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Commentary on Valerie P. Hans's Presidential Address

Learning from Precursors, Shaping It from Experiences

Masayuki Murayama

I am honored to have the opportunity to comment on Professor Valerie Hans's presidential address on the jury trial as a legal transplant. In her address, Professor Hans presents a panoramic view of "the global dissemination of institutions of lay participation in law," starting from the newest jury systems in Argentina, going back to the origin of the jury trial in England, then going on to the dissemination of jury to English colonies and countries conquered by Napoleon and to recent waves of dissemination of lay participation in Europe and East Asia. She also emphasizes important roles scholars played in international collaborations to understand the process of transplanting legal institutions, which "in some instances help to shape political debates over the adoption and implementation of... jury trials and mixed courts around the globe." As she describes, Japan recently introduced a mixed panel of lay judges sitting together with professional judges. Drawing upon Japanese experiences, I would like to bring a different point of view to Professor Hans's discussion of juries as traveling legal institutions. After a close overview of recent experiences with lay participation in Japan, I argue that countries learn from their experiences, and

Professor, School of Law, Meiji University. My first encounter with jury trial occurred when I watched *The Defenders* on the Japanese national TV channel in 1962. Then, I watched *Twelve Angry Men* and was fascinated to see how the American jury worked. I firmly believed that we should have such a wonderful democratic institution in Japan and did not doubt that people who would watch the movie would have the same opinion. Much later when I began to teach at a university, I asked opinions of students on jury trial, after playing the video of *Twelve Angry Men* in my class. Surprisingly, a majority of them had negative opinions on jury trial, saying that people would behave like the man who wanted to go to a ball game. I explained in vain how jury could deliberate in collective thinking. The students taught me that it would not be easy to bring jury to Japan. But at the same time, because of these very popular TV series and the movie, jury trial has been always "there" to think about as a possible element of criminal justice among post-war generations in Japan.

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adapt legal institutions into the vernacular. (See also Levitt and Merry's [2009] work on human rights frames and vernaculars.)

Legal transplants or translation is a common theme for Japanese scholars, as Japan "imported" French law at the beginning of modernization, German law since the legislation of the Imperial Constitution modeled on the Prussian law, and American law after the Second World War. This history of legal transplants has led Japanese legal scholars to be comparativists. I would like to discuss how a transplant of lay participation and its process looks to a sociolegal scholar.

Professor Hans pointed out that the term "transplant" is contested. As she suggests, "translation" better captures the process of adapting. Transplant brings to mind organ transplants. In medicine, a transplant replaces a failed organ in a body. The metaphor implies that the new organ is healthy and expected to function within the body, with some amount of expert support. However, we know that a legal institution brings both benefits and problems. From a law reform perspective, the unknown nature of outcomes is why we seek empirical evidence. The term, "transplant" assumes the "health" of a legal institution, and we tend to argue for or against the original whole without really considering social conditions in the new locale. Rarely do we transplant a whole institution. We might remove a part of the original and add a part taken from another whole to the original. What is finally "transplanted" is likely to be different from the original. "Transplanting" can take a long time, as a legal institution lives much longer than a human being.

This essay will now turn to the long process of bringing lay participation to the Japanese legal system.

Japan's Introduction of Lay Participation: A Political Context for a Process

The Argentine case Professor Hans discusses illustrates the importance of process and context. Japan also has had a long complex encounter with juries. In Japan public discussion of jury trials began when the idea of democracy was introduced soon after the beginning of modernization in the late nineteenth century. In the late 1870s, when the new governing system based on the parliament and cabinet was planned, the government considered introducing jury trials and the Freedom and People's Rights Movement also advocated jury trial (Mitani 1980: 94–132). Despite its name, the movement included only Shizoku [Swordsmen] and landlords as counter elites to national government officials (Banno 2014: ch. 1). The government did not bring jury trials to Japan.

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Next, in the early 1920s Prime Minister Hara considered coopting demands for the vote for all men by introducing jury trials to allow public participation in governing (Mitani 1980: 143–150). He was assassinated, and soon afterward the government instituted both juries and general suffrage for men. This was the Taisho Democracy period, when working-class people in Japan became more aware of socialist and communist ideas. Ruling elites developed a sense of crisis after seeing the collapse of European monarchies. Although all men gained the vote, the government limited campaign methods. The legislature enacted the notorious security maintenance law, which was invoked to suppress socialism and even liberalism as well as communism. The jury trial system was designed to malfunction, and it eroded under a widespread belief in the superiority of officials. As the political party that supported the jury trial system declined, the jury trial system declined (Mitani 1980: 324–28).

Jury trials were suspended during the Second World War and not reinstated during the immediate postwar legal reform. As the post-war legal reform brought the influence of American law, we might have expected that jury trials would have been introduced into Japan immediately. In fact, an American lawyer drafted a jury trial law, but the General Headquarters, or the Supreme Commander for the Allied Powers, did not push it through over objections by the court and the Ministry of Justice (Toshitani 1975: 99–159).

The law establishing a mixed panel of lay and professional judges for serious criminal cases was enacted in 2004 and implemented in 2009. The mixed panel came as part of a much broader plan to reform the judiciary and the legal profession. It also resulted from long and complex negotiations between the Supreme Court, the Ministry of Justice and the Japan Federation of Bar Associations (JFBA). The Supreme Court and Ministry of Justice wanted to increase the number of people who passed the bar exam, while the JFBA opposed it. The JFBA wanted to adopt the jury trial, while the Supreme Court and Ministry of Justice opposed it (Murayama 2004). The mixed panel resulted most immediately from compromise among the three main players, but, as "transplant" of lay participation, it took more than 100 years to establish a viable system of democratic lay participation in judicial decisions.

Roles of Scholars in the Japanese Case

Before the justice system implemented the most recent form of lay participation, lawyers, law professors, and sociologists of

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law participated in discussions of proposals. In addition to the meetings Professor Hans describes, the Japanese Association of Sociology of Law (JASL) held an International Symposium on the Role of the Judiciary in Changing Societies in 2001. JASL invited ten judges and scholars from England, Germany, France, the United States, and China as well as judges, lawyers, and scholars from Japan to discuss challenges for the judiciary. Takao Tanase, President of JASL at that time, summarized the themes of the symposium as "efficiency," "politicization" and "socialization" (Japanese Association of Sociology of Law, 2001: 1). Lay participation was central to what the symposium called socialization.

Lawyers focused on how lay people would influence judicial decisions rather than lay participation as a democratic institution. Some argued that juries would make better judgments than judges in a bench trial, while others argued that a mixed panel of lay and professional judges would make reasonable judgments. The JFBA had long advocated for juries, but some lawyers opposed any lay participation. The most eloquent opponent of the jury trial was Tetsuo Takezawa, a famous human rights lawyer, who played a major role in the Shiratori case in 1975 where the Supreme Court expanded the scope of retrial for convicted prisoners. Many lawyers shared his doubts: in 2009 a survey on lawyers' attitudes about the mixed panel found that lawyers were more likely to think that more sentencing disparity would occur with lay participation, that lay judges would impose heavier penalty than professional judges, or that lay judges would follow professional judges' opinions (Matsumura, Kinoshita, and Shozo Ota 2015: 182). However, we do not know how these debates influenced the Justice System Reform Council.

Professor Hans discusses the important roles that scholars play in transplanting, and in shaping political debates over the adoption of juries or other forms of lay participation. These two roles are inseparable. By presenting findings, scholars might influence political debate. Two problems connected to this politics of expertise were evident in the process of making the mixed panel in Japan. First, only legal professionals participated in justice reform. Members of the Justice System Reform Council and sub-committees were law professors, lawyers, prosecutors, and judges; the ministry was familiar with how lawyers think. Ministries relied on this process, similar to law reform processes in other countries (Halliday 1987; Sterett 1997). The Ministry recruited law professors to sit on committees, because the Ministry knew the professors' opinions. Lawyers, prosecutors and judges represented their institutional and occupational interests. Even with this traditional way of reforming justice, the Justice System Reform Council issued groundbreaking proposals aimed

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at structural changes of post-war Japan (The Justice System Reform Council 2001).

The debate did not rely on empirical evidence. If empirical researchers had conducted research on how people considered different types of lay participation or how lay people would interact with legal professionals, it might have allowed the Council's process to include the points of view of lay people.

Japanese Mixed Panel: Ideals and Realities

In describing the Argentine case, Professor Hans demonstrates that democratic ideals are tied to the institutionalization of juries or lay participation. However, she points out decline of jury in the United Kingdom and some EU countries. As Mary Rose points out in her comments, jury trials have also declined in the United States. Professor Hans indicates that though we promote democratic ideals and see lay participation as connected to democracy, we also face problems of how to sustain participation.

Mixed Panel as a Democratic Institution

A 2008 independent nation-wide survey evaluated the Saiban-In Seido, a mixed panel of lay and professional judges, one year before it came into force. The survey found that the Japanese people were almost evenly split in their attitudes to mixed panels, including among those with no opinion. The survey also found that people who believed that trial by a mixed panel would fit the principle of democracy better than trial by professional judges were likely to approve of the new mixed panel, while people who believed that judgment by a mixed panel would be more arbitrary than judgment by professional judges tended to disapprove the new institution (Matsumura, Kinoshita, and Shozo Ota 2015: 3, 46–52). Many Japanese people do not see lay participation as central to democratic institutions.

Even seeing lay participation as part of democratic institutions does not lead people to wish to serve. In the 2009 survey and another about 2 years after the implementation of the mixed panel procedure, people leaned against being willing to serve (Matsumura, Kinoshita, and Shozo Ota 2015: 32). People follow through with their unwillingness to serve. Lay judge candidates can ask the court to let them withdraw from the service under certain circumstances. In the first year, more than half withdrew, and the percentage only increased. The percentage of people who do not appear on the appointed day has more than doubled in seven years, from 16 percent to 35 percent (Saiko Saibansho

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2017a: 5). Although absence without a good reason is punishable by a fine, none has been fined by the court.

People are reluctant to serve in trials that have increased in length, from more than 3 days in 2009 to more than 9 in 2016. Mixed panels also are deliberating longer, from 6 hours to 12 hours (Saiko Saibansho 2017a: 7, 9). Despite the reluctance to serve, virtually everyone has reported that serving as a lay judge was a good experience (Saiko Saibansho 2017b: 8). With so many wishing to avoid serving as lay judge, we can expect that the very few people who serve are more likely to be those who have free time or flexible jobs.

Mixed Panel as an Integrated Decision Making Procedure

One reason to introduce lay judges into judicial decision-making is the expectation that lay judgment would counterbalance professional judgment. People who do not trust lay judgment are afraid that trial outcome will be more arbitrary, as we saw above. Both perspectives assume that lay participation changes the professional judge's decision making. Indeed, over the seven years since they were instituted, mixed panels did decide differently from professional judges.

First, a mixed panel tends to impose heavier penalties. The Japanese penal code gives a wide sentencing discretion to a judge. Judges and prosecutors have developed a system of criteria for sentencing. The mixed panels work outside those bounds (*Nihon Keizai Shinbun* 2014a: 35). The Tokyo High Court reversed three mixed court judgments that imposed death penalty (*Nihon Keiwai Shinbun* 2014b: 34). Two decisions were appealed and the Supreme Court affirmed the High Court reversals (Saiko Saibansho 2015). In another case where the prosecutor asked 10 years imprisonment for manslaughter of a child, the Supreme Court reversed a mixed panel judgment that imposed fifteen years imprisonment (Saiko Saibansho 2014). The Supreme Court said that a mixed panel did not have to comply with the past sentencing criteria, but that, a mixed panel could have to explain the reason for the deviation (Saiko Saibansho 2014).

Second, Supreme Court decisions on fact-finding influence mixed panels. Mixed panels have convicted defendants in most criminal cases they have tried, betraying the initial expectation that the dismissal rate would rise. In drug trafficking cases, however, they found defendants not guilty. On appeal, the High Court reversed some mixed panels' dismissals. The Supreme Court upheld the High Court decisions, saying that where a drug traffic organization was involved, a panel could assume that a

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person who carried drugs did so at the behest of the organization (Saiko Saibansho 2013). After the Supreme Court issued this decision, mixed panels stopped dismissing drug trafficking cases. In drug trafficking cases, mixed panel decisions swang to dismissal, but after the Supreme Court decision, they began to swing to the other direction, conviction. The Tokyo High Court reversed a guilty finding by a mixed panel in a drug trafficking case (*Nihon Keizai Shinbun* 2016). These cases show the instability and limited autonomy of mixed panels in fact-finding.

Lay judges can bring changes both in sentencing and fact-finding. We do not know how these differences from the past practice occurred. Do professional judges not try to persuade lay judges to comply with the established practice? To what extent do lay and professional judges disagree in contested cases and why? These questions would be at the center in social scientific research on jury and lay participation.

Translation or Dissemination of an Idea?

As Professor Hans indicated, transplant is a contested idea. Even the gentler term translation can be contestable. The initial introduction of an idea of an institution may come through translation from the original language to another. But building an institution is much more than that. And in this process, international collaborations of social scientists can provide indispensable findings and insights to facilitate lay participation in judicial judgment and, in so doing, to promote democratic values.

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