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# Varieties of Labor Courts: Is there a Best Model?

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## Abstract

This article focuses on labor courts, most of which are 'mixed' in that a professional judge sits with lay judges. It traces the organization and operation of these courts in several countries, finding considerable variation. It also examines a range of criteria to determine labor court effectiveness. It concludes that effectiveness depends on the perception of the stakeholder and also on the criterion that is adopted: a labor court that scores highly on one criterion, May not do so on another. Accordingly, there is no best model.

**Keywords:** Labor court • Judges • Adjudication • Lay judges • Employment disputes

## Introduction

The decrease in trade union membership and collective regulation and the growth of statutory and/or contractual legal rights for the individual employee across much of the developed world has led to an increased role for adjudicatory institutions in resolving employment disputes [1]. With employment disputes likely to rise as unemployment, dismissals and employment insecurity spread in the wake of the COVID-19 pandemic, such adjudicatory regimes are likely to become yet more significant.

## Labor Courts

Some countries, both large and small, (for instance the United States of America (USA) and the Netherlands), use the ordinary civil court for the adjudication of employment disputes, while Italy has a hybrid: a specialist chamber in the civil court and Japan allows claimants to choose between the 'ordinary' civil court and a labor tribunal.

This article focuses on bespoke adjudicatory regimes for employment disputes and we use the generic term 'labor court', although the nomenclature varies by country [2]. Labor courts are frequently justified on the grounds that the workplace is special and so a separate court is needed. Furthermore, to underline the special nature of labor courts, in some countries the professional judge sits with lay judges. Such lay judges, while not required to be legally qualified, are appointed because of their workplace experience either as a worker or an employer/manager. Countries with mixed labor courts (i.e. professional and lay judges together) include Austria, Belgium, Denmark, Finland, France, Germany, Japan, Luxembourg, Slovenia, Sweden, UK [3].

In most countries lay judges are appointed after nomination by trade unions and employers' associations and commonly a professional judge sits with two lay judges, one drawn from the trade union/worker side and one drawn from the employer/manager side, each having an equal vote. Accordingly, the lay judges can outvote the professional judge, although this rarely occurs. Exceptionally France has four lay judges (two from each side), while in Sweden's labor court mostly there are seven judges: two professional judges, a labor market expert, two employee lay judges and two employer lay judges [4].

In nearly every country the lay judges sit with the professional judge in all cases. Exceptionally in France, the four lay judges meet without a professional judge to adjudicate and only if they fail to agree (which happens in about 20 per cent of cases) is a professional judge brought in to break the tie [2]. In contrast in Britain, the professional judge sits alone in many cases and lay judges (one from each side) essentially only sit with the professional judge on employment discrimination cases. Research suggests that many British lay judges feel that this limits their contribution as they rarely sit on dismissal cases where their workplace knowledge is most useful. Instead, they sit on legally complex discrimination cases where workplace issues are rarely relevant [5].

In most countries there are gateways to adjudication in the form of mediation or conciliation. These two words are often used interchangeably and, unlike adjudication, the claimant and respondent both agree voluntarily to accept the decision. Commonly, such mediation is carried out by a professional judge alone, although unusually in France it is by the lay judges alone, while in Japan it is by the professional judge and two lay judges together [3]. If there is no settlement, an adjudicatory hearing ensues.

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In Britain and New Zealand conciliation/mediation takes place in institutions separate from the labor court: respectively the Advisory, Conciliation and Arbitration Service and the Mediation Service [4]. South Africa, too, has a separate institution, the Commission for Conciliation, Mediation and Arbitration (CCMA), which often carries out con/arb: if the parties do not resolve their dispute through conciliation, the dispute is then arbitrated by the same 'commissioner' [6,7].

### Effectiveness

This summary indicates that labor courts vary in their organization and mode of operation, but which institution is the most effective, effectiveness cannot be measured by a population's litigiousness because that varies by country, for instance according to the ease in which a labor court claim can be lodged, the extent of employment rights and the availability of administrative dispute resolution bodies [8]. Similarly, effectiveness cannot be measured by the number of appeals from the labor court, because the opportunity to appeal varies. In the UK, for instance, it is limited to a point of law; but in Germany appeals are allowed where the amount in dispute exceeds a certain amount of €600 [4].

Over 50 years ago, a British Royal Commission [9]. Set out four criteria of labor court effectiveness 'easily accessible, informal, speedy and inexpensive'. When comparing countries, however, one does not find a labor court that score highly on every criterion. For instance, currently British labor courts are inexpensive: a British claimant does not have to pay any fee to make a claim and the parties do not have to have legal representation. Yet Britain's labor court procedure is not informal: a hearing often lasts several days. Apart from often voluminous written evidence, witnesses are cross-examined and afterwards a long judgment is handed down, summarizing the relevant law, setting out findings of fact and giving the reasons for the decision, with any dissent noted [2].

In Germany, self-representation is also allowed and although there is a hearing fee, it is only paid by the loser after adjudication. Furthermore, although in Germany it often takes some months to obtain a labor court hearing, the hearings themselves are speedy: typically, four or five cases are heard in a morning based on paperwork previously submitted and short oral submissions. In Japan's labor court, not only has the claimant to pay a hearing fee at the outset based on a sliding scale related to the amount claimed, but mostly there are legal costs too: unless express permission is granted, the parties have to have legal representation. Yet the court is informal. Japanese professional judges do not wear robes (unlike their German counterparts) and there is a round table, unlike Germany where there are separate tables facing each other. (In Britain the judges' table is on a dais) [3].

Another criterion is whether the judges have expertise. Often trade unions and employers' associations, when nominating lay judges for appointment, carry out some, albeit informal, quality control. Unusually in Great Britain, there is a system of open recruitment. As in many occupations, a British person seeking to become a lay judge answers an advertisement and fills in an application form; then, after short-listing and, crucially, a successful interview, he/she is appointed to either the worker panel or the employer panel. Research suggests that selection by interview has poor predictive validity [9]. On the other hand, such an appointment system militates against nepotism and has increased gender and ethnic diversity. Indeed, a few women reported that self-nomination, introduced in 1999, had enabled them to apply direct, whereas previously they had been blocked by senior males in their organization [2].

Arguably the more training lay judges have, the more expertise they acquire, but once again there is variation. For instance Japan's trade union confederation (Rengo) requires, and its employers' confederation (Keidanren) recommends, that those interested in becoming a lay judge first participate in a three-day training program in individual dispute resolution, funded by the government, but delivered by a private institution. Furthermore, after appointment, the court provides training annually. In contrast, there is no mandatory training for German lay judges either before or after appointment, although some labor courts and some trade unions provide training [3].

There is variation also in professional judges' expertise. Most countries have a career judiciary and so the professional judges know little about the workplace and have to rely on their lay judges. In contrast British professional judges are only appointed after several years' experience as lawyers, where perhaps they will have gained some knowledge of workplaces, albeit indirectly, through those they have represented [2].

Unusually in France, as noted above, a professional judge only comes in where the four lay judges cannot agree. These French professional judges are usually judges in district courts specializing in other areas of law. Research indicates that at least some French lay judges prided themselves on knowing more about employment law than the professional judge [3].

Satisfaction with the labor court is another criterion, but there is a paucity of information. A British survey found that 57 per cent of claimants and 85 per cent of employers believed that the labor court hearing gave them 'a fair chance to make their case', but attitudes were clearly related to case outcomes [7]. In Japan, where the claimant can choose between the civil court or the labor court, statistics suggests that the popularity of the labor court has risen more steeply than that of the civil court. This figure, however, should be treated cautiously: monetary compensation can be awarded to resolve a dismissal dispute in Japan's labor court, but not in Japan's civil court, which can only award reinstatement or reengagement [2].

Yet a further criterion is whether legal norms are propagated. Normally, labor court hearings are open to the public and decisions are publicly available, although the detail of such decisions varies from country to country. Unusually in Japan all labor tribunal hearings are closed to the public and decisions are only available to the parties [3].

## Discussion and Conclusion

In summary, this article finds that labor courts vary from country to country. Yet this is not surprising: countries differ in their history, industrial relations context and legal system. Certain commonalities emerge however, including pre-hearing conciliation/mediation, lay judges' role and training and the extent of professional judges' expertise. This article also finds that it is well-nigh impossible to gauge the effectiveness of labor courts, as that depends on the criteria adopted. Whereas labor courts in one country may score

highly on one criterion, the same labor courts may score less well on another criterion. Furthermore, different stakeholders may give one criterion more importance than another. For instance, claimants may rate inexpensiveness more highly than the propagation of legal norms, but professional judges may take the contrary view. Thus, although comparisons can be useful, as they enable a deeper understanding of an individual national system and an appreciation of the different approaches that can be adopted, they do not point to a best model.

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