Industrial Relations Journal ••:••, ••–••
ISSN 0019-8692

Judicial regimes for employment rights disputes: comparing Germany, Great Britain and Japan

Susan Corby* and Ryuichi Yamakawa

ABSTRACT

This article compares the judicial regimes for resolving individual employment rights disputes in Germany, Great Britain and Japan. First, we consider the form of institutional change; second, we examine the lay judge's role; and third, we assess the effectiveness of the three judicial regimes. We find that Japan made the least institutional change, layering a new procedure on top of an existing one. Paradoxically, however, its lay judges have a more extensive role than their counterparts in Germany and Britain, which established new institutions. As to effectiveness, there are several criteria. British labour courts are currently the least informal and speedy, but the cheapest. In both Britain and Germany, legal norms are publicised as adjudicatory hearings are open to the public and judgements are available for public scrutiny, unlike in Japan.

1 INTRODUCTION

The decrease in trade union membership and the increase in individual employment rights in much of the developed world in the last quarter of a century have led to juridification, that is, increased legal intervention in the employment relationship and consequently a key role for the courts in resolving employment disputes. In response, many governments have established discrete judicial mechanisms to resolve employment rights disputes (Ebisui et al., 2016). With individual rights disputes likely to increase as unemployment and employment insecurity spread in the wake of the COVID-19 pandemic, such judicial mechanisms are likely to become yet more significant.

Accordingly, this article compares judicial regimes in Germany, Great Britain[1] and Japan, but this choice of countries is not arbitrary. When Japan's prime minister appointed a Study Group to recommend a judicial system for resolving employment rights disputes, it considered judicial regimes abroad, especially the labour court systems in Germany and Great Britain. Additionally, the Study Group invited German and British employment judges to address a public symposium on their systems.

❒ Susan Corby, University of Greenwich, London, UK and Ryuichi Yamakawa, University of Tokyo, Tokyo, Japan. Correspondence should be addressed to Professor Susan Corby, University of Greenwich, London, UK; email: s.r.corby@gre.ac.uk

[1] Great Britain covers England, Scotland and Wales but excludes Northern Ireland. Labour courts in Northern Ireland differ in several respects and merit separate comparison, but they are excluded here because of our limited resources and the fact that the working age population is small (under one million employees).

We direct our comparison to three research questions. The first research question concerns institutional change: in what circumstances were regimes in these three countries established specifically to handle employment rights disputes and what form did the institutional change take?

Our second research question concerns lay judges. Many countries, as noted above, establish discrete institutions for resolving employment rights disputes. Many of these have a 'mixed' composition: a legally trained professional judge sits with, and is outnumbered by, two lay judges drawn equally from those with experience as employees and those with experience as employers or managers, so that any adjudication takes cognizance of workplace norms. Yet the role of these lay judges varies from country to country. Accordingly, we ask the following question: in which of our three comparison countries is the lay judge's role the most extensive?

Our third research question concerns effectiveness: in which of these three countries is the judicial regime the most effective? This assessment is based on a range of criteria specified below.

Our plan is as follows: we begin by briefly considering previous research and describing the industrial relations context in which our three regimes operate. Then, after outlining our methodology, we seek to answer our research questions: institutional change, the lay judge role and regime effectiveness. We conclude by discussing our findings and offering some observations about future research. In so doing, we sometimes use the generic term 'labour court'. Alternatively, we sometimes use the term 'employment tribunal' for Britain, 'labour court' or *Arbeitsgericht* for Germany and 'labour tribunal procedure' or *rodo shinpan seido* for Japan.

2 PREVIOUS RESEARCH

There have been country-specific studies of the judicial regimes for resolving individual employment rights disputes in our three countries. For Japan, Sugeno (2004) explained how Japan's labour tribunal procedure was born; Araki (2013) reviewed its operation; and Yamakawa (2014, 2016) considered Japan's labour tribunal system together with other governmental and non-governmental structures for resolving both individual and collective labour disputes, as did Honami (2014).

For Great Britain, Dickens et al. (1985) carried out seminal research over 30 years ago, but recent studies include those by Meeran (2006), Dickens (2012), Corby and Latreille (2012) and Corby (2015), who have traced the development of employment tribunals and commented on their effectiveness. There have also been country-specific studies of Germany's labour courts, both some time ago, for instance Brandstätter et al. (1984) and recently by Höland et al. (2007) and Höland and Buchwald (2018), particularly looking at lay judges in German labour courts.

Comparisons between countries, however, are rarer. Nevertheless, British and German labour courts have been compared by Blankenburg and Rogowski (1986) and Schneider (2005). The former found that British employment tribunals were more formal than German labour courts. The latter concluded that although the two countries had different legal systems, they had common problems, including criticism that they were legalistic and that they provided monetary compensation, not reinstatement, where they found a dismissal was unfair. More recent research, funded by the Hans Böckler Foundation, considered the role of lay judges in French, British and German labour courts, spawning several academic papers, which found inter alia that the

relationship between the professional judge and the lay judges was more consensual in Britain and Germany, than in France (Burgess et al., 2020; Corby et al., 2020).

To date, however, there has not been any three-way comparison of judicial regimes for resolving individual employment rights disputes between Germany, Great Britain and Japan, even though such comparison is merited. This is because, as noted above, when Japan was designing its bespoke regime, it considered the processes in the aforementioned countries, resulting in similarities and differences explored below. Initially, however, we consider the context and then our methodology.

3 THE INDUSTRIAL RELATIONS CONTEXT

The judicial regimes we are comparing are shaped by their country's industrial relations context. Japan's industrial relations have been typified by enterprise unions, de facto lifetime employment and seniority-based pay systems (Benson, 2012). In contrast, the UK has horizontal unions and pay systems often mainly based on performance, with company bargaining predominating in the private sector. German unions are also horizontal, but with a much greater role for industry-level bargaining than in the UK, and German pay systems are often competency based, sometimes combined with limited seniority-based progression. In both the UK and Germany, unlike Japan, there is neither de facto nor de jure provision for lifetime employment (Corby and Burgess, 2014).

Nevertheless, there are similarities between Germany and Japan. Both are civil law countries. Indeed, the Japanese Civil Code drafted in the late 19th century mainly drew on the draft of the German Civil Code, whereas the UK is a common law country. Both Germany and Japan are classed as co-ordinated market economies, unlike the UK, a liberal market economy (Hall and Soskice, 2001; Hancké, 2009). Both Germany and Japan are noted for their stakeholder-oriented corporate culture and consensual workplace industrial relations. In large German companies (private sector), there is co-determination with worker representation on supervisory boards and works councils in the establishment, creating an institutionalised mechanism for consultation, co-determination and even negotiation on some issues. In Japan, in large companies, there are enterprise unions, which de facto play the role of works councils (Araki, 2007) (in the UK, works councils are uncommon).

Yet there are similarities between all three countries, particularly a decline in union density and collective bargaining coverage in recent decades and a growth of part-time workers, fixed-term workers and agency workers. Table 1 summarises some key contextual similarities and differences. **T1**

4 METHODOLOGY

The authors conducted desk research in all three countries, drawing on official materials, statutes, handbooks and academic articles. To clarify institutional practice, we conducted face-to-face interviews with 12 stakeholders in Japan. Furthermore, the second author was a member of the Labor Study Group that recommended Japan's labour tribunal procedure. The first author was a member of an international team of researchers focusing on labour courts in certain European countries ~~(*details supplied when unanonymised*)~~, which included 107 interviews with lay and professional judges in Great Britain and Germany.

Table 1: The context

Item	Japan	UK	Germany
Legal origins	Civil law	Common law	Civil law
Varieties of capitalism	Co-ordinated market economy	Liberal market economy	Co-ordinated market economy
Union density	17%	23%	17%
Collective bargaining coverage	17	26	56
Type of unions	Mainly enterprise	Mainly horizontal	Mainly horizontal
Number of unions	26,000	134	65
Level of collective bargaining	Enterprise and establishment	Mainly company; some sectoral bargaining in the public sector	Industry and company
Worker participation and consultation	De facto works councils: enterprise unions and employers	Works councils uncommon	Union representatives on company boards and works councils in most workplaces with over 200 workers

Sources: OECD statistics (n.d.); Yong Jeong and Aguilera, (2008); European Trade Union Institute (2016); and Ellguth and Kohaut (2019).

5 INSTITUTIONAL CHANGE

Having sketched the context and methodology, we now address our first research question: in what circumstances was there institutional change and what form did it take?

Thelen, who sought to explore the limits of path dependency and move away from the functionalism embedded in the varieties of capitalism literature, examines institutions from the viewpoint of actors' interests. In a number of papers by herself and with others (Mahoney and Thelen, 2010; Streek and Thelen, 2005; Thelen, 2003; Thelen, 2009), she argues that institutional change can result from an exogenous shock such as war. Alternatively, it can stem from endogenous disturbance. She categorises four types of institutional change: drift, conversion, layering and displacement. While normally, displacement is exogenously caused, the other three types of institutional change are endogenously caused.

Germany's labour courts exemplify institutional change in the form of displacement following an exogenous shock. They were established in 1926 in the wake of Germany's defeat in the First World War, the country's reduction geographically and then political upheaval, with the empire ending and the Weimar Republic being formed. They displaced earlier trade courts, which had limited jurisdiction and covered a few trades only. They survived the Third Reich, albeit with limitations on their jurisdiction, but regained their pre-fascist jurisdictions after the Second World War. Since then, their jurisdiction has increased, both because of new national laws, for instance on dismissal protection and co-determination, and European Union

employment law. They cover individual and collective disputes and all workers/employees except established civil servants (*Beamte*) (Blankenburg and Rogowski, 1986).

Great Britain's employment tribunals exemplify institutional change in the form of conversion after endogenous change. They were established in 1964 as administrative courts to hear appeals by employers against the state in respect of industrial training levies, and then, certain other administrative jurisdictions followed, for instance in respect of a selective employment tax (Meeran, 2006). Yet concurrently, British governments of the 1960s were increasingly concerned about the number of strikes, particularly unofficial strikes. In response, it established a Royal Commission in 1965, chaired by Lord Donovan, 'to consider relations between managements and employees and the role of trade unions and employers' association … and to report' (Royal Commission, 1968).

The Royal Commission, which included employer and union representatives as well as academics, received many submissions, including from the Ministry of Labour. The ministry submitted that disputes regarding employment rights, particularly dismissals, redundancy and suspension, were a significant factor in unofficial strikes and recommended that the existing employment tribunals (then called industrial tribunals) should determine all types of employee/employer disputes arising from the contract of employment, but not collective disputes (Royal Commission, 1968).

The Royal Commission accepted this, and when the government enacted unfair dismissal legislation in 1971, it tasked employment tribunals with resolving the resulting disputes, hence converting them from essentially administrative forums to party v party forums. Moreover, legislation to confer individual employment rights mushroomed from the 1970s and successive governments gave employment tribunals the jurisdiction to hear individual disputes arising from these new statutory rights, although purely contractual matters have mostly remained with the civil courts (Corby, 2015).

Japan's labour tribunal procedure is an example of institutional change through layering as a result of endogenous change. Interestingly, although this change occurred later than in Britain, the causes are similar: a rise in individual employment rights disputes. Whereas in Britain, this took the form of unofficial strikes, in Japan, it took the form of civil litigation. Thus, between 1991 and 2004, when the Labor Tribunal Act was passed, 'the number of civil actions involving labour relations tripled, while the number of entire civil litigation in the same period [grew] 1.5 times' (Sugeno, 2004: 522). At the same time, labour administrative agencies also received an increasing number of grievances from individual workers (Yamakawa, 2014). This is attributed to the Japanese recession in the 1990s, when enterprises downsized, unemployment increased, as did the number of irregular workers and the traditional Japanese industrial relations system eroded.

As to the process, after reforming the administrative and economic systems in the 1990s, the Japanese government embraced widespread criminal and civil judicial reform, with parliament establishing a Judicial System Reform Council in 1999. A Labour Study Group, containing management and worker representatives plus academics (a similar make-up to Britain's Royal Commission), was then set up under the aegis of the Judicial Reform Promotion Headquarters led by the prime minister. The Study Group's proposals were accepted by all the political parties and were embodied in legislation (Sugeno, 2004; Yamakawa, 2014).

Japan's new institutional provision involved layering: a new judicial regime, a labour tribunal procedure, was added to the civil court system, satisfying those with a vested interest in the extant system, which continued unchanged. As a result, however, a Japanese claimant now has the choice of using the traditional civil court system with a professional judge alone adjudicating strictly on the basis of the law, or a swifter, more informal procedure emphasising mediation and with decision-making by a professional judge together with two lay judges and taking account of workplace norms (Yamakawa, 2014). This Japanese approach differs from Germany, where claimants have no such choice of forum, and Great Britain, where claimants mostly have no such choice.

Moreover, in Japan, if a party objects to an adjudication of the labour tribunal, it can transfer the dispute to the 'ordinary' civil court for a rehearing. No such provision for a rehearing applies in the other two countries. Table 2 summarises the three judicial regimes. T2

6 LAY JUDGES

We now turn to our second research question: the role of lay judges in the three countries' labour courts.

According to the latest available data, in 2018, there were 1506 Japanese lay judges of whom only 6 per cent were women, with roughly one employee lay judge per 79 000 employees. ~~In 2020,~~ there were 1140 British lay judges in 2018, of whom just over half were women, with roughly one employee lay judge per 56 000 employees, and approximately 24 000 German lay judges in 2016, with roughly one employee lay judge per 3000 employees.[2]

There are superficial similarities. In all three countries, lay judges are not required to be legally qualified, but they are required to have workplace knowledge. In all three countries, there is tripartism: one lay judge drawn from a panel of those with experience as employers/managers, one lay judge drawn from a panel of those with experience as workers/union officials and a professional judge. Nevertheless, the lay judge role varies.

In Japan and Germany, *all* cases that come before the labour tribunal are adjudicated on a tripartite basis. In contrast, in Great Britain, professional judges sit alone to determine a vast range of cases including redundancy payments, holiday pay and unfair dismissal. Although in such cases, British professional judges can, in prescribed circumstances, exercise their discretion and opt for a tripartite tribunal, they rarely do so. In practice, therefore, British lay judges almost always only sit on discrimination cases, which perhaps include other concurrent claims brought simultaneously by the claimant (Corby, 2015).

Also, British lay judges have a circumscribed role for two other reasons. First, they do not participate in any pre-adjudication conciliation or mediation. Conciliation is conducted by a government agency, the Advisory Conciliation and Arbitration Service (Acas), normally by email or telephone over several days, not face to face on a single day, either before a claim is lodged at the labour court or afterwards at any time up to the hearing, ~~n~~or do British lay judges participate in any face-to-face mediation once a claim is lodged, as this is carried out by a professional judge alone,

[2]Statistics supplied to the authors.

Table 2: Labour court composition and procedures

Item	Japan (rodo shinpan seido)	Great Britain (employment tribunal)	Germany (Arbeitsgericht)
Jurisdiction	Individual labour disputes arising from statutory and all contractual rights	Individual labour disputes arising from statutory rights and some contractual rights	Individual and collective labour disputes except senior civil servants
Exclusivity	No. Claimant can go to civil court. Labour tribunal may refer complex cases to the civil court	Yes. In the main.	Yes
Mandatory conciliation *before* claim submitted	No.	Yes. Separate government agency	No
Court fee	Yes, paid when claim lodged.	None	Yes, paid by loser after adjudication
Representation	Parties required to be legally represented or self-represented	Parties can be represented by any person. Legal qualification not required	Parties can be represented by any person. Legal qualification not required
Judicial mediation *after* claim submitted	Yes. Professional judge plus two lay judges	Yes. Professional judge in selected cases *only*	Yes. Professional judge
Professional judge	Career judiciary mostly sits in District Court	Appointed after at least 5 years in a legal activity. Most sit full time in labour court	Career judiciary sits virtually full time in labour court
Cross-examination	No	Yes	No
Composition of labour court	Professional judge plus two lay judges	Professional judge plus two lay judges in certain	Professional judge plus two lay judges

(Continues)

Table 2. (Continued)

Item	Japan (rodo shinpan seido)	Great Britain (employment tribunal)	Germany (Arbeitsgericht)
		complaints. In others, professional judge only	
Appointment of lay judges	Employer and trade union bodies nominate	Open competition	Employer and trade union bodies nominate
Length of case	3 days maximum	Half a day to over 20 days	Four to five cases in half a day
Public hearing?	No	Yes	Yes
Decision clarifies whether it is unanimous or not?	No. Only a brief summary of the decision by tribunal as a whole	Yes. Any dissent and the reasons for it noted in the decision	No. Only a brief summary of the decision by tribunal as a whole
Decision available for public scrutiny?	No	Yes	Yes
Aftermath	Either party can object and have case reheard by District Court	Appeal on point of law only to the Employment Appeal Tribunal	Leave to appeal to the *Land* labour court given if amount in dispute exceeds €600 or a point of law

Source: Ebisui et al. (2016).

although only in selected cases.[3] German lay judges too do not mediate, just the professional judge alone.[4] In contrast, in Japan, mediation is conducted on a tripartite basis, with lay judges often playing a significant role in urging 'their side' to compromise.[5]

Prima facie, lay judges who do not have the same information as the professional judge about a case are disadvantaged (Fujita and Hotta, 2010). British lay judges, when they sit on a case, read the same evidence as the professional judge, normally at the same time (if there has been judicial mediation, a different professional judge with no prior knowledge of the case adjudicates). German lay judges usually only have access to the case papers for the scheduled hearing on the hearing day itself, and however much effort they might invest in reading the file, it is virtually impossible for them to catch up with the professional judge's familiarity with the case, a familiarity gained from studying the papers for some weeks and conducting mediation (Burgess et al., 2017).

Japanese lay judges are able to read all the papers and evidence in advance of the hearing, but often only with difficulty. The complainant's claim is posted to the lay judges generally a week or two before the hearing, but the response is posted later, often just a day or two before the hearing. In Tokyo, lay judges have to go to the court to see the evidentiary documents, either making a special journey or arriving early on the same day as the hearing. As there is only one set of documents, these can be unavailable if the other lay judge is already reading them.[6] To summarise, Japanese and British lay judges have the same information as the professional judge, unlike their German counterparts. To put it another way, the German professional judge has an informational advantage.

7 EFFECTIVENESS

We now consider our third research question and ask which judicial system is the most effective. To determine this, we adopt various criteria.

7.1 The Donovan Commission criteria

The Royal Commission (1968: para 572) set out four criteria, 'easily accessible, speedy, informal, and inexpensive', which we consider in turn.

In all three countries, there is easy accessibility from the viewpoint of location. In Germany, there are 110 labour courts and some of them hold court sessions in rural areas in order to alleviate travelling for the parties (Burgess et al., 2017). In Great Britain, which is smaller geographically, there are 34 hearing venues. In Japan, the labour tribunal procedure is available in 55 district court venues.

Accessibility can also be measured by how easily a claim can be made. A British claimant must first notify Acas to see if conciliation is possible (see above). If it is

[3]Cases scheduled to last 3 days or more with at least one complex legal or evidential point (in practice discrimination), where there is a single complainant with no concurrent proceedings and both parties are willing to enter into mediation. There is also provision for 'judicial assessment', also by a professional judge alone.

[4]LCA 54a(1) provides expressly for a judge to propose extra-judicial mediation as well, but the general consensus is that this has not resulted in a greater uptake of extra-judicial mediation (see Wass, 2016).

[5]Interviewees' reports.

[6]We understood that some district courts posted out all the documents and that the Tokyo situation was because of court staffing constraints.

not, Acas issues a certificate. Without it, a claim cannot be lodged. There is no such prior requirement in Japan and Germany. Also, a British claimant has to complete a form of 15 pages (UK Government, n.d.). There is no prescribed form in Germany or in Japan.

As to speed, British employment tribunals are not speedy. The mean figure for cases where there was a single claimant in April–June 2019 was 33 weeks, rising to 140 weeks where there were multiple claimants such as in equal pay cases. Because there is cross-examination in Britain (unlike Germany and Japan), the hearing itself can take many days: 5 days is not uncommon, and occasionally, hearings have lasted 15 days or more. Often, the judgement is reserved and is only sent to the parties about a month after the hearing. Accordingly, more complex cases, such as discrimination and whistle-blowing, can take at least a year from start to finish (Makortoff, 2019; Ministry of Justice, 2019a).

German labour courts are speedier. Where there is a works council, they must be consulted on a dismissal, but otherwise, a claim can be lodged without prior restriction; after which, a professional judge holds a mediation hearing, which often only lasts some 20 minutes and is normally held 3 to 6 weeks after submission of the claim (ICLG, 2020). If there is no resolution, the case proceeds to a full hearing with the same professional judge joined by two lay judges. The actual hearing is brief; typically, four or five cases are heard in a morning, with the professional judge, after deliberating with the lay judges, promulgating the judgement on the afternoon of the day of the hearing.[7] Cases that ended in a judgement took 7 months on average, with 51 per cent concluded within 6 months in 2019 (Statistisches Bundesamt, 2019).

The Japanese labour tribunal procedure is the speediest. In 2018, the average duration of a case from start to finish was 79.4 days, according to statistics provided to the author. The actual hearing is designed to last 3 days: on the first day, a clarification of the issues; on the second day, mediation; and on the third day, adjudication, but 70 per cent of cases were concluded in 2 days in 2018. These Japanese statistics, however, are not strictly comparable with German and British statistics for two reasons. First, a case can be transferred to the 'ordinary' civil court if it is complex and therefore not appropriate for disposal in just three sessions (Yamakawa, 2014), although statistics show that this rarely occurred (1.2 per cent of cases in 2018). Second, adjudication under the labour tribunal procedure may not end the matter. Either party can object (no reason needs to be given) and rerun the case at first instance in the District Court, leading to further delay.

As to informality, British labour courts are very formal. As noted above, a claim can only be lodged using a long form. Furthermore, the parties have to submit written witness statements to be read by the court in advance of cross-examination. Moreover, cross-examination is a formal (and lengthy) process, whereas in German labour courts or the Japanese labour tribunal procedure, the emphasis is on submissions by the parties and questioning by the judges.

Another test of informality is whether the professional judge wears robes: they do not do so in Japan and Britain, but they do in Germany. As to the setting, in Japan, there is a round table, but in Britain, the three labour court judges sit on a long

[7]There is an expedited process for dismissal cases, with a conciliation hearing within 2 weeks of the claim being submitted.

table on a dais facing the parties. In Germany, the three judges also sit on a long table facing the parties, but the court room floor is level.

In all three countries, an adjudicatory hearing can be obviated if the case is resolved by the more informal process of judicial mediation. British judicial mediation boasts a 65 per cent success rate (Gov UK, n.d.). That figure, however, should be treated with caution because it is only offered in some cases (see above), including where the parties have indicated a willingness to mediate. In Germany, some two thirds of cases are settled by judicial mediation *or* are withdrawn, while in Japan, 72.6 per cent of cases were resolved by mediation in 2018. Given these statistics, it is not surprising that the Japanese lay judges whom we interviewed had rarely had an adjudicatory hearing.

Our final Donovan criterion is inexpensiveness. In all three regimes, the losing party is not normally required to pay the other side's costs. As to a court fee, currently, claims to British employment tribunals are free.[8] Moreover, the parties do not have to have legal representation; a party can be represented by someone who is not legally qualified, for instance a friend, a human resources manager or a trade union official. Nevertheless, three quarters of claimants (73.6 per cent) were legally represented in 2017–2018 (Ministry of Justice, 2019b).

In Germany, there is a fee, but this is paid by the loser *after* the hearing (or not at all if there is a settlement during the proceedings). The amount of the fee, which is less than that in the civil court, is on a sliding scale broadly relating to the amount of compensation claimed (based on 3 months' salary) but is typically €390 for an unfair dismissal claimant on average earnings. As in Britain, there is no requirement to have legal representation; a person who is not legally qualified can represent a party, although there is legal aid subject to income thresholds (Corby and Burgess, 2014).

In Japan, the claimant has to pay a hearing fee, but as in Germany, it is less than the civil court fee and is on a sliding scale related to the amount claimed. There is no legal aid, but a party is required to be represented by a lawyer, unless there is self-representation. One cannot be represented by a person who is not legally qualified unless prior consent has been obtained from the professional judge. We were told that this provision was not publicised and we were not aware of any instance when it was sought or granted.

7.2 Other criteria

A criterion not adopted in the Donovan Report is whether the judges have expertise in industrial relations when adjudicating individual employment rights disputes. Such expertise is a rationale for the participation of lay judges to supplement the legal expertise of professional judges. Article 1 of Japan's Labour Tribunal Act empowers the tribunal to achieve 'prompt, proper and effective dispute resolution'. We dealt above with promptness and to some degree about effectiveness. Here, the term 'proper' means, inter alia, that the adjudicatory body includes those who have expertise and that the dispute resolution procedure is tailored to the reality of employment disputes (Sugeno et al., 2007).

Dealing first with expertise, British lay judges are appointed by open competition (this process was introduced in 1999 as part of a general drive to eradicate nepotism

[8] Between 2013 and 2017, there were hefty fees, but these were abolished when the Supreme Court held that they were unlawful.

in public appointments). Accordingly, anyone can apply. Those doing so submit a long application form giving examples of competencies and then those who survive a sift are interviewed by a panel of a professional judge and two current lay judges, answering questions on a case study. Appointment is by a minister on the recommendation of the interview panel. Research suggests that selection by interview has poor predictive validity and is 'riddled with problems' (Marchington and Wilkinson, 1996:123).

In contrast, quality control is exercised informally by trade unions and employer organisations in Germany and Japan. In Germany, lay judges are selected at a regional (*Land*) level, having been nominated by many organisations: trade unions, independent employee organisations, employers' associations and certain public employers. The appointing authority (the *Land* ministry or a designated body) ensures that the number of those nominated by each organisation is proportionate to that organisation's strength in the region, so some might be asked to submit their membership figures (Burgess et al., 2017).

In Japan, lay judges' appointment is centralised at national level through the main trade union confederation (*Rengo*) and the main employers' confederation (*Keidanren*). Annually (sometimes twice a year), the Supreme Court notifies *Rengo* and *Keidanren* of the number of lay judges required in each of the 50 district courts. These two bodies then ask their affiliated organisations to supply nominations exactly according to the numbers required by the district court(s) in their area.[9] To do so, these affiliated organisations will both supply lay judges themselves and may subcontract. For instance, *Rengo Tokyo* asks *Tokyo UA Zensen* (the Japanese Federation of Textile, Chemical, Food, Commercial, Service and General Workers' Unions) to supply a certain number of lay judges. Then, *Rengo* and *Keidanren*, having collated their responses, submit the exact number of nominations per district court to the Supreme Court, which normally accepts all the nominations, subject to certain legal requirements, for instance age.[10]

Importantly, Japanese lay judges are arguably more equipped for their role than their German and British counterparts. This is because *Rengo* requires, and *Keidanren* recommends, that those interested in becoming a lay judge first participate in a 3-day training programme in individual dispute resolution, delivered by private organisations, but funded by government. Also, *Rengo* requires its nominees to have acquired more than 15 years of work experience or more than 10 years as a union official/union employee. *Keidanren* does not specify any required length of experience.

In Japan and Great Britain, there is court-provided training both for new lay judges and refresher courses for existing lay judges, but in Germany, there is no nationwide requirement for training, although some labour courts and some trade unions provide training.

Berger et al. (1972) developed status characteristics theory to explain interactions in small task groups, distinguishing between diffuse status characteristics (such as gender) and specific ones, *directly* related to the immediate task. Some group members

[9] *Rengo* also asks *Zenroren*, a separate and relatively small trade union federation with different political views, to supply a certain number of nominations.

[10] Over 35 years old and under 68 years old. In Great Britain, the retirement age is 70. In Germany, the retirement age is 65, but lay judges reaching that age can continue to sit until their term of office expires, while employer lay judges, not in the social security system, can continue without any age limitation.

are almost invariably more expert in the performance of a particular task than others, and this affects each group member's estimation of others' performance. A group member for whom others' expectations are relatively high will have a higher status and thus more power and will initiate more interaction, receive more attention and deference and exercise greater influence in the group, especially when there are disagreements. At the same time, low-status group members will be influenced by the opinions of a high-status group member on the assumption that doing so will help the group as a whole to accomplish the group's goals.

Japanese lay judges have a higher status in helping the group accomplish its goal of resolving the dispute than their British and German counterparts for two reasons. First, they always take part in mediation, which is given prominence in Japan's Labour Tribunal Procedure. Second, Japanese lay judges have much more expertise in industrial relations than Japanese professional judges. This is because Japanese professional judges are normally moved every 2 years, sometimes sitting in local courts where there are few labour cases and adjudicating on both civil and criminal matters. Accordingly, professional judges' reliance on lay judges is substantial, especially if they have never sat in large cities, such as Tokyo or Osaka, where there are special labour divisions in the civil court, as well as the labour tribunal procedure.

German professional judges are career judges too, but some often sit for many years in the labour court and so amass a modicum of industrial relations knowledge, albeit indirectly. In contrast, British professional judges are not career judges and will have previously been lawyers, whose many clients have often been employees or employers. At the same time, British lay judges, unlike their Japanese and German counterparts, have little chance to deploy their industrial relations expertise. As noted above, they primarily adjudicate in discrimination cases where industrial relations norms are rarely a factor in decision-making, unlike adjudication in unfair dismissal cases.

Turning to the related issue of which judicial regime is most tailored to the reality of workplace disputes, we find some difficulty in assessment. One, albeit imperfect, measure is the parties' evaluation. A British survey in 2013, based on 3999 telephone interviews, found that most claimants (72 per cent) were satisfied 'with the working of the employment tribunal system', but as might be expected, satisfaction was highest where the claimant was successful. Furthermore, it found that employers were less satisfied than claimants (64 per cent), but again, satisfaction was related to outcome (Department for Business, Innovations and Skills, 2014). This survey, however, did not differentiate between unipartite and tripartite employment tribunals.

In Japan, a 2011 survey, which resulted in 494 postal responses from parties who had used the labour tribunal procedure, found that the majority of respondents were on average satisfied with lay judges (3.45 for lay judge A and 3.30 for lay judge B based on the scale of 5). Also, respondents' evaluation of the professional judge as a member of the labour tribunal panel was higher compared with respondents' evaluation when a professional judge decided cases without lay judges (3.47 as compared with 2.67). Furthermore, respondents' evaluation of the labour tribunal procedure was generally higher than that for ordinary civil litigation: 3.13 as compared with 2.61 for ordinary civil litigation (Sato, 2012).

Preference for a procedure in which lay judges participate can be another indirect measurement of effectiveness. This can only be measured in Japan as the claimant has a choice of forum: the civil court or the labour tribunal, as noted above. According to statistics provided to the authors, there were 1494 labour tribunal cases in 2007,

rising to 3630 cases in 2018, an increase of 143 per cent. There were 2292 labour cases in the civil courts in 2007, rising to 3496 in 2018, an increase of 53 per cent. This suggests a far greater rise in the popularity of the labour tribunal procedure compared with the civil court. This figure, however, should be treated with caution. Under the labour tribunal procedure, monetary compensation can be awarded by adjudication to resolve an unfair dismissal dispute. In contrast, the civil court lacks the power to order monetary compensation.

Another criterion of a court system is whether legal norms are propagated. If they are, employers who disregarded the law are publicly named and all employers are able to understand what the courts consider is good practice. In Great Britain, adjudicatory hearings are open to the public and judgements are readily available for public scrutiny and have been posted online since 2017. In Germany, both mediation and adjudication hearings are open to the public and decisions are available for public scrutiny, albeit often with the parties' names anonymised. In Japan, in contrast, secrecy prevails: all labour tribunal procedure hearings, both mediation and adjudication, are closed to the public and decisions are only available to the parties.

8 DISCUSSION AND CONCLUSIONS

We have pointed out that although the context in which the judicial regimes for resolving individual employment rights disputes varies, there are similarities and our three-country comparison is not arbitrary: before Japan established its regime, it considered the British and German regimes.

To focus our comparison, we posed three research questions. First, we considered the circumstances in which institutional change took place and its form. We found that in Japan, there was endogenous change: widespread judicial reform after its financial problems in the 1990s. This led to a *layering* as its judicial regime took the form of a labour tribunal procedure placed within the civil court. In Great Britain, there was also endogenous change: a rise in unofficial strikes often conducted in response to an individual's dismissal. As a result, employment tribunals, originally established as administrative tribunals, were *converted* into party versus party courts. In Germany, there was exogenous change: defeat in the First World War and the imperial government being superseded by the Weimar republic. This resulted in the *displacement* of trade courts and the establishment of labour courts.

Second, we considered the role of lay judges. When British and German professional employment judges visited Japan to address its Study Group, they stressed the importance of having lay judges alongside the professional judge, but we found that the lay judge role varied in the three countries. In short, lay judges play a more extensive part in Japan's judicial regime than in Germany and Great Britain for several reasons. Japanese lay judges, along with the professional judge, carry out mediation, whereas in the other two regimes, face-to-face mediation is conducted by the professional judge alone. Also, Japanese and German lay judges *always* adjudicate with a professional judge, whereas their British counterparts do not; often, the British professional judge adjudicates alone.

A further criterion is the expertise of the judges, given that status characteristics theory gives a higher status and most power to those who can make the greatest contribution to the task in hand. We found that Japanese professional judges have less knowledge of industrial relations and are more reliant on their lay judges, certainly than British professional judges, if not German professional judges. It is perhaps

paradoxical that Japan made the least institutional change, but has given its lay judges a greater role than in the other two countries.

Finally, we considered which of the three regimes was the most effective and we found that this depended on the criterion adopted. For instance, British employment tribunals were the least informal and speedy, but the cheapest. In contrast, the Japanese regime was the most informal, particularly as it gives a high priority to mediation, a method of dispute resolution based on the consensus of the parties, which aligns with Japanese culture more generally, a culture that values consensus and co-operation.

Another criterion is the propagation of legal norms. Unlike Germany and Britain, all hearings and decisions in the Japanese labour tribunal procedure are secret.

Our comparative analysis enables academics and practitioners to arrive at a deeper understanding of their national systems, including the different approaches that can be adopted and their effectiveness. Kahn-Freund (1974), however, has warned that comparative law becomes an abuse if it ignores the context and, particularly, the distribution of power and that all rules that organise judicial institutions are designed to allocate power.

In this article, we considered to what extent British, German and Japanese governments, when regulating judicial regimes for employment dispute resolution, allocated power to professional *and* lay judges and to any nominating organisations. Nevertheless, although we adopted a range of dimensions for comparison purposes, others are possible. Moreover, this article's remit is empirically based, and further work is needed to suggest theoretical explanations for the differences and similarities we have uncovered.

References

Araki, T. (2007), 'Changing employment practices, corporate governance and the role of labor law in Japan', *Comparative Labor Law and Policy Journal*, **2**, 251–281.

Araki, T. (2013), 'New forms of dispute resolution: Japan's labor tribunal system', in K. Stone and H. Arthurs (eds), Rethinking Workplace Regulation: Beyond the Standard Contract of Employment (New York, Russell Sage).

Benson, J. (2012), 'Alternative dispute resolution in Japan: the rise of individualism', *The International Journal of Human Resource Management*, **21**, 3, 511–527.

Berger, J., B. Cohen, M. Zelditch and J. Zelditch (1972), 'Status characteristics and social interactions', *American Sociological Review*, **37**, 3, 241–255.

Blankenburg, E. and R. Rogowski (1986), 'German labour courts and the British industrial tribunal system: a socio-legal comparison of degrees of judicialisation', *Journal of Law and Society*, **13**, 1, 67–92.

Brandstätter, H., L. Bleckwenn and G. Kette (1984), 'Decision-making of industrial tribunals as described by professional and lay judges', *International Review of Applied Psychology*, **33**, 1, 137–159.

Burgess, P., S. Corby, A. Holand, H. Michel and L. Willemez (2020), 'Lay labour court judges as industrial relations actors in Germany, Great Britain and France: can field theory contribute to comparative research', in V. Pulignano and F. Hendrickx (eds), Employment Relations in the 21st Century (Alphen aan den Rijn, Kluwer).

Burgess, P., S. Corby, A. Höland, H. Michel, L. Willemez, C. Buchwald and E. Krausbeck (2017), The Roles, Resources and Competencies of Employee Lay Judges: A Cross-National Study of Germany, France and Great Britain *Working Paper 051* (Dusseldorf, Hans Böckler Stiftung).

Corby, S. (2015), 'British employment tribunals: from the side-lines to centre stage', *Labor History*, **56**, 2, 161–179.
Corby, S. and P. Burgess (2014), Adjudicating Employment Rights: A Cross-National Approach (Basingstoke, Palgrave).
Corby, S., P. Burgess, A. Holand, H. Michel and L. Willemez (2020), 'Lay and professional judges in Europe's labour courts: does the professional judge dominate?' *Industrial Law Journal*, **19**, 2, 231–257.
Corby, S. and P. Latreille (2012), 'Employment tribunals and the civil courts: isomorphism exemplified', *Industrial Law Journal*, **41**, 4, 387–406.
Department for Business, Innovations and Skills (2014), Findings from the Survey of Employment Tribunal Applications 2013 (London, Department for Business, Innovations & Skills).
Dickens, L. (2012), 'Employment tribunals and alternative dispute resolution', in L. Dickens (ed.), Making Employment Rights Effective (Oxford, Hart).
Dickens, L., M. Jones, B. Weekes and Hart (1985), Dismissed: A Study of Unfair Dismissal and the Industrial Tribunal System (Oxford, Blackwell).
Ebisui, M., S. Cooney and C. Fenwick (2016), 'A general introduction', in M. Ebisui, S. Cooney and C. Fenwick (eds), Resolving Individual Labor Disputes: A Comparative Overview (Geneva, International Labor Organization).
Ellguth, P. and S. Kohaut (2019), 'Tarifbindung und betriebliche Interessenvertretung: Ergebnisse aus dem IAB-Betriebspanel 2018', *WSI-Mitteilungen*, **72**, 4, 292–297.
European Trade Union Institute. (2016), https://www.worker-participation.eu/National-Industrial-Relations/Map-of-European-Industrial-Relations Brussels: ETUI [accessed 28. 1.20].
Fujita, M. and S. Hotta (2010), 'The impact of differential information between lay participants and professional judges on deliberative decision-making', *International Journal of Law, Crime and Justice*, **38**, 216–235.
Gov UK. (n.d.), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/710055/t612-eng.pdf [accessed 14.6.20]
Hall, P. and D. Soskice (2001), Varieties of Capitalism: The Institutional Foundations of the Varieties of Capitalism (Oxford, OUP).
Hancké, B. (2009), Debating Varieties of Capitalism (Oxford, OUP).
Höland, A. and C. Buchwald (2018), Ehrenamtliche Richterinnen und Richter in der Arbeitsgerichtsbarkeit und in der Sozialgerichtsbarkeit: Ergebnisse einer repräsentativen Befragung in Baden-Württemberg, Berlin und Sachsen-Anhalt (Halle, ZSH).
Höland, A., U. Kahl and N. Zeibig (2007), Kündigungspraxis und Kündigungsschutz im Arbeitsverhältnis (Augsburg, Rainer Hampp).
Honami, M. (2014), 'How successful is Japan's labor tribunal system? The labor tribunal's limited scope and effectiveness', *Asian-Pacific Law & Policy Journal*, **16**, 1, 83–100.
ICLG. (2020), https://iclg.com/practice-areas/employment-and-labour-laws-and-regulations/germany [accessed 12.6.20].
Kahn-Freund, O. (1974), 'On uses and misuses of comparative law', *The Modern Law Review*, **37**, 1, 1–27.
Mahoney, J. and K. Thelen (2010), 'A theory of gradual institutional change', in J. Mahoney and K. Thelen (eds), Explaining Institutional Change: Ambiguity, Agency and Power (Cambridge, CUP).
Makortoff, K. (2019), *Guardian* https://www.theguardian.com/money/2019/jul/29/employment-tribunal-claims-taking-eight-months-to-be-heard [accessed 12.6.20].
Marchington, M. and A. Wilkinson (1996), Core Personnel and Development (London, CIPD).
Meeran, G. (2006), 'Employment tribunals', in L. Dickens and A. Neal (eds), The Changing Institutional Face of British Employment Relations (Alphen aan den Rijn, Kluwer).
Ministry of Justice. (2019a), *Tribunal Statistics* Table T-2 Percentage of clearances that took place in April to June 2019 by age of case at clearance.

Ministry of Justice. (2019b), Employment Tribunal and Employment Appeal Tribunal Annual Tables. Table E1 Representation of claimants at Employment Tribunals, 2005/06 to 2018/19.

OECD statistics. (n.d.), https://www.oecd-ilibrary.org/employment/data/oecd-employment-and-labour-market-statistics_lfs-data-en [accessed 12.2.20].

Royal Commission on Trade Unions and Employers' Associations Report. (1968), chaired by Lord Donovan, Cmnd, 3623 (London; HMSO).

Sato, I. (2012), 'Expanding access to justice for labour disputes: the impact of the labour tribunal system', *Social Science Japan*, 8–9.

Schneider, M. (2005), 'Employment litigation on the rise? Comparing British employment tribunals and German labour courts', *Comparative Labour Law and Policy Journal*, **22**, 261–280.

Statistisches Bundesamt. (2019), *Rechtspflege: Arbeitsgerichte*, Fachserie 10 Reihe 2.8. Table 2.3.

Streek, W. and K. Thelen (2005), 'Introduction: institutional change in advanced political economies', in W. Streek and K. Thelen (eds), Beyond Continuity: Institutional Change in Advanced Political Economies (Oxford, OUP).

Sugeno, K. (2004), 'The birth of the labor tribunal system in Japan: a synthesis of labor law reform and judicial reform', *Comparative Labor Law & Policy Journal*, **25**, 519–533.

Sugeno, K., R. Yamakawa, T. Saito, M. Jouzuka and S. Otokozawa (2007), *Rodo Shinpan Seido* (Labour Tribunal System) (Tokyo, Koubundo).

Thelen, K. (2003), 'How institutions evolve: insights from comparative historical analysis', in J. Mahoney and F. Rueschemeyer (eds), Comparative Historical Analysis in the Social Sciences (Cambridge, CUP).

Thelen, K. (2009), 'Institutional change in advanced political economies', *British Journal of Industrial Relations*, **47**, 3, 471–498.

UK Government. (n.d.) https://www.gov.uk/government/publications/make-a-claim-to-an-employment-tribunal-form-et1 [accessed 12.6.20].

~~Wagner, D. and J. Berger (1993), 'Status characteristics theory: the growth of a program', in J. Berger and M. Zelditch (eds), Theoretical Research Programs: Studies in Theory Growth (California, Stanford University Press).~~

Wass, B. (2016), 'Germany', in M. Ebisui, S. Cooney and C. Fenwick (eds), Resolving Individual Labor Disputes: A Comparative Overview (Geneva, International Labor Organization).

Yamakawa, R. (2014), 'Systems and procedures for resolving labor disputes in Japan', *Comparative Labor Law & Policy Journal*, **34**, 899–927.

Yamakawa, R. (2016), 'Japan', in M. Ebisui, S. Cooney and C. Fenwick (eds), Resolving Individual Labor Disputes: A Comparative Overview (Geneva, International Labor Organization).

Yong Jeong, D. and R. Aguilera (2008), 'The evolution of enterprise unionism in Japan: a socio-political perspective', *British Journal of Industrial Relations*, **46**, 1, 98–132.