

## THE DAWN OF CRIMINAL JURY TRIALS IN JAPAN: SUCCESS ON THE HORIZON?

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Domestic and international critics have long called for substantial revisions to Japan's criminal justice system. The system has been noted for incessant delays, pressured confessions, and an insufficient number of criminal defense attorneys.<sup>1</sup> Japan's extreme conviction rate, which presently exceeds 99.5 percent, has been widely criticized by scholars and defense attorneys,<sup>2</sup> who cite abuses and errors caused by excessive investigative methods, bureaucratic hierarchy, and insufficient judicial oversight and control.<sup>3</sup> In theory, the Japanese justice system provides the accused with extensive rights and legal protections. To critics, the reality is that Japan's justice system is just another bureaucracy that hides its problems and focuses on preserving its

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<sup>1</sup> Kana Inagaki, *Unlocking the Judicial Door to Public: Lawyer Flood Looms Amid Litigious Trend*, JAPAN TIMES, Aug. 23, 2006; Bruce Wallace, *Slow-to-Judge Japanese Trials Prompt Anger, Return of Juries*, SEATTLE TIMES, Jan. 24, 2005, at A7, available at 2005 WLNR 1010571.

<sup>2</sup> See Frank K. Upham, *Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary*, 30 LAW & SOC. INQUIRY 421, 432-33 (2005) (book review); Kent Anderson, *Essay Review: The Japanese Way of Justice: An Up-close Look at Japan's Jack McCoy*, 4 ASIAN-PAC. L. & POL'Y J. 7 (2003) (stating that the high conviction rate has effectively, if indirectly, robbed Japan of its primary forum for challenging criminal justice).

<sup>3</sup> See Ichiro Kitamura, *The Judiciary in Contemporary Society: Japan*, 25 CASE W. RES. J. INT'L L. 263, 269 (1993).

own authority.<sup>4</sup> The police and overly ambitious prosecutors,<sup>5</sup> inordinate delays,<sup>6</sup> and other systematic deficiencies can easily undermine legal protections.

The lack of juries and absence of significant lay participation affects the criminal justice system in Japan. Prosecutors are responsible for initial fact-finding and recommending legal determinations.<sup>7</sup> Career judges are tasked with determining the law, the facts, and the applicable procedures.<sup>8</sup> The close interaction between government prosecutors and professional judges evokes criticism that judges are prone to giving undue credence to prosecutorial investigations.<sup>9</sup> Some claim that judges merely “rubber stamp” the conclusions of the prosecutors, which means that the prosecutor has basically convicted a criminal defendant even before the trial begins.<sup>10</sup> The criminal justice system is described as bureaucratic and remote.<sup>11</sup> Accordingly, defense lawyers find the system stacked against them and often feel that they are talking to a wall, rather than to a judge.<sup>12</sup> In the past, concerns about the criminal justice system have been limited to academics and criminal defense lawyers, however, these concerns have started spreading to the public as well.<sup>13</sup>

Conversely, Japan generally regards its judicial system as one of the most consistent and sophisticated in the world.<sup>14</sup> By many accounts,

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<sup>4</sup> See generally Colin P.A. Jones, *Book Review: Prospects for Citizen Participation in Criminal Trials in Japan*, 15 PAC. RIM L. & POL'Y J. 363, 364 (Feb. 2006) (reviewing TAKASHI MARUTA, SAIBAN'IN SEIDO [THE LAY JUDGE SYSTEM] (2004)).

<sup>5</sup> Lester W. Kiss, *Reviving the Criminal Jury in Japan*, 62 LAW & CONTEMP. PROBS. 261, 264 (1999).

<sup>6</sup> Yomiuri Shimbun, *Speedy Trials on Consecutive Days (Renbi Kaien de Jinsoku Shinri)*, Sept. 5, 2006 (on file with author). In 2004, the Supreme Court of Japan noted that, on average, the lag between hearings in a trial was over a month. *Id.*

<sup>7</sup> Kiss, *supra* note 5, at 264.

<sup>8</sup> JOHN OWEN HALEY, *THE SPIRIT OF JAPANESE LAW* 72 (1998).

<sup>9</sup> See Rob Wakulat, *Japan Looks to West for Judicial Reforms*, FOREIGNER JAPAN, Apr. 2005, <http://www.theforeigner-japan.com/archives/200504/judicialreforms.htm> (last visited Mar. 29, 2007).

<sup>10</sup> Kiss, *supra* note 5, at 264.

<sup>11</sup> See Joseph P. Nadeau, *Judicial Reform in Japan*, 44 JUDGES J. 34 (2005).

<sup>12</sup> Wallace, *supra* note 1 (quoting criminal defense attorney and Waseda Law Professor Satoru Shinomiya).

<sup>13</sup> Joseph J. Kodner, *Reintroducing Lay Participation to Japanese Criminal Cases: An Awkward Yet Necessary Step*, 2 WASH. U. GLOBAL STUD. L. REV. 231, 233 (2003); Kiss, *supra* note 5, at 262-63 (arguing that several overturned guilty verdicts in the 1980s influenced the return of criminal jury trials in Japan. Although these incidents lend support for systematic revision, they do not seem to be the genesis of judicial reform proposals.).

<sup>14</sup> See John Owen Haley, *Arbitration and Litigation: Litigation in Japan: A New Look at Old Problems*, 10 WILLAMETTE J. INT'L DISP. RESOL. 121, 132-33 (2002); see also Lockman Found.

Japan's criminal judicial system has not been considered to be broken, or even in need of a fix.<sup>15</sup> Criticism is countered with the maxim that Japanese judges are generally honest, esteemed, politically independent, and professionally competent, particularly in comparison with other countries.<sup>16</sup> Many feel that professional judges are in the best position to competently and neutrally adjudicate criminal matters.<sup>17</sup> Supporters of the system argue that Japan's high conviction rate is justified because prosecutors charge and convict only guilty defendants.<sup>18</sup> Another theory about the extreme conviction rate postulates that limited financial resources and personnel within the prosecutors' office results in charges only being brought against those who are definitely guilty or willing to confess.<sup>19</sup> Ultimately, the prosecutors set the innocent or "less guilty" defendants free.<sup>20</sup>

Regardless of one's views about the present state of the Japanese criminal justice system, it cannot be disputed that Japan has decided to put the future of its criminal justice system in the hands of the general public. Starting in 2009, the general public will join career judges in trying serious criminal trials as part of a *sabanin seido* or "lay jury trial" system.<sup>21</sup> Instead of arguing to a panel of professionally trained judges,

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v. Evangelical Alliance Mission, 930 F.2d 764, 768 n.3 (9th Cir. 1991) (explaining that U.S. federal courts have consistently held that Japan provides an adequate alternative forum to litigation in the United States).

<sup>15</sup> Interview with judges serving in the General Secretariat of the Supreme Court (July 19, 2006) [hereinafter Supreme Court Interview] (notes on file with author). Promising career judges will be assigned to the General Secretariat within the Supreme Court to fulfill administrative posts, research assignments, and judicial clerkships. See CENTRAL RESEARCH SERVICES, INC., PUBLIC OPINION POLL ABOUT THE SAIBAN-IN SYSTEM (SAIBANIN SEIDO NI KANSURU YORON CHOSA) (Chuo Poll Report No. 562, June 2004), available at <http://www.crs.or.jp/56221.htm> (last visited Mar. 29, 2007) (showing that only 17.8 percent of those polled thought that a jury system was definitely necessary, and only 22.1 percent thought it might be necessary).

<sup>16</sup> See John Owen Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy and the Public Trust* 15 (Washington University of St. Louis Sch. of Law Faculty Working Paper Series, Paper No. 05-10-01), available at <http://ssrn.com/abstract=821466> (last visited Mar. 29, 2007).

<sup>17</sup> *Id.*

<sup>18</sup> Supreme Court Interview, *supra* note 15. See J. Mark Ramseyer & Eric B. Rasmusen, *Why is the Japanese Conviction Rate So High?*, 30 J. OF LEGAL STUD. 53, 62-65 (2001).

<sup>19</sup> See Ramseyer & Rasmusen, *supra* note 18, at 68-69 (explaining that prosecutors take only a small fraction of cases that they consider winnable due to limited budgets and reputations to protect; other cases are dropped).

<sup>20</sup> *Id.* at 69.

<sup>21</sup> See *Saiban-in no Sanka Suru Keiji Saiban ni Kansuru Horitsu* [Law for Implementation of Lay Judge System in Criminal Court Procedures], Law No. 63 of 2004, translated in Kent Anderson & Emma Saint, *Japan's Quasi Jury (Saiban-in) Law: An Annotated Translation of the Action Concerning Participation of Lay Assessors in Criminal Trials*, 6 ASIAN-PAC. L. & POL'Y J. 233

prosecutors and defense attorneys will now argue before six citizen or “lay” judges and three career judges (the “jury”).<sup>22</sup> The new lay judge system in Japan borrows heavily from European lay jury systems, and thus considerably differs from the United States’ jury system. However, the new Japanese lay jury system does resemble the U.S. model in various ways, including its purpose and effect. Most significantly, the shift towards lay juries for serious criminal trials is pronouncedly geared towards expanding citizen participation and understanding as well as opening the judicial system.<sup>23</sup>

The new lay jury system places a substantial burden upon the average Japanese citizen. In anticipation of this challenge, the three primary pillars of Japan’s justice system, namely the Supreme Court of Japan (Supreme Court), the Japanese Federation of Bar Associations (JFBA), and the Department of Justice, are collectively working to establish rules, regulations, and practices in hopes of establishing a fair and efficient system. They are actively publicizing the lay jury system in an effort to gain support and understanding among the citizenry.<sup>24</sup> In fact, to publicize the system, these organizations have cooperatively and independently formed special committees and working groups<sup>25</sup> as well as created web pages, “catch phrases,” leaflets, posters, mass media advertisements, symposia, courtroom tours, field trips, nationwide mock trials, and other means to publicize the new system.<sup>26</sup> Despite these

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(2005) [hereinafter Anderson & Saint]. This law is commonly referred to as the *Saiban-in Hou* in Japanese. It has been translated as “Lay Judge Act” and “Lay Assessor Act.” For purposes of this paper, it will be referred to as the “Lay Judge Act.”

<sup>22</sup> *Id.* at 237.

<sup>23</sup> See Wakulat, *supra* note 9; see also SUPREME COURT OF JAPAN, START OF THE SAIBAN-IN SYSTEM BROCHURE 3 (2005).

<sup>24</sup> DANIEL E. FOOTE, JUSTICE SYSTEM REFORM IN JAPAN 4 (2005) (Colloquium: *Law and Justice Beyond Borders*, Annual Meeting of the Research Committee of Sociology of Law, July 11-13, 2005), available at <http://www.reds.msh-paris.fr/colloque/foote.pdf>.

<sup>25</sup> The author was appointed to one of these working groups in 2004, namely the Jury Trial Advocacy Project Team established by the Japanese Association of Bar Associations. The project team has been tasked with explore issues related to jury trial advocacy and developing educational programs for criminal attorneys.

<sup>26</sup> See generally Heisei 16 Nendo Saibanin Seido Houkoku no Aidea [Ideas about Publicizing the Lay Judge System for 2004], Sup. Ct. of Japan, available at <http://www.saibanin.courts.go.jp/shiryo/pdf/18.pdf>; Saibanin Seido Houkoku ni Kansuru Kentou no Taisei [Flow of Research about Publicizing the Lay Judge System], Sup. Ct. of Japan, available at <http://www.saibanin.courts.go.jp/shiryo/pdf/20.pdf>; Saibanin Seido Houkoku Suishin Kyougikai no Secchi ni Tsuite [Establishment of Lay Judge System Public Relations Cooperative Committee], Sup. Ct. of Japan (2004), available at <http://www.saibanin.courts.go.jp/shiryo/pdf/22.pdf>; Saibansho Houkoku no Genjou ni Tsuite [General Administrative Public

efforts, there are serious doubts about whether the public can be convinced that this additional burden will be worth their time, effort, and tax monies.

With the introduction of lay juries, all players in Japan's justice system face uncharted territory. Significant questions exist about whether this new system is real or artificial, and more importantly, whether it can ever succeed. The pessimistic view forecasts an enormous expenditure of time and financial resources, in exchange for little or no substantive change to an elite-controlled criminal justice system. The lay jury system will simply stand as a façade that appeases active reformers in Japan. Conversely, the optimistic outlook pictures the "light at the end of the tunnel." Although optimists acknowledge various flaws and challenges within the new system,<sup>27</sup> they maintain that it will promote greater fairness and eliminate preconceived convictions. It will educate the public and generate additional participation, interest, and trust in the system. As this generation and future generations become more involved, there will be greater transparency and more democratic participation in the criminal justice system.

This Article seeks to strike a neutral balance between the cynical and optimistic camps by thoroughly examining the new challenges posed by the lay jury system and providing key suggestions on how this new system might survive, if not actually succeed at some level. Additionally, this Article looks at the principal challenges facing the judiciary, the public, and criminal lawyers, and addresses how these groups can contribute to the future success of the lay jury system.

## I. IS THE SUN RISING OVER A NEW JAPAN?

Jury trials, though unknown to most, are known to Japan. Adopted in 1923 during the Taisho Democracy period, the Jury Act

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Relations Section, State of Promotion by the Courts], Sup. Ct. of Japan (2004), available at <http://www.saibanin.courts.go.jp/shiryo/pdf/25.pdf>; see also JAPANESE FEDERATION OF BAR ASSOCIATIONS, SAIBAN-IN NEWS 3 (Dec. 1, 2005). It is noteworthy that the "three pillars" are running advertisements in newspapers and magazines. Full-page advertisements have even been placed in flight magazines and other places. Also, the joint catch phrase decided by these three organizations is "*Watakushi no Shiten, Watakushi no Kankaku, Watakushi no Kotoba de Sanka Shimasu*," which translates to "Participating using my opinion, my senses, and my words").

<sup>27</sup> While this Article discusses some of the flaws in the new lay jury system, its focus looks beyond these flaws into methods whereby at least some of the intended benefits of the system may be potentially realized.

established American-style jury trials starting in 1928.<sup>28</sup> This jury trial mandate allowed literate male Japanese taxpayers over the age of thirty to adjudicate criminal matters.<sup>29</sup> For the next fifteen years, Japan experimented with twelve-man juries in criminal cases.<sup>30</sup> The jury system, unfortunately, was plagued by procedural defects and loaded with disincentives. Most defendants waived their right to a jury trial because the jury could only determine factual matters and the accused could not appeal the jury's factual determinations.<sup>31</sup> Also, if the judge disagreed with the jury, he could dismiss the jury at any point in time.<sup>32</sup> Some scholars contend that jury trials were under-utilized due to cultural inexperience and lack of trust in the new system.<sup>33</sup> Others argue that the decline of the Taisho Democracy and rise of an authoritarian state in the 1930s doomed this democratic institution.<sup>34</sup> In any event, jury trials were not popular and only 484 jury trials took place during this fifteen-year period.<sup>35</sup> In the year 1942, only two jury trials were held in Japan.<sup>36</sup> The conviction rate for jury trials was about 84 percent.<sup>37</sup> With this limited use of juries, the system did not have sufficient time to develop or evolve.

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<sup>28</sup> Kodner, *supra* note 13, at 234.

<sup>29</sup> Baishinho [Jury Act of Japan], Law No. 50 of 1923; Kokumin no Shiho Sanka ni Kansuru Saibansho no Iken [Court's Opinion Concerning Public Participation in the Judicial System], Sup. Ct. of Japan 2 (2001), available at <http://www.saibanin.courts.go.jp/shiryo/pdf/24.pdf>. See Setsuko Kamiya, *Preparing for 'People's Courts'*, JAPAN TIMES, June 11, 2006, available at <http://search.japantimes.co.jp/cgi-bin/fl20060611x1.html>; Asahi Shimbun, *Citizen Judges May Lay Down the Law Erratically*, Mar. 18, 2006, available at <http://www.asahi.com/english/Herald-asahi/TKY20063180141.html>.

<sup>30</sup> Kokumin no Shiho Sanka ni Kansuru Saibansho no Iken [Court's Opinion Concerning Public Participation in the Judicial System], Sup. Ct. of Japan 2 (2001), available at <http://www.saibanin.courts.go.jp/shiryo/pdf/24.pdf>. See also Wakulat, *supra* note 9; Kodner, *supra* note 13, at 234. Through the introduction of public participation, the government hoped to legitimize the judiciary during a time of rapid development in Japan.

<sup>31</sup> See Kodner, *supra* note 13, at 234; Sabrina Shizue McKenna, *Japanese Judicial Reform: Proposal for Judicial Reform in Japan*, 2 ASIAN-PAC. L. & POL'Y J. 121 (2001); Masaki Takasugi, *The New Lay-Judge System in Japan: A Comparison with the Jury System in NSW 1* (2005), <http://www.law.usyd.edu.au/anjel/documents/23Feb2005Conf/takasugi2005.pdf>.

<sup>32</sup> See Kodner, *supra* note 13, at 235; McKenna, *supra* note 31.

<sup>33</sup> Kodner, *supra* note 13, at 235-36.

<sup>34</sup> Kent Anderson & Mark Nolan, *Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (Saiban-in Seido) from Domestic Historical and International Psychological Perspective*, 37 VAND. J. TRANSNAT'L L. 935, 964 (2004).

<sup>35</sup> McKenna, *supra* note 31.

<sup>36</sup> See Wakulat, *supra* note 9.

<sup>37</sup> McKenna, *supra* note 31, at 129.

After the Second World War, the Supreme Commander of Allied Powers or “SCAP” under the direction of General MacArthur was tasked with reconstructing Japan and revamping its rule of law.<sup>38</sup> SCAP pushed through changes to the Constitution of Japan, the Code of Criminal Procedure, and the organization of the courts.<sup>39</sup> While the new constitution adopted many of the constitutional rights found in the United States, it did not include the right to trial by an “impartial jury,” like that found in the Sixth Amendment of the U.S. Constitution.<sup>40</sup> Rather, the Japanese Constitution provides for trial only by “an impartial tribunal.”<sup>41</sup> Opinions vary as to why the concept of jury trials was excluded from the new constitution. However, the Supreme Court of Japan postulates that Japan probably did not have the political stability or social energy to resurrect the jury trial system at that time.<sup>42</sup>

As a result, the Japanese criminal justice system evolved into a national court system integrating German and American influences.<sup>43</sup> Judges are government officials who serve as the sole arbiters of fact and guilt.<sup>44</sup> Trials are generally discontinuous, often with gaps of several weeks or months between hearings.<sup>45</sup> Once a verdict has been issued, the prosecution or defense can appeal both findings of fact and law, and appellate proceedings are generally conducted *de novo*.<sup>46</sup>

For nearly fifty years, the criminal justice system functioned without any fundamental reform.<sup>47</sup> In the late 1990s, however, Japan embarked on a monumental course of legal reform.<sup>48</sup> A brief examination of the recent politics of administrative reform in Japan sheds light on this fundamental movement. Starting in the mid-1980s,

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<sup>38</sup> Melissa Clack, *Caught Between Hope and Despair: An Analysis of the Japanese Criminal Justice System*, 31 DENV. J. INT’L L. & POL’Y. 525, 528 (2003).

<sup>39</sup> *Id.*

<sup>40</sup> Erik Luna, *A Place for Comparative Criminal Procedure*, 42 BRANDEIS L.J. 277, 312 (2004).

<sup>41</sup> Kenpō [Constitution] art. 37, para. 1 (Japan), available at [http://www.kantei.go.jp/foreign/constitution\\_and\\_government\\_of\\_japan/constitution\\_e.html](http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/constitution_e.html) (last visited Mar. 29, 2007).

<sup>42</sup> Kokumin no Shiho Sanka ni Kansuru Saibansho no Iken [Court’s Opinion Concerning Public Participation in the Judicial System], Supreme Court of Japan 2 (2001), available at <http://www.saibanin.courts.go.jp/shiryo/pdf/24.pdf>.

<sup>43</sup> Kodner, *supra* note 13, at 236.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 237.

<sup>46</sup> *Id.* See Matthew J. Wilson, *Failed Attempt to Undermine the Third Wave: Attorney Fee Shifting Movement in Japan*, 19 EMORY INT’L L. REV. 1457, 1476 (2005).

<sup>47</sup> Wilson, *supra* note 46, at 1476.

<sup>48</sup> *Id.* at 1458.

Japanese political discourse was dominated by calls for administrative reform and deregulation due to a stagnating economy and mounting national debt.<sup>49</sup> The politics of deregulation quickly expanded beyond the simple reduction of governmental intervention and evolved into a wholesale reevaluation of Japan's political and economic structure.<sup>50</sup> As a result, Japan amended its Commercial Code in 1993 to strengthen shareholder rights;<sup>51</sup> implemented an Administrative Procedure Act in 1994 to require transparency in government and reduce the effect of administrative guidance or *gyosei shido*;<sup>52</sup> increased the social responsibility of corporations through the Product Liability Act of 1995;<sup>53</sup> implemented a new Code of Civil Procedure in 1998 geared towards making the litigation process quicker, more efficient, and more accessible to the public;<sup>54</sup> revamped its Commercial Code in 2002 in a move to reform the corporate governance system;<sup>55</sup> and opened new professional U.S.-style law schools in 2004 in conjunction with efforts to increase the number of attorneys and revise the bar examination,<sup>56</sup> as well as many other reforms. Visionary reformers reasoned that fundamental change was necessary for Japan to meet the challenges of the modern

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<sup>49</sup> Setsuo Miyazawa, *Reform in Japanese Legal Education: The Politics of Judicial Reform in Japan: The Rule of Law at Last?*, 2 ASIAN-PAC. L. & POL'Y J. 89, 97 (2001), available at <http://www.hawaii.edu/aplpj/pdfs/v2-19-Miyazawa.pdf>. The author points out that the push for deregulation gained momentum under Prime Minister Yasuhiro Nakasone (1982-87) because the Prime Minister wanted to reduce the costs of government. *Id.*

<sup>50</sup> *Id.* at 97-98. In 1987, Japan formed an Ad Hoc Advisory Council for the Promotion of Administrative Reform (Rinji Gyosei Kaikaku Suishin Shingikai) to discuss the issues of reform. *Id.* Another ad hoc council was formed in 1990 for this same purpose. *Id.* At the same time, in the context of the U.S.-Japan Structural Impediments, the United States submitted a Policy Action Reform Proposal to Japan which included more than 200 items for reform. *Id.*

<sup>51</sup> *Id.* at 98. For example, with the amendments, a shareholder derivative suit can now be filed for only 8,200 yen or about \$75.00 as opposed to thousands of dollars before the revisions. *Id.* This enables shareholder plaintiffs the ability to better pursue their rights.

<sup>52</sup> *Id.*

<sup>53</sup> See Nancy L. Young, Comment, *Japan's New Product Liability Law: Increased Protection for Consumers*, 18 LOY. L.A. INT'L & COMP. L. REV. 893, 919 (1996).

<sup>54</sup> *Id.* See, e.g., Yasuhei Taniguchi, *The 1996 Code of Civil Procedure of Japan: A Procedure for the Coming Century?*, 45 AM. J. OF COMP. L. 767 (1997).

<sup>55</sup> Ronald J. Gilson & Curtis J. Milphaupt, *Choice as Regulatory Reform: The Case of Japanese Corporate Governance*, 53 AM. J. COMP. L. 343, 344 (2005).

<sup>56</sup> Waseda Law School, *Transformation of Japan's System of Justice*, <http://www.waseda.jp/law-school/eng/system.html> (last visited Oct. 13, 2006); Judicial Reform Council, *Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21<sup>st</sup> Century (2001)*, reprinted in 2002 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 119, 178-83, available at <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html> (last visited Mar. 29, 2007).



“globalized” era from a social, economical, and legal perspective.<sup>57</sup> However, the actual reforms extended far beyond from the original intent of the legal reformers.<sup>58</sup>

The reformers viewed judicial reformation as the “final linchpin” in restructuring the shape of Japan.<sup>59</sup> In June 1999, Japan established the Justice System Reform Council (JSRC) to consider concrete measures necessary for justice reform and define the role of the administration of justice in the twenty-first century.<sup>60</sup> The JSRC’s mission was to facilitate a more accessible and user-friendly justice system, ensure public participation in the system, redefine the legal profession, and reinforce its function.<sup>61</sup> This agenda was supported by the theory that deregulation in Japan would reduce government intervention in many aspects of life; therefore, the public must be afforded better access to the judicial system and legal profession in order to ensure its protection.<sup>62</sup>

In June 2001, the JSRC issued its recommendations for reform and suggested that every person “will break out of the consciousness of being a governed object and will become a governing subject, with autonomy and bearing social responsibility.”<sup>63</sup> In proposing the lay jury system<sup>64</sup> the JSRC viewed jury duty as a key means of empowering the average Japanese citizen in the operation of government.<sup>65</sup> Traditionally, the criminal justice system has been the exclusive domain of professional judges, prosecutors, and lawyers.<sup>66</sup> When Prime Minister Junichiro Koizumi’s cabinet adopted the JSRC’s recommendations, it suddenly

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<sup>57</sup> See Joachim Herrmann, *Models for the Reform of the Criminal Trial in Eastern Europe: A Comparative Perspective*, 1996 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 127, 128 (1996); Judicial Reform Council, *supra* note 56.

<sup>58</sup> Miyazawa, *supra* note 49, at 98.

<sup>59</sup> Judicial Reform Council, *supra* note 56, at 127; Nadeau, *supra* note 11, at 35. See also Judicial Reform Council website, [www.kantei.go.jp/foreign/judiciary/index.html](http://www.kantei.go.jp/foreign/judiciary/index.html) (last visited Oct. 13, 2006) (explaining the reformers’ statutory purpose).

<sup>60</sup> Wilson, *supra* note 46, at 1459-60.

<sup>61</sup> *Id.* at 1460.

<sup>62</sup> *Id.*

<sup>63</sup> Judicial Reform Council, *supra* note 56, at 127.

<sup>64</sup> Anderson & Nolan, *supra* note 34, at 939-40. Responsibility for the lay jury system was assigned primarily to the Saiban-in Keiji Kentokai [Lay Jury/Penal Matters Study Investigation Committee], chaired by Tokyo University Professor Masahito Inouye. *Id.* at 940.

<sup>65</sup> Robert M. Bloom, *Jury Trials in Japan*, 28 LOY. L.A. INT’L & COMP. L. REV. 35, 37 (2006).

<sup>66</sup> See Takasugi, *supra* note 31, at 1.

appeared that the lay jury system would be realized without much debate or opposition.<sup>67</sup>

### A. STRUCTURE OF THE NEW SYSTEM

Based on the JSRC's recommendations, the Japanese Diet enacted legislation in 2004<sup>68</sup> commonly referred to as the "Lay Judge Act." This law mandated the creation of "lay jury trials" starting in May 2009.<sup>69</sup> The legislation facilitated a mixed lay judge system where the "jury" consists of six citizen judges (or *saiban-in*) and three professional judges.<sup>70</sup> In cases where the defendant has confessed, the sentencing jury panel will be comprised of four citizens and one professional judge.<sup>71</sup> While civil law jurisdictions such as Germany and France utilize mixed-judge systems, Japan has never used a lay judge system before.<sup>72</sup>

Pursuant to the Lay Judge Act, citizens will be required to participate in the following type of cases: homicide, robbery resulting in bodily injury or death, bodily injury resulting in death, unsafe driving resulting in death, arson of an inhabited building, kidnapping for ransom, abandonment of parental responsibilities resulting in the death of a child, and other serious cases involving certain rape, drug, and counterfeiting cases.<sup>73</sup> If the new jury trial system would have been in effect between 2003 and 2005, over 3,000 criminal cases at the district court level would have been subject to a jury trial each year.<sup>74</sup>

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<sup>67</sup> See Anderson & Nolan, *supra* note 34, at 940. As often happens in Japan, bills and recommendations endorsed by the Cabinet will generally become law. *Id.* Once the JSRC's recommendations were adopted, their implementation was delegated to the newly formed Shiho Seido Kaikaku Suishin Honbu [Office for Promotion of Justice System Reform]. *Id.* This office was responsible for the implementation of the proposals in the JSRC report, including those related to the lay jury system. *Id.*

<sup>68</sup> Anderson & Saint, *supra* note 21, at 233.

<sup>69</sup> *Id.* at 234; Bloom, *supra* note 65, at 37. See Cabinet Secretariat of Japan, *Action Plan to Smoothly Implement the Lay Judge System*, Aug. 3, 2005, <http://www.cas.go.jp/jp/seisaku/saiban/kettei.html>.

<sup>70</sup> Anderson & Saint, *supra* note 21, at 237 art. 2(2).

<sup>71</sup> *Id.* at 237 art. 2(3).

<sup>72</sup> McKenna, *supra* note 31, at 141.

<sup>73</sup> Anderson & Saint, *supra* note 21, at 237. See also SUPREME COURT OF JAPAN, *supra* note 23, at 4.

<sup>74</sup> Chihou Saibansho ni Mita Taishou Jikensuu—Heisei 15-17nen [Number of Relevant Cases Seen By the Circuit Courts from 2003-2005], Sup. Ct. of Japan, *available at* <http://www.saibanin.courts.go.jp/shiryo/pdf/05.pdf> (showing 3,646 relevant cases in 2003, 3,786 cases in 2004, and 3,629 cases in 2005).

In 2005, there were 111,724 criminal cases in Japan, of which 3,629 (3.2 percent) would have been subject to a jury trial.<sup>75</sup> That same year, there were 77,643 individuals prosecuted in Japan.<sup>76</sup> Out of these individuals, the sum total of 72,540 (93.4 percent) confessed, and the remaining 5,193 defendants pleaded not guilty.<sup>77</sup> In cases of confession, the trial courts held an average of 2.4 hearings over the course of 2.8 months.<sup>78</sup> When defendants pleaded not guilty, an average of 7.3 hearings were held over the course of 9.5 months. Based on the 2005 figures, it is estimated that approximately 181,450 to 362,900 citizens would have been called for jury duty.<sup>79</sup> Lay judges will be selected from voter registration lists.<sup>80</sup> In 2005, there were 102,985,213 registered voters in Japan, meaning that only 0.18 to 0.35 percent of registered voters would have been affected.<sup>81</sup>

Each court will be responsible for making a prospective lay judge list.<sup>82</sup> A certain number of prospective lay judges will be summoned from these lists and informed of their obligation to appear for “jury duty.”<sup>83</sup> At their appearance, the court will question each prospective lay judge about whether they have any relationship with the

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<sup>75</sup> Saibanin Seido no Taisho to naru Jiken no Kazu—Heisei 17nen [Number of Cases Subject to Lay Jury Trials in 2005], Sup. Ct. of Japan, *available at* <http://www.saibanin.courts.go.jp/shiryō/pdf/03.pdf>.

<sup>76</sup> Saibanin Seido no Taisho to naru Jiken no Jinninsuu, Genzai no Heikin Kanri Kikan Oyobi Heikin Kaitei Kaisuu—Heisei 17nen [Number of Necessary Lay Judges, Average Number of Investigations, and Average Number of Trials in 2005], Sup. Ct. of Japan (2006), *available at* [http://www.saibanin.courts.go.jp/shiryō/pdf/heikin\\_sinri\\_kikan.pdf](http://www.saibanin.courts.go.jp/shiryō/pdf/heikin_sinri_kikan.pdf). Note that the official tally shows 79,203 cases were prosecuted. This discrepancy occurred because 1,560 were counted a second time when the case was transferred.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Chihou Saibanshobetsu ni Soutei sareru Saibaninshasuu to Sono Yuukensha ni Shimeru Wariai no Shisanhyō—Heisei 17nen [Number of Lay Judges Estimated for Local Courts and Forecasted Chances of Eligible Citizens for Selection], Sup. Ct. of Japan, *available at* <http://www.saibanin.courts.go.jp/shiryō/pdf/06.pdf>.

<sup>80</sup> Anderson & Saint, *supra* note 21, at 243 art. 13.

<sup>81</sup> Chihou Saibanshobetsu ni Soutei sareru Saibaninshasuu to Sono Yuukensha ni Shimeru Wariai no Shisanhyō—Heisei 17nen [Number of Lay Judges Estimated for Local Courts and Forecasted Chances of Eligible Citizens for Selection], Sup. Ct. of Japan, *available at* <http://www.saibanin.courts.go.jp/shiryō/pdf/06.pdf>.

<sup>82</sup> Anderson & Saint, *supra* note 21, at 249-51 art. 21-23. *See also* Saibanin Senin Tetsuzuki no Gaiyō [Outline of Lay Judge Selection Process], Sup. Ct. of Japan, *available at* <http://www.saibanin.courts.go.jp/shiryō/pdf/09.pdf>.

<sup>83</sup> Saibanin Senin Tetsuzuki no Gaiyō [Outline of Lay Judge Selection Process], Sup. Ct. of Japan, *available at* <http://www.saibanin.courts.go.jp/shiryō/pdf/09.pdf> (courts may distribute questionnaires in advance as well).

case and related actors,<sup>84</sup> whether the lay judge can make an impartial determination,<sup>85</sup> and whether there is any reason that they cannot serve.<sup>86</sup> If a prospective lay judge has previously served within a five-year period or has previously appeared as a prospective lay judge within the past year, they may refuse service.<sup>87</sup> Other individuals may also be exempt from lay judge duty including those more than seventy years old, city council members, students concurrently enrolled in classes, members of prosecutorial review committees, and other individuals who are injured, sick, who have to attend a family member's funeral, or who have unavoidable child care, elderly care, or business obligations.<sup>88</sup> The prosecution and defense may strike up to four prospective lay judges without cause.<sup>89</sup> The court will then select the lay judges from those individuals who were not excluded.<sup>90</sup>

At trial, lay judges will have, at least theoretically, much the same authority and rights as the three professional judges.<sup>91</sup> The lay judges will assist in determining criminal responsibility and deciding the appropriate sentence.<sup>92</sup> Lay judges may ask questions of the witnesses.<sup>93</sup> Judgments must be rendered by a majority of the jury panel, provided that at least one citizen and one professional judge are included in the

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<sup>84</sup> Anderson & Saint, *supra* note 21, at 247-49 art. 17. Lay judges may be disqualified if they are the defendant's or victim's relative, legal guardian, employee, co-habitant, or if they are a witness, legal counsel, or other parties related to the criminal suit. *Id.*

<sup>85</sup> *Id.* at 249 art. 18.

<sup>86</sup> Saibanin Senninn Tetsuzuki no Gaiyo [Outline of Lay Judge Selection Process], Sup. Ct. of Japan, available at <http://www.saibanin.courts.go.jp/shiryō/pdf/09.pdf>. A citizen may not serve as a lay judge if that person has: (i) not completed compulsory education in Japan; (ii) committed a crime; (iii) mental or physical incapacities that would preclude them from serving. Anderson & Saint, *supra* note 21, at 243-44 art. 14. Also, certain members of the community are automatically excluded from the process, including Diet members, ministers of state, certain governmental employees, lawyers, patent lawyers, judges, prosecutors, police officers and employees of the police department, certain politicians, notaries, legal apprentices, self defense officers, and others. *Id.* art. 15.

<sup>87</sup> *Id.* at 247 art. 16(iv)-(v).

<sup>88</sup> *Id.* at 246-47 art. 16.

<sup>89</sup> Saibanin Senninn Tetsuzuki no Gaiyo [Outline of Lay Judge Selection Process], Sup. Ct. of Japan, available at <http://www.saibanin.courts.go.jp/shiryō/pdf/09.pdf>.

<sup>90</sup> *Id.*

<sup>91</sup> Anderson & Saint, *supra* note 21, at 240-41 art. 6. Lay judges also have the obligation to carry out their duties with honesty, fairness, and secrecy. *Id.* at 241-42 art. 9.

<sup>92</sup> Bloom, *supra* note 65, at 38. See also Saibanin no Shokumuu no Naiyou Nado [Description of Lay Judge's Duties], Sup. Ct. of Japan, available at <http://www.saibanin.courts.go.jp/shiryō/pdf/10.pdf>.

<sup>93</sup> Saibanin no Shokumuu no Naiyou Nado [Description of Lay Judge's Duties], Sup. Ct. of Japan, available at <http://www.saibanin.courts.go.jp/shiryō/pdf/10.pdf>.

majority.<sup>94</sup> It should be noted that professional judges will retain sole authority to reach decisions on questions of law and procedure.<sup>95</sup>

## B. UNDERLYING PURPOSE AND FOCUS OF MONUMENTAL REFORMS

Given the reintroduction of jury trials after a nearly seventy-year hiatus, one naturally questions the impetus of Japan in embarking on this monumental path. A relevant inquiry is whether bureaucrats or politicians openly or secretly perceived a fundamental flaw or a crack in the armor of their criminal justice system. Answering these questions is difficult because both supporters and opponents of the new lay jury system have been vague and sometimes contradictory in their arguments.<sup>96</sup> It is clear, however, that the courts do not feel that the system was broken, or even flawed.

The Supreme Court of Japan was diametrically opposed to the introduction of “jury trials” in any form. Because the Supreme Court and its administrative arm adamantly believe that the system was never broken, they believe that there certainly is no reason for it to be “fixed”.<sup>97</sup> In September 2001, the Supreme Court issued an opinion letter opposing jury trials.<sup>98</sup> In support of this opinion, the Supreme Court alluded to the large burden upon the citizenry, an insufficient number of attorneys to conduct non-stop trials on consecutive days, the chances of citizen error, the high costs associated with juries, the decreasing use of jury trials in other countries, the complexity of the proceedings, an increased need for specialized knowledge, and the necessity of major reform if a jury trial system were adopted.<sup>99</sup> In criticizing the U.S. jury trial system, the Supreme Court could not fathom how twelve ordinary citizens prone to inconsistency and error could arrive at verdicts more just and fair than three professional judges.<sup>100</sup> The Court relied upon the opinion of academics and other experts stating that there were insufficient

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<sup>94</sup> Bloom, *supra* note 65, at 41. If a defendant pleads guilty and all parties consent, four citizens and one professional judge may determine the appropriate sentence with court approval. *Id.*

<sup>95</sup> Takasugi, *supra* note 31, at 2.

<sup>96</sup> Anderson & Nolan, *supra* note 34, at 941.

<sup>97</sup> Supreme Court Interview, *supra* note 15.

<sup>98</sup> Kokumin no Shiho Sanka ni Kansuru Saibansho no Iken [Court’s Opinion Concerning Public Participation in the Judicial System], Sup. Ct. of Japan 2 (2001), available at <http://www.saibanin.courts.go.jp/shiryo/pdf/24.pdf>.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 4.

safeguards to prevent U.S. juries from convicting innocent defendants.<sup>101</sup> Given the general opposition to juries, Japanese legislators offered a compromise by adopting a lay jury system comprised of both citizen and professional judges.

One of the declared purposes of the lay jury mechanism is to increase public involvement and understanding of the legal system.<sup>102</sup> This reflects the belief by some Japanese lawmakers that the public should stop relying on a paternalistic government, and take a more active role in the societal development.<sup>103</sup> In theory, the lay jury system will promote a more democratic society that brings the norms and operations of the judiciary to the attention of the citizenry.<sup>104</sup> Also, it should enhance the court system's legitimacy and bolster respect by "creating the perception that disputes are resolved openly and fairly" in Japanese courts.<sup>105</sup>

The JSRC additionally pronounced that "for the justice system to achieve its functions fully, it is indispensable that the justice system obtain broad support from the people and that the popular base be established."<sup>106</sup> While there has been limited citizen participation in the criminal justice system in the past, it has been relatively irrelevant, largely unknown, and quite obscure.<sup>107</sup> Theoretically, the lay jury system will foster a stronger public support base in the judiciary.<sup>108</sup>

The lay jury system is also designed to provide balance to criminal proceedings. Through public participation, it is hoped that the

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<sup>101</sup> *Id.* at 5-6.

<sup>102</sup> Judicial Reform Council, *supra* note 56, at 211; SUPREME COURT OF JAPAN, *supra* note 23, at 3. See also Dounyu no Riyuu [Reason for Introduction of Lay Jury], Sup. Ct. of Japan, available at <http://www.saibanin.courts.go.jp/introduction/reason.html> (last visited Mar. 29, 2007).

<sup>103</sup> Jones, *supra* note 4, at 365.

<sup>104</sup> See Anderson & Nolan, *supra* note 34, at 943.

<sup>105</sup> Bloom, *supra* note 65, at 50-51.

<sup>106</sup> Judicial Reform Council, *supra* note 56, at 212.

<sup>107</sup> Anderson & Nolan, *supra* note 34, at 965. Citizen participation in the judicial system has come in the form of Prosecutorial Review Commissions or *Kensatsu Shinsa Kai*, comprised of eleven citizens serving six-month terms. There are 201 commissions across Japan that review prosecutors' decisions not to prosecute when a victim, proxy, or the JSRC complains. Upon receiving a complaint, the commission will review the allegations and prosecutor's explanation for not bringing charges. The commission may then issue a non-binding recommendation about the issuance of an indictment. Additionally, there is limited lay participation in non-lawyer judges at the Summary Court and Supreme Court levels as well as conciliators that work in conjunction with the courts.

<sup>108</sup> *Minutes from 4th Meeting of the Saiban-in System/Criminal Trial Investigative Commission*, Judicial Sys. Reform Comm'n Headquarters, June 11, 2003, <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai4/4gaiyou.html>.

“common sense” feelings and opinions of non-legal experts will be reflected in criminal trials.<sup>109</sup> Because Japanese judges have lifelong tenure and start their judgeships when they are quite young,<sup>110</sup> critics have argued that judges are forced to either conform to the systematic pressures to convict or forego career advancement within the system.<sup>111</sup> Critics further assert that because judicial culture advocates that a judge refrain from public activities to create the appearance of impartiality, judges tend to be isolated from the realities of society.<sup>112</sup> The Secretariat of the Supreme Court<sup>113</sup> closely manages each judge’s career. Judges are constantly rotated throughout the country where they generally live in judge-only housing compounds and interact socially primarily with other judges.<sup>114</sup> Given that judges do not acquire a variety of experiences before or after they sit on the bench,<sup>115</sup> advocates of the lay jury system maintain that ordinary citizens are “best placed to understand and appreciate a defendant’s criminality and the appropriate response.”<sup>116</sup> In

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<sup>109</sup> *Minutes from 25th Meeting of the Saiban-in System/Criminal Trial Investigative Commission*, Judicial Sys. Reform Comm’n Headquarters, Sept. 12, 2002, <http://202.232.58.50/jp/singi/sihou/kentoukai/saibanin/dai25/25gaiyou.html>; SUPREME COURT OF JAPAN, *supra* note 23, at 3.

<sup>110</sup> Bloom, *supra* note 65, at 48 (“Given their youth at the commencement of their judgeship, [judges] tend to be more impressionable and are therefore subject to greater influence by some of the veteran actors in the system.”). Judges may take the bench immediately after passing the bar and graduating from the Judicial Research and Training Institute. This means that professional judges might start their tenure on the bench in their mid-twenties.

<sup>111</sup> *Id.* (explaining that judges are more willing to defer to the prosecution to advance within the system). See also Anderson & Nolan, *supra* note 34, at 942-43; Ramseyer & Rasmusen, *supra* note 18, at 72. The secretariat has manipulated job assignments to reward or punish judges for their politics or opinions they write. *Id.*

<sup>112</sup> See Anderson & Nolan, *supra* note 34, at 942; Bloom, *supra* note 65, at 49.

<sup>113</sup> Ramseyer & Rasmusen, *supra* note 18, at 70-71 (explaining that the Supreme Court Secretariat is the administrative office of the court system, is staffed by career judges, and that a posting there at some point during a judge’s career signals recognized talent).

<sup>114</sup> See Anderson & Nolan, *supra* note 34, at 942 (explaining that this system results in the strengthening of collegial bonds between the judges and their families, but tends to weaken general ties with the public).

<sup>115</sup> See Ramseyer & Rasmusen, *supra* note 18, at 70-71. Until recently, judges have begun their journey to the bench while studying as undergraduate law majors. During the last year of undergraduate studies, the prospective judges sit for the national bar examination or *shiho shaken*. Most examination takers do not pass on their first try unless they are extraordinarily skilled or lucky. Successful exam takers typically pass on their fourth or fifth try. After passing, the prospective judge enters the Legal Research and Training Institute [LRTI] for 1.5 years. The LRTI provides lectures on legal practice and clinical assignments at public and private offices. Judges are selected at the LRTI and formally appointed by the Cabinet. After appointment, the secretariat immediately names each judge to a specific court.

<sup>116</sup> See Anderson & Nolan, *supra* note 34, at 941-42. The judiciary in Japan tends to be quite elite, given the historical two-percent passage rate on the Japanese bar exam, level of education, and

theory, the new system will avoid institutional bias and foster better justice. By working together to reach a verdict, the professional judges' knowledge and experience can be combined with the lay judges' fresh perspective, sense of justice, and practical observations.<sup>117</sup> It will also enable a broader investigation of fact, give the courts a greater ability to determine the truth, and ensure that sentencing reflects public attitudes and opinions. This reform should also help the judiciary remove itself from the shadow of isolation and elitism.<sup>118</sup>

### C. "TATEMAE" AND "HONNE"—FACT OR FICTION

In Japan, the concepts of "tatemae" and "honne" are inherent in many aspects of society and culture. Tatemae connotes the desired appearance of things or the official stance on a particular matter,<sup>119</sup> while honne indicates the reality of the situation or what one truly thinks underneath the surface.<sup>120</sup> These concepts are often inconsistent and apply in a variety of societal settings.<sup>121</sup> By way of basic example, a governmental agency may have an official policy of accepting employment applications from persons of all ages, but in actuality, it will not hire any new employees over the age of forty.

In assessing the lay jury system as presently designed, it appears that tatemae and honne may be irreconcilable. The tatemae is rhetoric touting a revamped justice system in which citizen participation will be meaningful, and subsequently produce fairer results, foster better balance, and enable better understanding of the judicial system.<sup>122</sup> Given the obstacles facing the new mixed jury scheme, it appears that the honne, or reality, will be the continuance of a system dominated by expert judges and bureaucrats.<sup>123</sup> There is a wide range of challenges

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family wealth. Many judges come straight from law school so they do not have the opportunity to acquire diverse experiences either before or after sitting on the bench.

<sup>117</sup> Takasugi, *supra* note 31, at 3.

<sup>118</sup> Jones, *supra* note 4, at 363.

<sup>119</sup> Glenn Theodore Melchinger, *For the Collective Benefit: Why Japan's New Strict Product Liability Law is Strictly Business*, 18 U. HAW. L. REV. 879, 884 n.27 (1997).

<sup>120</sup> Kiyoko Kamio Knapp, *Still Office Flowers, Japanese Women Betrayed By Equal Employment Opportunity Law*, 18 HARV. WOMEN'S L.J. 83, 108 (1995).

<sup>121</sup> Melchinger, *supra* note 119, at 884 n.27; Knapp, *supra* note 119, at 108.

<sup>122</sup> See generally Susumu Yamaguchi, *Shimin ni totte Wakariyasui Shiho towa?* [What is an Easy-to-Understand Judicial System for the Public?], 57 JIYU TO SEIGI [LIBERTY & JUSTICE] 33 (2006).

<sup>123</sup> See *id.* at 34.



facing citizen participation that confirm this reality. For example, if all three professional judges band together, only two lay judge votes are needed to reach the requisite majority threshold for conviction.<sup>124</sup> Little effort may be required for three respected governmental officials who are experienced and educated in criminal law to persuade or pressure two citizen judges to accept their conclusions. This is particularly true in the jury deliberation room where discussions are generally isolated from external scrutiny. In addition, judges are further empowered with their exclusive authority to interpret and make decisions about the applicable law and procedure.<sup>125</sup> To some degree, these factors will likely impede the ability of lay judges to influence the proceedings. Also, lay judges will be hindered because they only serve for one trial, giving them little opportunity to develop the legal knowledge and sophistication necessary to disagree with the professional judges.<sup>126</sup> As such, it seems that Japan has created an expensive system that merely provides the “appearance of civic participation by having lay judges ratify decisions that are still largely controlled by the judiciary.”<sup>127</sup>

Despite these and other obstacles, implementation of the lay jury system is worthwhile. In fact, if Japan is willing to take the actions and implement the policies described in this article, public participation in the criminal justice system may be sweeping and actually achieve the JSRC’s goals and original intentions.

## II. THE JUDICIARY: MAKING THE SYSTEM A SUCCESSFUL REALITY

As a matter of policy and principle, Japanese courts do not openly engage in politics. However, the Supreme Court of Japan not only raised fierce opposition to jury trial proposals in any form,<sup>128</sup> but it also lobbied the leading political party<sup>129</sup> to ensure that the Japanese Diet

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<sup>124</sup> See Anderson & Saint, *supra* note 21, art. 67.

<sup>125</sup> Jones, *supra* note 4, at 369.

<sup>126</sup> Anderson & Nolan, *supra* note 34, at 964.

<sup>127</sup> Jones, *supra* note 4, at 366.

<sup>128</sup> *Id.* at 366-67; McKenna, *supra* note 31, at 141.

<sup>129</sup> The Liberal Democratic Party of Japan, also known as the LDP.

did not adopt legislation calling for a pure citizen jury.<sup>130</sup> This is remarkable for a judicial institution that rarely challenges any decision by the legislative branch. Among other things, the Court argued about the need for additional resources, adverse of pre-trial publicity, the possibility of jury tampering, and lack of jury findings regarding specific consequences.<sup>131</sup> These masked arguments seem superficial, and were specifically designed to preserve the status quo.

After studying various jury models around the world, Japan opted for the mixed lay system common to continental Europe. There was less opposition to the lay judge system as courts felt that, as a compromise, they could monitor the situation and make adjustments to reduce possible negative consequences.<sup>132</sup> With this compromise, possibly the judiciary felt comfort that the facade (*tatemaie*) of jury trials had been created, but in actuality, a mixed system (*honne*) would not result in any shift of power away from the judiciary.

Regardless of its prior feelings, the judiciary needs to abandon its initial prejudice and opposition towards public participation in the criminal justice system and move towards encouraging a lay jury system that realizes its intended purposes. A mixed judge-jury system has the potential to increase public understanding of criminal justice and the court system, while simultaneously reducing the danger of one-sided judicial administration that may be out of touch with reality.<sup>133</sup> By concurrently using professional judges in the process, the system can maintain a higher degree of objectivity and consistency due to the judge's formal legal training and experience.<sup>134</sup> Mixed courts can also be more efficient because the participation of professional judges facilitates with issues of jury control, such as the exclusion of potentially prejudicial evidence and the crafting of jury instructions.<sup>135</sup> There is considerable hope and potential for success if the judiciary can accept the premise that lay juries can deliver "improved justice and democratic

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<sup>130</sup> Jones, *supra* note 4, at 366-67 (explaining that the Supreme Court of Japan even argued that the jury system might violate the constitution because it infringed upon the judiciary's role in government).

<sup>131</sup> McKenna, *supra* note 31, at 141-42.

<sup>132</sup> *Id.* at 142.

<sup>133</sup> Volker F. Krey, *Characteristic Features of German Criminal Proceedings—An Alternative to the Criminal Procedure Law of the United States?*, 21 LOY. L.A. INT'L & COMP. L. REV. 591, 601-02 (1999).

<sup>134</sup> *Id.*

<sup>135</sup> Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 374-75 (2003).

engagement.”<sup>136</sup> In addition, the judiciary can facilitate success by adopting practices and procedures supportive of the new system.

#### A. DEVELOPING APPROPRIATE PROCEDURES AND SAFEGUARDS

To ensure a criminal justice system that provides better justice and protects against unintended negative consequences, appropriate procedures and safeguards must be in place.<sup>137</sup> First, organizational rules that avoid the marginalization of citizen participation need to be established for the deliberative phase of the trial. A system where the professional judges lead the discussion and the lay judges merely vote is ripe for abuse and judicial domination.<sup>138</sup> Professional judges must refrain from dominating the panel, and should instead view lay judges as teammates working towards a common cause. It is important that professional judges acknowledge the integral role of lay judges and avoid improperly influencing or usurping their power.<sup>139</sup> This concern is specifically recognized in the Lay Judge Act.<sup>140</sup> This act mandates that both professional and lay judges are “entrusted to decide freely based on the strength of the evidence.”<sup>141</sup> Moreover, the professional judges must consider how to politely explain applicable laws to the lay judges, organize the deliberations so that they are easily understandable by the lay judges, provide sufficient opportunities for the lay judges to voice their opinions, and ensure that the lay judges can fulfill their roles.<sup>142</sup>

Although it should be presumed that professional judges will naturally follow these important provisions in the Lay Judge Act, additional safeguards are necessary. The courts should develop systematic mechanisms to constantly remind judges that they possess a legal and moral obligation to refrain from domineering or improperly coercing lay judges. Basic steps can be taken to adequately train judges. Initially, professional judges should actively participate in mock trials

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<sup>136</sup> Anderson & Nolan, *supra* note 34, at 974.

<sup>137</sup> *See id.* at 987.

<sup>138</sup> *Id.* at 974-75.

<sup>139</sup> *See* Bloom, *supra* note 65, at 62-63; Anderson & Nolan, *supra* note 34, at 990.

<sup>140</sup> Anderson & Saint, *supra* note 21, at 273-74 art. 67 (explaining that the Lay Judge Act is formally translated as the “Law Concerning Lay Judge Participation in the Criminal Justice System”).

<sup>141</sup> *Id.* at 268-69 art. 62.

<sup>142</sup> *Id.* at 272-73 art. 66. *See also* Yamaguchi, *supra* note 122.

where their actions and performance can be scrutinized and critiqued.<sup>143</sup> However, the courts cannot stop there. The courts need to develop a comprehensive handbook for professional judges about acceptable behavior in the jury deliberation room and must mandate sufficient training exercises based on the handbook. Professional judges should be subject to continuing education on a periodic basis as well.

Another safeguard is ensuring that the deliberation process is transparent. Transparency can be achieved by requiring a detailed record of the lay jury's deliberations.<sup>144</sup> A comprehensive record would likely deter complete judicial control of the deliberations.<sup>145</sup> Special oversight committees could analyze and regularly review judicial conduct, trial results, and jury deliberation records. The lay jury system would be strengthened if the special oversight committee findings were reported to the courts, lawmakers, bureaucracy, and the bar. To the extent possible, the mass media should have access to these findings as well. Based on these findings, the court could develop a critiquing system that rates performance and reminds professional judges to exercise special caution. Also, through constant monitoring, the lay jury system can then be modified as necessary to ensure meaningful participation and realization of its intended purpose. The JSRC counseled that the system "should not be regarded as fixed in stone," even after its initial implementation.<sup>146</sup>

Further, a debriefing mechanism would bolster the lay jury system's transparency. At the conclusion of each trial, the lay judges could be individually debriefed through interviews or questionnaires about their experience and interaction with the professional judges. The debriefing results could then be utilized to counsel professional judges and make adjustments to procedural rules governing the trial and deliberation processes. If it is discovered that a career judge is consistently overstepping acceptable boundaries in pressuring lay judges or demeaning their participation, this judge can then be privately warned and educated. Monitoring of the system is imperative for success, given that the justice system must be transparent and logical to the public.

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<sup>143</sup> Supreme Court Interview, *supra* note 15 (explaining that the Supreme Court is presently placing considerable emphasis on mock trials based on the belief that public scrutiny of these activities will assist judicial understanding of a professional judge's proper role).

<sup>144</sup> Bloom, *supra* note 65, at 63.

<sup>145</sup> *Id.* at 63.

<sup>146</sup> Judicial Reform Council, *supra* note 56, at 67.

In any event, Japan needs to separate itself from a society where a handful of the elite make all the decisions based on the premise that they are “experts”.<sup>147</sup> Confidence should be exhibited in the worth of lay judges and their authority should not be undermined. If lay judges are marginalized or overpowered, the meaning of their participation in the system will be denigrated, and the lay jury system will never assume its intended form.

The German mixed jury system illustrates the danger of overpowering lay judges.<sup>148</sup> “Empirical research on the operation of mixed courts in Germany has revealed that the influence of lay judges on court decisions on guilt and punishment is minimal.”<sup>149</sup> The reality that “jurors are likely to defer to the judge too often and too quickly” has significantly discounted the meaning of citizen participation.<sup>150</sup> In fact, studies show that “lay judges influenced the decision on guilt in about 1.4 percent and the decision on punishment in about 6.2 percent of [sentencing decisions].”<sup>151</sup> This difference is understandable if the professional and citizen judges always agree on the outcome, however, if the lay judges have little or no influence, it defeats the purpose of their participation.<sup>152</sup> In Germany, lay judges have been increasingly excluded from the decision making process because the community representative has become a marginalized player in the legal system.<sup>153</sup> Japan needs to avoid a similar result, and cooperation from the judiciary is imperative.

Additionally, if appellate courts freely second-guess or overturn jury verdicts and sentences, there is a serious risk. Under the new system, the standard *koso* appeal practice will continue.<sup>154</sup> This practice

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<sup>147</sup> Yamaguchi, *supra* note 122.

<sup>148</sup> Erhard Blankenburg, *Patterns of Legal Culture: The Netherlands Compared to Neighboring Germany*, 46 AM. J. COMP. L. 1, 28 (1998) (explaining that more serious crimes in Germany with a sentence over one year have to be charged before a bench of one judge and two lay referees, and that if the seriousness of a crime dictates a penalty in excess of two years, then a “big chamber” of three professional judges and two lay referees will decide).

<sup>149</sup> Herrmann, *supra* note 57, at 133.

<sup>150</sup> Iontcheva, *supra* note 135, at 375.

<sup>151</sup> Herrmann, *supra* note 57, at 133. This factor led many German legal scholars to advocate the abolition of lay judges. *Id.* Consequently, in 1975, the German legislature reduced the number of lay judges from six to two in courts hearing the most serious cases. *Id.* Currently, however, there is no movement to abolish the mixed court system in its entirety. *Id.*

<sup>152</sup> See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 961 (2006).

<sup>153</sup> Nora V. Demleitner, *More Than “Just” Evidence: Reviewing Mirjan Damaška’s Evidence Law Adrift*, 47 AM. J. COMP. L. 515, 526 (1999).

<sup>154</sup> Anderson & Nolan, *supra* note 34, at 992.

allows either the prosecution or defense to appeal, and a panel of three professional appellate judges hears the case and determines both issues of fact and law.<sup>155</sup> If lay jury determinations are consistently challenged and overturned by a panel of career judges, this has the potential of undermining confidence in the jury system and frustrating the public's belief in the value of its service.<sup>156</sup>

## B. REDUCING INCONVENIENCES WITHIN THE SYSTEM

If the judiciary can reduce the inconveniences facing the public, the prospects of success increase significantly. The Lay Judge Act requires that the judges and attorneys endeavor so that “lay assessors are able to perform sufficiently their duties without their responsibility becoming onerous.”<sup>157</sup> Because the courts do not have experience with jury trial administration, they need to pay careful attention to the realities facing the citizenry. The courts need to develop a system that reasonably limits the number of prospective lay judges summoned for potential selection as well as the number of questions posed to the lay judges.<sup>158</sup> The courts must diligently strive to notify prospective jurors of their appearance date as far in advance as possible.<sup>159</sup> Without sufficient notification, there will be great burdens placed upon each prospective lay judge as well as their families and employers. In a recent poll by the Supreme Court, over 65 percent of the citizens polled responded that potential scheduling difficulties were their primary concern in relation to the new jury system. This was well ahead of the next highest concern expressed by respondents, which was anxiety about the mental pressure associated with judging the defendant.<sup>160</sup> Public resentment might quickly arise if major rescheduling is required for business trips, work

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<sup>155</sup> Bloom, *supra* note 65, at 41.

<sup>156</sup> Demleitner, *supra* note 153, at 526.

<sup>157</sup> Anderson & Saint, *supra* note 21, at 266 art. 51.

<sup>158</sup> *See id.* arts. 26-27 (explaining that the courts have discretion in handling these matters); Cabinet Secretariat of Japan, *supra* note 69 (advocating that the Supreme Court reduce the burden upon citizen judges as much as possible).

<sup>159</sup> Tokuko Kobayashi, *Kahansuu 3 ka inai Nara Sanka—Saibanin Seido, Saikosai Ishiki Chosa [Majority Can Participate if Within 3 Days—Lay Jury System, Supreme Court Awareness Poll]*, YOMIURI SHIMBUN, (Apr. 28, 2006), available at [http://job.yomiuri.co.jp/news/jo\\_ne\\_06042820-2.cfm](http://job.yomiuri.co.jp/news/jo_ne_06042820-2.cfm). The Lay Judge Act merely requires that the courts notify prospective lay judges in advance. It does not specify a particular time frame. *See* Anderson & Saint, *supra* note 21, at 266 art. 53.

<sup>160</sup> Kobayashi, *supra* note 159.

commitments, prescheduled vacations, and other pre-existing obligations.

To have an effective lay jury system, the courts need to ensure that the time required of citizen judges is both the shortest period possible and also consistent with the needs of justice.<sup>161</sup> Given the work and family commitments of the public, the courts must work for quick, easy-to-comprehend, and complete trials.<sup>162</sup> In a 2006 opinion poll, approximately 60 percent of the respondents indicated that it would be possible to serve in a trial lasting from three to five days.<sup>163</sup> However, if a trial were to last more than one week, then the percentage of citizens willing and able to serve decreases significantly.<sup>164</sup>

Revisions to the criminal code of procedure will enable the court to focus the arguments before trial by accepting pleas, evidence, and holding pretrial proceedings to narrow the scope of trial.<sup>165</sup> In line with these revisions, a court can develop an efficient schedule and plan for trial while taking into consideration the arguments of the prosecution and defense.<sup>166</sup> The judges, prosecutors, and defense attorneys need to cooperate so as to formulate an efficient trial plan and shorten the trial period.

In the past, criminal trials in Japan have been held in non-consecutive sessions over the course of weeks, if not months or years.<sup>167</sup> To accommodate the lay jury system, Japan has modified its procedures to accommodate trials held in a single session over consecutive days.<sup>168</sup> Courts and attorneys alike will have to adjust their practices and procedures so that lay judges are not unnecessarily burdened. Moreover,

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<sup>161</sup> AM. BAR ASS'N, PRINCIPLES FOR JURIES AND JURY TRIALS, AM. JURY PROJECT 4 (2005), available at <http://www.abanet.org/juryprojectstandards/principles.pdf>.

<sup>162</sup> *Saiban-in Seido: Kokumin ga sanko shiyasui joken ni shinai to* [Lay Jury System: Conditions Must Make Public Participation Easy], MINAMI NIHON SHIMBUN, May 7, 2006 [hereinafter Conditions], <http://373news.com/2000syasetu/2006/sya060507.htm>.

<sup>163</sup> *Sanko no Kagi ha Shinri no Jinsoku ka* [Expediting is the Key to Participation in Trials], OKINAWA TIMES, May 5, 2006, [http://www.okinawatimes.co.jp/edi/20060506.html#no\\_2](http://www.okinawatimes.co.jp/edi/20060506.html#no_2) [hereinafter Expediting].

<sup>164</sup> *Id.*

<sup>165</sup> See Jun Nagata, *Yagi Case Example of Trials in the Future*, JAPAN TIMES ONLINE, July 8, 2006, <http://search.japantimes.co.jp/cgi-bin/nn20060708f1.html> (citing the conviction of a man who sexually assaulted and murdered a young girl, in which the trial lasted only fifty days, reflecting speed not previously seen in the Japanese judicial system).

<sup>166</sup> Expediting, *supra* note 163.

<sup>167</sup> See generally Public Prosecutor's Office, <http://www.kensatsu.go.jp/oshirase/00111200603310/saibanin.htm> (last visited Mar. 29, 2007).

<sup>168</sup> *Id.*

another reason advanced for adopting mixed jury trials was to foster a faster, friendlier, and more reliable justice system.<sup>169</sup> In introducing novice justices into an established system, it can be argued that the trial process may be slowed down due to the training activities that will be necessary.<sup>170</sup> Courts will need to implement measures to fully compensate for this inexperience and expedite the court proceedings to the extent possible.

In the context of the U.S. jury system, the American Bar Association (ABA) recently engaged in the American Jury Project to study ideas to optimize modern jury practice.<sup>171</sup> While the findings by the ABA are limited by existing legal and practical constraints in the United States, many of the fundamental principles can be applied to Japan and the new saiban-in system. The recommendations include respecting jurors' time by calling in the minimum number of jurors and minimizing their waiting time.<sup>172</sup> They also call for limiting the length of trials to the extent that justice allows<sup>173</sup> and fully informing the lay participants about the trial schedule and applicable procedure so as to avoid alienation.<sup>174</sup>

### C. ELIMINATING DISTRACTIONS FOR THE LAY JUDGES

In developing the lay jury system, the judiciary must recognize other serious distractions facing lay judges. The tatemae of the lay jury system is that the public will show broad support and understanding once they actively participate in trials. In reality, however, because Japan has focused its attention only on the most serious criminal trials, it is highly possible that the reality will be a citizenry that quickly becomes disenfranchised with the lay jury system. Japan is a safe society where the public has been largely shielded from both the courts and direct exposure to misconduct. With public "jury" trials, many heinous and violent crimes will now come to the forefront.<sup>175</sup> In longer trials

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<sup>169</sup> SUPREME COURT OF JAPAN, *supra* note 23, at 3.

<sup>170</sup> See Anderson & Nolan, *supra* note 34, at 959.

<sup>171</sup> AM. BAR ASS'N, *supra* note 161, at 2.

<sup>172</sup> *Id.* at 4.

<sup>173</sup> *Id.* at 17.

<sup>174</sup> *Id.*

<sup>175</sup> See Anderson, *supra* note 2, at 176-77 (arguing that the scarcity of drug offenses, gun possession, and membership in organized crime in Japanese society is what makes Japan a pleasant place to live for many Japanese citizens and foreigners alike).



involving the *Yakuza*<sup>176</sup> or other terrifying figures, the risk of juror intimidation increases. In fact, the public has already expressed apprehension and questioned whether special measures will be taken to prevent trouble in the courtroom as well as out-of-court intimidation.<sup>177</sup>

Whether the danger is real or perceived, lay judges must be comfortable and feel that they are not in danger when serving. In the short term, increased protection should be provided. The Lay Judge Law currently mandates that the identities of lay judges be kept secret unless they specifically agree to disclosure,<sup>178</sup> and prohibits anyone from contacting the lay judges regarding the case.<sup>179</sup> However, this might not go far enough to provide lay judges with the comfort that they need to freely and adequately perform their jobs. The courts might consider sequestering lay judges and even holding closed-door proceedings in certain situations. Other options should be considered as well. One possibility would be having lay judges watch the proceedings anonymously on closed circuit television or from a secluded room. However, the lay judges should be present in the courtroom to observe the demeanor of each witness and pose questions to witnesses when appropriate. They should also be able to interact with the defendant, defense counsel, and prosecutor.

In the long term, Japan should strongly consider involving lay judges for proceedings other than serious criminal trials. By exposing lay judges only to serious criminal trials, the public may be soured on the idea of public participation in the judicial process. While opponents of juries might find joy in this end result, the investment of time and effort in the new system is too valuable to squander. As acknowledged by the JSRC, the introduction and operation of lay judges should be closely monitored and public participation in “proceedings other than criminal cases should be considered as a future issue.”<sup>180</sup>

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<sup>176</sup> The *Yakuza* is an organized criminal group in Japan.

<sup>177</sup> See Kenjisouchou, *Keidanren de Setsumei-Saibanin Seido no Seiko no tame ni* [For the Lay Judge System to Succeed-As Explained by the Chief Prosecutor at the Japan Business Federation], MINISTRY OF JUSTICE, Feb. 21, 2006, <http://www.moj.go.jp/SAIBANIN/saibanin08.html>.

<sup>178</sup> Anderson & Saint, *supra* note 21, at 275 art. 72.

<sup>179</sup> *Id.* at 275 art. 73.

<sup>180</sup> Judicial Reform Council, *supra* note 56, at 78.

### III. CITIZEN PARTICIPATION: TO “HONNE” AND BEYOND

Citizen participation in the judicial process has the potential of increasing public knowledge of the judicial system and the average citizen's role within Japan's democratic state. Participation can also engender public trust and confidence in the system.<sup>181</sup> For the lay jury system to realize its full potential, it is important that Japan either eliminate or neutralize the major obstacles facing it. This can be done through education, empowerment, private-sector cooperation, and an ongoing nationwide dialogue on how to revise and improve the system that involves the public sector, participants in the judicial process, members of the private sector, and citizenry.

#### A. EDUCATION, AWARENESS, AND CONVICTION

The initial key to citizen participation is education. Japan does not have a culture of citizen participation in the judiciary like the United States, England, and other European countries that have traditionally utilized some form of jury trial. In fact, although the criminal justice system in Japan presently utilizes a limited amount of citizen participation in the form of conciliation members, judicial commissioners, and Inquests of Prosecution,<sup>182</sup> these activities have not resulted in public awareness or a system widely influenced by public participation. Conversely, the announcement of the new lay jury system starting in 2009 has already generated unparalleled public exposure of Japan's criminal justice system because of the concerted efforts of the Supreme Court, Ministry of Justice, and JFBA. These organizations have cooperated in publicizing the new system through informative booklets, posters, events, symposia, advertisements in popular media, and related activities. Local courts, governments, and other interested organizations have also held events to familiarize local citizens with the judicial process and new system.<sup>183</sup> These events should continue in an effort to further increase awareness and understanding.

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<sup>181</sup> Takasugi, *supra* note 31, at 3.

<sup>182</sup> Judicial Reform Council, *supra* note 56.

<sup>183</sup> In late 2006, the newspapers were filled with details about educational activities and events being held across Japan to educate the populace about jury trials. A few of these events can be

Education needs to go beyond mere awareness, however. The public must be convinced about the importance of “lay jury duty.”<sup>184</sup> Without conviction by the lay judges, the system will not function as envisioned. The public requires information and an explanation about their important role in the delivery of justice, and the democratic right and duty involved in serving as a lay judge.<sup>185</sup> It is essential to emphasize the importance and goal of public participation. Generally, the Japanese are very civic-minded and tend to support notions of community. If the community can be convinced that lay judge participation will better society and that lay judge service is a worthy civic duty, then support for the system and meaningful participation are likely.

The community has been quite reluctant to embrace the idea of jury trials. As of April 2006, approximately 60 percent of those polled were reluctant to become citizen judges.<sup>186</sup> Public concern stemmed from feared threats by criminal defendants and gangsters involved in the trials, or expected inconveniences in the workplace or when trying to take care of children or the elderly.<sup>187</sup> The JFBA, Supreme Court, and Ministry of Justice are holding mock trials and conducting other activities in an attempt to combat this initial reluctance.<sup>188</sup> Mock trial participants have found their “trial” experience interesting and meaningful.<sup>189</sup> After

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found below. Mainichi Shimbun, *Kanezawa Saiban: Shogakuseira 40 nin, Saiban no Shikumi Manabu—Oyako Kengakukai* [Kanezawa Court: 40 Elementary School Children Pair Up with Their Parents to Learn about the Court Structure], Aug. 26, 2006, available at <http://headlines.yahoo.co.jp/hl?a=20060826-00000230-mailo-117>; Nishi Nihon Shinbun, *Saiban-in Seidotte nani? Kenritsu Toshokan De Panelmin Raigetsu 3ka made* [What is the Saiban-in System? Panel to Discuss at Prefectural Library on 3rd of Next Month], Aug. 26, 2006, available at <http://headlines.yahoo.co.jp/hl?a=20060826-00000010-nnp-145>; Ministry of Justice, *Anata mo Saibanin! [You Too Can Be a Lay Judge!]*, available at <http://www.moj.go.jp/SAIBANIN/> (listing town meetings on the lay judge system that have been held throughout Japan).

<sup>184</sup> Conditions, *supra* note 162.

<sup>185</sup> See Kamiya, *supra* note 29, at 8.

<sup>186</sup> See, e.g., *Toyota May Give Paid Leave for Lay Judge Participants*, JAPAN TIMES ONLINE, Aug. 6, 2006, <http://search.japantimes.co.jp/cgi-bin/nn20060806a6.html> [hereinafter Toyota]. “The survey, conducted in January and February, covered about 8,300 people 20 or older, of whom 5,172, or 62 percent, gave valid responses.” *61% Reluctant To Be Citizen Judge*, JAPAN TIMES ONLINE, May 4, 2006, <http://search.japantimes.co.jp/cgi-bin/nn20060504b5.html>.

<sup>187</sup> Toyota, *supra* note 186.

<sup>188</sup> Kamiya, *supra* note 29 (describing mock trials and various other promotional events being run by the Supreme Court, Federation of Bar Associations, and Ministry of Justice).

<sup>189</sup> *Id.* The opinions expressed by the citizen judges participating in mock trials may not be an accurate indicator of popular sentiment. If these individuals were willing to spend the time participating in a “mock” exercise, it reasons that they have sufficient time to participate in such activities and likely do not have major resistance to the process.

becoming involved in the process, they generally indicated a new willingness to take part in the lay juries.<sup>190</sup> Hands-on activities like this will help the public understand the importance of involvement in the criminal justice system. Additionally, these activities should not be limited to adults eligible for jury service. The public should be educated from a young age, and both public and private schools should develop programs to educate future lay judges on the benefits and operation of the criminal justice system.<sup>191</sup> Similar to the United States, schools might teach about these issues through demonstrations, mock trials, court tours, and other practical activities.

Lay judges also need to fully understand the mechanics of the judicial system. As recognized in the United States, courts should provide sufficient information to lay judges upon their initial contact with the court, their first appearance at the courthouse, and when they report to the courtroom.<sup>192</sup> Additionally, the court should hold orientation programs that ensure each person's understanding of the judicial system and prepare them to adequately serve as lay judges. Such a program would be most effective if it is compact, detailed, and conducted as part of the lay judge selection process.

## B. COOPERATION FROM THE PRIVATE SECTOR

In a society unaccustomed to “jury” trials, there is an issue regarding how employers will react to the new system—particularly when trials last for extended periods of time. Without cooperation from the private sector, the lay jury system will face severe difficulties. Seigoh Hirayama, current president of the JFBA, emphasized that organizations must create a workplace environment that removes all disincentives to participation in the system.<sup>193</sup> Lay jury duty will naturally require time away from the workplace, and employers must stand as willing participants in the process.

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<sup>190</sup> *Id.*

<sup>191</sup> See Cabinet Secretariat of Japan, *supra* note 69.

<sup>192</sup> See AM. BAR ASS'N, *supra* note 161, at 7.

<sup>193</sup> Seigoh Hirayama, *Saiban-in Kyuka Seido no Dounyuu ni Tsuite no Kaicho Danwa* [President's Commentary on Introducing Paid Holiday System for Lay Judges], Aug. 11, 2006, <http://www.nichibenren.or.jp/ja/opinion/statement/060811.html>.

Pursuant to the Labor Standards Law, an employer “shall not refuse when a worker requests time necessary to . . . perform public duties during working hours.”<sup>194</sup> Also, the Lay Judge Law requires that companies must not treat prospective or actual lay judges “adversely in their employment or otherwise due to taking days off from work to perform their lay assessor duties.”<sup>195</sup> Although the government applies these rules to lay jury duty, they are not specific enough. Employers should go beyond mere compliance with the law and actually pay employees while they are serving as lay judges. It would be detrimental to the lay judges themselves and the system as a whole if employers deprive employees of pay or standard holiday time as a result of their civic service.<sup>196</sup> The private sector needs to recognize those selected for “lay judge” duty with additional paid time off.<sup>197</sup> Americans and Europeans summoned for jury duty typically receive such allowances pursuant to applicable law or internal corporate policy.<sup>198</sup> Without similar concessions in Japan, employees will face unnecessary hardships.

Additionally, it is necessary for the private sector to make employees feel comfortable when they are summoned for “lay judge” duty. Workers should be encouraged by the private sector to perform their civic duties. Absent a national holiday or traditional vacation period when all employees in an organization receive paid time off, many Japanese are reluctant to take personal time away from work due to internal pressures and social stigma. Companies and organizations must strive to remove these pressures. They must be supportive of those required to serve as lay judges. Several governmental ministries and the judiciary have been charged with assisting corporations in understanding this important social responsibility, however private organizations should take this initiative on their own.<sup>199</sup>

In mid-2006, corporate Japan began to seriously discuss how to treat employees who are summoned for lay judge duty. In August 2006, Toyota was the first major company to announce that it would develop

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<sup>194</sup> Labor Standards Law, Law No. 49 of Apr. 7, 1947, art 7. An English translation is available at [http://www.jil.go.jp/laborinfo-e/docs/ljlj\\_law1-rev.pdf](http://www.jil.go.jp/laborinfo-e/docs/ljlj_law1-rev.pdf).

<sup>195</sup> Anderson & Saint, *supra* note 21, at 275 art. 71.

<sup>196</sup> See Cabinet Secretariat of Japan, *supra* note 69.

<sup>197</sup> See generally Conditions, *supra* note 162.

<sup>198</sup> Kobayashi, *supra* note 159.

<sup>199</sup> Cabinet Secretariat of Japan, *supra* note 69 (charging the Ministry of Justice, the Ministry of Health, Welfare, and Labor, and the Supreme Court of Japan with the task of raising awareness and compelling cooperation in the private sector).

an employment policy that facilitates the unlimited participation of its employees in trials.<sup>200</sup> Toyota and other large companies are discussing granting paid leave to employees who are summoned for lay judge duty.<sup>201</sup> However, the real challenge will be felt by smaller firms and sole proprietors, which do not have the capacity to readily substitute employees or cover for missing employees over extended periods of time.

Employees are just one segment of the eligible lay judge population. The needs of other citizens must also be considered, and steps must be taken to facilitate logistical participation by non-workers. Specifically, those with responsibilities to care for children or the elderly will need assistance and relief. The Lay Judge Act does provide an exemption from lay judge service to when “it is necessary to provide childcare or nursing to cohabitating family members who would otherwise be impaired in their daily life.”<sup>202</sup> However, it is anticipated that all such individuals will not be given an exemption from service unless there is undue hardship involved.<sup>203</sup> As such, the government hopes to develop a system of cooperation with child care providers and short stay facilities for the elderly across Japan to assist in these areas, and measures should be implemented to provide for child care and assistance with the elderly.<sup>204</sup>

Given that the government does not currently have this capacity and may be overburdened with such measures, it might be simplest to pay lay judges a generous amount to cover these incidental expenses. While lay judge compensation is currently being debated, it appears that jurors will receive 10,000 yen (about \$90) per day.<sup>205</sup> Even if compensation is paid, however, the private sector infrastructure is currently inadequate to meet people’s needs in this area; it will need to

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<sup>200</sup> Hirayama, *supra* note 190; Toyota, *supra* note 186. Canon Inc. also announced that it would consider giving paid leave to its employees for lay judge service. With large market players supporting their employees, it is likely that other companies may follow suit.

<sup>201</sup> Toyota, *supra* note 186.

<sup>202</sup> Anderson & Saint, *supra* note 21, at 267 art. 16 § vii(B).

<sup>203</sup> Also, to ensure a fair cross-section of the community, Japan should avoid readily granting too many exemptions to prospective lay judges.

<sup>204</sup> See Cabinet Secretariat of Japan, *supra* note 69; Conditions, *supra* note 162.

<sup>205</sup> Kobayashi, *supra* note 156 (this amount should adequately cover incidental expenses). See also Anderson & Saint, *supra* note 21, at 242 art. 11 (requiring that travel, per diem, and hotel expenses be covered).

adjust to meet the increased demand for short-term care for infants, children, and the elderly.

### C. NEED TO EMPOWER CITIZEN JUDGES

Lay judges must feel empowered throughout the trial and deliberation processes. Citizen participation will only be meaningful if the lay judges can deliberate on equal footing with professional judges. One major source of criticism of the lay jury system relates to the cultural stereotype that most Japanese citizens will routinely defer to the judges out of respect and awe for their esteemed position.<sup>206</sup> If citizen judges defer to professional judges too easily, then the meaning of their participation in the system will largely be relegated to an educational activity as opposed to a consequential democratic activity. Because of their courtroom experience, professional judges may unduly influence lay judges by taking charge of the deliberations, relying upon legal technicalities, or pressuring lay judges to concur with their conclusions.

It cannot be refuted that mixed courts are not as independent as purely citizen juries.<sup>207</sup> To empower lay judges and facilitate independence, they need to be educated about their rights and responsibilities both before and during the court proceedings. Moreover, lay judges should be assured about their role in the process and ability to serve in this capacity. Among Japanese citizens polled, less than 10 percent responded that they had any confidence in judging the accused.<sup>208</sup> Among respondents, only 1.5 percent responded that they had confidence in judging others in a criminal trial and only 5.5 percent had some confidence in doing so.<sup>209</sup> Confidence needs to be instilled among the citizen participants. To adequately educate the community about these matters, it would be beneficial to use symposia, mock trials, town meetings, and other similar means. At trial, lay judges should be specifically advised and reminded about their role and duties. They should also be encouraged to actively participate in the proceedings and question witnesses. A lay judge has the authority to question a witness

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<sup>206</sup> Anderson & Nolan, *supra* note 34, at 987.

<sup>207</sup> See Di Jiang, *Judicial Reform in China: New Regulations for a Lay Assessor System*, 9 PAC. RIM L. & POL'Y 569, 584 (2000).

<sup>208</sup> See CENTRAL RESEARCH SERVICES, INC., *supra* note 15.

<sup>209</sup> See *id.*

about “those matters that are required to be decided with the lay judge’s participation.”<sup>210</sup> They should take advantage of this benefit.

Defense attorneys and prosecutors should focus their oral presentations on the lay judges so that they can understand and quickly acquire the sophistication necessary to protect their opinions and determinations when necessary. Procedural safeguards might be implemented to avoid undue judicial influence as well. As discussed above, Japan might consider implementing a debriefing or evaluation system where citizens have the opportunity to file reports about overpowering judicial conduct in the deliberation room.

#### **IV.THE ATTORNEYS: ABILITY TO EFFECT CHANGE**

The new lay jury system will certainly change both the internal and external structure of the criminal justice system. New faces will appear in the courtroom, unfamiliar with legal terminology and lacking the expertise of professional judges. Structurally, courtrooms must be reconfigured to seat nine judges instead of three. Internally, the courts will have to deal with various changes including revamped procedural rules, continuous trials, and untried practices such as *voir dire* and jury deliberations. Without support from defense attorneys and prosecutors, these external and internal changes alone may not have the intended substantive effect. However, with the integration of additional lawyers into the criminal justice system as well as improved advocacy techniques adapted to citizen jurors, the effectiveness of the lay jury system can be enhanced.

##### **A. EFFECTIVE INTEGRATION OF ADDITIONAL CRIMINAL DEFENSE LAWYERS**

Unlike the United States, which has been constantly criticized for having too many attorneys, Japan has faced an acute shortage of lawyers.<sup>211</sup> Particularly in the area of criminal law, the accused have been under-represented<sup>212</sup> and the prosecutors’ office understaffed in

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<sup>210</sup> Anderson & Saint, *supra* note 21, arts. 56-60.

<sup>211</sup> Inagaki, *supra* note 1, at 2.

<sup>212</sup> *Id.*



Japan.<sup>213</sup> Defense lawyers are widely perceived as “protectors of the public’s enemies” and are largely underpaid.<sup>214</sup> Because lay judge trials will now be held on consecutive days, additional pressures will mount on both the defense and the prosecution as trial preparations must be focused and concentrated.

As part of its wave of judicial reform, Japan fortunately decided to increase the number of licensed attorneys. As of 2005, Japan had approximately 22,000 licensed attorneys or one for every 5,790 people, compared with one for every 268 attorneys in the United States.<sup>215</sup> By 2018, the Japanese government intends to double the number of attorneys, prosecutors, and judges.<sup>216</sup> To accomplish this, Japan is abandoning its practice of limiting the bar passage rate from 2-3 percent, in favor of a professional legal education system modeled on U.S. law schools.<sup>217</sup> While Japan is still struggling with the exact number of new attorneys who will pass the bar examination, the bar passage rate in 2006 for graduates of the new professional law schools was slightly below 50 percent.<sup>218</sup>

Although the government does face fiscal restraints and financial ramifications, it should be able to adequately staff the courts and prosecutors’ offices to meet the needs associated with the mixed jury system. The challenge will be in enticing new graduates to become criminal defense attorneys and effectively integrating them into the system. Unfortunately, mere increases in the number of attorneys may not cure the criminal defense attorney shortage. In addition to their poor

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<sup>213</sup> See Ramseyer & Rasmusen, *supra* note 18, at 68-69 (explaining that with limited budgets and reputations to protect, prosecutors take only a small fraction of cases that they consider winnable, while other cases are dropped).

<sup>214</sup> Inagaki, *supra* note 1, at 2.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* It is expected that the number of lawyers in Japan will reach 50,000 by 2018.

<sup>217</sup> See Shin Shiho Shinken, *Goukakuritsu 48%, Houka Daigakuin no Kakusha uki* [New Bar Examination Passage Rate 48%: Differences Raised among Law Schools], CHUNICHI SHIMBUN, Sept. 21, 2006, available at <http://www.chunichi.co.jp/flash/2006092101000657.html> [hereinafter Bar Examination]. In 2004, Japan opened seventy-four new U.S.-style professional law schools. Students with an undergraduate degree in law could obtain an advanced degree in two years, while others could acquire the degree in three years’ time. Students studying at these new law schools are subject to different scoring criteria on the bar examination. In September 2006, the bar examination results for the first class of graduates from the new schools were released. Out of 2,091 test-takers, 1,009 graduates passed the examination. See also Inagaki, *supra* note 1, at 1-2.

<sup>218</sup> See Bar Examination, *supra* note 217. The expected passage rate for future bar examinations is 30 percent.

reputations among the community because they represent “criminals,” defense attorneys are typically poorly compensated.<sup>219</sup> One recent graduate of Japanese law school commented that “it is impossible to make a living by becoming a criminal lawyer,” and there are “so few incentives to become one.”<sup>220</sup> To overcome this issue, Japan should consider improving its presently inadequate legal aid and public defender systems.<sup>221</sup> Also, law schools, the JFBA, and the Legal Research and Training Institute (LRTI) for new attorneys should expose students to the criminal justice system and provide them with practical experience through clinical training, internships, apprentice-type activities, and trial advocacy courses. Through this exposure, prospective attorneys will gain valuable experience and potentially be attracted to a career in criminal law.

## **B. TEACHING “NEW TRICKS” TO AN “OLD DOG” – ORAL ADVOCACY**

Driven by the fictions and non-fictions portrayed in Hollywood movies and television programs, many law students in the United States and other common-law countries are drawn to the legal profession with the dream of heated arguments in court, revealing “smoking guns,” impeaching adverse witnesses, or delivering a compelling closing argument. In these countries, children who enjoy public speaking or debate are often encouraged to employ their talents and interests by becoming attorneys.

Up until now, the road to the Japanese courtroom has been quite different. In general, law students do not aspire to become lawyers so that they can argue in the courtroom. In fact, under the present system, even if prosecutors or defense attorneys have poor communication skills, they assume that the judges will grasp the importance of a witness and relevance of their statements.<sup>222</sup> If not, then the judges will be able to decipher the significance of their arguments based on the submission of written papers. This has been true in both criminal and civil contexts.

With the introduction of lay jury trials in serious criminal cases, the rules have changed. Under the current system, the focus of advocacy

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<sup>219</sup> Inagaki, *supra* note 1, at 2-3.

<sup>220</sup> *Id.* at 3.

<sup>221</sup> See Tom Ginsburg, *Transforming Legal Education in Japan and Korea*, 22 PENN. ST. INT’L L. REV. 433, 437 (2004).

<sup>222</sup> Takasugi, *supra* note 31, at 3.

and evidence has been written submissions to the court.<sup>223</sup> Now, all prosecutors and defense attorneys face a new challenge—they must focus on oral advocacy and how to convince six citizen judges and three professional judges that their respective position is correct. In choosing their profession, current Japanese attorneys were generally not driven by dreams of arguing before a jury. Although the overwhelming majority of criminal defense attorneys support the adoption of jury trials and the benefits that these trials might bring, some attorneys are wary about the sufficiency of their skills and abilities to persuade and advocate their cases to ordinary citizens.<sup>224</sup>

As in the past, prosecutors and defense attorneys will continue to present evidence in hopes of convincing the trier-of-fact. Going forward, however, attorneys will need to adjust their methods and styles of case presentation. If the new lay jury system is going to realize its potential, polished oral advocacy skills and effective communication are vital.<sup>225</sup> This will particularly assist citizen judges to become an integral part of the trial and criminal justice systems. Most citizen judges will be inexperienced in the law. Their impressions, experiences, and knowledge will vary and differ significantly from those of career judges. As such, attorneys need to prepare for the new mixed citizen-career judge jury system and the associated challenges by acquiring more refined skills to communicate with lay people.<sup>226</sup> To accomplish this goal, attorneys should pursue special education, training, or skills development.<sup>227</sup> Japanese lawyers can also focus on many of the established persuasive tools and oral advocacy methods utilized in the United States and integrate them into their future practice. Many of these methods can be selectively adapted to the Japanese environment.

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<sup>223</sup> Takashi Takano, *Saiban-in Saihan to Kouhan Bengou Gijutsu* [Advocacy Techniques for Lay Judge Trials and Hearings], 57 JIYU TO SEIGI [LIBERTY & JUSTICE] 66 (May 2006).

See *Jury Trial Advocacy Seminar With Temple University School of Law*, Japanese Ass'n of Bar Ass'ns, Nov. 11, 2005, <http://www.nichibenren.or.jp/ja/event/attorneys/051101.html>. In organizing and presenting training symposia in 2005 and 2006 for over a thousand criminal defense attorneys around Japan, the author spoke with many attorneys who expressed their anxiety about advocacy before juries. See also Japanese Ass'n of Bar Ass'ns, *Jury Trial Advocacy Seminar With Temple University School of Law—Part 2*, July 20, 2006, <http://www.nichibenren.or.jp/ja/event/attorneys/060720.html>. Professors Ohlbaum and Epps trained criminal defense attorneys in trial advocacy techniques.

<sup>225</sup> See generally Takano, *supra* note 223.

<sup>226</sup> Takasugi, *supra* note 31, at 3.

<sup>227</sup> The JFBA has already started to conduct a variety of training events, including seminars with experts in the field. See *supra* note 223. However, more educational and practical training activities are required for both criminal defense attorneys and prosecutors.

In addition, attorneys will need to carefully consider their target audience. When teaching people from different backgrounds, the scope of case presentation will need to be expanded. With the new jury system in Japan, the nine judges will certainly have different backgrounds. Unlike the lay judges, the career judges will have been through the Legal Research & Training Institute where they are all trained after passing the bar examination. Also, the three career judges will have seen and encountered many criminals. It is possible that the six lay judges will have never knowingly met a criminal or personally encountered a crime in their lifetimes. As such, Japanese prosecutors and defense attorneys will be forced to advocate in a manner that accommodates these different groups.

## **V. CONCLUSION**

The dawn of criminal jury trials in Japan has brought much discussion, hope, and uncertainty. Although Japan faces many challenges as it prepares for the introduction of jury trials involving both professional and citizen judges, preparatory and promotional activities are proceeding at full speed ahead. While forecasts about the new jury system are mixed, there is certainly promise for Japan to use this opportunity to better educate the citizenry about the criminal justice system. In order to claim genuine success, however, Japan will need to move beyond mere education. Measures are needed to ensure that there is meaningful public involvement such that the respect, legitimacy, and fairness in the legal system can be bolstered. Also, rational practices and policies designed to achieve the goals and intentions set forth by the JSRC are necessary. With the implementation of these measures and policies, as well as the cooperation of all actors involved in the lay judge system, there is ample opportunity for Japan to realize success. Japan should grasp this opportunity and ensure that mixed jury trials become a welcome reality.