprisonment, the offense to be supposed as less-than-1-year imprisonment by public prosecutor. But, if a public prosecutor raises the prosecution to the state court because of the character of the offense except the exclusive case for the local court judge, and if the offense is to be supposed more than-3-year imprisonment or the public prosecutor raise prosecution to the State Court because of the case's speciality except the exclusive case for the jury court or (State Supreme Court) *OLG*, "*Schöffengericht*" is opened. "*Grosse Strafkammer*" and "*Schwurgericht*" (jury court) belong to *Landgericht* (State Court).

Grosse Strafkammer is competent in the action for the following cases: All the cases that do not belong to local court, jury court, or State Supreme Court, and minor offense against national security; the crime to be prosecuted by the *Grosse Strafkammer* because of the case's speciality: when the juror's decision is necessary.

Jury court is competent in the action for the following cases: obscenity or rape resulting in death, homicide, beating to death, child murder, deserting a child resulting in death, poisoning, illegal detention resulting in death, grave larceny, burglar, threat, arson, explosion resulting in death, inundation resulting in death, destruction of building resulting in death, malversation resulting in death.

ibid. Kern-Roxin: Strafverfahrensrecht, S. 28. ff.

(12) a. a. O.

(13) op. cit. Kern-Roxin: Strafverfahrensrecht, S. 378

(14) ibid. Kern-Roxin: Strafverfahrensrecht S. 378

(15) ibid. Kern-Roxin: Strafverfahrensrecht S. 378

(16) a. a. O.

(17) Prof. Gerald L. Kock, A. B., J. D., LL. M. Emory University:

THE FRENCH CODE OF CRIMINAL PROCEDURE, FRED B. ROTHMAN & CO. SOUTH HACKENSACK, N. J., SWEET & MAXWELL LIMITED, LONDON, 1964, p. 97

(18) ibid. Prof. Gerald L. Kock: THE FRENCH CODE OF CRIMINAL PROCEDURE, p. 97

(19) ibid. Prof. Gerald L. Kock: THE FRENCH CODE OF CRIMINAL PROCEDURE, p. 97

(20) ibid. Prof. Gerald L. Kock: THE FRENCH CODE OF CRIMINAL PROCEDURE, p. 98

(21) ibid. Prof. Gerald L. Kock: THE FRENCH CODE OF CRIMINAL PROCEDURE, p. 98

- (22) op. cit. M. CHERIF BASSLOUNI: CRIMINAL LAW AND ITS PROCESSES, p. 486, Allen P. Bristow, M. S., John B. Williams, LL. B., LL.M., M. S.: A Handbook in CRIMINAL PROCEDURE and the ADMINISTRATION OF JUSTICE, GLENCOE PRESS, A DIVISION OF THE MACMILLAN COMPANY, BEVERLY HILLS, 1966, pp. 66-68
- (23) op. cit. Kern-Roxin: Strafverfahrensrecht, S. 30, op. cit. M. CHERIF BASSLOUNI: CRIMINAL LAW AND ITS PROCESSES, p. 449, vgl.