

CITIZEN JUDGES IN JAPAN: A REPORT CARD FOR THE INITIAL THREE YEARS

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I. INTRODUCTION

Previous literature is critical of the European features of the Japanese jury system, including the joint deliberation by judges and citizens on juries, majority voting, non-waiver of jury trial by the defense, as well as juror confidentiality requirements. This Article presents contrary arguments that the Japanese should maintain the current features of their system and expand the jury system to cover even more criminal offenses, to eventually covering civil cases. The offered recommendations include eliminating prosecutor appeals to maintain legitimacy of the jury system and promulgating procedural rules requiring that lay jurors deliberate and vote separately from the professional judges.

During the past twelve years as an Orange County Judge in Orlando, Florida, I had the privilege of presiding over many criminal jury trials. I prosecuted state crimes early in my legal career. Recently, I observed the public's reaction to one of the highly publicized jury trials to take place inside the courthouse where I presided. In the case of *Florida v. Case Anthony*,¹ the extensive international media coverage furthered the public's interest in our local state jury system. When the verdict was published, groups and individuals expressed their adamant pleasure or displeasure with the verdict. As it typically occurs with intense media coverage of trials, citizens begin to take a closer look at the role of juries. Those who agreed with the verdict praised the modern US jury system. Those who disagreed with the verdict discredited the jury.

During my years of judicial service, I also had unique opportunities to meet with foreign judges from Brazil and South Korea. Foreign judges generally schedule visits to US courts when their respective countries are considering changes to their court system.² During one such visit, I

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1. *State v. Anthony*, No. 48-2008-CF-15606-O, 2011 WL 7463889 (Fla. Cir. Ct. Mar. 18, 2011). The defendant was charged with first degree murder of her young daughter. The jury rendered a verdict of not guilty of the first degree murder charges and the defendant was convicted of several misdemeanors. The defendant appealed the judgment and sentence of the court on the misdemeanor offenses, and two of misdemeanor charges were reversed on appeal.

2. Japan, China, South Korea, Spain, Russia, and the Republic of Georgia have

questioned a South Korean Judge about his country's interest in expanding the role of juries. The judge explained that some judicial rulings were unpopular and that the public would better receive lay citizen verdicts and have more confidence in jury decisions.³ Ironically, unpopular judge verdicts led to a public interest in a Korean all lay jury system.

When I visited Tokyo and Kyoto, I could not help but notice the extremely low concern for crimes. To the casual observer, Japanese citizens expressed no concern for crimes of any nature. I was surprised to see women leaving their purses and businessmen leaving their laptops unattended at lunch tables while they briefly stepped away.

In 2012, Japan marked the completion of the initial three year period of its new lay adjudication court system.⁴ The three year report was anticipated in 2012 and should be forthcoming in 2013. Many scholars have criticized certain aspects of Japan's unique *saiban-in* jury system.

In 2009, in its first post-war effort to reintroduce a citizen jury system, Japan implemented a mixed tribunal using citizen participation.⁵ The mixed tribunal, or quasi-jury, system adopts some features of a traditional common law jury system similar to that which exists in the United States.⁶ The *saiban-in* system further adopts some features from the continental European influenced mixed jury systems.⁷ Lastly, Japan has

introduced or reintroduced the use of juries in criminal trials. Few countries outside the United States, Canada, and Great Britain use juries for civil cases, and then only in limited cases. Therefore, this Article will not address civil cases. However, Professor Matthew J. Wilson proposes that Japan expand the use of juries into civil cases. See Matthew J. Wilson, *Prime Time for Japan to Take another Step Forward in Lay Participation: Exploring Expansion to Civil Trials*, 46 AKRON L. REV. (forthcoming 2013).

3. South Korea introduced an all lay jury system in 2008. See Jae-Hyup Lee, *Korean Jury Trial: Has the New System Brought About Changes?*, 12 ASIAN-PAC. L. & POL'Y J. 58 (2010).

4. On May 21, 2004, the Diet enacted Saiban'in no sanku suru keiji saiban ni kansuru hōritsu [Act Concerning Participation of Lay Judges in Criminal Trials] Law No. 63 of 2004 (Japan), translated in Kent Anderson & Emma Saint, *Japan's Quasi-Jury (Saiban-in) Law: An Annotated Translation of the Act Concerning Participation of Law Assessors in Criminal Trials*, 6(1) ASIAN-PAC. L. & POL'Y J. 233 (2005) [hereinafter Lay Assessor Act].

5. Japan adopted the *Saiban-in* system, which is referred to by many names. Throughout this Article, the Japanese reformed system shall be referred to as "*Saiban-in*" or "lay assessor" jury system.

6. The lay juror members are selected at random from a list of eligible voters. Similar to the United States common law jury system, lay jurors decide issues of fact, and not law, and serve for one case only. Lay Assessor Act, *supra* note 4, at 234, 241-43.

7. German criminal courts utilize mixed courts where lay jurors sit side by side with professional judges. Throughout this Article, a "lay juror" shall mean a non-lawyer citizen member of the public who is not formally trained nor educated about the law or courts and who is summoned by a court to serve on a jury. A "professional judge" shall mean an individual elected or appointed to serve as a judge in a full time paid position. In Germany, for example, lay jurors serve for a length of time and render service on multiple cases until discharged.

introduced some very unique aspects to its jury system.⁸

The Japanese mixed tribunal generally consists of three professional judges and six lay members of the public who sit and deliberate together as a jury.⁹ The quasi-jury presides over criminal cases where the sentence can be death or life imprisonment, as well as offenses involving the death of a victim from an intentional act. The jurors decide both the guilt of an accused¹⁰ and an appropriate sentence upon conviction.¹¹ The jurors' verdict is derived from a combined majority vote,¹² including at least one vote of a judge.¹³

The *saiban-in* system incorporates many continental European-style mixed court features.¹⁴ Just like modern US jurors, Japanese jurors may question witnesses¹⁵ and victims who provide a statement in court.¹⁶ Either party may appeal a verdict, and due to the ability of a prosecutor to appeal an acquittal, many cases are retried.¹⁷ Japanese jurors face severe penalties for disclosing information about the trial and jury deliberations.¹⁸

This Article includes both a comparative and historical evaluation of the reformed Japanese criminal jury system. The Article first reviews the

8. Historically, Japanese law has evolved from early Chinese influences, followed by French and German impact, and then US style views incorporated into the Japanese Constitution during the World War II occupation. Luke Nottage, et al., *Japan Final Report for United Nations Development Programme, Viet Nam* (July 30, 2010) in RESEARCH STUDIES ON THE ORGANISATION AND FUNCTIONING OF THE JUSTICE SYSTEM IN FIVE SELECTED COUNTRIES (CHINA, INDONESIA, JAPAN, REPUBLIC OF KOREA AND RUSSIAN FEDERATION) [hereinafter UN REPORT].

9. Lay Assessor Act, *supra* note 4, at 233, 237. Cases involving undisputed facts, especially where the Defendant has confessed, are generally tried before a small court consisting of one professional judge and four lay jurors. *Id.* at 233.

10. In US court opinions and legal scholarship, a person accused of a crime, regardless of the stage of the prosecution, is frequently referred to as a defendant, suspect, arrestee, or an accused. In this Article, for the sake of consistency and clarity, a person accused of a crime shall be referred to as the "accused" or the "defendant." As used in this Article, the accused (singular and plural) or the defendant may be a person or persons investigated, detained, arrested, charged by the prosecution, or convicted of a crime.

11. Lay Assessor Act, *supra* note 4, at 233.

12. *Id.* at 273.

13. *Id.*

14. See generally Stephen C. Thaman, *Should Criminal Juries Give Reasons for Their Verdicts?: The Spanish Experience and the Implications of the European Court of Human Rights Decision in Taxquet v. Belgium*, 86 CHI.-KENT L. REV. 613, 618 (2011) (Mixed jury courts have some favorable features including the ability to address questions of fact and law and the ability to provide reasoned verdicts by professional judges.).

15. Lay Assessor Act, *supra* note 4, at 267.

16. *Id.* at 268.

17. See Arne F. Soldwedel, *Testing Japan's Convictions: The Lay Judge System and the Rights of Criminal Defendants*, 41 VAND. J. TRANSNAT'L L. 1417, 1444-45 (2008).

18. Lay Assessor Act, *supra* note 4, at 277-278.

history of the jury system in pre-war Japan.¹⁹ It then explores the political and economic climate influencing the many Japanese judicial reforms. The Article identifies key issues concerning courts, police conduct, prosecution, legal education, and the legal profession as a whole.²⁰ The Article addresses the initial skepticism and competing interests of the public, government, courts, and defense attorneys.

The Article details and evaluates the initial three-year period of Japan's new lay adjudication court system. In a sense, this Article serves as a report card of this start up period. It attempts to evaluate the advantages and disadvantages of the current lay jury system; describes the opinions offered by former lay jurors, members of the public, and legal scholars; and identifies competing interests and challenges expressed by Japanese attorneys.²¹

American scholars criticize the European features of the Japanese jury system including: the combination of judges and citizens on juries, majority voting, non-waiver of jury trial by the defense, and juror confidentiality requirements. The Article recommends that not only should these current features be maintained in the Japanese system, but the jury system should be expanded to address even more criminal offenses, and eventually civil cases. These recommendations do, however, include eliminating prosecutor appeals to maintain legitimacy of the jury system, and promulgating court rules to require lay assessors to deliberate separately from the judges with their votes being combined to determine a majority vote.

II. HISTORY OF JURIES

For centuries, England maintained a jury system for both criminal and civil cases.²² When the English empire expanded, the common law jury system was incorporated into the English colonies in the United States, Africa, and Asia.²³ In the United Kingdom (England and Wales), jury trials

19. Jury trials existed in Japan before World War II. See Anna Dobovolskaia, *Japan's Past Experiences with the Institution of Jury Service*, 12 ASIAN-PAC. L. & POL'Y J. 1, 11-17 (2010).

20. The reforms addressed improvement to civil court cases by creation of the Intellectual Property Courts and development of graduate level law schools. See JUSTICE SYSTEM REFORM COUNCIL, RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL: FOR A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE 21ST CENTURY (2001), available at http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612_e.html [hereinafter JSRC INTERIM REPORT] (Jun 12, 2001).

21. The Japan Federation of Bar Associations ("JFBA") represents the interests of the Japanese attorneys. See Japan Fed'n of Bar Associations, *What is the JFBA?*, <http://www.nichibenren.or.jp/en/about/us/profile.html> (last visited July 1, 2013).

22. Neil Vidmar, *A Historical and Comparative Perspective on the Common Law Jury* in WORLD JURY SYSTEMS 1, 7 (Neil Vidmar ed., 2000).

23. *Id.* at 2.

are now very rare and almost non-existent in civil cases.²⁴ Jury trials still exist in England in a small number of serious criminal cases.²⁵ Interestingly, the civil jury remains in only the United States and parts of Canada.²⁶

In America, juries are still widely used in both criminal and civil cases. Some scholars express concern that the use of jury trials is steadily declining in the United States and the United Kingdom.²⁷ One author cautioned that if the decline continues, the jury system could become just a “symbol of democracy.”²⁸ The modern US jury system is one of the few that provides jury trials for criminal cases. In the State of Florida, juries hear misdemeanor criminal cases.²⁹ The lay jury were instituted for the following three main roles: (1) to operate as a check and balance against judicial and governmental overreaching; (2) to allow for meaningful citizen participation in the democratic process; and (3) to act as an essential figure in the administration of justice.³⁰

The early US juries were seen as an institution furthering citizen participation in government. The jury was perceived as an educational tool. Alexis de Tocqueville described the US jury as “a gratuitous public school.”³¹ Today, juries continue to educate the public about the court system. They educate the public about citizen governance and further promote democracy as a result. Juries inject the public values from within their local communities and increase the legitimacy of the judicial branch.

Americans envisioned that the jury system would encourage citizens to affect judicial decision-making thereby creating a balance between government and citizens.³² During the early Colonial period of the United States, juries were seen as a check against British tyranny and the power of judges.³³ For example, the American founders used the jury system to shield the colonists from the oppressive prosecution of the British.³⁴ However, the same jury power has been used by jurors in the Southern part

24. *Id.* at 7.

25. *Id.*

26. *Id.*

27. See Valerie P. Hans, *Introduction: Citizens as Legal Decision Makers: An International Perspective*, 40 CORNELL INT’L L.J. 303, 305 (SPECIAL ISSUE) (2007).

28. *Id.*

29. In Florida, misdemeanor offenses are punishable by less than one year in jail. FLA. STAT. ANN. § 775.082 (WEST 2011).

30. Jon P. McClanahan, *Citizen Participation in Japanese Criminal Trials: Reimagining the Right to Trial by Jury in the United States*, 37 N.C.J. INT’L L. & COM. REG. 725, 727 (2012).

31. *Id.* at 736; See 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 337 (Henry Reeves trans., Schocken Books 1961) (1835).

32. McClanahan, *supra* note 30, at 737.

33. *American Juries*, IIP DIGITAL US EMBASSY (July 1, 2009), <http://iipdigital.usembassy.gov/st/english/publication/2009/07/20090706173035ebyessedo0.8885418.html#axzz2sa2sk2kj>.

34. *Id.*

of the US to exonerate white criminal defendants accused of committing crimes against black victims.³⁵ As a consequence, judges now instruct juries that they shall follow the law even if they do not agree with the law and criminal defense lawyers are prohibited from requesting that a jury disregard the law and acquit a defendant.³⁶ In reality, modern US criminal juries render general verdicts, which do not contain findings of fact or reasoning for their verdicts. This means that when a criminal jury verdict is rendered, the public and court participants remain without knowledge of the jury thought process.

A. Waiver of Jury Trial and Juror Sentencing

In early England, the accused did not have the right to waive a jury trial.³⁷ If the accused did not consent to a jury trial, he was tortured until he consented. Later, the accused who did not consent to a jury trial was treated as if he pled guilty.³⁸ In early Colonial America, most states and federal courts did not allow the accused to waive jury trial. In 1931, the US Supreme Court ruled contrary in *Patton v. United States* and held that an accused could, in fact, waive jury trial.³⁹ In *Singer v. United States*, the US Supreme Court clarified that the right to waive jury trial was not absolute and could be contingent upon the prosecutor or court approval.⁴⁰ Currently, most US courts permit the accused to waive the jury trial.

The reformed Japanese jury system does not provide for the accused to waive the right to jury trial⁴¹. Many US scholars have criticized this provision.⁴² However this Japanese court feature is very similar to the longstanding non-waiver provision in continental European jury systems as well as early US court features.

In the reformed Japanese court system, the jury determines the guilt of an accused and an appropriate sentence. In early US colonial cases, jurors actually impacted sentencing by refusing to convict in death penalty cases. Some would refer to this as a "jury nullity." When the jurors simply believed that the mandatory death penalty was too harsh for the criminal offense charged, they rendered a general verdict of acquittal even when the accused had committed the offense. Therefore, the jury did in fact play a

35. See generally Vidmar, *supra* note 22, at 10.

36. E.g., FLORIDA SUPREME COURT, *Special Jury Instructions*, http://www.floridasupremecourt.org/jury_instructions/instructions.shtml (last visited July 1, 2013).

37. McInahan, *supra* note 30, at 743.

38. *Id.*

39. *Patton v. United States*, 281 U.S. 276, 312 (1930).

40. *Singer v. United States*, 380 U.S. 24, 37 (1965).

41. David T. Johnson, *Early Returns from Japan's New Criminal Trials*, 36 ASIA-PAC. J 3 (2009), available at http://japanfocus.org/-david_t_-johnson/3212#.

42. *Id.*

role in sentencing.

In early America, many states provided for juror sentencing. In the nineteenth century, half of the US states permitted juror sentencing in non-capital cases.⁴³ Many other states allowed for jury sentencing recommendations in non-capital offenses.⁴⁴ Today, only the following five states still provide for jury sentencing: Arkansas,⁴⁵ Missouri,⁴⁶ Oklahoma,⁴⁷ Texas,⁴⁸ and Virginia.⁴⁹

B. Mixed Courts

Mixed court systems originated in continental Europe and are currently used in many various forms throughout Europe. Mixed courts were used in Russia commencing in 1864 until abolition by the Bolsheviks in 1917.⁵⁰ These mixed juries became more commonly used in Germany.⁵¹ Today, many European countries have adopted their own unique version of the mixed court system.

Mixed courts use juries composed of both professional judges and non-lawyer lay citizens (“lay assessors”). The professional judges and lay assessors sit side by side as a joint jury, deliberate together, and render their jury verdict answering questions of fact, law, and sentencing. Mixed jury criminal court systems vary regarding the types of offenses covered, size of the jury, ratio of judges to lay assessors, vote required to convict or acquit, length of service, waiver provisions, appeals, and type of verdict.

First, unlike the United States, most European mixed courts are available for only the most serious criminal offenses. In Italy, France, and Germany, for example, mixed juries generally preside over criminal offenses where defendants are subject to life imprisonment or the death penalty.⁵² Each country varies in the number of professional judges and the number of lay assessors empaneled on the jury.⁵³ A vote of guilty could be

43. Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 964 (2003).

44. *Id.*

45. See ARK. CODE ANN. § 5-4-103 (West 2011).

46. See MO. ANN. STAT. § 557.036 (West 2011).

47. See OKLA. STAT. ANN. tit. 22, § 926.1 (2012).

48. See TEX. CODE CRIM. PROC. ANN art. 37.07 (West 2011).

49. See VA. CODE ANN. § 19.2-295 (West 2007).

50. Stephen C. Thaman, *Europe's New Jury Systems: The Cases of Spain and Russia*, in WORLD JURY SYSTEMS 323 (Neil Vidmar ed., 2000) (An all lay jury system was introduced in Russia in 1993. *Id.* at 233).

51. See *infra* note 52 & 55.

52. Daniel Senger, *The Japanese Quasi-Jury and the American Jury: A Comparative Assessment of Juror Question and Sentencing Procedures and Cultural Elements in Lay Judicial Participation*, 2011 U. ILL. L. REV. 741, 748 (2011).

53. Ethan J. Leib, *A Comparison of Criminal Jury Decisions Rules in Democratic Countries*, 5 OHIO ST. J. CRIM L. 629, 633 & 640-41 (2008).

determined by a majority, super majority, or unanimous vote, as required by law.⁵⁴ Lay assessors can be utilized for one case only or for multiple cases, as exists in Germany.⁵⁵ In many countries, including common law countries such as Canada and Australia, and in Russia, prosecutors may appeal acquittal verdicts.⁵⁶

In Japan, jurors play an important role by injecting community values and common sense into the proceedings. Some argue that professional judges in mixed court deliberations dominate over the lay jurors.⁵⁷ In Russia's prior mixed court system, lay jurors were referred to as "noddors," accused of deferring to, or nodding in agreement with, the professional judges.⁵⁸ In Germany, the lay members have been called puppets.⁵⁹ In Japan, most cases have uncontested facts. With juror sentencing, however, lay jurors may be more likely to have some impact on the outcome.

C. *Expansion of All Lay Juries*

Notwithstanding the popularity of mixed juries, several European and Asian countries have implemented jury systems with juries consisting of all lay assessors with one professional judge presiding over the proceeding. All lay assessor juries have traditionally been incorporated into common law court systems in the United States, Canada, Australia, Hong Kong and the United Kingdom.

More recently, countries without a common law or English heritage have embraced an all lay assessor system with variations. Spain and Russia have incorporated all lay assessor courts.⁶⁰ These juries render special verdicts where they are asked to answer specific questions in their findings, rather than the general verdict of "guilty" or "not guilty" used in US criminal courts. The Spanish and Russian "question list" is not unlike the interrogatory verdicts used in US civil case verdicts.

Korea introduced an all lay assessor jury system in 2008.⁶¹ The Korean all lay assessor jury renders a general verdict. However, the verdict is not binding on the professional judge presiding over the proceeding, as

54. MARTIN F. KAPLAN & ANA M. MARTIN, UNDERSTANDING WORLD JURY SYSTEMS THROUGH SOCIAL PSYCHOLOGICAL RESEARCH 114 (2006).

55. *Id.* at 113.

56. Vidmar, *supra* note 22, at 45-46.

57. Douglas G. Levin, *Saibin-in seido: Lost in Translation? How the Source of Power Underlying Japan's Proposed Lay Assessor System May Determine its Fate*, 10 ASIAN-PAC. L. & POL'Y J. 207 (2008).

58. Stephan C. Thaman, *The Nullification of the Russian Jury: Lessons for Jury-Inspired Reform in Eurasia and Beyond*, 40 CORNELL INT'L L.J. 355, 357 (2007).

59. Stefan Machura, *Interaction between Lay Assessors and Professional Judges in Germany Mixed Courts*, 72 INT'L REV. PENAL. L. 451 (2001).

60. Thaman, *supra* note 50.

61. Jae-Hyup Lee, *supra* note 3.

the jury verdict is advisory in nature.⁶² The reformed Korean system will proceed with a five-year introductory period and is subject to review in 2013.⁶³ The all lay jury retires to deliberate in secrecy attempting to reach a unanimous verdict on guilt.⁶⁴ If the jurors are unsuccessful in reaching unanimity, then the professional judge states an opinion on guilt.⁶⁵ The jury then retires again to deliberate in secrecy and reach a majority verdict on guilt. If a verdict of guilt is rendered, the jury discusses sentencing with the professional judge.⁶⁶

In 2010, the Republic of Georgia enacted legislation to institute an all lay assessor jury system.⁶⁷ Georgia has implemented a US style jury system. This system became effective throughout the Republic of Georgia on July 1, 2012.⁶⁸ The juries consist of 12 lay assessors and two substitutes (alternate jurors).⁶⁹ The jury must deliberate with an attempt to reach a unanimous verdict for at least three hours.⁷⁰ If unable to reach unanimity, the jury then retires to reach a super majority vote of 10 to 2 to convict.⁷¹

HISTORY OF JURIES IN PRE-WAR JAPAN

A. *Meiji Period Sanza System in 1870s*

Japan attempted to maintain a jury system during two different pre-war eras. The first was in the 1870s during the Meiji Period with the *sanza* system.⁷² The *sanza* jury panel was implemented for a sole trial involving a high profile dispute.⁷³ The panel was created for the first trial involving both the Counselor and Governor of the Kyoto Prefecture.⁷⁴ A second unique panel was formed and convened two years later for a single trial involving the assassination of the Counselor of State.⁷⁵ For each of the two trials, specific *sanza* rules were created and utilized.⁷⁶ In the first trial, the jury performed a fact-finding function similar to that of the modern US

62. *Id.* at 58, n.3.

63. *Id.*

64. *Id.* at 64.

65. *Id.*

66. *Id.*

67. Peter Roudik, *Georgia: Courts with Jurors Established Nationwide*, THE LIBRARY OF CONG (Nov. 9, 2011), http://www.loc.gov/lawweb/servlet/lloc_news?disp3_1205402877_text.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. McClanahan, *supra* note 30, at 746. See Dobrovolskaia, *supra* note 19, at 6-7.

73. McClanahan, *supra* note 30, at 746.

74. *Id.* at 747.

75. *Id.*

76. *Id.*

common law jury and rendered a verdict.⁷⁷ In the second trial, the jury's role was expanded. The *sanza* jury in the second trial entered a verdict of guilty.⁷⁸ However, the *sanza* jury was also charged with the duties of evaluating the quality of pre-trial investigations and commenting on the Court's actions.⁷⁹

It is unclear why Japan utilized juries in these rare and isolated instances. Several assumptions exist. Japan demonstrated an interest in the use of a jury following colonial America's successful expansion of its own jury system. The Japanese perhaps believed that it was important to use the jury in high profile cases involving government figures to add credibility to the process. Using a jury in high profile cases may have also offered political insulation to key decision making figures.

B. Influence of French Civil System

The French inquisitorial system was established in Japan by enactment of the 1880 Code of Criminal Instruction.⁸⁰ The 1889 Japanese Constitution also provided the defendant with the right to counsel in a criminal proceeding.⁸¹ Under the Code of Criminal Instruction, the judge questioned suspects and gathered evidence.⁸² The prosecutors played a dominant role and the main goal of the legal professionals (judges and prosecutors) was to discover the truth.⁸³ Japan's justice system is a civil law system based on the legal codes of France and Germany.⁸⁴ The Japanese Civil Code was enacted in 1898.⁸⁵ Japan's Criminal Code of 1907 was based partly on German law⁸⁶ where legislation remains the source of law.⁸⁷

C. Showa Period Jury System: 1928-1943

In 1923, the Japanese Diet (national legislature) enacted *Baishin Ho* [Jury Act], thereby creating a jury system.⁸⁸ The jury system operated in

77. *Id.*

78. *Id.*

79. *Id.*

80. Ingram Weber, *The New Japanese Jury System: Empowering the Public, Preserving Continental Justice*, 4 E. ASIA L. REV. 125, 130 (2009).

81. *Id.*

82. *Id.*

83. *Id.* at 131.

84. Senger, *supra* note 52, at 744; see KENNETH L. PORT & GERALD PAUL MCALINN, *COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN* 32-33 (2d ed. 2003).

85. Senger, *supra* note 52, at 744.

86. *Id.*

87. Weber, *supra* note 80, at 131 & 138.

88. McClanahan, *supra* note 30, at 748. See *Baishin Ho* [The Jury Act], Law No. 50 of 1923 (Japan).

Japan between 1928 and 1943 during the early *Showa* period.⁸⁹ *The Jury Guidebook*, published in 1931 by the Japan Jury Association [*Dai Nippon Baishin Kyokai*], sheds light on the successes and shortcomings of this jury system.⁹⁰

Serving as a juror was a high honor and duty.⁹¹ The Japan Jury Association (“Association”) stressed that the judiciary was the only branch of government that did not include public participation.⁹² In *The Jury guidebook*, the Association stated that the spirit of the jury system was to increase public trust in the justice system through citizen participation and that improved public knowledge and understanding would lead to smoother court operations.⁹³

This twelve person US style jury system was Japan’s most significant pre-war experience with juries.⁹⁴ This Japanese jury system included many features similar to the US jury system. However, significant distinctions existed, which many scholars attribute for its demise. First, the Japanese courts used magistrates to determine whether sufficient grounds of guilt existed before sending a case to a jury trial.⁹⁵ If insufficient grounds existed, the magistrate would simply dismiss the case.⁹⁶ Second, the Japanese courts held pre-trial conferences to review trial preparation procedures (*kohan junbi tetsuzuki*).⁹⁷ If the suspect confessed, then the case would proceed under standard court procedures before a professional judge.⁹⁸ If the suspect did not confess, then the case would proceed to a jury trial if the charge otherwise warranted a jury trial.⁹⁹ Third, defendants could waive a jury trial in the most serious cases or were required to assert a demand in the less serious cases.¹⁰⁰

Two categories of criminal cases were eligible for a jury trial.¹⁰¹ The first category is crimes designated by law (*hotei baishin jiken*).¹⁰² These crimes were generally punishable by the death penalty or life imprisonment;¹⁰³ the accused could waive the right to a jury trial.¹⁰⁴ The

89. Senger, *supra* note 52, at 745.

90. Anna Dobrovolskaia, *The Jury System in Pre-War Japan: An Annotated Translation of “The Jury Guidebook”* (Baishin Tebiki), 9 *ASIAN-PAC. L. & POL’Y J.* 232, 237 (2008).

91. *Id.* at 248.

92. *Id.* at 250.

93. *Id.*

94. *Id.* at 232.

95. *Id.* at 253.

96. Dobrovolskaia, *supra* note 90, at 253-54.

97. *Id.* at 254.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. Dobrovolskaia, *supra* note 90, at 254.

103. *Id.*

second category of cases allowed for jury trials upon the accused's request (*seikyu baishin jiken*).¹⁰⁵ These cases included crimes such as larceny, fraud, embezzlement, and forgery that are punishable by more than three years of incarceration.¹⁰⁶ As a result of the sentencing parameters, jury trials were not authorized for many minor offenses, such as simple theft, embezzlement, and gambling.¹⁰⁷ Requests for jury trial were required to be submitted within ten days of receiving the summons and the accused could submit a "withdrawal of jury trial request."¹⁰⁸

Last, these pre-war Japanese juries did not render general verdicts.¹⁰⁹ Rather, these pre-war Japanese criminal juries answered specific interrogatories regarding the facts (*toshin*) of the alleged crime.¹¹⁰ Following the jury instructions, the Judge delivered a question sheet (*monsho*) containing questions of fact to the lay jury.¹¹¹ The juries were tasked with answering main questions (*shumon*), supplementary questions (*homon*), and other questions (*betsumon*).¹¹²

The main questions required the jurors to deliberate on the existence or absence of facts supporting the elements of the offense.¹¹³ These were the most important questions and were sometimes followed by supplementary questions involving factual determinations other than the elements of the crime.¹¹⁴ Answers were sought in a "yes" or "no" format and the verdicts, or interrogatory answers, only required a majority vote of the twelve jurors.¹¹⁵ The jury foreperson asked each juror for his or her opinion followed by the foreperson providing an opinion.¹¹⁶ The deliberations were confidential and the jurors played no role in sentencing.¹¹⁷

Of significance, criminal cases were re-tried repeatedly following a "not guilty" verdict.¹¹⁸ If the judges accepted the decision, a *koso* appeal of the facts was prohibited.¹¹⁹ Rather, if the judges rejected the jury's verdict, they would simply dismiss the jury and submit the case to a new jury to try

104. *Id.*

105. *Id.*

106. *Id.*

107. Lester W. Kiss, *Reviving the Criminal Jury in Japan*, 62(2) LAW & CONTEMP. PROBS. 261, 267 n.57.

108. Dobrovolskaia, *supra* note 90, at 255-56.

109. Kiss, *supra* note 107, at 267 n. 57.

110. *Id.* at 267. Spain and Russia, along with five other European countries, have introduced jury systems where the juries answer interrogatory style question lists in their verdicts. See Thaman, *supra* note 14, at 619.

111. Dobrovolskaia, *supra* note 90, at 269.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 270.

116. *Id.*

117. *Id.* at 248, 271.

118. *Id.* at 272.

119. *Id.*

the case *de novo*.¹²⁰ In practice, this system permitted unlimited re-trials,¹²¹ which would continue until the decision of the jury and the decision of the judges matched (“the revision of the jury”).¹²² This is contrary to the US jury system where an accused cannot be retried after an acquittal.¹²³ In *The Jury Guidebook*, the Association explained this distinction as a “defect of foreign jury systems” and proudly described Japan’s unique goal to preserve strict fairness.¹²⁴

However, appeals on matters of law (*jokoku*) were permitted by either party.¹²⁵ For example, a party could appeal procedural errors of the trial court; such as the judge inserting an opinion in the jury instruction or that a juror was ineligible by law to serve.¹²⁶ If the verdict was reversed by the appellate court, the Great Court of Judicature would decide whether a new trial would be granted by the same trial court judges or by another court.¹²⁷

Jurors were encouraged to question the accused and witnesses “without any feelings of embarrassment and without reservation”¹²⁸ with the judge’s approval. Initially, jurors were observed to pose relevant questions missed by the attorneys.¹²⁹ In subsequent years, the jurors seemed to lack enthusiasm in questioning.¹³⁰

Jurors were prohibited from disclosing details of the deliberations, including the other jurors’ opinions, and the voting distribution.¹³¹ Jurors leaking the confidential information would face a fine up to 1,000 Japanese yen.¹³² If the information was published in the newspaper or other print material, the author could be fined up to the amount of 2,000 Japanese yen.¹³³

Initially, the jury system was accepted and used.¹³⁴ In 1929, 143 cases were tried.¹³⁵ However, in 1930, only sixty-six cases were tried.¹³⁶ In 1942, only two cases were tried.¹³⁷ The Jury Act was suspended in 1943.¹³⁸ The

120. Kiss, *supra* note 107, at 268. See Baishinho [Jury Act], Law No. 50 of 1923, art. 91.

121. Dobrovolskaia, *supra* note 90, at 272.

122. *Id.*

123. U.S. CONST. amend. V (the theory of Double Jeopardy prohibits an accused from being tried for the same offenses twice).

124. Dobrovolskaia, *supra* note 90, at 272.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 267.

129. Dobrovolskaia, *supra* note 90, at 267.

130. *Id.*

131. *Id.* at 271, 274.

132. *Id.* at 274.

133. *Id.*

134. McClanahan, *supra* note 30, at 750.

135. *Id.*

136. *Id.*

137. *Id.*

jury tried only 611 cases in the fifteen years of the jury system.¹³⁹

Legal scholars have debated the reasons for the demise of the pre-war jury system.¹⁴⁰

First, the numerous re-trials rendered the Japanese jury verdicts meaningless, as the verdicts became mere recommendations or suggestions.¹⁴¹ Second, the juries were used in only a limited cases, as the accused frequently waived the right to a jury trial or did not “opt in” or demand the right to a jury trial in the lesser cases.¹⁴² This pre-war jury system hardly furthered public participation or education nor did it build public trust in the courts.

Another reason for the failure of this jury system can be attributed to the then changing political and social climate in Japan.¹⁴³ In 1923, at the time the Jury Act was instituted, Japanese citizens were moving toward democracy.¹⁴⁴ By 1928 when the jury trial system actually commenced, the country was experiencing rising militarism and was moving toward fascism.¹⁴⁵ Criminal defendants were encouraged to waive the right to jury trial out of fear that their decision would work against them at trial.¹⁴⁶ As a result, juries were rarely used and the jury system was suspended.¹⁴⁷

IV. CLIMATE FOR REFORM

In May 2004, the Japanese Diet passed the Lay Assessor Act, thereby creating the lay assessor system or *saiban-in seido*, which became effective in 2009.¹⁴⁸ At the time, Japan was the only Group of Eight (G8) country without some form of lay jury system.¹⁴⁹

In the late 1980s and 1990s, Japanese judicial reform was sought from several groups: (1) the Ministry of Justice; (2) the Secretariat of the Supreme Court; (3) the Japanese Federation of Bar Association (JFBA); (4) the Federation Association of Corporative Executives; and (5) political parties like the Liberal Democratic Party (LDP) and the New Clean

138. *Id. See Baishin Ho no Teishi Ni Kansuru Horitsu* [An Act to Suspend the Jury Act], Law No. 88 of 1943 (Japan).

139. Kiss, *supra* note 107, at 267.

140. *Id.*

141. *See id.* at 268; Dobrovolskaia, *supra* note 90, at 272.

142. Kiss, *supra* note 107, at 268-69.

143. *Id.* at 268.

144. *Id.* at 267-68.

145. *Id.* at 268.

146. *Id.*

147. *Id.* at 266.

148. Dobrovolskaia, *supra* note 90, at 231-32.

149. Matthew J. Wilson, *Japan's New Criminal Jury Trial System: In Need of More Transparency, More Access, and More Time*, 33 FORDHAM INT'L L.J. 487, 488 (2010). *See Lay Judge System Starts in Japan amid Lingering Concerns*, ASSOCIATED PRESS, May 20, 2009, available at http://www.pddnet.com/news/2009/05/lead-lay-judge-system-starts-japan-amid-lingering-concerns?qt-recent_blogs=0.

Government Party.¹⁵⁰ The Japanese Supreme Court and the Ministry of Justice held common ground in increasing the number of judges and prosecutors.¹⁵¹ To further this objective, they sought to increase the number of people passing the national exam.¹⁵² The JFBA opposed this plan.¹⁵³ In 1982, the Research Group on Jury Trial (RGJT), comprised of prominent figures from within the Japanese legal community, became the first civic group to recommend re-introducing a jury system in post-war Japan.¹⁵⁴ The group supported an all citizen jury system¹⁵⁵ and opposed a mixed jury system.¹⁵⁶

In 1989, Japan saw a burst of its financial bubble and the country faced a long economic recession.¹⁵⁷ The government initiated reforms to address its economic crisis.¹⁵⁸ Various government changes were developed to improve public trust, decentralize government, increase transparency, and improve democratic ideals.¹⁵⁹ Reforms were introduced to improve judicial supervision of elections and protect corporate shareholder rights.¹⁶⁰ New laws improved governmental transparency by addressing freedom of information.¹⁶¹ Lastly, wide ranging reforms began in the civil and criminal courts to promote deliberative democracy.¹⁶²

Business groups sought improvements in civil litigation.¹⁶³ Business leaders proposed the recruitment of new judges from among lawyers holding business experience.¹⁶⁴ Efforts were made to speed up civil trials.¹⁶⁵ Further, new courts were created to handle matters involving intellectual property¹⁶⁶ and small claims cases.¹⁶⁷

150. Hiroshi Fukurai, *Peoples Panels vs. Imperial Hegemony: Japan's Twin Lay Justice Systems and the Future of American Military Bases in Japan*, 12 *ASIAN-PAC. L. & POL'Y J.* 95, 104, (2010).

151. *Id.* at 105.

152. *Id.*

153. *Id.*

154. Hiroshi Fukurai, *The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participating Experience in Japan and the U.S.*, 40 *CORNELL INT'L L.J.* 315, 317 (2007).

155. *Id.* at 318.

156. *Id.* at 320.

157. Weber, *supra* note 80, at 149.

158. *Id.*

159. *Id.* at 150.

160. *Id.*

161. *Id.*

162. *See generally Id.*

163. Fukurai, *supra* note 150, at 106.

164. *Id.*

165. *Id.* at 105.

166. INTELLECTUAL PROPERTY HIGH COURT, <http://www.ip.courts.go.jp/eng/aboutus/history/index.html> (last visited July 1, 2013).

167. *See generally* THE JAPANESE JUDICIAL SYSTEM, <http://www.kantei.go.jp/foreign/>

Criminal courts faced criticism over both procedural and substantive concerns.¹⁶⁸ First, criminal cases were taking too long to get to trial and the trials were not held on consecutive days.¹⁶⁹ Second, prosecutors maintained a 99.9% conviction rate.¹⁷⁰ Third, law enforcement interrogation tactics raised skepticism as a result of the high emphasis on confessions obtained during custodial interrogation.¹⁷¹ Lastly, public attention has been focused on four death penalty cases involving wrongful convictions.¹⁷² In the 1970's and 1980's, four Japanese men were sentenced to death row following their respective murder convictions (Menda, Zaidagawa, Matsuyame, and Shimada cases).¹⁷³ After decades of imprisonment, their convictions were reversed on appeal when higher appellate courts reviewed concerns involving the police interrogation and confessions.¹⁷⁴ The men were acquitted after they served a combination of 130 years in prison.¹⁷⁵ The trial court judges were criticized for poor fact finding.¹⁷⁶ The liberal media criticized the criminal courts for allowing the admissibility of confessions obtained during custodial police interrogations.¹⁷⁷ In Japan, confessions were obtained in more than 90% of cases.¹⁷⁸ Critics have alleged that the confessions were obtained under improper police interrogation techniques.¹⁷⁹

Many more liberal groups have maintained a persistent interest in reintroducing the lay jury system back into Japanese criminal courts. Koichi Yaguchi, The Chief Justice of the Japanese Supreme Court, commissioned a study to review the implementation of a new jury system.¹⁸⁰ The members of this committee reviewed modern US criminal trial courts as well as continental European courts.¹⁸¹

Likewise, in the early 1990's, the Japan Federation of Bar Associations (JFBA) engaged in jury system reform by organizing national

judiciary/0620system.html (last visited July 1, 2013).

168. Fukurai, *supra* note 150, at 106.

169. Hiroshi Fukurai, *Japan's Quasi-Jury and Grand Jury Systems as Deliberative Agents of Social Change: De-Colonial Strategies and Deliberative Participatory Democracy*, 86 CHI.-KENT L. REV. 789, 823 (2011); Wilson, *supra* note 149, at 515.

170. Fukurai, *supra* note 150, at 106 n. 41.

171. Soldwedel, *supra* note 17, at 1430.

172. Weber, *supra* note 80, at 149, n. 127.

173. INT'L BAR ASS'N, INTERROGATION OF CRIMINAL SUSPECTS IN JAPAN-THE INTRODUCTION OF ELECTRONIC RECORDING 41 (2003), available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=340486E4-A77A-4205-A73C-F422C3714CBB> ("IBA Report"); Fukurai, *supra* note 169, at 803.

174. Weber, *supra* note 80, at 149.

175. Fukurai, *supra* note 169, at 803.

176. *Id.*

177. *Id.*

178. Weber, *supra* note 80, at 146.

179. Soldwedel, *supra* note 17, at 1432-33.

180. Fukurai, *supra* note 169, at 803.

181. Fukurai, *supra* note 154, at n. 98.

symposiums.¹⁸² The JFBA suggested that new judges be obtained from practicing attorneys.¹⁸³ The JFBA further promoted the implementation of an all lay jury system.¹⁸⁴ The JFBA sought checks and balances against the judiciary and prosecutors.¹⁸⁵

In 1997 and 1998, the LDP and its Special Investigation Council [*Seio tokubetsu chosakai*] held meetings and published reports detailing their proposed reforms for the judiciary and the legal profession.¹⁸⁶ The group sought many judicial and legal professional reforms, including public participation juries.¹⁸⁷

A. Justice System Reform Council

In 1999, the late Prime Minister Keizo Obuchi responded to growing concerns for judicial reform by creating the Justice System Reform Council (JSRC); the Diet enacted legislation confirming the group's creation.¹⁸⁸ The JSRC was comprised of the three branches of the legal profession—judges, prosecutors, and private practicing attorneys.¹⁸⁹ Other members included law professors and members of the business and labor communities.¹⁹⁰

The JSRC was charged with the following objectives: (1) clarify the role of the judiciary; (2) investigate easier public use; (3) examine popular jury participation; (4) strengthen and clarify the roles of the three legal profession branches; and (5) explore other policies to reform the operation and foundation of the justice system.¹⁹¹ The JSRC sought to eliminate lengthy criminal trials, increase public access, and include live witness testimony. The group began its challenge to design and implement a criminal jury system to build public trust and increase citizen participation in a more democratic and adversarial process.¹⁹²

B. Review of the Modern American Jury

After carefully reviewing the US jury system, the JSRC rejected the

182. Weber, *supra* note 80, at 149.

183. *Id.* at 175.

184. Fukarai, *supra* note 150, at 106.

185. *Id.*

186. *Id.* at 105.

187. *Id.* at 107.

188. See generally Weber, *supra* note 80, at 151; See *Shiho seido kaikaku shingikai secchiho* [Law Establishing the Justice System Reform Council], Law No. 68 of 1999, art. 2 (Japan).

189. See generally Weber, *supra* note 80, at 151.

190. *Id.*

191. *Id.* See also *Shiho seido kaikaku shingikai secchiho* [Law Establishing the Justice System Reform Council], Law No. 68 of 1999, art. 2 (Japan).

192. See generally Weber, *supra* note 80, at 151.

same. The JSRC analyzed the liberal and democratic values associated with the US jury and rationalized that the all lay jury was more appropriate in America's multi-ethnic society but not in Japan.¹⁹³

Japanese legal professionals held divergent opinions on the US style lay jury system. Some scholars saw only inconsistent and unpredictable US jury verdicts. Japanese Supreme Court judges indicated that US juries produced a high number of erroneous verdicts.¹⁹⁴ Many conservatives correctly asserted that all lay assessor juries rendered more "not guilty" verdicts than professional judges.¹⁹⁵ Not surprisingly, both conservative and liberal Japanese groups held vested interests in the make-up of the juries and promoted different types of jury systems.¹⁹⁶ Furthermore, the Japanese watched several widely broadcast US jury trials, which could have also affected their views of the US style lay jury system.¹⁹⁷ Specifically, The trial of O.J. Simpson made an impact upon the Japanese public.¹⁹⁸

Japanese scholars offered explanations for rejecting the US style jury system. Koichiro Fujikura, scholar of US Law, indicated that the pure jury system worked well in US society.¹⁹⁹ He implied that the pure all lay jury system merely legitimized the US courts, as Americans held confidence in a system where the diverse public participated in the courts.²⁰⁰ Others argued that Americans were better equipped to serve on an all citizen jury.²⁰¹

C. Competing Interests

Various groups would be impacted by revisions to the Japanese justice system and the JSRC obtained input from all players. Conservative groups, such as prosecutors, victim advocates, judges, and the Ministry of Justice, sought to maintain judicial control of the proceedings.²⁰² More liberal groups, including the JFBA, criminal defense attorneys, and the media, sought change by emphasizing the participation of lay citizens on the jury.²⁰³ Not surprisingly, the Japanese Supreme Court and the Ministry of Justice maintained the view that judges should remain the adjudicators, stressing the importance of professional judges providing consistent, fair,

193. Takuya Katsuta, *Japan's Rejection of the American Criminal Jury*, 58 AM. J. COMP. L. 497, 499 (2010).

194. McClanahan, *supra* note 30, at 762.

195. *Id.* at 763.

196. *Id.*

197. *Id.*

198. *Id.*

199. Katsuta, *supra* note 193, at 510.

200. *Id.*

201. McClanahan, *supra* note 30, at 763.

202. *See Id.* at 765.

203. *Id.*

and predictable decisions and furthering the goal of discovering the truth.²⁰⁴ The Japanese Supreme Court sought to limit the actual role of lay citizens in the jury and proposed a system that would include citizen involvement, but disallow citizen voting power.²⁰⁵

The role of Japanese professional judges continued to face criticism. Japanese judges, prosecutors, and private attorneys completed their education through a highly competitive national exam.²⁰⁶ The Supreme Court selected, trained, promoted, assigned and rotated all judges.²⁰⁷ The selected judges receive additional legal training and education through the Supreme Court's Legal Training and Research Institute (LTRI).²⁰⁸ Japanese judges rise through the judicial ranks for maintaining decisions that were consistent with the opinions of higher judges.²⁰⁹ The judges came from similar educational backgrounds; the judiciary lacked diversity.²¹⁰ The judges were criticized for being isolated and out of touch with public opinions.²¹¹ They work long hours and rotate to different parts of the country.²¹² As such, they had little opportunity to integrate within their local communities. Some critics alleged that the professional judges were insulated from public opinion.²¹³ Other critics have indicated that the Japanese judges did not demonstrate warmth towards crime victims.²¹⁴ Ironically, judges in Western countries continue to face similar criticism from time to time when they render an unpopular decision.

The various Japanese civic and legal groups proposed different jury system models. At one point, the Liberal Democratic Party (LDP) supported a conservative model similar to that proposed by the Supreme Court and Ministry of Justice.²¹⁵ This model consisted of three professional judges and four lay members.²¹⁶ The Democrats supported a more liberal model consisting of one professional judge and ten lay members.²¹⁷ One group proposed a moderate model consisting of two judges and seven

204. Weber, *supra* note 80, at 153.

205. *Id.* at 155.

206. *Id.* at 139.

207. *Id.*

208. *Id.*

209. Weber, *supra* note 80, at 140.

210. *Id.* at 152.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. Kent Anderson & Leah Ambler, *The Slow Birth of Japan's Quasi-Jury System (Saiban-in Seido): Interim Report on the Road to Commencement*, 21 J. JAPAN. L. 55, 61 (2006).

216. *Id.*

217. *Id.*

citizens.²¹⁸

D. Reform Compromise

Tokyo Law Professor Masahito Inouye proposed a “middle ground” continental European style mixed court system combining lay citizen jurists and professional judges.²¹⁹ On June 12, 2001, the JSRC adopted Professor Inouye’s proposal and recommended a compromise that would address the concerns of all of the groups in its Interim Report.²²⁰ The JSRC indicated that the fundamental task for reform was to clearly define what must be done to “transform both the spirit of the law and the rule of law into the flesh and blood” of Japan.²²¹ The JSRC recognized respect for individuals pursuant to Article 13 of the Japanese Constitution and popular sovereignty under Article 1.²²² The JSRC detailed the fundamental philosophy to realize a system that would be easy to utilize and would incorporate citizen participation in the justice system with direction for reform of the justice system for the twentieth-first century.²²³ In its Interim Report, the group described the role of the justice system, legal profession, and the people.²²⁴ The JSRC outlined the shape of the justice system by addressing: (1) the construction of a justice system responding to public expectations (coordination of the Institutional Base); (2) how the legal profession supporting the justice system should be (expansion of the Human Base); and (3) establishment of the Popular Base.²²⁵

The JSRC proposed substantial reforms to both the civil justice system and the criminal justice system, including speeding up civil cases.²²⁶ It proposed that the parties confer to outline a proceeding plan and that the process to collect evidence be expanded.²²⁷ The JSRC strengthened the courts for intellectual property rights and labor rights cases;²²⁸ recommended improvements to family courts and summary courts;²²⁹ called for reinforcing the legal aid system and the alternative dispute resolution

218. *Id.*

219. Fukurai, *supra* note 150, at 108; See Soshō tetsuzuki eno ratana sankā seido kokushi an [A New Mixed Court System in Criminal Procedure: A Suggestion for the Framework], Mar. 13, 2001, (Japan) available at <http://www.kantei.go.jp/jp/sihouseido/dai51/51bessi1.html>.

220. See generally JSRC INTERIM REPORT *supra* note 20.

221. *Id.* at ch. I.

222. *Id.*

223. *Id.* at ch. I.

224. *Id.* at ch. I, pt. 2, para. 1.

225. *Id.* at ch. I, pt. 3, para. 2 (1) – (3).

226. JSRC INTERIM REPORT *supra* note 20, at ch. II, pt. 1, para. 1.

227. *Id.*

228. *Id.* at ch. II, pt. 1, paras. 3 & 4.

229. *Id.* at ch. II, pt. 1, para. 5.

process.²³⁰ Many of these recommendations reflect successful aspects of the US state and federal courts.

The JSRC recommended significant reform to the legal training system and increasing the number of Japanese attorneys.²³¹ The group recommended US style graduate level law schools.²³² It addressed accreditation of the law schools, the future vision of undergraduate legal education,²³³ a new national bar exam, apprenticeship training and continuing legal education.²³⁴ The group stressed the need for a “larger stock of legal professionals” with a “wide range of activities in various fields.”²³⁵ The JSRC set a goal of 1,500 individuals passing the national bar exam in 2004 and 3,000 people passing the national bar exam in 2010.²³⁶ It recommended improving legal ethics and making lawyer discipline clearer and more effective²³⁷ and improving the consciousness of prosecutors.²³⁸

In its Interim Report, the JSRC indicated that the people “must participate in the administration of justice autonomously and meaningfully” and must maintain “rich communication with the legal profession.”²³⁹ The JSRC recognized the need for broad popular support and understanding. It reasoned that the judicial branch must strive for accountability to the people while maintaining judicial independence.²⁴⁰ Proceedings should be “easily seen, understood, and worthy of reliance by the people.”²⁴¹ In essence, the legal profession and the courts would need to win over the public trust. The system would need to respond to “public expectations.”²⁴²

The JSRC outlined three basic policies necessary for justice reform, which would contribute to maintaining a free and fair society.²⁴³ The policies were described, as follows:

1. First, in order to achieve “a justice system that meets public expectations,” the justice system should be made easier to use, easier to understand, and more reliable[;]
2. Second, by reforming ‘the legal profession supporting the justice system,’ a legal profession that as a

230. *Id.* at ch. II, pt. 1, paras. 7(2) & 8.

231. *Id.* at ch. III, pt. 1, para. 1.

232. JSRC INTERIM REPORT *supra* note 20, at ch. III, pt. 2, para. 2.

233. *Id.* at ch. III, pt. 2, para. 2(5)

234. *Id.* at ch. III, pts. 2, 3, 4 & 5.

235. *Id.* at ch. I, pt. 2, para. 2.

236. *Id.* at ch. I, pt. 3, para. 2(2).

237. *Id.*

238. JSRC INTERIM REPORT *supra* note 20, at ch. I, pt. 3, para. 2(2).

239. *Id.* at ch. I, pt. 2, para. 3.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at ch. I, pt. 3, para. 1.

profession is rich both in quality and quantity shall be secured [; and]

3. Third, for 'establishment of the popular base,' public trust in the justice system [should] be enhanced by introducing a system in which the people participate in legal proceedings and through other measures.²⁴⁴

The JSRC proposed expanding the people's access to the justice system to improve public's expectations. It stressed insuring "fairer, more proper and more prompt proceedings."²⁴⁵ In its Interim Report, the JSRC indicated that the justice system of the 21st century must resolve disputes with "predictable, highly clear and fair rules."²⁴⁶ People should have a "proper and prompt remedy" when their rights or freedoms have been infringed.²⁴⁷

In the Interim Report, the JSRC recommended changes to the recruitment and selection of judges by diversifying the applicant sources.²⁴⁸ The JSRC sought the appointment of lawyers as judges and recommended that assistant judges gain diverse legal experience.²⁴⁹ Moreover, the JSRC sought the establishment of a system where groups reflecting public views participated in the selection of judges.²⁵⁰

The JSRC recommended the adoption of a mixed jury system, but did not specify the number of lay judges or professional judges.²⁵¹ It proposed a new preparatory pre-trial proceeding with expanded disclosure of evidence by the prosecution and indicated that jury trials should be held on consecutive days.²⁵² To secure fairness and the protection of an accused's rights, the JSRC recommended the creation of a public defender system.²⁵³ To address the concerns raised about coerced police interrogation, the JSRC proposed requiring written records of the conditions of questioning.²⁵⁴

The JSRC recommended that the jury preside over criminal cases regardless of whether the accused admitted or denied guilt and, unlike most US jurisdictions and Japan's own unsuccessful pre-war jury system, the accused could not waive the right to a jury trial.²⁵⁵ Mixed juries would decide the guilt or innocence of an accused and impose a sentence upon

244. JSRC INTERIM REPORT *supra* note 20, at ch. I, pt. 3, para. 1.

245. *Id.* at ch. I, pt. 3, para. 2(1).

246. *Id.* at ch. I, pt. 2, para. 1.

247. *Id.*

248. *Id.* at ch. I, pt. 3, para. 2(2).

249. *Id.*

250. JSRC INTERIM REPORT *supra* note 20, at ch. I, pt. 3, para. 2(2).

251. *Id.*

252. *Id.* at ch. IV, pt. 1, para. 1(4)a.

253. *Id.* at ch II, pt. 2, para. 2.

254. *Id.* at ch. I, pt. 3, para. 2(1).

255. *See supra* note 41.

conviction. The JSRC emphasized that the mixed jury system would afford the professional judges and laypersons with the opportunity to share their knowledge and experience through effective communications.²⁵⁶ In the new jury system, professional judges would educate the lay members and maintain consistency, while lay members would add a fresh perspective. This hybrid system would inject public sentiment and common sense, eliminate judicial bias, and improve civic education.²⁵⁷ The JSRC considered a future expansion of the jury system to apply to civil cases, and Japan has not yet addressed this topic.

Resurrection of the lay jury system had been sporadically raised since the suspension of the Japanese jury system in 1943 and many were surprised when a jury system was included in the JSRC's Interim Report in 1999.²⁵⁸ The Interim Report did not specify the detailed composition of the mixed or quasi-jury; interested parties lobby for their respective positions from 2001 to 2004. The Japanese Federation of Bar Associations (JFBA) represented the private attorneys, including criminal defense attorneys. This group held the most liberal view and proposed a system consisting of one professional judge and nine lay citizens.²⁵⁹ The Japanese Supreme Court proposed the most conservative position proposing a non-binding advisory mixed-court panel. Subsequently, the Supreme Court proposed a mixed panel consisting of three professional judges and three lay citizen jurors.²⁶⁰ The Ministry of Justice and the prosecutors supported Professor Inoue's middle ground position calling for a panel consisting of three professional judges and four to six lay jurors.²⁶¹

V. IMPLEMENTATION OF THE NEW JURY SYSTEM

On May 28, 2004, the Japanese Diet enacted an Act Concerning Participation of Lay Assessors in Criminal Trials ("Lay Assessor Act").²⁶² In Article 1, the Lay Assessor Act indicates that its purpose is to "contribute to the promotion of the public's understanding of the judicial system and thereby raise their confidence in it."²⁶³ It defines a criminal justice system promoting the joint participation of lay assessors with professional judges. The lay participants are to be selected from "among the people."²⁶⁴

256. Weber, *supra* note 80, at 156.

257. Anderson & Ambler, *supra* note 215, at 56.

258. *Id.* at 58.

259. *Id.* at 59.

260. *Id.*

261. *Id.*; See INVESTIGATION COMM., *Saiban-in seido nit suite* [Concerning the Lay Assessor System] (March 11, 2003), available at <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai13/13siryou1-2.pdf>.

262. Lay Assessor Act, *supra* note 4, at 233.

263. *Id.* at 236.

264. *Id.*

The Lay Assessor Act contains a five-year preparatory time period (2004-2009).²⁶⁵ The Japanese Supreme Court was tasked with drafting procedural trial and deliberation rules. The government and the Supreme Court were required to spend the preparatory time educating the public and encouraging citizen participation.²⁶⁶

The Lay Assessor Act indicates that the citizen lay assessors will adjudicate criminal offenses falling within the following two categories:

1. Cases involving crimes punishable by death or imprisonment for an indefinite period or by imprisonment with hard labor; and
2. Cases involving crimes in which the victim has died from an intentional criminal act²⁶⁷

After years of debate, the Lay Assessor Act prescribed the composition of the jury panel. For contested cases, three professional judges and six lay assessors will serve with one of the three professional judges acting as the chief judge.²⁶⁸ When an accused admits guilt and there are no disputed issues of facts at trial, a smaller size jury shall consist of one professional judge and four lay assessors.²⁶⁹

Notwithstanding the prosecutor charging serious crimes covered by a mixed jury trial, the judge may determine that certain cases proceed to an all professional judge panel, as follows:

1. When there are conditions that make it difficult to guarantee lay assessor candidates' appearance;
2. When it is difficult to appoint substitute lay assessors;
3. When the duties cannot be performed due to the lay assessors' fear of significant violation to their peaceful existence; or
4. When the jurors' fear of added injury to themselves or their family's assets or lives.²⁷⁰

The mixed panel of lay assessors and professional judges are empanelled to make court decisions. These decisions include determinations of sentencing judgment, determinations of sentence exoneration, determinations of innocence, and determinations on transfers

265. *Id.* at 280.

266. *Id.* at 280-81

267. *Id.* at 237.

268. Lay Assessor Act, *supra* note 4, at 237.

269. *Id.*

270. *Id.* at 238.

to the Family Court under Juvenile Act.²⁷¹ The professional judges interpret laws and ordinances and render decisions concerning litigation procedure.²⁷² When a smaller size jury is appropriate for an uncontested case, the decisions typically made by empanelled judges are then made by the sole judge.²⁷³

Lay jurors (assessors) must carry out their duties with honesty and fairness in accordance with the law.²⁷⁴ They shall not disclose deliberation secrets nor take any action that might diminish the public trust in the trial's fairness or affect the dignity of the trial.²⁷⁵ The Lay Assessor Act provides for utilization of reserve lay assessors, referred to as "juror alternates" in US courts.²⁷⁶ Lay assessors and reserve lay assessors are compensated for travel, per diem, and hotel expenses, pursuant to the Rules of the Supreme Court.²⁷⁷

Jurors are subject to disqualification in a few instances. First, jurors must have completed a ninth grade education.²⁷⁸ Second, they must have not been subject to imprisonment for a crime.²⁷⁹ Third, those unable to perform juror duties due to significant burden to physical or mental incapacities are disqualified.²⁸⁰

People falling under any of the following career titles are prohibited from serving as a lay juror:

1. Members of the National Diet;
2. Ministers of the State;
3. Certain higher ranking employees of national administrative institutions;
4. Current or former judges;
5. Current or former prosecutors;
6. Current or former attorneys;
7. Patent attorneys;
8. Judicial clerks;
9. Notaries;
10. Judicial police officers;
11. Court personnel;

271. *Id.* at 240; Shonen ho [Juvenile Act], Law No. 168 of 1948, art 55 ("Transfers to Family Court") (Japan).

272. Lay Assessor Act, *supra* note 4, at 241.

273. *Id.*

274. *Id.* at 242.

275. *Id.*

276. *Id.*

277. *Id.*

278. Lay Assessor Act, *supra* note 4, at 243, n. 24.

279. *Id.* at 244.

280. *Id.*

12. Ministry of Justice personnel;
13. Police;
14. Persons qualified to be a judge, assistant judge, prosecutor, or lawyer;
15. Professors of law;
16. Legal apprentices;
17. Prefectural governors and mayors;
18. Self Defense Force Officers;
19. Persons with pending criminal charges; and
20. Persons under arrest or detention.²⁸¹

The following citizens are eligible to decline jury service:

1. Persons over age 70;
2. Members of local councils;
3. Students;
4. Person who served as a juror in the past 5 years;
5. Candidates called for service in the past year;
6. Persons who have served on the Prosecutorial Review Commission within the past 5 years;²⁸²
7. Persons who by unavoidable reason face difficulty in serving on the particular date scheduled, as follows:
 - A. Where it is difficult to appear in court due to a serious illness or injury;
 - B. Where it is necessary to provide childcare or nursing care to household members;
 - C. Where there is fear of significant damage to a business interest; and
 - D. Where it is necessary to attend a parent's funeral or other social obligation that cannot be rescheduled.²⁸³

Jurors with a relationship to a particular case being heard shall be disqualified. Those individuals include:

1. The Accused, the victim, and their relatives, guardians, representatives, family members, attorneys and employees;
2. Witnesses in the case;
3. Prosecutors or law enforcement officers in the case;

281. *Id.* at 244-46.

282. *Id.* at 246-47.

283. *Id.* at 247.

4. Prosecutorial Review Commission members in the case; and
5. Persons participating in the original trial, in the event of a remand and re-trial.²⁸⁴

The judge maintains discretion to disqualify a potential lay assessor when the judge believes that the individual is unable to act fairly.²⁸⁵ The judge may submit juror questionnaires to prospective jurors in advance of jury selection.²⁸⁶ The questions can be designed to determine whether the jurors will conduct the trial fairly.²⁸⁷ Jury selection shall take place in the presence of the judges, prosecutor, defense counsel, and court clerks.²⁸⁸ The judge may permit the accused to be present when necessary.²⁸⁹ Jury selection shall not be open to the public.²⁹⁰ The chief judge presides over jury selection.²⁹¹

Similar to the US court's challenges for cause, the prosecutor, accused, and the accused's attorney, may request that the judge not appoint or seat a prospective juror based upon any grounds relating to the juror's legal qualifications or disqualification matters.²⁹² The judge may also raise the issue *sua sponte*.²⁹³ If the judge decides not to appoint a prospective juror, the judge shall state a reason²⁹⁴ and any party may appeal the court's decision.²⁹⁵ Similar to the peremptory strikes in the US, the Japanese prosecutor and the defense may each request the non-appointment of four additional jurors without providing any reasons.²⁹⁶

Under the Lay Assessor Act, cases are scheduled for pre-trial proceedings.²⁹⁷ The judge reviews expert testimony during the pre-trial proceedings.²⁹⁸ Judges, prosecutors, and defense counsel shall strive to make jury trials quick and easy for the jurors to understand.²⁹⁹ Jurors and reserve jurors shall appear at any pre-trial proceedings when the judge

284. Lay Assessor Act, *supra* note 4, at 248-49.

285. *Id.* at 249.

286. *Id.* at 254.

287. *Id.* at 255.

288. *Id.* at 256.

289. *Id.*

290. Lay Assessor Act, *supra* note 4, at 256.

291. *Id.*

292. *Id.* at 257.

293. *Id.*

294. *Id.*

295. Lay Assessor Act, *supra* note 4, at 258.

296. *Id.*

297. *Id.* at 265.

298. *Id.*

299. *Id.* at 266.

questions and inspects witnesses.³⁰⁰

The jury trial proceeds with the prosecutor and defense attorney providing opening statements.³⁰¹ Lay jurors may question the witnesses.³⁰² During the trial, victims (or a representative upon victim death) may state their opinions and are then subject to juror questioning.³⁰³ If the defendant provides a voluntary statement, then the jurors may, upon informing the chief judge, request a statement from the defendant.³⁰⁴ Jurors shall be present in court when the verdict and judgment are rendered.³⁰⁵ However, the failure of a juror to appear in court does not affect the validity of the jury's verdict or the court's judgment.³⁰⁶

Professional judges and jurors ("lay assessors") shall deliberate together.³⁰⁷ Lay assessors shall state their opinions during the deliberations.³⁰⁸ The judges shall deliberate on matters of law and trial procedure. The judges may allow the lay jurors to listen to the judges' deliberations on law and may choose to ask for the lay jurors' opinions.³⁰⁹ During deliberations, the chief judge shall, at a minimum, state their judicial opinions on matters of law and trial procedure³¹⁰ and lay assessors shall follow the judges' legal opinions.³¹¹ During deliberations, the chief judge shall insure that lay assessors are able to perform their duties. The chief judge shall explain the laws, make deliberations easily understandable, and provide opportunity for the lay assessors to state opinions.³¹² Reserve lay assessors participate in deliberations by listening to all deliberations by the professional judges and joint deliberations by expressing their opinions.³¹³

The verdict of the jury is rendered by a majority vote, including the vote of at least one professional judge.³¹⁴ Upon a conviction, the jury also

300. *Id.*

301. Lay Assessor Act, *supra* note 4, at 267.

302. *Id.*

303. *Id.* at 268.

304. *Id.*

305. *Id.* at 269.

306. *Id.*

307. Lay Assessor Act, *supra* note 4, at 273.

308. *Id.*

309. *Id.* at 274.

310. *Id.* at 273.

311. *Id.*

312. *Id.*

313. Lay Assessor Act, *supra* note 4, at 274.

314. *Id.* at 273. The Act specifies that all majority opinions shall include at least one vote of a professional judge and one vote of a lay juror. By virtue of the size of the panel, lay juror votes will always be contained in a majority vote. The Act does not specify what verdict would be rendered if a majority vote failed to include a professional judge vote. A reasonable interpretation of the Act would imply that a majority vote to acquit without a professional judge vote would result in an acquittal verdict. However, a majority vote to

determines an appropriate sentence in accordance with the law and by a majority vote of the jury including a vote of at least one professional judge and one lay assessor vote.³¹⁵ When there is no initial agreement, the number of votes for the defendant's most unfavorable sentence is combined with the number of votes for the next sentence favorable to the defendant until a majority vote, including both a judge and lay juror, is reached.³¹⁶

Deliberations of the professional judges alone, as well as joint deliberations, shall never be revealed.³¹⁷ The opinions and votes of the professional judges and lay assessors shall also remain confidential.³¹⁸ The names, addresses, and personal particular information of the jurors, prospective jurors and reserve jurors must never be made public.³¹⁹ However, the individual jurors may elect to disclose their own identity.³²⁰

No one may contact a lay assessor or reserve lay assessor about the defendant's case or for the purpose of learning trial secrets.³²¹ Violation of this law carries a fine of up to 200,000 Japanese yen.³²² If a lay assessor or reserve lay assessor leaks a deliberation secret, they are subject to a fine up to 500,000 Japanese yen and/or a term of imprisonment not to exceed six months.³²³ The lay assessors are further prohibited from stating what they thought the weight of a sentence should have been or the facts they thought should have been found, regardless of whether they agreed or disagreed.³²⁴ Prosecutors, defense counsel and defendants are prohibited from revealing the name of lay assessors and their answers to juror questionnaires in jury selection.³²⁵ Violation of this law carries a fine of up to 500,000 Japanese yen and/or imprisonment for up to one year.³²⁶

During the five year preparatory period, the government and the Japanese Supreme Court were required to develop educational opportunities for the public, explaining the lay assessors' duties in deliberations and during the trial, jury selection, and the importance of citizen participation as lay assessors in jury trials.³²⁷ The government and other groups underwent an extensive public education campaign. The Supreme Court, the Ministry of Justice, and the Japanese Federation of Bar Associations each

convict without a professional judge vote would result in an acquittal verdict. *Id.* at 273, n. 49.

315. *Id.* at 273-74.

316. *Id.* at 274.

317. *Id.* at 275.

318. *Id.*

319. Lay Assessor Act, *supra* note 4, at 275.

320. *Id.*

321. *Id.*

322. *Id.* at 277

323. *Id.*

324. *Id.* at 278.

325. Lay Assessor Act, *supra* note 4, at 278.

326. *Id.*

327. *Id.* at 280-81.

disseminated information through their respective websites.³²⁸

The Japanese government spent hundreds of millions of US dollars on the new justice system.³²⁹ The Japanese Supreme Court estimated annual expenses of 2 billion Japanese yen (\$20 US million) for lay judge compensation and 1.2 billions Japanese yen (\$12 US million) for lay judge travel related expenses.³³⁰ In the first three years since the enactment of the Lay Assessor Act, the Supreme Court spent 3.6 billion Japanese yen (\$47 US Million) on advertising. The Ministry of Justice spent 970 million Japanese yen (\$12.6 US million) on advertising.³³¹ Further, the Japanese government expended more than 28.6 billion yen (\$350 US million) remodeling court facilities around the country to accommodate jury panels.³³²

The three groups created the Lay Assessor Promotions Office [*Saiban-in seido koho suishin kyogo-kai*], which developed public relations efforts to promote the new system.³³³ The Promotions Office filmed a television drama, conducted mock trials throughout the country and published posters, newsletters, and flyers.³³⁴

The Promotions Office conducted public opinion surveys.³³⁵ Surprisingly, in a 2005 poll, 70% of people surveyed stated that they did not want to serve on a jury panel.³³⁶ Those surveyed expressed their apprehension of judging people and finding guilt.³³⁷ In a separate poll, citizens indicated the following reasons for not wishing to serve as a lay juror: “‘the responsibility to decide another’s fate is too great’ (75%); ‘lay people cannot try a case without legal knowledge’ (64%); and ‘lay people cannot deliberate as equals with experienced and professional judges’ (55%).”³³⁸ A Japanese Supreme Court survey disclosed that those caring for children or the elderly did not wish to serve as jurors.³³⁹

328. Anderson & Ambler, *supra* note 215, at 71. See SUPREME COURT OF JAPAN, *Saiban-in Seido* [The Lay Assessor System], <http://www.saibanin.courts.go.jp> (last visited July 1, 2013) (Japan); MINISTRY OF JUSTICE, *Anata mo Saiban-in!!* [You too will be a lay assessor!!], <http://www.moj.go.jp/SAIBANIN/> (last visited July 1, 2013) (Japan); JAPAN FED’N OF BAR ASSOCIATIONS, *Saiban-in Seido* [The Lay Assessor System], http://www.nichibenren.or.jp/ja/citizen_judge/index.html (last visited July 1, 2013) (Japan).

329. Mclanahan, *supra* note 30, at 770-71.

330. Wilson, *supra* note 149, at 494-95.

331. Mclanahan, *supra* note 30, at 770-71.

332. *Id.* at 771, n. 297.

333. Anderson & Ambler, *supra* note 215, at 68.

334. *Id.*

335. *Id.* at 69.

336. *Id.*

337. *70% Don’t Want to Serve on Juries in New System*, THE JAPAN TIMES (Apr. 17, 2005), <http://www.japantimes.co.jp/news/2005/04/17/national/70-dont-want-to-serve-on-juries-in-new-system/#.UXBIBsrNuSo>.

338. Mclanahan, *supra* note 30, at 770, n. 293.

339. Anderson & Ambler, *supra* note 215, at 69. See *Caregivers Reluctant to Be Lay*

Areas of public criticism included fears of mistake, bias, and ignorance. The public expressed some anxiety over hearing murder cases and imposing the death penalty. Members of the public held some concern regarding appeals, sentencing guidelines, adverse treatment of jurors by employers, and penalties for leaking secret information.³⁴⁰

In subsequent polls conducted just prior to the commencement of the new jury trial system in 2009, citizens started to respond more favorably to jury service. Results reflected that 71.5% of respondents were “willing” to serve as a juror.³⁴¹ Only 13.6% of the respondents stated that they would participate “regardless of [their] legal obligation” to serve.³⁴² A majority of the respondents (57.9%) indicated that they felt legally obligated to serve.³⁴³

VI. EARLY CRITICISM

Prior to the effective date of implementation in 2009, many experts expressed their apprehension regarding the new criminal jury system. Scholars suggested three areas warranting court rules.³⁴⁴ First, judges maintained discretion to assign cases to the larger panel, smaller jury panel (consisting of one professional judge and four lay jurors when the accused confesses and there are no issues of fact to be resolved by a jury), and to an all professional judge panel.³⁴⁵ The Japanese Supreme Court should promulgate rules providing guidance on judicial discretion in designating the types of appropriate trial panels.

Second, similar to US and other foreign courts, the participants have great interest in jury selection, as the jury make-up may affect the outcome of the cases.³⁴⁶ Jury composition can be greatly affected by the manner in which *voir dire* (jury selection) is conducted by the judge; experts recommend that the Japanese Supreme Court promulgate rules regarding jury selection.

Third, the deliberations between professional judges and lay citizens create many concerns. Professional judges could very well dominate discussions due to their expert knowledge and legal stature.³⁴⁷ Professional judges must deliberate on both issues of law and court procedure. Some scholars have suggested that the Japanese Supreme Court provide guidance on the deliberation dynamics.³⁴⁸ For example, the scholars recommend rules

Judges, THE DAILY YOMIURI (Mar. 23, 2006), <http://www.accessmylibrary.com/article-1G1-143562874/caregivers-reluctant-lay-judges.html>.

340. Anderson & Ambler, *supra* note 215, at 70.

341. 70% Don't Want to Serve on Juries in New System, *supra* note 337.

342. McLanahan, *supra* note 30, at 771.

343. *Id.*

344. Anderson & Ambler, *supra* note 215, at 67.

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.* at 67-68.

that specify the role and participation of the lay jurors when the professional judges determine issues of law.³⁴⁹ They further recommend rules to regulate the role of the professional judge when the panel is expressing opinions during deliberations.³⁵⁰

A. *Deliberation Secrecy and Voting*

Other legal scholars have stressed great criticism over the statutory provisions mandating juror confidentiality of deliberations. One author argues that Japan should “lift the overly strict duty of lifetime secrecy” placed on lay jurors.³⁵¹ Others argue that the jurors would be unable to address their own post-trial stress in pursuing professional help or communicating with friends and family.³⁵²

Interestingly, many foreign courts have similar confidentiality provisions. In England, Northern Ireland, and Canada, jurors are prohibited from disclosing deliberation information.³⁵³ In Russia and Spain, juror deliberations are completely confidential.³⁵⁴ In Australia, jurors may disclose information, but not for remuneration.³⁵⁵ The media cannot contact Australian jurors.³⁵⁶ New Zealand does not impose restrictions on juror disclosures; however, court opinions have sanctioned media for contacting jurors.³⁵⁷ Violations are enforced through contempt of court proceedings.³⁵⁸

Under the juror confidentiality provisions, Japanese lay jurors would be precluded from sharing their positive experiences and educating the general public around them about the reformed criminal justice system. In US courts, jurors generally have a positive experience from their participation on a jury. At a minimum, they return home and share their new perspective of the courts with household members, family and co-workers. This communication arguably improves democracy and increase transparency and legitimacy of the US judicial branch. US jurors are also free to write their own “tell all” books for substantial profits and disclose the communications and votes of the other jurors provided during

349. *Id.*

350. Anderson & Ambler, *supra* note 215, at 67-68.

351. Wilson, *supra* note 149, at 498.

352. See generally James E. Kelley, *Addressing Juror Stress: A Trial Judge's Perspective*, 43 DRAKE L. REV. 97, 108 (1994).

353. Neil Vidmar, *Review of Jury Systems Abroad Can Provide Helpful Insights Into American Practices*, 73 N.Y. ST. B.J. 23 (June 2001).

354. Thaman, *supra* note 50.

355. Michael Chesterman, *Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy*, 62 LAW & CONTEMP. PROBS. 69, 101 (1999).

356. *Id.* at 100-01.

357. Neil Cameron, Susan Potter & Warren Young, *The New Zealand Jury*, 62(2) LAW & CONTEMP. PROBS. 103, 129-31 (1999).

358. *Id.*

deliberations.

Ironically, several parts of the US court system do, in fact, embrace confidentiality provisions. Court ordered mediations in civil cases are completely confidential. The US grand jury system holds a longstanding tradition of complete confidentiality at every stage. Further, US jurors cannot be compelled to disclose deliberation communications. US attorneys in many jurisdictions are subject to ethical rules restricting them from initiating communications about any subject with jurors.

Japanese jurors are precluded from sharing their deliberation experiences, including the votes and opinions of themselves and the other jurors and judges.³⁵⁹ However, they may still communicate their positive experiences and newly gained court education. In fact, many jurors have joined groups, created blogs, and become self-appointed spokespersons championing court reforms and jury service.³⁶⁰

Unlike the majority of modern US courts, which require a unanimous verdict, Japanese verdicts require only a simple majority vote with one professional judge in the vote.³⁶¹ This vote is more characteristic of the continental European style mixed jury systems. All lay juries in Russia and Spain are required to obtain more of a super-majority vote.³⁶² The lay jury in Spain must obtain a guilty verdict with seven out of nine lay jurors voting.³⁶³ The Spanish jury may acquit with five out of nine jurors voting.³⁶⁴ Russian all lay juries may convict with a vote of seven out of twelve jurors in agreement.³⁶⁵ A vote of six out of twelve is required to acquit.³⁶⁶ However, Russian jurors must attempt to obtain a unanimous verdict during their first three hours of deliberation.³⁶⁷

359. Mark Levin & Virginia Tice, *Japan's New Citizen Judges: How Secrecy Imperils Judicial Reform*, THE ASIA-PAC. J.: JAPAN FOCUS, www.japanfocus.org/-Mark-Levin/3141 (last visited July 1, 2013).

360. Setsuko Kamiya, *Lay Judge Duty Sparks New Passion*, JAPAN TIMES ONLINE (June 21, 2012), www.japantimes.co.jp/text/nn20120621f1.html.

361. In Canada, New Zealand, US federal courts and almost all US state courts, unanimous verdicts are required. The US states of Oregon and Louisiana permit all majority verdicts. Majority verdicts are allowed in US state civil trials. Vidmar, *supra* note 22, at 31.

362. "Russian jurors must strive for unanimity during the first three hours of deliberation, whereafter they may seek to reach a majority decision." Stephen Thaman, *Europe's New Jury Systems: The Cases of Spain and Russia*, 62 LAW & CONTEMP. PROBS. 233, n. 114 (1999) [hereinafter Thaman, *Spain and Russia*]. "In Spain, seven of nine votes are required to prove any propositions unfavorable to the defendant, whereas only five votes are needed to prove any proposition favorable to the accused." *Id.* at 254.

363. Thaman, *supra* note 14, at 629.

364. Thaman, *Spain and Russia*, *supra* note 368, at 254.

365. *Id.* at n. 113.

366. *Id.*

367. *Id.* at n. 114.

B. Prosecutor Appeals

Japan has adopted the continental European mixed jury system that allows for prosecutorial appeals of acquittals.³⁶⁸ Scholars have expressed great concern over allowing prosecution appeals of defense acquittals. Under the Lay Assessor Act, prosecutors maintain their rights to appeal acquittals and they are not bound by the acquittal.³⁶⁹ The prosecution may appeal the acquittal based upon issues of law and procedural error and seek a re-trial upon reversal.³⁷⁰

In contrast, US court participants are bound by acquittals pursuant to the Fifth Amendment to the US Constitution, which prohibits Double Jeopardy.³⁷¹ However, in US jurisdictions, individuals can face accusations even following an acquittal on criminal charges.³⁷² Japan has a longstanding tradition of allowing prosecutorial appeals under its pre-war jury systems and under its post-war justice system. Ironically, however, Article 39 of the post-war Japanese Constitution [KENPO] provides, in part that "No person shall be held criminally liable for an act . . . of which he has been acquitted, nor shall he be placed in double jeopardy."³⁷³

C. Confessions and Police Interrogations

Traditionally, obtaining a confession has been "at the heart" of the Japanese criminal justice system.³⁷⁴ Concerns have been raised regarding the voluntariness and reliability of confessions. Specific criticism involves custodial interrogation techniques and the emphasis placed upon confessions in criminal cases, along with the use and accuracy of prepared "confession statements."³⁷⁵

Following an arrest in Japan, the accused can be held for up to twenty-three days without bail or any provision for release.³⁷⁶ Under the

368. Levin & Tice, *supra* note 365.

369. *Id.*

370. *Id.*

371. U.S. CONST. amend. V. ("Due Process Clause").

372. Following an acquittal in a criminal state court case, the US government may indict an individual on federal criminal charges for the same conduct that resulted in the state court acquittal. Further, following an acquittal in a criminal case, those seeking monetary damage awards may initiate a civil cause of action for money damages. O.J. Simpson was acquitted of his criminal charges in the state court of the State of California. The family of the decedents filed a civil cause of action and obtained a civil judgment awarding money damages to the Plaintiffs.

373. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 39 (Japan), available at <http://history.hanover.edu/texts/1947con.html>.

374. Daniel Foote, *From Japan's Death Row to Freedom*, 1 PAC. RIM L. & POL'Y J. 11, 86 (1992).

375. *Id.* at 96-97.

376. *Id.* at 86. UN Report, *supra* note 8 (Confessions are known as the "king of

Code of Criminal Procedure (amended in 1948) [Keisoho], police can hold a subject for up to seventy-two hours.³⁷⁷ Following an arrest, police have forty-eight hours to turn the criminal case over to the prosecutor, who then has up to twenty-four hours to obtain a detention warrant from a judge.³⁷⁸ The judge typically issues the detention warrant to hold the accused in custody for a period up to ten days.³⁷⁹ The prosecutor may then seek a judicial warrant extending the detention time for an additional ten day period before the accused is either indicted or released.³⁸⁰

Under the Japanese Constitution [Kenpo] and the Code of Criminal Procedure enacted in 1948 [Keisoho], confessions shall not be admitted into evidence if obtained after “prolonged detention.”³⁸¹ In past years, police have used the theory of “voluntary accompaniment” and “arrest on other charges” when an arrest or detention is not made.³⁸²

An accused is required to appear before the police or prosecution for questioning when under arrest or under detention.³⁸³ However, when police do not make an arrest for lack of probable cause or other reasons, officers may request an individual to voluntarily accompany them to a police station for questioning.³⁸⁴ While not required under law to appear for questioning, the accused is voluntarily submitting to interrogation.³⁸⁵ Following interrogation, the individual departs the police station to return home. In other instances, the accused’s statements during interrogation may result in probable cause for an arrest on the subject case or an arrest on other unrelated charges.³⁸⁶

Japanese courts have rendered different opinions when confronted

evidence” in Japanese courts. “Experienced detectives are expected to extract statements from suspects concerning their personal background, life history, the motive of the crime, the crime was committed and a statement of apology. For this task, most interrogators hope to form a good relationship with the suspect, known as constructing “rapport”. Over ninety per cent of suspects confess in this way.”)

377. KEIJI SOSHŌHŌ [KEISOHŌ] [C. CRIM. PRO.] 1948, art. 205, para. 1-2 (Japan), available at <http://www.oecd.org/site/adboecdanti-corruptioninitiative/46814489.pdf>.

378. *Id.* at art. 204 & 205.

379. *Id.* at art. 208, para. 1.

380. *Id.* at art. 208, para. 2.

381. KENPO [Constitution] art. 38(2) (“Confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence”) NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION](Japan), available at <http://history.hanover.edu/texts/1947con.html>; See also KEIJI SOSHŌHŌ [KEISOHŌ] [C. CRIM. PRO.] 1948, art. 319(1)(Japan) (“Confession made under compulsion, torture or threat, or after prolonged arrest or detention, or which is suspected not have been made voluntarily shall not be admitted in evidence”), available at <http://www.oecd.org/site/adboecdanti-corruptioninitiative/46814489.pdf>

382. Foote, *supra* note 380, at 87.

383. *Id.*; See KEIJI SOSHŌHŌ [KEISOHŌ] [C. CRIM. PRO.] 1948, art. 198, para. 1 (Japan), available at <http://www.oecd.org/site/adboecdanti-corruptioninitiative/46814489.pdf>.

384. KEIJI SOSHŌHŌ [KEISOHŌ] [C. CRIM. PRO.] 1948, art. 198, para. 1 (Japan), available at <http://www.oecd.org/site/adboecdanti-corruptioninitiative/46814489.pdf>.

385. *Id.*

386. *Id.* at art.199, para. 1.

with contested issues involving alleged aggressive use of “voluntary accompaniment” techniques. Some courts have reviewed these challenges and denied the same ruling that while improper techniques were used, the confessions remained voluntary.³⁸⁷ Other courts continue to review the challenges of police impropriety in determining whether the confessions are reliable.³⁸⁸

Also, some criminal cases involve interrogation during an arrest on other unrelated minor charges. For example, an accused may be arrested or detained on prior minor offenses.³⁸⁹ During the arrest or detention on the minor, unrelated offense(s), police may interrogate the accused on the subject case.³⁹⁰ Japanese courts have considered and rejected this argument in many criminal cases.

Following arrest and during this pre-indictment stage, the arrestees are typically held in substitute prisons in police station holding cells called the “Daiyo Kangoku System.”³⁹¹ Prosecutors may conduct interrogation inside the police holding cell.³⁹² However, the accused may be transported to the prosecutor’s office for questioning during the day and then returned to the police station holding cell.³⁹³ In 2009, the average daily number of persons detained in such facilities was 11, 235.³⁹⁴

Defense attorneys argue that the accused remains too readily accessible for lengthy or repetitive interrogation and that this location hinders the attorneys’ access to their clients.³⁹⁵ Police and prosecutors argue that detention centers (jails) have insufficient beds to house all of the accused held in these “substitute prisons” and that building additional bed space in detention centers is too costly.³⁹⁶ Prosecutors argue that the existing detention centers are located too far from their offices.³⁹⁷ The government responds that these pre-indictment arrestees are actually afforded more privacy and comfort, as they are permitted to use their own personal clothing and bedding.³⁹⁸ One major inherent problem with substitute prisons involves the police maintaining the dual role of

387. Foote, *supra* note 380, at 88.

388. *Id.*

389. *Id.* at 89.

390. *Id.*

391. IBA Report, *supra* note 173, at 18.

392. *Id.*

393. *Id.* at 19.

394. MINISTRY OF JUSTICE, *White Paper on Crime* (2010), available at <http://hokusyo1.moj.go.jp/en/59/nfm/mokuji.html>.

395. *Japan's "Substitute Prison" Shocks the World*, JAPAN FED’N OF BAR ASSOCIATIONS, 9 (Sept. 2008), http://www.nichibenren.or.jp/library/en/document/data/daiyo_kangoku.pdf.

396. IBA Report, *supra* note 173.

397. *Id.* at 110.

398. IBA Report, *supra* note 173.

supervision over both the custody and the questioning of the accused.³⁹⁹

Another challenge raised in courts involves lengthy questioning during interrogation. While in custody, the accused is subject to unlimited interrogation. They can be questioned for multiple days and, in some reported instances, for over ten to twelve hours per day and into the evening.⁴⁰⁰ Some critics have recommended that police document the duration and frequency of questioning.⁴⁰¹

Japanese accused have the right to counsel under the Japanese Constitution.⁴⁰² However, defendants have not been afforded access to counsel during custodial interrogation and are not typically provided US style *Miranda* warnings advising them of their right to counsel.⁴⁰³ If an accused invokes the right to counsel, the interrogation does not halt.

Court appointed counsel is not made available to pre-indictment arrestees held in *Daiyo Kangoku*.⁴⁰⁴ Counsel is not available during interrogation or during detention hearings.⁴⁰⁵ Accused may retain an attorney at his or her own expense prior to indictment and at every stage.⁴⁰⁶ In 2003, the International Bar Association (IBA) compiled a thorough investigative study. It indicated its support of the electronic recording of Japanese police and prosecutor interrogation to accomplish the following goals:

1. The creation of an objective and complete record of proceedings that is more reliable than other means of reporting and that remains available for later examination and application as required;
2. The protection of suspects from the fabrication of false confessions;
3. The reduction of the likelihood of ill-treatment of suspects by police;

399. *Id.* See also HUMAN RIGHTS WATCH/ASIA & HUMAN RIGHTS WATCH PRISON PROJECT, PRISON CONDITIONS IN JAPAN 1 (Human Rights Watch 1995), available at <http://www.hrw.org/sites/default/files/reports/JAPAN953.PDF>

400. IBA Report, *supra* note 173, at 41; See also *Japan's "Substitute Prison" Shocks the World*, JAPAN FED'N OF BAR ASSOCIATIONS, 10 (Sept. 2008), http://www.nichibenren.or.jp/library/en/document/data/daiyo_kangoku.pdf.

401. IBA Report, *supra* note 173, at 51. See also JSRC INTERIM REPORT, *supra* note 20, at ch. II pt. 2, para. 4(2).

402. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 34 (Japan), available at <http://history.hanover.edu/texts/1947con.html>.

403. IBA Report, *supra* note 173, at 21.

404. *Id.* at 62.

405. See *Japan's "Substitute Prison" Shocks the World*, JAPAN FED'N OF BAR ASSOCIATIONS, 10-11 (Sept. 2008), http://www.nichibenren.or.jp/library/en/document/data/daiyo_kangoku.pdf.

406. IBA Report, *supra* note 173, at 109.

4. Fewer allegations of impropriety by officials, resulting in improvements in morale and public standing; and
5. Less time and expense on the interrogation process and on police.⁴⁰⁷

The JFBA has opined that custodial confessions should be videotaped in full.⁴⁰⁸ Many argue that complete videotaping of the entire interrogation will insure transparency and objectivity.⁴⁰⁹ They argue that videotaping will eliminate concerns of torture, coerced confessions, and false confessions.⁴¹⁰ They go so far as to lobby that the admissibility of confessions should be examined by the lay jurors as a question of fact, rather than a judge determination of a question of law.⁴¹¹

Law enforcement and prosecutors remain adamantly opposed to audiotaping and videotaping interrogations.⁴¹² They argue that taping will impede their ability to connect with the accused and obtain confessions, considered the "King of Evidence."⁴¹³ Many other countries, like the United States, do not generally require the electronic recording of interrogations, except in a few US jurisdictions.

In the past, some accused have alleged that during interrogation, they were abused, tortured and forced to confess.⁴¹⁴ The interrogation process has played "an integral role in the investigative process" by truth searching.⁴¹⁵ Similar to US courts, confessions are generally admissible in court. However, in US jurisdictions, custodial confessions obtained without properly advising the accused's of his rights are suppressed by Courts and never heard by juries.

The Japanese Constitution [KENPO] developed at the end of World War II in 1947 contains many rights afforded to a criminal accused. Accused have the constitutional right to the presumption of innocence, the right to silence, and the right to counsel.⁴¹⁶ Confessions must be voluntary, reliable, and consistent to the constitution. Article 38 of the Japanese Constitution provides, in part, that "no person shall be compelled to testify

407. *Id.* at 7.

408. *Id.* at 75.

409. *Id.* at 77.

410. *Id.*

411. *Id.* at 79.

412. *Id.* at 14. *See also* Wilson, *supra* note 149, at 551.

413. *Id.*; Mariko Oi, *Japan Crime: Why Do Innocent People Confess?*, BBC NEWS (Jan. 2, 2013), <http://www.bbc.co.uk/news/magazine-20810572>.

414. Wilson, *supra* note 149, at 503. *See* Jeff Vize, *Torture, Forced Confessions, and Inhuman Punishments: Human Rights Abuses in the Japanese Penal System*, 20 UCLA PAC. BASIN L.J. 329, 360-63 (2003).

415. Wilson, *supra* note 149, at 503.

416. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 34 (Japan), *available at* <http://history.hanover.edu/texts/1947con.html>.

against himself” and confessions made under compulsion, torture, threat, or prolonged detention shall not be admitted in evidence.⁴¹⁷ No person “shall be convicted or punished in cases where the only proof against him is his own confession.”⁴¹⁸

Some expressed concern over the use of “statement by word processor.”⁴¹⁹ This involves a process whereby the interrogation process involves oral questions and answers back and forth over a period of time.⁴²⁰ The interrogator then prepares the accused’s statement on a word processor in a typewritten form. The statement is allegedly read to the accused, who then signs the typewritten statement prepared by in the interrogator.⁴²¹ Others express concerns over foreign language translation where accuracy issues can arise during the oral question and answer phase.⁴²²

D. Death Penalty

Members of the public and the JFBA have held very vocal long-term criticism over the use of the death penalty in general.⁴²³ Critics further seek the requirement of a unanimous sentencing vote before imposition of the death penalty. Under the current reformed Japanese jury trial system, an accused can be convicted of a crime by a majority vote and then be subject to the death penalty by a simple majority vote.⁴²⁴

Other concerns mirror those human rights issues raised by groups in US jurisdictions, as well as other foreign jurisdictions.⁴²⁵ Death penalty concerns vary with the political changes and beliefs under Japanese leadership. Similar to US jurisdictions, following a death penalty sentence recommended by a jury and ordered by a judge, a government official must specifically order the imposition of the death penalty on each individual.⁴²⁶

The JFBA has taken an aggressive stance and again demanded a

417. *Id.* at art. 38.

418. *Id.*

419. IBA Report, *supra* note 173, at 42.

420. *Id.*

421. *Id.* at 93.

422. *Id.*

423. *JFBA Recommends to Put Capital Punishment Moratorium into Law*, JAPAN FED’N OF BAR ASSOCIATIONS, <http://www.nichibenren.or.jp/en/meetings/year/2002/20021129.html> (last visited July 6, 2013).

424. Keiji Hirano, *Lay Judge Death Sentences Must Be Unanimous: JFBA*, THE JAPAN TIMES (Mar. 25, 2012), <http://www.japantimes.co.jp/news/2012/03/25/national/lay-judge-death-sentences-must-be-unanimous-jfba/#.UVYgu6KG2So>.

425. US groups have frequently attacked the use of the death penalty on several fronts. Some groups cite to religious beliefs. Other US groups contend that the death penalty is imposed disproportionately against black men and cite to long term racial imbalances in the United States.

426. AMNESTY INTERNATIONAL, “*WILL THIS DAY BE MY LAST?*” THE DEATH PENALTY IN JAPAN 5 (2006), available at <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/AI4Japan92.pdf>.

national debate on abolishing the death penalty and suspension of executions.⁴²⁷ The JFBA responded to the government carrying out four executions in a two month period. Two executions took place on August 3, 2012, and two additional executions during September, 2012.⁴²⁸

In a letter from Kenji Yamagishi, President of the JFBA, to the Ministry of Justice, Mr. Yamagishi warns that “the Japanese government has been repeatedly warned from United Nations-related institutions that it should suspend executions.”⁴²⁹ He expressed concerns that the Minister of Justice, Toshio Ogawa, on March 29, 2012, gave the go ahead to execute three death row inmates after a period of twenty months without executions.⁴³⁰ Ogawa’s predecessors, Hideo Hiraoka and Satsuki Eda, were reluctant to issue death warrants for executions.⁴³¹ Mr. Yamagishi requested a nationwide debate and the suspension of executions.⁴³²

Justice Minister Ogawa, who had just assumed his position in January 2012, issued three death warrants, thereby approving the executions by hanging.⁴³³ One of the inmates was Yasuaki Uwabe, 48, who was convicted of killing five victims and injuring ten others in the 1999 train station rampage in Yamaguchi Prefecture.⁴³⁴ Justice Minister Ogawa stated, “the death penalty has been supported in lay judge trials.”⁴³⁵ In the initial eight months of the reformed system, juries recommended death sentences in more than ten cases.

E. Preparation of Judgment

Some critics have expressed concern over the preparation of the judgment document. Following the deliberations and imposition of sentence upon a finding of guilt, the professional judge prepares the written judgment.⁴³⁶ The judgment shall contain a written description of the jury’s judgment, the sentence and the reasoning for the same.⁴³⁷ The verdict shall

427. Kenji Yamagishi, *Statement Protesting the Resumption of Executions, and Requesting Once More the Launch of a Nationwide Debate on the Abolition of the Death Penalty and Suspension of Executions*, JAPAN FED’N OF BAR ASSOCIATIONS (Sep. 27, 2012), available at <http://www.nichibenren.or.jp/en/document/statements/year/2012/120927.html>.

428. *Id.*

429. *Id.*

430. *Id.*

431. Kyodo, *Ogawa Has No Qualms About Executions*, THE JAPAN TIMES (Apr. 6, 2012), <http://www.japantimes.co.jp/news/2012/04/06/national/ogawa-has-no-qualms-about-executions/#.UVYxZ6KG2So>.

432. Yamagishi, *supra* note 433.

433. Kyodo, *supra* note 437.

434. *Id.*

435. *Id.*

436. Makoto Ibusuki, “*Quo Vadis?*”: *First Year Inspection to Japanese Mixed Jury Trial* 24, 33 (2010), available at http://blog.hawaii.edu/aplpj/files/2011/11/APLPJ_12.1_ibusuki.pdf.

437. *Id.*

contain the views reflected in the panel's majority voted opinion. The JFBA has demanded that the courts make public all such judgment documents.⁴³⁸

Under the voting scheme, one professional judge is required to join the vote of guilt.⁴³⁹ The proposed legislation does not mandate that the professional judge who voted with the majority draft the group's verdict. Further, all three professional judges could vote to convict, but the panel's majority vote could end in an acquittal.⁴⁴⁰ In such a scenario, the professional judge drafting the opinion would again be drafting a verdict that was contrary to the judge's own opinion. Some scholars have discussed the risk of the drafter "sabotaging" the verdict by drafting the verdict in such a way as to cause an appellate court to reverse the decision.⁴⁴¹ Others express concern that the views of the dissenters would be ignored by a majority vote and not included at all.

VII. THREE YEARS IN REVIEW

In 2012, the reformed Japanese criminal justice system completed its initial three year period, and pursuant to the Lay Assessor Act, its review should be conducted.⁴⁴² The Ministry of Justice is leading the review and formed a group tasked with analyzing the court reforms.⁴⁴³ The group's members are lawyers and members of civic groups and media organizations. The review group has reviewed court records and interviewed former lay jurors, professional judges, and non lawyer court personnel.

Some believe that the new Japanese jury system is functioning well and expect no changes.⁴⁴⁴ Others anticipate some minor court revisions addressing the types of criminal charges covered.⁴⁴⁵ Some critics argue that the jurors should not address criminal sex cases due to concerns about the victim's privacy and nature of charges.⁴⁴⁶ Others express concern that juries have increased acquittal verdicts in drug cases.⁴⁴⁷ Some scholars anticipate revisions to juror confidentiality mandates. They further expect jurors and defense attorney to gain increased access to information obtained during

438. *Id.*

439. Hirano, *supra* note 430.

440. Levin & Tice, *supra* note 365 ("Acquittal is by majority vote but convictions must also obtain the concurrence of at least one professional judge.").

441. Ibusuki, *supra* note 442, at 34.

442. Lay Assessor Act, *supra* note 4.

443. *Lay Judge System Reviewed After Auspicious Start*, THE JAPAN TIMES (May 30, 2012), <http://www.japantimes.co.jp/text/nn20120530f2.html>.

444. *Id.*

445. *Id.*

446. *Id.*

447. *Id.*

pre-trial investigations.⁴⁴⁸

The JFBA has issued its own report and recommendations for change. The JFBA has traditionally advocated for the repeal of the death penalty, which is unlikely at this time. Therefore, the JFBA has proposed that death penalty sentencing decisions be rendered by a unanimous jury decision, rather than the currently required majority vote.⁴⁴⁹ It further recommended that jury confidentiality laws be relaxed so that juror violators are only punished if acting maliciously.⁴⁵⁰

A. Public Opinion

Public opinion has increasingly improved and former lay assessors have had positive experiences. In the Japanese Supreme Court's annual surveys for each of the three years of operation of the new juror system, 96.7% of citizen jurors regarded their experience as positive.⁴⁵¹ During the initial year of operation, 57% of lay jurors surveyed indicated that their experience was "extremely positive" and 39.7% indicated it was a "positive" experience.⁴⁵² The jurors surveyed expressed that they were also satisfied with the deliberations.⁴⁵³ The great majority of jurors have expressed that they understood the trial proceedings, discussions, evidence and testimony and that the judges and prosecutors were easy to follow. Only about half of the jurors were able to understand the defense arguments.⁴⁵⁴

Former lay jurors have spoken publicly about their experience with great enthusiasm. Notwithstanding their duty of confidentiality, many citizen jurors have offered their own suggestions for improvements. One juror indicated that his jury service has "sparked his new engagement with society."⁴⁵⁵ He recommends that jurors be afforded tours of correctional facilities prior to commencing the trial.⁴⁵⁶ The former juror participates with a group that visits juvenile detention facilities and speaks to youths.⁴⁵⁷ His

448. Setsuko Kamiya, *Lay judges Present Ideas to Make System Better*, THE JAPAN TIMES (Jan. 21, 2012), <http://www.japantimes.co.jp/text/nn20120121f2.html>.

449. *Lay Judge System Reviewed After Auspicious Start*, THE JAPAN TIMES (May 30, 2012), <http://www.japantimes.co.jp/text/nn20120530f2.html>.

450. *Id.*

451. Ibusuki, *supra* note 442, at 44.

452. *Id.*; See Supreme Court Office, *Saiban-In To Keikensha Ni Taisuru Anketo Chousa Houkokusho* [Report of Questionnaire Survey of Former Lay Judges], Mar. 2010, available at <http://www.moj.go.jp/content/000050865.pdf>.

453. Ibusuki, *supra* note 442, at 44.

454. *Id.* at 47.

455. Setsuko Kamiya, *Lay Judge Duty Sparks New Passion*, THE JAPAN TIMES (June 21, 2012), <http://www.japantimes.co.jp/text/nn20120621f1.html>.

456. *Id.*

457. *Id.*

group requests that the government disclose more information regarding death penalty cases.⁴⁵⁸

Some lay jurors did express some negative feedback in the first year of reform. When surveyed, 21% of the lay jurors indicated that the professional judges tried to influence their decisions.⁴⁵⁹ Six percent of the 210 people who responded to the survey indicated that the judges tried to influence them.⁴⁶⁰ The 210 respondents were part of the more than 5,200 lay citizens who had served on the panels consisting of three professional judges and six lay members.⁴⁶¹ These citizens sentenced 903 of the 904 people convicted in 858 cases.⁴⁶² Fifteen percent indicated that the professional judges tried “somewhat” to influence them for a total equating to 21%.⁴⁶³ However, 73% of those who responded to the survey indicated that they did not believe that the professional judges directed them during deliberations.⁴⁶⁴

B. Case Management

In the first three years of reform, almost 21,000 lay citizens have served as jurors in almost 5,000 cases.⁴⁶⁵ During the first year of operating the reformed Japanese criminal justice system, the number of cases which proceeded to trial and were completed were far lower than expected.⁴⁶⁶ The new system commenced in May 2009 and the first actual lay trial took place in August 2009.⁴⁶⁷ From its inception on May 21, 2009, until May 20, 2010, the trial courts handled 1,881 criminal cases, of which 530 resulted in a guilty verdicts and no acquittals were entered.⁴⁶⁸ Scholars have offered explanations for the lower number of completed jury trials.⁴⁶⁹

The number of offenses warranting a jury trial filed monthly by the prosecutors was about half as much as officials had expected, based upon a

458. *Id.*

459. *21% of Lay Judges Felt Decisions Guided By Pros*, THE JAPAN TIMES (August 2, 2010), <http://www.japantimes.co.jp/text/nn20100802a1.html>.

460. *Id.*

461. *Id.*

462. *Id.*

463. *Id.*

464. *Id.*

465. Anna Watanabe, *Japan's 'Lay Judge' System To Be Revised*, ASIAN CORRESPONDENT (June 3, 2012), available at <http://asiancorrespondent.com/83631/japans-lay-judge-system-to-be-revised/>.

466. Ibusuki, *supra* note 442, at 39 (The actual number of jury trials was 40% lower than expected and the number of completed jury trials was only a little more than 18%).

467. Setsuko Kamiya, *Lay Judges Present Ideas to Make System Better*, THE JAPAN TIMES (Jan. 21, 2012), <http://www.japantimes.co.jp/text/nn20120121f2.html>.

468. Ibusuki, *supra* note 442, at 36.

469. *Id.* at 37-38.

review of the prior five year period.⁴⁷⁰ In the first year of operation of the jury trial system, the Ministry of Justice expected 3,600 lay trials, equating to roughly 300 cases per month.⁴⁷¹ However, prosecutors filed approximately 138 indictments per month during the first year.⁴⁷²

One expert has characterized prosecutors as commencing with an "extra measure of caution"⁴⁷³ and offered three explanations for this prosecutor caution, as follows: avoid uncertainties, allocate resources efficiently, and maintain a high conviction rate.⁴⁷⁴ Prosecutors could avoid the uncertainty of a jury trial by simply reducing the number of charges and types of offenses they choose to file. Japanese prosecutors have the power to serve as the gatekeepers to jury trials by selectively filing cases.

Another explanation for the lower than expected numbers of completed jury trials during the first year maybe due to the delay in the pre-trial phase.⁴⁷⁵ More emphasis is now placed on pre-trial proceedings.⁴⁷⁶ Prosecutors have broader discovery requirements. Previously, prosecutors were only required to disclose evidence that they sought to introduce at trial.⁴⁷⁷ Prosecutors must now disclose more of their collected evidence, even if it shows weaknesses in their case.⁴⁷⁸ By utilizing pre-trial conferences, judges and litigants should narrow the issues and clarify the charges and applicable laws. Judges should review evidence and discovery issues and schedule all hearings and trials.

A typical period from indictment to judgment was six months.⁴⁷⁹ Jury trials took only three or four days on average to complete and the period was not significantly different from the time required for a trial before professional judges.⁴⁸⁰ Further, the pre-trial period was not significantly longer with jury trials.

The first year statistics must also take into account the initial pre-trial delay or "lag time" in bringing the first cases under the new jury system to conclusion. For example, the new system commenced in May 2009 and the first trial did not commence until August 2009.⁴⁸¹ If the average pre-trial period was six months, the full trial caseload did not commence until November 2009 (six months following the May inception). Further, the 2008 report issued by the Court Office reflects that prior to the new system,

470. Johnson, *supra* note 41.

471. *Id.*

472. *Id.*

473. *Id.*

474. *Id.*

475. Fukurai, *supra*, note 169, at 822.

476. *Id.*

477. *Id.*

478. *Id.*

479. Ibusuki, *supra* note 442, at 38.

480. *Id.*

481. *Id.*

contested cases averaged 10.5 months to complete.⁴⁸² Therefore, once the initial lag time and start-up inefficiencies are fully appreciated, it becomes difficult to criticize the low number of completed trials in the first twelve months of operation.

In 2006, District Courts disposed of their 75,370 contested and uncontested cases on average in 3.1 months.⁴⁸³ This means that from the onset of prosecution (indictment) to disposition (sentencing), cases were concluded in just over three months.⁴⁸⁴ In 2010, District Courts resolved their 62,840 contested and uncontested cases in just 2.9 months following commencement of prosecution.⁴⁸⁵ However, the 2010 caseload includes cases tried under the new lay jury system.

Of the 1,506 individuals who concluded their cases following a lay jury trial in 2010, 971 confessed and 535 individuals denied the charges.⁴⁸⁶ Of those individuals who confessed, the average case was resolved in 7.4 months.⁴⁸⁷ Of those who denied their charges, the average case was resolved in 9.8 months.⁴⁸⁸ Therefore the average case was resolved in 8.3 months.⁴⁸⁹ Of those cases tried by jury, the median case was resolved in three to four days of trial in 2010.⁴⁹⁰ Of the 1,506 cases, 73% were tried in five days or less.⁴⁹¹ Ninety four percent of the cases were tried in ten days or less.⁴⁹² It is apparent that the Japanese trials are being run fairly efficiently, as they are taking just a few days to complete. Also, the jury's sentencing function is being concluded during this same time frame.

In light of the significant reforms, participants should remain patient with the perceived delay from onset of the cases until conclusion. Presiding judges and attorneys must gain comfort with the jury system and defense attorneys must improve pre-trial investigatory skills. Lawyers for both sides must develop new litigation and advocacy skills with their new lay audiences. Presiding and professional judges must develop different organizational skills in operating trial courtrooms.

Upon review of the judicial criminal court case statistics, it must be

482. *Id.*

483. *White Paper on Crime 2007*, MINISTRY OF JUSTICE, <http://hakusyo1.moj.go.jp/en/56/nfm/mokuji.html> (last visited July 1, 2013).

484. Ibusuki, *supra* note 442, at 38.

485. STATISTICS BUREAU, *Ch 25. Justice & Police: tbl. 25-13*, <http://www.stat.go.jp/english/data/nenkan/1431-25.htm> (last visited July 1, 2013).

486. *White Paper on Attorneys 2011*, JAPAN FED'N OF BAR ASSOCIATIONS, 47, <http://www.nichibenren.or.jp/library/en/about/data/WhitePaper2011.pdf> (last visited July 1, 2013)[hereinafter *White Paper on Attorneys*].

487. *Id.*

488. *Id.*

489. *Id.*

490. *Id.*

491. *Id.*

492. *White Paper on Attorneys*, *supra* note 486.

noted that Japanese courts have a near 100% clearance rates. US courts review monthly and annual caseload reports to determine judicial efficiency. The number of newly assigned cases is compared against the number of cases concluded or closed (generally, by conviction, acquittal or sentence). The resulting comparison number is considered the clearance rate. In Japan, criminal judicial cases reported for 1995, 2000, 2005, 2009 and 2010 reflect nearly equivalent numbers for “accepted” and “settled” cases. Therefore, the criminal justice system as a whole, which includes all offenses whether or not subject to the new jury trial system, operates at a near 100% clearance rate.⁴⁹³

A total of 3,173 people have been tried by Japanese juries since the reform inception through December 2011.⁴⁹⁴ However, the Japanese government reports an overall reduction in criminal court cases in the last decade. In 2000, Japanese courts accepted roughly 1,638,000 cases. In 2010, Japanese courts accepted 1,158,000 cases.⁴⁹⁵ These statistics reflect a 30% overall reduction in filed criminal cases over a 10-year time span. However, it should be noted that these overall criminal case numbers include traffic related cases, which could dramatically skew the perceived overall decrease in prosecuted crimes.

C. Verdicts

During the initial first year period, few Japanese jury trials ended with acquittals. The almost 100% conviction rate continued even after the reforms. Of course, it should be noted that Japan does not have arraignments where defendants may plead guilty. Further, unlike US courts where defendants admit guilt and “plea bargain” for a negotiated lesser charge or lower sentence, uncontested cases where Japanese defendants admit guilt are still tried before the small mixed jury panel expecting, of

493. This clearance rate for court cases should not be confused with police and prosecutor reported clearance rates. In 2009, the clearance rate for all reported crimes to police was 51%. See *White Paper on Crime 2010, Part 1/Chapter 1/Section 1*, MINISTRY OF JUSTICE, http://hakusyo1.moj.go.jp/en/59/nfm/n_59_2_1_1_1_0.html#fig_1_1_1_1 (last visited July 1, 2013). Between 2004-2008, the clearance rate for reported homicides remained between 95% and 97% in Japan and Germany. The homicide crime rate is significantly lower in Japan than the US. The homicide clearance rate in the US for the same time period ranged from 61% - 64%. See *White Paper on Crime 2010, Part 1/Chapter 4/Section 2*, MINISTRY OF JUSTICE, <http://hakusyo1.moj.go.jp/en/59/image/image/h001004002001h.jpg> (last visited July 1, 2013). In 2008, police clearance rates for reported major offenses were 32% in Japan and 21% in the US. See, *White Paper on Crime 2010/ Part 1/Chapter 4/Section 1*, MINISTRY OF JUSTICE, <http://hakusyo1.moj.go.jp/en/59/image/image/h001004001001h.jpg> (last visited July 1, 2013).

494. STATISTICS BUREAU, *Handbook, Ch. 17: Government System*, <http://www.stat.go.jp/english/data/handbook/c17cont.htm> (last visited July 1, 2013).

495. STATISTICS BUREAU, *Ch 25. Justice & Police: tbl. 25-12*, <http://www.stat.go.jp/english/data/nenkan/1431-25.htm> (last visited July 1, 2013).

course, that the defendant will be found guilty.

The first jury trial ending in an acquittal occurred on June 22, 2010, in the Chiba District Court involving a drug trade offense.⁴⁹⁶ The second acquittal verdict was rendered six months later in December 2010.⁴⁹⁷ In this case, an acquittal was entered for the first time where the prosecutor was seeking the death penalty. From 2003-2007, not guilty verdicts ranged from 2-3%.⁴⁹⁸ Not guilty verdicts actually decreased slightly. Until May 2010, not guilty pleas were entered in 26% of the 554 indicted cases.⁴⁹⁹ From 2003-2007, not guilty pleas were entered in roughly 30% of serious offense cases.⁵⁰⁰

In 2010, after the first full calendar of operation, a total of 1,835 cases were prosecuted for offenses subject to the new lay jury criminal system.⁵⁰¹ Robbery Causing Injury offenses accounted for 25% of the cases (460 cases).⁵⁰² Homicide cases (353 cases) amounted to 19% of the prosecuted offenses and the 180 Arson of Inhabited Buildings offenses constituted 10% of the cases.⁵⁰³ Injury Causing Death and Violations of the Stimulants Control Act each accounted for 8% of the cases.⁵⁰⁴

During 2010, the cases of 1,530 individuals tried before lay jurors were finalized.⁵⁰⁵ Of those cases finalized, 1,503 individuals were convicted, two were acquitted, one was partly acquitted, and twenty-four other individuals had their cases dismissed or transferred.⁵⁰⁶ These first full year results indicate a 98% jury conviction rate.⁵⁰⁷

D. Attorneys

As part of the justice system reform, many changes were made to the practice of law and the role of the attorney [bengoshi]. Sweeping changes were made to legal education, including the opening of several graduate level law schools, an increase in the number of attorneys passing the bar

496. Ibusuki, *supra* note 442, at 40. *First Full Acquittal in Lay Judge Trial*, THE JAPAN TIMES (June 23, 2010), <http://search.japantimes.co.jp/cgi-bin/nn20100623a4.html>.

497. See Fukurai, *supra* note 169, at 819. *Gallows Averted in a First as Lay Judges Acquit*, THE JAPAN TIMES (Dec. 11, 2010), <http://search.japantimes.co.jp/cgi-bin/nn20101211a1.html>.

498. Ibusuki, *supra* note 442, at 40. SUP. CT. OF JAPAN, *Table 4. Annual Comparison of Number and Rate of the Accused Found Not Guilty* (2008), http://www.courts.go.jp/english/proceedings/pdf/criminal_justice/table4.pdf.

499. *Id.* at 40.

500. *Id.*

501. *White Paper on Attorneys*, *supra* note 492, at 45.

502. *Id.*

503. *Id.*

504. *Id.*

505. *Id.* at 46.

506. *Id.*

507. *White Paper on Attorneys*, *supra* note 492, at 46.

exam and practicing law, and the implementation of the publicly funded criminal defense attorney system.

From 2000 to 2011, the Japanese Bar experienced a 44% increase in practicing lawyers. In 2011, Japan maintained 30,485 attorneys, 17% of which were women.⁵⁰⁸ The highest number of male and female attorneys were in their 30s. Almost half of the attorneys practiced in Tokyo, where the ratio of people per attorney was the lowest.⁵⁰⁹

The increase in the number of Japanese attorneys is decreasing the number of citizens per lawyer. From 2005 to 2011, Japan experienced a 17% decrease in the number of people per attorney.⁵¹⁰ Other major foreign countries did not have any significant changes during the same time period. In 2011, Japan had 4,196 people per attorney.⁵¹¹ In comparison, France had 1,244 people per attorney in 2011; Germany had 525 people per attorney; The United Kingdom had 435 people per attorney; and the United States had 273 people per attorney.⁵¹²

Japan has reduced the number or people per judge from 2005 to 2011 by 13%.⁵¹³ In 2005, Japan maintained 51,905 people per judge.⁵¹⁴ In 2011, the number of people per judge declined to 44,932.⁵¹⁵ In comparison, the United Kingdom had 15,074 people per judges; France had 10,964 people per judge; the United States had 9,553 per judge (federal and state judges combined); and Germany had the highest number of judges with 4,070 people per judge.⁵¹⁶

Japan increased its number of prosecutors. From 2005 to 2011, Japan experienced a 13% decrease in the number of people per prosecutor.⁵¹⁷ In 2011, Japan maintained 71,500 people per prosecutor.⁵¹⁸ In comparison, France maintained 32,677 people per prosecutor; the United Kingdom (England and Wales) had 17,929 people per prosecutor; and Germany consisted of 15,971 people per prosecutor.⁵¹⁹ From 2005 to 2011, the United States saw an 11% “increase” in the number of people per prosecutor with 9,455 people per prosecutor.⁵²⁰

The Japanese criminal justice system experienced significant improvements by increasing the number of arrestees represented by counsel

508. *Id.* at 13.

509. *Id.* at 15.

510. *Id.* at 17

511. *Id.*

512. *Id.*

513. *White Paper on Attorneys*, *supra* note 492, at 18.

514. *Id.*

515. *Id.*

516. *Id.*

517. *Id.* at 19.

518. *Id.*

519. *White Paper on Attorneys*, *supra* note 492, at 19.

520. *Id.*

prior to indictment by the prosecution. From 2007 to 2010, the percentage of pre-indictment arrestees in the District Courts with an attorney increased from 23% to 64%.⁵²¹ In 2010, 40,329 arrestees out of 62,840 arrestees retained an attorney before they were formally charged with a crime by the prosecutor.⁵²² Of those accused represented by counsel, 18% retained private counsel and 84% were furnished with court-appointed counsel.⁵²³

In Summary Courts where less serious offenses are heard,⁵²⁴ the percentage of individuals represented at the pre-indictment stage increased significantly from 2007 to 2010.⁵²⁵ In 2007, roughly 9% of arrestees were represented by counsel.⁵²⁶ In stark contrast in 2010, 64% of arrestees were represented.⁵²⁷ Interestingly, court-appointed counsel represented 95% of the arrestees and 5% of the individuals hired private counsel.⁵²⁸

The new court-appointed attorney system has been rolled out in two stages. The first stage was implemented in October 2006 and court-appointed counsels were furnished to arrestees prior to indictment in serious cases.⁵²⁹ These cases included crimes punishable by the death penalty, indefinite incarceration or a minimum of one year incarceration, such as murder, rape and robbery.⁵³⁰ In May 2009, stage two commenced and court-appointed counsel were additionally provided to pre-indictment arrestees facing less serious charges carrying maximum sentences of up to three years incarceration.⁵³¹ In 2008, court-appointed counsels were appointed in 7,415 pre-indictment cases.⁵³² In 2009, court-appointed counsels were appointed in 61,857 pre-indictment cases.⁵³³ In 2010, 70,917 cases received attorneys.⁵³⁴

In post-indictment District Court cases, almost all individuals were

521. *Id.* at 36.

522. *Id.*

523. *Id.*

524. *Outline of Criminal Justice in Japan*, SUP. CT. OF JAPAN, http://www.courts.go.jp/english/judicial_sys/criminal_justice_index/ (last accessed Apr. 7, 2013). (District courts are the principal courts of general jurisdiction and summary courts have limited jurisdiction over “offenses punishable by fines or lighter punishments and other minor offenses, such as theft and embezzlement”).

525. *White Paper on Attorneys*, *supra* note 492, at 37.

526. *Id.*

527. *Id.*

528. *Id.* (95% arrived at by dividing the number of defendants with court appointed counsel (6,025) by the total number of defendants with defense counsel from pre-indictment stages in 2010 (6,345) to arrive at 94.96%).

529. *Id.* at 39.

530. *Id.*

531. *White Paper on Attorneys*, *supra* note 492, at 39.

532. *Id.*

533. *Id.*

534. *Id.*

represented by counsel. In 2000, 97% of individuals were represented.⁵³⁵ In 2005, individuals retained counsel in 98% of the cases.⁵³⁶ In 2010, indicted individuals were represented more than 99% of the time.⁵³⁷

However, the number of individuals receiving court-appointed counsel rose. In 2005, District Courts appointed counsel to 76% of individuals following indictment.⁵³⁸ In 2010, court-appointed counsel represented 84% of indicted individuals in District Court cases.⁵³⁹

In Summary Court cases, post-indictment individuals retain counsel nearly 100% of the time.⁵⁴⁰ However, from 2005 to 2010, the percentage of individuals receiving court-appointed counsel rose from 89% to 94%.⁵⁴¹ Interestingly, the number of cases pending in Summary Courts decreased significantly from 14,549 cases in 2005 to 9,876 in 2010.⁵⁴²

In appeals pending in the High Courts, 95% of individuals retained counsel in 2010.⁵⁴³ This percentage rose slightly from 2005, when 93% of individuals were represented by counsel for their appeals.⁵⁴⁴ The percentage of individuals represented by court-appointed, as opposed to privately retained counsel, rose slightly. In 2005, 70% of individuals received court-appointed counsel.⁵⁴⁵ In 2010, individuals with appeals pending in the High Courts were represented by court-appointed counsel in 74% of the cases.⁵⁴⁶

The reformed system has addressed and modified many significant aspects of the judicial system. To be effective, a thorough preparation and educational period was utilized. However, court participants cannot be expected to fully appreciate and adjust to the reformations until actual implementation. During the initial years, participants and observers must be patient with the progress. Modern US courts with long traditions of jury trial systems continue to struggle with these same concerns of efficiency, trial length, and length of pre-trial periods.

E. Appeals and Sentencing

In reviewing the cases tried in 2010 before lay judges, many cases were tried multiple times. *Koso* appeals ("First Instance") are filed to the

535. *Id.* at 36.

536. *Id.*

537. *White Paper on Attorneys, supra* note 492, at 36.

538. *Id.*

539. *Id.*

540. *Id.* at 37.

541. *Id.*

542. *Id.*

543. *White Paper on Attorneys, supra* note 492, at 38.

544. *Id.*

545. *Id.*

546. *Id.*

High Courts from the District Courts.⁵⁴⁷ Either the defense or the prosecution may appeal.⁵⁴⁸ The High Court may reverse and order a new trial.⁵⁴⁹ A party may appeal a jury's verdict and judgment of the court based upon the following grounds: (1) error in trial procedure; (2) error of law; (3) inappropriate Sentence; and (4) error of Fact Finding.⁵⁵⁰ The average case involving a confession was tried 3.5 times.⁵⁵¹ The average case involving a denial of the criminal charge resulted in being tried 4.4 times.⁵⁵²

In 2009, 75,128 cases were heard in District Courts and the death penalty was imposed in nine cases.⁵⁵³ Four of the cases involved robbery offenses and five cases involved homicide.⁵⁵⁴ Life sentences were imposed in sixty-eight cases.⁵⁵⁵ Life sentences were handed down in fifty robbery cases and eighteen homicide cases.⁵⁵⁶

F. Jurors

From May 2009 until May 2010, more than 50,000 citizens were identified as potential lay jurors.⁵⁵⁷ Juror summons were sent to almost 38,000 people.⁵⁵⁸ Exemptions or excusals were awarded to roughly 13,000.⁵⁵⁹ More than 21,000 citizens appeared at court for jury selection.⁵⁶⁰ More than 4,600 citizens were selected to serve as either jurors or alternate jurors.⁵⁶¹

By December 2009, 5,000 citizens were summonsed to appear for trial and almost 80 percent appeared for jury selection.⁵⁶² The Japanese Supreme Court surveyed the group about their demographics. The majority of the jurors were male, middle-aged (30s to 50s), and full time workers.⁵⁶³ Almost 17% of the jurors were primarily responsible for the care of a child

547. *Outline of Criminal Justice in Japan*, SUP. CT. OF JAPAN, http://www.courts.go.jp/english/judicial_sys/criminal_justice_index/ (last visited July 1, 2013).

548. *Id.*

549. *Id.*

550. *Id.*

551. *White Paper on Attorneys*, *supra* note 492, at 47.

552. *Id.*

553. MINISTRY OF JUSTICE, WHITE PAPER ON CRIME app. 2-4 (2010), *available at* <http://hakusyol.moj.go.jp/en/59/image/image/h008002004-1h.jpg>.

554. *Id.*

555. *Id.*

556. *Id.*

557. Fukurai, *supra* note 169, at 815.

558. *Id.*

559. *Id.* at 815

560. *Id.* at 816

561. *Id.*

562. Fukurai, *supra* note 169, at 816.

563. *Id.*

or elderly person.⁵⁶⁴

In July 2010, the Japanese Supreme Court conducted its second report. From January to April 2010, more than 11,000 appeared for jury selection.⁵⁶⁵ The majority of the jurors were male, middle-aged and full-time workers.⁵⁶⁶ Nearly 20% maintained the primary responsibility for the care of a child or elderly person.⁵⁶⁷ Of the jurors selected to sit on a jury as a juror or as an alternate, the demographic make-up of the juror remained the same. Of the jurors selected to serve, 18%-20% of the jurors maintained the primary care responsibility for a child or elderly person.⁵⁶⁸ Full-time homemakers comprised approximately 10% of the jurors.⁵⁶⁹ Individuals without employment, including retired persons, made up 5% to 7% of the jurors in both the 2009 and 2010 surveys.⁵⁷⁰

VIII. RECOMMENDATIONS

The initial three year period of the Japanese jury system has proven to be a huge success. After decades of an under utilized pre-war jury system, Japan bravely implemented sweeping judicial reform to almost all aspects of the court system and the legal profession. Certain continental European court features will always cause concern for US scholars, but mixed courts have been widely accepted across Europe. Japan should expand the use of its jury trials to additional serious criminal offenses; maintain juror confidentiality; further study death penalty issues; further study police interrogations and reduce emphasis on confessions; stabilize professional law schools and bar passage rates; eliminate prosecutor appeals; and develop court rules for separate lay juror deliberations. Japan should eventually expand coverage to civil cases.

A. Expand Jury System to Additional Serious Offenses

The Japanese jury system commenced by covering the more serious cases involving capital offenses and those offenses involving victim death by intentional act. These categories of cases were an excellent starting point. Many foreign jury systems similarly cover only the most serious cases.

The Japanese government and other groups developed an extensive public education campaign leading up to the commencement of the reforms.

564. *Id.*

565. *Id.* at 817.

566. *Id.*

567. *Id.*

568. Fukurai, *supra* note 169, at 817.

569. *Id.*

570. *Id.*

Further, the media covered many Japanese jury trials. Many lay jurors have spoken publicly about their positive trial experiences. Without doubt, Japanese citizens have embraced their reformed and unique jury system. Similar to US jurors, Japanese lay jurors generally enjoy their service. These positive jury experiences and media coverage have furthered the court reform goals of enhancing citizen participation in government, advancing democracy, and improving legitimacy of the court system.

The Japanese courts successfully implemented the jury system to the intended criminal offenses. After three years of smooth operation, Japanese courts are now well prepared to expand jury trials to cover additional criminal offenses. Some critics have proposed excluding drugs and sexual related offenses. Critics express concern over jury acquittals in drug cases. They further cite to victim privacy concerns in sex offenses. I propose maintaining jury trials for both drug offenses and sex crimes. If needed, measures may be easily implemented to protect victims of sex crimes. Further, prosecutors and members of the public should not fear any perceived jury acquittals in drug cases.

Rather, the court system will remain a strong institution if the number of jury trials increases. Learning from Japan's past experience with its pre-war jury system, which was suspended due to nonuse, utilization is key. The goal of public participation and education will be furthered with an increased number of lay jury trials. The Japanese courts are well prepared to tackle an expansion of the jury system to additional categories of criminal offenses. For example, jury trials could be implemented in serious cases involving victim violence, such as robberies, kidnapping, batteries and rapes, even when death does not result. Once the court system adjusts to the increase in volume, the jury system should continue to expand to cover more serious offenses involving property and drug offenses.

B. Maintain Juror Confidentiality

Juror confidentiality has worked well in the reformed Japanese criminal jury system. Many foreign scholars have expressed their concern over punishing jurors for "leaking" information about juror deliberations. First, the critics cite to their concerns for jurors who need to discuss their own stress from the court experience. Second, authors have proposed that restricting juror speech could prevent a juror from disclosing juror misconduct. Third, scholars cite to the ideals of freedom of speech that exist under the First Amendment to the US Constitution. Last, critics have asserted that imposing juror confidentiality actually defeats the goals of democracy, as jurors cannot share their court experiences with others.

Jurors experiencing stress after a jury trial may seek professional assistance. They are permitted to make limited disclosures so that they may benefit from counseling services. Therefore, it seems that the jurors are not facing any harm by the required confidentiality.

The mixed jury system encompasses professional judges and lay assessors. The professional judges deliberate side-by-side with citizen jurors. If juror misconduct exists, the professional judges have complete access to the lay jurors. The parties could remain unaware of the misconduct affecting the outcome of a case in certain instances. However, in light of the direct participation of the professional judges, the risk of unaddressed lay assessor misconduct is rare.

Juror confidentiality exists in many forms. United States grand juries have long maintained strict confidentiality requirements. The Japanese new grand jury (Kensatsu Shinsakai or Prosecutorial Review Commission (PRC)) also requires strict juror confidentiality. In the United States, jurors are free to maintain confidentiality, if they choose, and in most jurisdictions, jurors cannot be forced to disclose communications from deliberations. US lawyers are subject to professionalism rules, which prohibit them from contacting jurors and initiating communications about the trial. In the United States, jurors are also free to disclose deliberation communications and votes. The US jurors are free to publish their "tell all" books at a profit and disclose the communications of a fellow juror, even when that juror chooses to maintain privacy. The freedom to disclose the communications of the other jurors provides a potential chilling effect upon juror deliberations.

Following the conclusion of the Japanese trials, lay jurors have spoken out about their experiences. Without divulging specific jury communications, the former jurors have completed polls and surveys. The media has interviewed jurors, who have expressed and described their feelings about the courts. Some jurors have taken steps to offer their recommendations to improve the court system. Other jurors have educated the public and enhanced democracy by sharing their positive experiences and feelings.

C. Further Study Death Penalty Concerns and Jury Voting

Citizens and governments in many countries have held long term debates over the use of the death penalty and the United States is no stranger to such heated debates. Many groups hold strong divergent views of the death penalty due to religious, moral, and human rights views. Some Americans, for example, believe that the death penalty is disproportionately imposed upon African Americans. Proponents of the US death penalty argue that this ultimate sanction deters criminal behavior.

The death penalty existed in Japan long before the jury system and court reforms were implemented. Japanese death penalty opponents seek the complete abolition of the death penalty. However, sensing the political climate supporting the death penalty, some groups have advocated for a less controversial change. Some critics have recommended that a death penalty sentencing vote be unanimous, rather than a majority vote. In this theory, in

a contested case, all three professional judges and all six lay jurors would be required to unanimously vote for a death penalty sentence.

Issues involving the death penalty should be addressed independently from issues involving jury and court reform. Changing a death penalty sentencing vote from a majority vote to a unanimous vote should indeed warrant consideration. However, this sentencing vote is really a small piece of a very large pie. The Ministry of Justice should commission a study to review all aspects of the death penalty. The commission should analyze cases reversed due to a wrongful conviction, police investigation and interrogation, confessions, prosecutorial discretion in seeking the death penalty, and sentencing statistics. The Japanese society should not address this large political issue in piecemeal decision making. Death penalty views vary in US jurisdictions from state to state. The Japanese courts have the benefit of having one unified court system. Therefore, one review group should review death penalty issues from across Japan.

D. Further Study Police Interrogation And Reduce Emphasis On Confessions

Scholars and groups have expressed much criticism over Japanese police interrogations. Critics have studied the use of “substitute prisons,” pre-trial detention, access to counsel, and the manner of obtaining confessions. However, the one consistent thread to all of these concerns involves the undue emphasis placed upon obtaining confessions and the near perfect conviction rates.

This culture of seeking confessions in every case is the real driving force behind these police, prosecutor and court concerns. If law enforcement agencies were trained to shift their focus away from obtaining confessions, they would develop other investigatory strategies. Therefore, police agencies and prosecutors should broaden their investigatory focus and develop other forensic techniques.

Concerns over Japanese police tactics include allegations of lengthy interrogations. With the implementation of the public defender system, many accused receive the services of court-appointed counsel. Further, attorneys are more frequently appointed to an accused during pre-indictment detention. Concerns relating to confessions should be studied by a specially appointed independent panel. This panel should carefully review police interrogation tactics involving the duration, location, and recording of interrogations. Special consideration must be focused upon the ability of the accused to terminate questioning once arrested. The accused should be afforded notice of the right to remain silent and right to counsel and the interrogation process should terminate upon the demand of the accused. The independent panel should study these recommended changes and finally address the many concerns surrounding police interrogation.

E. Stabilize Law School Enrollment And Bar Passage Rates

In 1999, Japan implemented sweeping reforms to its legal education system. The JSRC recommended changes to Japanese legal education.⁵⁷¹ In response, Japan adopted “American-style” professional graduate level law schools [houka daigakuin] modeled after the 202 US law schools accredited by the American Bar Association.⁵⁷² The JSRC further recommended increasing the bar passage rate from 3% to over 70%.⁵⁷³

Prior to the legal education reform, Japanese legal education consisted of undergraduate law [hougakubu] and graduate law [hougakuin].⁵⁷⁴ Roughly 45,000 students were educated through this legal study each year.⁵⁷⁵ Legal education was not required to sit for the national legal examination.⁵⁷⁶ Students would sit for the national exam after attending expensive “cram schools” for several years.⁵⁷⁷ Only two to five percent of the students passed the competitive national legal examination.⁵⁷⁸ Those who passed the exam were then educated by the Japanese Supreme Court’s Legal Training and Research Institute (“LTRI”) [Shiho Kenshujo].⁵⁷⁹

The Japanese legal education reforms have faced a rocky start. Seventy-four graduate level law schools opened.⁵⁸⁰ Graduation from one of these law schools became a requirement to sit for the exam.⁵⁸¹ The government planned to gradually increase the number of new attorneys. Law school enrollment was predicted to reach 4,000, however, enrollment came in much higher at 5,800.⁵⁸² To prevent the number of licensed attorneys from growing too quickly, Japan reduced the expected bar passage rate. In 2009, the bar exam passage rate was 27.6%.⁵⁸³ As a result, the number of law school applicants dropped.⁵⁸⁴ Japan should stabilize its legal education system by regulating the number of law schools student enrollment, maintaining high quality standards in legal education, and

571. Matthew J. Wilson, *U.S. Legal Education Methods and Ideals: Application to the Japanese and Korean Systems* 18 CARDOZO J. INT'L & COMP. L. 295, 314 (2010); See JSRC INTERIM REPORT, *supra* note 20, at ch.I, pt.3, para. 2(2).

572. *ABA-Approved Law Schools*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html (last visited July 1, 2013).

573. JSRC INTERIM REPORT, *supra* note 20, at ch. III, pt. 2, para.2(2)(d).

574. Wilson, *supra* note 577, at 315.

575. *Id.*

576. *Id.*

577. *Id.* at 315-16.

578. *Id.* at 317.

579. *Id.* at 316.

580. Wilson, *supra* note 577, at 319.

581. *Id.*

582. *Id.* at 326.

583. *Id.* at 327.

584. *Id.*

developing a consistently high bar exam passage rate to 75%.

F. Eliminate Prosecutor Appeals

Under the current system, prosecutors may appeal jury acquittals. Upon appellate court review, a new trial can be ordered and criminal defendants are re-tried several times. By allowing these retrials until a defendant is ultimately convicted, the goal of citizen participation in government is defeated. Citizens may suspect that their involvement in the courts is mere “window dressing” for legitimacy of the courts. Citizens may feel that they are wasting their time and effort if their decisions have no real teeth. With prosecutorial appeals, the jury’s job is diminished as juries, in effect, are rendering advisory opinions and not binding verdicts. As Japan’s court reform goals are to promote deliberative democracy and enhance legitimacy of the courts, prosecutor appeals should end.

G. Maintain Prohibition of Waiving Jury Trial

The reformed Japanese jury system has faced criticism for not allowing criminal defendants to waive the right to jury trial. If the accused confesses and no facts are in dispute, the case proceeds to the smaller size jury panel consisting of one professional judge and four lay assessors. However, the jury hears all the evidence, including the victim statement. The jury panel further maintains its sentencing function, if a verdict of guilt is determined. Modern US courts permit individuals to waive their right to a jury trial and proceed to a “bench trial” before a professional judge.⁵⁸⁵ The judge serves as the fact finder and renders a verdict of guilty or not guilty. However, in practice, criminal “bench trials” are uncommon.

It is more common for American defendants to “plea bargain.” A typical “plea bargain” includes an agreement whereby the defendant waives the right to trial and admits guilt. The defendant proceeds directly to sentencing without a trial or any findings of fact. The prosecutor generally agrees to recommend a lighter sentence to be imposed by the judge. As a result, US justice systems face concerns over a diminished number of criminal jury trials.

H. Define Rules for Separate Deliberations

One inherent problem with mixed courts and the Japanese *saiban-in* that make US judges cringe is the likelihood of professional judges dominating the jury deliberations. When discussing mixed courts with my fellow American judges, their first responses are, as expected, that the lay

585. In some US jurisdictions, the prosecutor and/or the judge must consent to the accused’s waiver of the right to a jury trial.

assessors will merely defer to the views expressed by the professional judges. These thoughts are similar to those expressed by critics of the previous Russian mixed courts where the lay assessors were referred to as simply “noddors” or “puppets” in German mixed courts. These mixed courts are a foreign concept for US judges, lawyers and scholars, while the mixed courts have a longstanding tradition in continental Europe.

Lay assessors should deliberate separately from the professional judges. The lay assessors should deliberate on questions of fact and vote privately. The professional judges would be limited to offer only opinions and views on questions of law. The professional judges should, likewise, deliberate separately and vote on questions of fact outside the presence of the lay assessors. The separate votes on guilt would be combined with a total majority vote dictating the verdict.

As such, the professional judges would retain their powerful veto power, as one professional judge vote is required for a conviction. By voting privately while not sitting next to the professional judges, the lay assessors might feel more comfortable exercising their independent votes. If five of the six lay assessors vote unanimously to acquit, their vote would be final and the professional judges would not have an opportunity to convince them to convict. However, the five person acquittal vote is actually lower than the unanimous six person jury vote required for an acquittal by US juries, who are already criticized by some Japanese for having high acquittal rates.

I. Expand to Civil Cases

For a homogenous country that does not embrace change, let alone quick change, Japan should be commended for its huge success in making such widespread changes to the entire justice system. In a reasonable period of time, Japan researched, designed, and implemented a “heads to toe” justice reform package encompassing an entirely new and accepted unique jury system, as well as legal education reform and court improvements addressing intellectual property courts, public defender system, and legal aid system. Some concerns remain incompletely addressed, such as judge selection and improper police interrogation and confessions. However, these issues are so embedded in Japanese culture and politics that slow and reinforced social changes are needed to fully address all issues. Other hotly contested issues regarding the death penalty cannot be changed overnight and, as in other countries, will remain a political issue that will change along with government leadership and public views.

The next step is to modify the current deliberation system using court rules for separate deliberations, expand the system to cover additional serious criminal offenses, and eliminate prosecutor appeals. Ultimately, Japan should embrace the expansion of the jury system to civil cases.