

# Necessary Conditions for Active Civilian Participation in Japanese Courts: Analysing Communication Networks in Two Mock Mixed Jury Trials

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## I. INTRODUCTION

On 21 May 2009<sup>1</sup> Japan will introduce a mixed tribunal system, named “*saiban-in*”,<sup>2</sup> to try severe criminal cases.<sup>3</sup> In that system, judicial panels will, in principle,<sup>4</sup> be com-

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\* This paper is rewritten from the paper presented at Law and Society Association 2007 held at Humboldt Universität zu Berlin.

1 *Saiban-in-hô* supplemental provision Art. 1. After pre-trial conferences, trials by *saiban-in* will be started in summer 2009.

2 *Saiban* means trial or judicial procedures. *In* means a member or members in this context. So with combining *saiban* and *in*, *saiban-in* means “trial members”. *Saiban-in* is not a part of the general civic vocabulary. Before introducing this system, the term *saiban-in* was used to indicate members of a panel at the Court of Impeachment. The Court of Impeachment is the special court designated by the Japanese constitution for impeaching judges who commit misconduct.

3 “Severe criminal cases” are cases in which the accused are indicted with crimes whose legally defined punishments include the death penalty or lifetime imprisonment. These also include criminal acts that bring the victims into death intentionally. These are prescribed in Art. 2 para. 1 nos. 1 and 2 *Saiban-in no sanku suru keiji saiban ni kansuru hôritsu* [Act Concerning Participation of Lay Assessors in Criminal Trials] (hereinafter *Saiban-in-hô*), Law No. 63/2004, latest amendment Law No. 124/2007; English translation: K. ANDERSON/

posed of three professional judges and six citizen participants. Contrary to the pure jury system<sup>5</sup> that was implemented in Japan in the early Shōwa era (from 1925 to 1989), none of the accused in severe cases can refuse trial by the *saiban-in* system. In consequence, around 3,000 cases per year will be tried by the *saiban-in* system.<sup>6</sup>

The introduction of the *saiban-in* system has made a huge impact on the administration of Japanese criminal justice. In particular, the administration of deliberation with civic participants is one of the most important issues. This issue is taken seriously among the three parties to the judicial community (judges, prosecutors, and practicing attorneys at law) as the implementation of the mixed jury system approaches.

To try out the deliberation by mixed jury panels, mock trials and mock deliberations are being held in every corner of Japan in these days.<sup>7</sup> Generally, the initiative is taken by a district court. Prosecutors and attorneys then participate in a mock trial. Three professional judges and six citizens make up a judicial panel, and they sit at and hear the mock trial. After the trial is completed, the judicial panel deliberates on the case, decides the case, and sentences if the panel convicts the accused.

Concerning the deliberation processes, The Act Concerning Participation of Lay Assessors in Criminal Trials<sup>8</sup> (hereafter “the Law”) stipulates that professional judges and civilian members should be on equal footing. Every member of the panel has the same voting powers on deciding issues except legal issues. And every member will be given chances to speak out during the deliberation. But actually, needless to say, judges

E. SAINT, Japan’s Quasi-Jury (Saiban-in) Law: An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials, in: *Asian Pacific Law & Policy Journal* 6 (2005) 233-283 (as of 2005).

- 4 Judicial panels that are composed of one professional judge and four civic participants can be chosen by a court decision under the consent of both parties of the trial (*Saiban-in-hō*, Art. 2, para. 2).
- 5 In 1928, Japan initiated a pure jury system to try severe criminal cases. With that system, 484 criminal cases were tried. But that system was suspended in 1943 with the “Act on Suspending Jury System Law” because of the force of circumstances. Of course, one of the reasons for this may have been that Japan was at war, but some defects of the Japanese jury system were also pointed out. These problems and some empirical issues of the Japanese pure jury system were investigated in M. FUJITA, *Shihō e no shimin sankā no kanō-sei* [Possibilities of Civic Participation in the Justice System] (Tokyo 2008).
- 6 Report by the Supreme Court of Japan issued in 2007. This report is available online at <http://www.saibanin.courts.go.jp/shiryō/pdf/03.pdf> (in Japanese).
- 7 Japan has 50 district courts with 207 branch offices. District courts are the first-instance courts for the major part of criminal cases, including severe cases. They find facts of the cases that are indicted by prosecutors. Trials by *saiban-in* are going to be held at the first instance of the criminal trial system, that is, district courts. From some personal communication with professional judges, every district court and some major branch offices of district courts have conducted mock mixed trials with civic participants at least four times. In consequence, 200 or more mock mixed trials have been carried out all over Japan. Many district courts have their own branch offices.
- 8 *Saiban-in-hō* 裁判員法, see *supra* note 3.

and citizens are not equal with regard to their knowledge (concerning legal knowledge and the case itself), their authority in managing the processes of deliberation, and even their social power. Even judges are not equal in their career, knowledge, and social power.

In substance, the Law stipulates that one of the judges should be a chief judge,<sup>9</sup> and that “during the deliberation the chief judge must carefully explain the laws discussed during the deliberation” (Art. 66, para. 1). He also should manage the deliberation in order to keep the deliberation understandable for civilian participants. Moreover, the chief judge must be mindful that civilian participants are able to satisfactorily perform their duties by securing enough time for them to speak out during the deliberation (Art. 66, section 5). With this article, a chief judge is vested with special powers in the process of deliberation by law.

As seen in Article 66 cited above, judges are required to explain the law applicable to the cases to civilian participants. Possibly, judges will influence lay members in the panel and lead the deliberation towards the conclusion that they are aiming for. This is very different from the pure jury system. The panel members are always together as long as the trial and deliberation last.<sup>10</sup> Moreover, if necessary, the panel will have intermediary deliberations in the course of the trial.<sup>11</sup>

## II. PURPOSE OF THIS RESEARCH

To assess communication patterns of mixed jury panels, the author obtained some records (videos and transcripts) of mock mixed trials carried out by district courts. The characteristics of the records will be described in the “data” section in this paper. Based on those data, the author conducted an analysis on communication patterns of mock mixed panels by counting the statements of the panel members. Through assessing the communication patterns and qualitative results of those deliberations, the author would like to examine the relationship between the structure of the networks and the results of qualitative aspects of the deliberations.

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9 *Saiban-in-hô*, Art. 66, paras. 3 and 5.

10 *Saiban-in-hô*, Art. 48 prescribes the reasons that terminate *saiban-in* duty. The first is when the court declares the final judgement. The second is if the case is tried by a bench trial under the provisions of *Saiban-in-hô*, Arts. 3 and 5.

11 Y. IMASAKI, *Saiban-in saiban ni okeru fukuzatsu konnan jiken no shinri* [Trials on Complex and Difficult Cases under Trials by *saiban-in*], in: Hanrei Taimuzu 1221 (2006) 4.

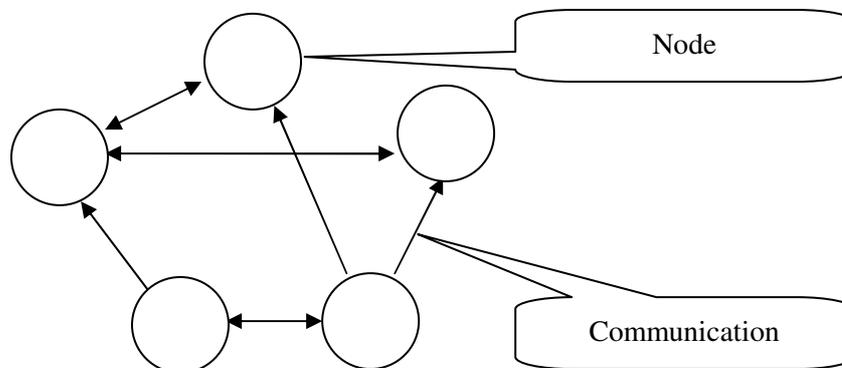
### III. COMMUNICATION NETWORKS

A communication network is a concept used in the field of group decision making. The communication network describes forms of communication patterns within groups in which information is exchanged among members to perform a task as a whole group.

Bavelas<sup>12</sup> claimed that we could know the effects of communication structure on group members by thinking that group members are connected by chains of information exchange.

In the diagrams drawn in *Figure 1*, a small circle like an “o” represents a “node”, which means a person in a group. A line “-” represents communication. If a line is accompanied by an arrow, it indicates the direction of the communication. The width of the line reflects the frequency of communication.

*Figure 1*: Example of a communication network



### IV. COMMUNICATION NETWORKS AND DECISION MAKING

According to studies on communication networks,<sup>13</sup> patterns of communication networks and task complexity affect the performance of group decision making.

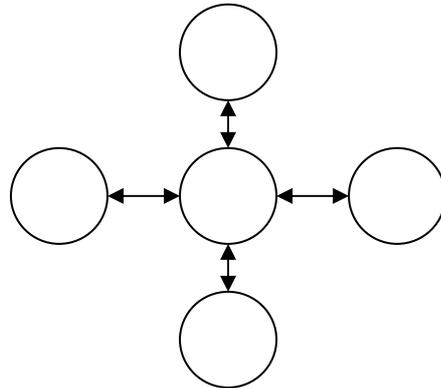
For example, groups with communication networks with centres (centralized network like *Figure 2*) are fast in decision making, good in resolving simple tasks, and take time for complicated tasks. However, they also have a low satisfaction level and low morale among their members. The low satisfaction level and low morale result in a low level of performance of the group as a whole, because individual autonomy is denied by the

12 A. BAVELAS, Communication patterns in task-oriented groups, in: Cartwright / Zander (eds.), *Group Dynamics: Research and Theory* (New York, 3<sup>rd</sup> ed. 1969).

13 H.J. LEAVITT, Some effects of certain communication patterns on group performance, in: *Journal of Abnormal and Social Psychology* 46 (1951) 38; M.E. SHAW, Communication networks, in: Berkowitz (ed.), *Advances in experimental social psychology* Vol. 1 (New York 1964); see also BAVELAS, *supra* note 12.

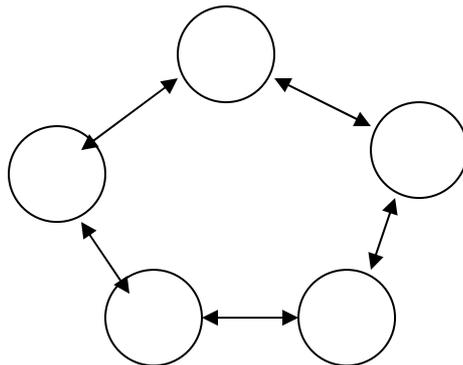
strong information carrier at the centre of the network.<sup>14</sup> A group with this type of communication network is not good at complicated tasks due to cognitive overload on the node at the centre.<sup>15</sup>

*Figure 2* : Centralized communication network



In contrast, groups with a low centralized communication network (*Figure 3*) take time to resolve simple tasks but are good at addressing complicated tasks because this type of communication network has a high functioning level of information consolidation. As a result, a group with this type of communication network is faster and more accurate at decision making in complicated tasks accompanied by arithmetic or discussion tasks. And if errors are made in a group with a communication network of this type, the errors are easily remedied in the processes of information exchange. At the same time, the satisfaction level and morale of the group members are higher than in the groups with a centralized communication network.

*Figure 3* : Non-centralized communication network



<sup>14</sup> See SHAW, *supra* note 13.

<sup>15</sup> R. BROWN, *Group processes: Dynamics within and between groups* (Oxford 1988).

Research using similar methods has been done on Korean courts. A study, for example, was conducted on a Korean mock jury by Min C. Kim, Park Kwan and Steven D. Penrod focusing on communication patterns of a mock jury. This study also described communication patterns with diagrams.<sup>16</sup>

This line of study has been developed by other Korean researchers as well, such as Kwan and Lee at Chungbuk University, Korea. They presented the latest results of their study using a communication network in a conference at Ritsumeikan University in October 2008.<sup>17</sup>

## V. MOCK MIXED TRIALS IN JAPAN

### 1. *Method*

We used videos and transcripts of mock mixed trials. The setting of the mock trials was very similar to real criminal cases. In this case, the accused was charged for complicity to robbery. The principal suspect of the robbery received some money from the victim, and then used force and weapons to prevent the victim from recapturing his property. One of the main issues in the case was whether the concerted action of using force to prevent the recapture of the property was constituted by the principal suspect and the accused.

The mock trials were hosted by real legal professionals of the three actors in the judiciary in each district in Japan; *i.e.* real prosecutors acted as prosecutors, real attorneys played the defence counsels, and real judges and citizens heard mock trials and deliberated on those criminal cases. Civilian participants who sat in on the mock trials were selected from pools of employees of private companies that are making common cause with district courts.

The mock trials were videotaped by the secretariat of each district court. Copies of the videos were forwarded to the Japan Federation of Bar Associations [JFBA], and were transcribed by its secretariat. All of the mock trials were conducted in 2006.

The two mock mixed jury deliberations presented in this paper were selected according to availability and permission. The trials were selected because of their contrasting deliberation processes. Although the two judicial panels saw many statements by civilian participants, one was less active while the other experienced active civilian participation. Here the author would like to describe the differences between those deliberations and discuss the reasons for those differences.

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16 M.C. KIM / P. KWAN / S.D. PENROD, Lay Participation in South Korea: The Content Analysis of Jury Deliberations (paper presented at the annual meeting of the Law and Society Association, 4 July 2006).

17 The latest reports of their studies related to jury decision making including communication networks were presented at the second law and psychology Korean-Japanese conference held at Ritsumeikan University, Kyôto, Japan, October 2008.

2. *Venue*

The two mock trials from which the data were obtained were held at two district courts. One of the venues was located on Hokkaido Island, the northernmost island of the four main islands of Japan (hereinafter called “venue 1”). The other venue was located on Shikoku Island, also one of the four main islands of Japan (hereinafter referred to as “venue 2”).

To draw diagrams of communication networks within mock mixed panels, the author counted the numbers of utterances during the deliberations using transcripts. At the same time, the author checked the speakers and listeners of the utterances with the contents of the transcripts. If the listener of the statement is not clear from the transcript, the author reviewed the videos and decided the direction of the speech.

VI. RESEARCH OF THE MOCK MIXED TRIALS

1. *Venue 1*

Table 1 shows the numbers of statements. The rows indicate the speaker of each statement and the columns show the number of statements. The abbreviation “CJ” means the chief judge, “J2” and “J3” refer to the second and the third judges, and “Cn” refers to civilian participant number n.

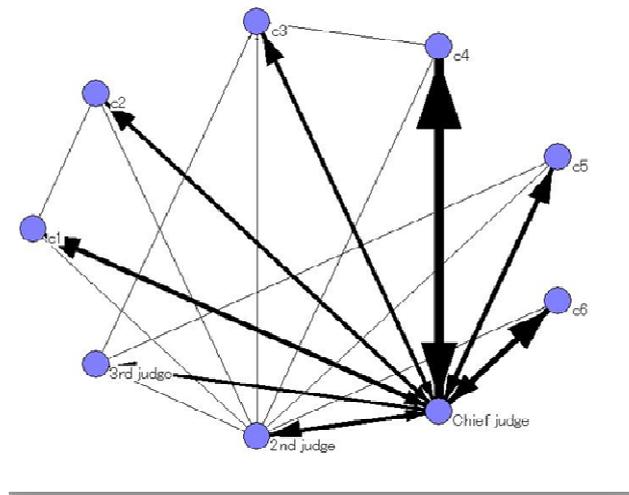
Table 1: Numbers of utterance in the deliberations at venue 1

		From									Total
		CJ	J2	J3	C1	C2	C3	C4	C5	C6	
To	CJ	×	30	18	36	27	29	90	38	48	316
	J2	26	×	1			2				29
	J3	18	2	×			2				22
	C1	33			×	1					34
	C2	26				×					26
	C3	25	3	4			×	1			33
	C4	89					1	×			90
	C5	32		2					×		34
	C6	45	2							×	47
All		23	2								25
Total		294	37	25	36	28	34	91	38	48	631

## 2. Results from the diagram

Based on the table above, the author used Pajek<sup>18</sup> to draw a diagram of the deliberations at venue 1. Pajek is free software for analyzing networks and can be run on Windows. Pajek is equipped with functions for drawing data diagrams with nodes that show the strength of each linkage between nodes. The layout of the diagram could be changed easily after the data were properly read by Pajek.

Figure 4 : Communication network of the deliberation at venue 1



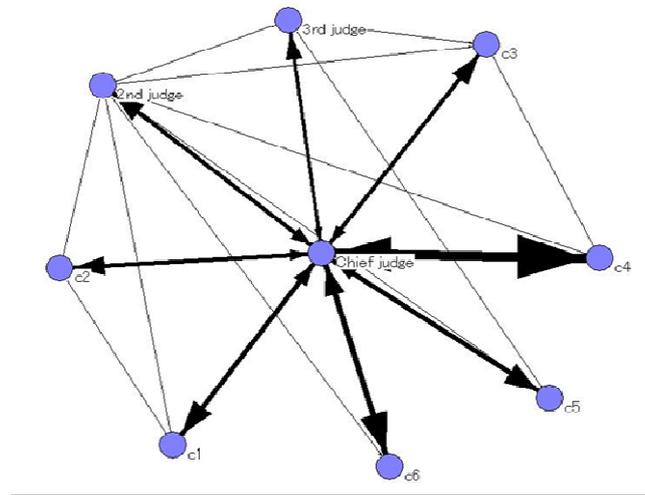
As seen in the table and figure above, the chief judge had frequent exchanges with the other members, but the other members had little communication with each other.

To understand the structure of this diagram more easily, the author changed the layout of the diagram above to have the chief judge at the centre of the diagram.

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18 Usage of Pajek and other resources can be accessed through Pajek Wiki. Pajek Wiki is located at <http://pajek.imfm.si/doku.php>.

Figure 5 : Communication network of the deliberation at venue 1 (the chief judge as a centre)



By changing the layout of the diagram, it is easy to observe its rather strong centrality. There are many exchanges between the chief judge and the other members of the panel, but the frequency of communication among members without the involvement of the chief judge is rare. We can understand this to indicate that the chief judge is the centre of this communication network. Therefore, this diagram can be evaluated as a communication network with a strong centre.

### 3. Qualitative results from the transcript and video

Communication between the chief judge and civilian participant 4 was more active than the exchanges among the other members of the panel. According to this figure, we can assume that civilian participant 4 was more active in this deliberation than the other civilian participants. But looking at the video record of the deliberation, I found that the chief judge often persuaded civilian participant 4 to conform if civilian participant 4 had a different opinion. Although there was a high number of exchanges between the chief judge and that specific civilian participant, those exchanges hardly promoted the participation of the civilian participant in the sense that the law stipulated.

Though the total number of statements can be considered sufficient for the time of the deliberation, overall the deliberation at venue 1 was less active than the deliberation at venue 2. And the deliberation at the first venue resulted in a conclusion that was defended by the judge.

4. Venue 2

Table 2 shows the numbers of statements at the second venue. Again the rows indicate the speaker of each statement, and the columns show the listeners of the statements.

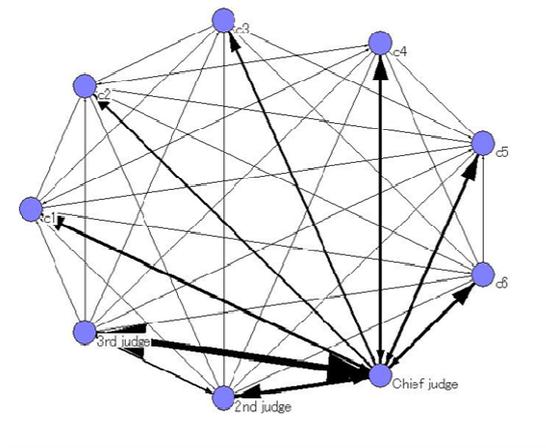
Table 2: Numbers of utterances in deliberations at venue 2

		From									Total
		CJ	J2	J3	C1	C2	C3	C4	C5	C6	
To	CJ	×	27	73	18	9	11	22	19	18	197
	J2	23	×	11	2			1	1		38
	J3	69	19	×	1		2		2		93
	C1	17	2	1	×	1	1	6	2	2	32
	C2	6		1	1	×	1	6	1	1	17
	C3	10	1	2	1	1	×		5	2	22
	C4	18	1		5	5		×	1	1	31
	C5	21	2	4	1		5	2	×	3	38
	C6	19				1	3	1		×	27
All		24	1	2	1						28
Total		207	53	94	33	17	23	38	31	27	523

5. Results from the diagram

Based on Table 2, the author used Pajek to draw a diagram of the deliberations at venue 2 in a similar way to the analysis of the data obtained at venue 1.

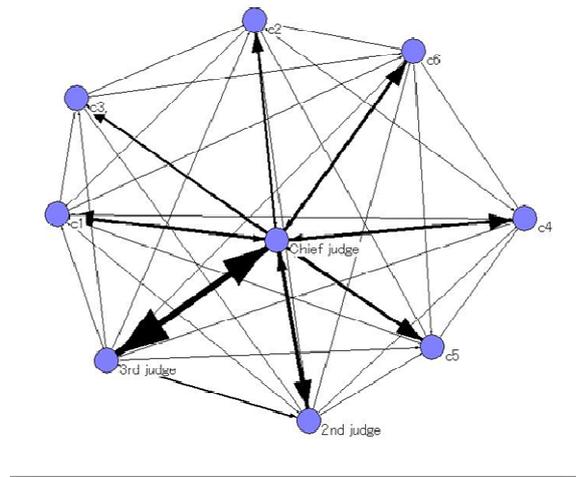
Figure 6: Communication network of the deliberations at venue 2



As seen in the table and figure above, the chief judge and each member communicated frequently. In addition, communication among the other members was also frequent. Indeed, *Table 2* and *Figure 6* show that interactions among all the members, even among civilian participants, occurred often.

To understand the structure of this diagram more easily, the author changed the layout of the diagram above to have the chief judge centred in the diagram.

*Figure 7*: Communication network of the deliberations at venue 2  
(the chief judge as the centre)



By changing the layout of the diagram, the centrality of the chief judge can also be observed. Compared to venue 1, however, the chief judge's central position is weaker. There was plenty of communication among the members in which the chief judge was not involved in addition to exchanges between the chief judge and the other members of the panel. This diagram of the second venue is a kind of amalgam of a communication network with a centre and a communication network without a centre.

#### 6. *Qualitative results from the transcript and video*

From the table and diagrams above, we also can see some communication between the chief judge and the third judge. Reviewing the video recording of the deliberations at venue 2, we see that the third judge played the role of a clerk in the discussion. Therefore, the wide arrow between the chief judge and the third judge did not represent the chief judge's persuasion of the third judge.

In general, each member of the panel, including every civilian participant, actively participated in the deliberations. Some of the civilian participants stood up from their seats, walked around and got together to simulate the crime scene, proving the liveliness of the deliberations. Finally, the conclusion of the deliberations was different from what had been expected by the chief judge. This could be confirmed by statements of the chief judge. That may be collateral evidence of emergent processes that occurred in the process of deliberation.

## VII. ANALYSIS

### 1. *Patterns of communication and quality of deliberation*

These two cases were typical divergent communication patterns. As we already saw, the deliberations at venue 1 can be seen as a communication network with a centre. On the other hand, the deliberations at venue 2 can be evaluated as a network without a centre. The total numbers of statements between the two deliberations are not so different. In fact, the deliberations at venue 1 had more statements than venue 2. However, qualitative observation with videotapes showed that the deliberations at venue 2 were more active in civilian participation, and this emerged in the conclusion of the deliberations.

From these observations, it can be concluded that communication patterns reflected the quality of the deliberation process, even in a mock mixed jury. It might be premature to conclude that the reason for the difference is to be found with the power of the chief judge. Still, we could observe that in the deliberations at venue 1, power was used to inhibit civil participants from unreserved opinions, while in deliberations at venue 2, power was used to accept civil participants' unreserved opinions and encourage free discussion.

### 2. *Effects of using dialect in deliberations*

Pondering over other factors that activate deliberation, we might reason that the dialect used in the deliberations was an important factor for efficient communication. At venue 2, almost all the members of the panel – not only the civilian participants but also the judges – used local accents in their verbal exchanges. These are largely classified as *Kansai*<sup>19</sup> dialects that are rather distinctive from standard Japanese language. Standard

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19 Today the word *Kansai* means the western part of Japan, including Ôsaka, Kyôto, and other major prefectures located at the center of Honshû island. The term *Kansai* indicates “on the west side of the barrier” literally. Which barrier should be meant by this term have varied through the history, but many of the cases have included the barriers located in Shiga prefecture, next to Kyôto prefecture.

Japanese accents are mainly spoken in and around Tokyo and are classified as *Kantô*<sup>20</sup> accents. Generally, for native *Kansai* speakers, using *Kansai* accents in conversation is comfortable not only because they can use their native dialect, but also because speaking the *Kansai* dialect can symbolize a closer relationship between the speaker and others. People using *Kansai* dialects also perceive fellow *Kansai* speakers to be warm-hearted. In contrast, those using standard Japanese or *Kantô* accents are considered rather formal, remote in relationships and cold-hearted. This description may be somewhat stereotypic, but one of the reasons why the deliberations at venue 2 were more active may be attributed to the use of dialect in the deliberations.

At venue 1, accents used in the deliberations were similar to standard Japanese. As many people at venue 1 used standard Japanese, too, this may not have inspired any negative feeling towards those using standard Japanese. Still, there can be a lack of promoting effects derived from the accents used in the deliberations.

### VIII. CONCLUSION

In this paper, the author analysed two mock mixed deliberations conducted by active members of the three legal professions in Japan. Three real professional judges and six civilians participated in each deliberation. Those mock deliberations were video recorded. The author obtained videos and transcripts of the deliberations. With those data, the author drew diagrams of the communication networks of those deliberations and analysed the nature of the deliberations, referring to some theories used in prior studies in the field of group decision making. The diagrams described frequencies and directions of verbal exchanges among members of the panels at the same time. Based on this observation, the two mock deliberations were contrasted in the form of network patterns of communication. The differences between the patterns of communications is thought to be a reflection of the difference of the nature of the deliberations. From a qualitative observation of the two mock deliberations, the inference about the reason for the difference was supported. Some possible other factors that may generate this difference and some future directions were discussed.

In further research, we need to explore the relationship between communication patterns and qualities of deliberation. In this article the author has tried to infer from anecdotal evidence, but a firmer theoretical framework and more extensive demonstration by experiments is needed. Linguistic aspects of deliberation in mixed trials should also be researched further, such as the effects of dialect on deliberation activity. By exploring the nature of the deliberation process through the use of linguistic methods, we

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20 Contrary to *Kansai*, *Kantô* means “on the east side of the barrier”. Today this term indicates one of the eastern parts of Japan, including Tokyo metropolis and six prefectures next to or near Tokyo metropolis.

may attain a deeper understanding of the influence of each member of the panel from different viewpoints, and this will contribute to a better understanding of the network patterns of communication.

#### ZUSAMMENFASSUNG

*Im System der gemischten Besetzung von Strafgerichten, das ab dem 21. Mai 2009 in Japan eingesetzt werden wird, entscheiden drei Richter und sechs Laien im Ausschuss. Auf der Grundlage von Aufzeichnungen aus zwei mock trials mit gemischter Besetzung analysiert der Autor anhand der Kommunikationsmuster das Verhältnis zwischen der Struktur der Netzwerke und der Qualität der Verhandlungsergebnisse. Im Ergebnis zeigt diese Untersuchung Unterschiede bei den Kommunikationsmustern innerhalb der Ausschüsse mit der Möglichkeit des vorsitzenden Richters, eine freie Diskussion anzuregen oder die Laienrichter daran zu hindern, offen ihre Meinung zu äußern. Die Erforschung des Verhandlungsprozesses kann dazu beitragen, den Einfluss jedes Ausschussmitglieds sowie die Kommunikationsmuster innerhalb eines Netzwerks besser zu verstehen.*

*(Übersetzung durch die Red.)*