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,

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.

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

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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).


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.\textsuperscript{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.\textsuperscript{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 accused\textsuperscript{10} and an appropriate sentence upon conviction.\textsuperscript{11} The jurors’ verdict is derived from a combined majority vote,\textsuperscript{12} including at least one vote of a judge.\textsuperscript{13}

The saiban-in system incorporates many continental European-style mixed court features.\textsuperscript{14} Just like modern US jurors, Japanese jurors may question witnesses\textsuperscript{15} and victims who provide a statement in court.\textsuperscript{16} Either party may appeal a verdict, and due to the ability of a prosecutor to appeal an acquittal, many cases are retried.\textsuperscript{17} Japanese jurors face severe penalties for disclosing information about the trial and jury deliberations.\textsuperscript{18}

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

\begin{itemize}
\item \textsuperscript{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., \textit{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].
\item \textsuperscript{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. \textit{Id.} at 233.
\item \textsuperscript{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.
\item \textsuperscript{11} Lay Assessor Act, supra note 4, at 233.
\item \textsuperscript{12} \textit{Id.} at 273.
\item \textsuperscript{13} \textit{Id.}
\item \textsuperscript{14} See generally Stephen C. Thaman, \textit{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 CH.-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.).
\item \textsuperscript{15} Lay Assessor Act, supra note 4, at 267.
\item \textsuperscript{16} \textit{Id.} at 268.
\item \textsuperscript{18} Lay Assessor Act, supra note 4, at 277-278.
\end{itemize}
history of the jury system in pre-war Japan. 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. 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.

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. When the English empire expanded, the common law jury system was incorporated into the English colonies in the United States, Africa, and Asia. In the United Kingdom (England and Wales), jury trials


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
of the US to exonerate white criminal defendants accused of committing crimes against black victims. 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. 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. 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. 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. 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. 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 trial. Many US scholars have criticized this provision. 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.
37. McLanahan, supra note 30, at 743.
38. Id.
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. Many other states allowed for jury sentencing recommendations in non-capital offenses. Today, only the following five states still provide for jury sentencing: Arkansas, Missouri, Oklahoma, Texas, and Virginia.

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. These mixed juries became more commonly used in Germany. 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. Each country varies in the number of professional judges and the number of lay assessors empaneled on the jury. A vote of guilty could be
determined by a majority, super majority, or unanimous vote, as required by law. Lay assessors can be utilized for one case only or for multiple cases, as exists in Germany. In many countries, including common law countries such as Canada and Australia, and in Russia, prosecutors may appeal acquittal verdicts.

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. In Russia's prior mixed court system, lay jurors were referred to as "nodders," accused of deferring to, or nodding in agreement with, the professional judges. In Germany, the lay members have been called puppets. 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. 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. 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

55. Id. at 113.
56. Vidmar, supra note 22, at 45-46.
60. Thaman, supra note 50.
the jury verdict is advisory in nature. The reformed Korean system will proceed with a five-year introductory period and is subject to review in 2013. The all lay jury retires to deliberate in secrecy attempting to reach a unanimous verdict on guilt. If the jurors are unsuccessful in reaching unanimity, then the professional judge states an opinion on guilt. 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.

In 2010, the Republic of Georgia enacted legislation to institute an all lay assessor jury system. Georgia has implemented a US style jury system. This system became effective throughout the Republic of Georgia on July 1, 2012. The juries consist of 12 lay assessors and two substitutes (alternate jurors). The jury must deliberate with an attempt to reach a unanimous verdict for at least three hours. If unable to reach unanimity, the jury then retires to reach a super majority vote of 10 to 2 to convict.

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. The sanza jury panel was implemented for a sole trial involving a high profile dispute. The panel was created for the first trial involving both the Counselor and Governor of the Kyoto Prefecture. A second unique panel was formed and convened two years later for a single trial involving the assassination of the Counselor of State. For each of the two trials, specific sanza rules were created and utilized. 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.
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. In the second trial, the jury's role was expanded. The sanza jury in the second trial entered a verdict of guilty. 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.

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. The 1889 Japanese Constitution also provided the defendant with the right to counsel in a criminal proceeding. Under the Code of Criminal Instruction, the judge questioned suspects and gathered evidence. The prosecutors played a dominant role and the main goal of the legal professionals (judges and prosecutors) was to discover the truth. Japan's justice system is a civil law system based on the legal codes of France and Germany. The Japanese Civil Code was enacted in 1898. Japan's Criminal Code of 1907 was based partly on German law where legislation remains the source of law.

C. Showa Period Jury System: 1928-1943

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

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77. Id.
78. Id.
79. Id.
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. 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.

Serving as a juror was a high honor and duty. The Japan Jury Association ("Association") stressed that the judiciary was the only branch of government that did not include public participation. 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.

This twelve person US style jury system was Japan's most significant pre-war experience with juries. 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. If insufficient grounds existed, the magistrate would simply dismiss the case. Second, the Japanese courts held pre-trial conferences to review trial preparation procedures (kohan junbi tetsuzuki). If the suspect confessed, then the case would proceed under standard court procedures before a professional judge. If the suspect did not confess, then the case would proceed to a jury trial if the charge otherwise warranted a jury trial. Third, defendants could waive a jury trial in the most serious cases or were required to assert a demand in the less serious cases.

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

89. Senger, supra note 52, at 745.
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). These cases included crimes such as larceny, fraud, embezzlement, and forgery that are punishable by more than three years of incarceration. As a result of the sentencing parameters, jury trials were not authorized for many minor offenses, such as simple theft, embezzlement, and gambling. 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.”

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

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

Of significance, criminal cases were re-tried repeatedly following a “not guilty” verdict. If the judges accepted the decision, a koso appeal of the facts was prohibited. 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

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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.\textsuperscript{120} In practice, this system permitted unlimited re-trials,\textsuperscript{121} which would continue until the decision of the jury and the decision of the judges matched ("the revision of the jury").\textsuperscript{122} This is contrary to the US jury system where an accused cannot be retried after an acquittal.\textsuperscript{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.\textsuperscript{124}

However, appeals on matters of law (jokoku) were permitted by either party.\textsuperscript{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.\textsuperscript{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.\textsuperscript{127}

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

Jurors were prohibited from disclosing details of the deliberations, including the other jurors' opinions, and the voting distribution.\textsuperscript{131} Jurors leaking the confidential information would face a fine up to 1,000 Japanese yen.\textsuperscript{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.\textsuperscript{133}

Initially, the jury system was accepted and used.\textsuperscript{134} In 1929, 143 cases were tried.\textsuperscript{135} However, in 1930, only sixty-six cases were tried.\textsuperscript{136} In 1942, only two cases were tried.\textsuperscript{137} The *Jury Act* was suspended in 1943.\textsuperscript{138}

\begin{thebibliography}{99}
\bibitem{120} Kiss, *supra* note 107, at 268. *See* Baishinho [*Jury Act*], Law No. 50 of 1923, art. 91.
\bibitem{121} Dobrovolskaia, *supra* note 90, at 272.
\bibitem{122} *Id.*
\bibitem{123} U.S. CONST. amend. V (the theory of Double Jeopardy prohibits an accused from being tried for the same offenses twice).
\bibitem{124} Dobrovolskaia, *supra* note 90, at 272.
\bibitem{125} *Id.*
\bibitem{126} *Id.*
\bibitem{127} *Id.*
\bibitem{128} *Id.* at 267.
\bibitem{129} Dobrovolskaia, *supra* note 90, at 267.
\bibitem{130} *Id.*
\bibitem{131} *Id.* at 271, 274.
\bibitem{132} *Id.* at 274.
\bibitem{133} *Id.*
\bibitem{134} McClanahan, *supra* note 30, at 750.
\bibitem{135} *Id.*
\bibitem{136} *Id.*
\bibitem{137} *Id.*
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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.
Government Party. The Japanese Supreme Court and the Ministry of Justice held common ground in increasing the number of judges and prosecutors. To further this objective, they sought to increase the number of people passing the national exam. The JFBA opposed this plan.

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. The group supported an all citizen jury system and opposed a mixed jury system.

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

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

151. Id. at 105.
152. Id.
153. Id.
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.
Criminal courts faced criticism over both procedural and substantive concerns. First, criminal cases were taking too long to get to trial and the trials were not held on consecutive days. Second, prosecutors maintained a 99.9% conviction rate. Third, law enforcement interrogation tactics raised skepticism as a result of the high emphasis on confessions obtained during custodial interrogation. Lastly, public attention has been focused on four death penalty cases involving wrongful convictions.

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). After decades of imprisonment, their convictions were reversed on appeal when higher appellate courts reviewed concerns involving the police interrogation and confessions. The men were acquitted after they served a combination of 130 years in prison. The trial court judges were criticized for poor fact finding. The liberal media criticized the criminal courts for allowing the admissibility of confessions obtained during custodial police interrogations. In Japan, confessions were obtained in more than 90% of cases. Critics have alleged that the confessions were obtained under improper police interrogation techniques.

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. The members of this committee reviewed modern US criminal trial courts as well as continental European courts.

Likewise, in the early 1990’s, the Japan Federation of Bar Associations (JFBA) engaged in jury system reform by organizing national...
symposiums.\textsuperscript{182} The JFBA suggested that new judges be obtained from practicing attorneys.\textsuperscript{183} The JFBA further promoted the implementation of an all lay jury system.\textsuperscript{184} The JFBA sought checks and balances against the judiciary and prosecutors.\textsuperscript{185}

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

\textbf{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.\textsuperscript{188} The JSRC was comprised of the three branches of the legal profession—judges, prosecutors, and private practicing attorneys.\textsuperscript{189} Other members included law professors and members of the business and labor communities.\textsuperscript{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.\textsuperscript{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.\textsuperscript{192}

\textbf{B. Review of the Modern American Jury}

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

\textsuperscript{182} Weber, \textit{supra} note 80, at 149.
\textsuperscript{183} \textit{Id.} at 175.
\textsuperscript{184} Fukarai, \textit{supra} note 150, at 106.
\textsuperscript{185} \textit{Id.}
\textsuperscript{186} \textit{Id.} at 105.
\textsuperscript{187} \textit{Id.} at 107.
\textsuperscript{188} \textit{See generally} Weber, \textit{supra} note 80, at 151; \textit{See} Shiho seido kaikaku shingikai secchiho [\textit{Law Establishing the Justice System Reform Council}], Law No. 68 of 1999, art. 2 (Japan).
\textsuperscript{189} \textit{See generally} Weber, \textit{supra} note 80, at 151.
\textsuperscript{190} \textit{Id.}
\textsuperscript{191} \textit{Id.} \textit{See also} Shiho seido kaikaku shingikari secchiho [\textit{Law Establishing the Justice System Reform Council}], Law No. 68 of 1999, art. 2 (Japan).
\textsuperscript{192} \textit{See generally} Weber, \textit{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.\textsuperscript{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.\textsuperscript{194} Many conservatives correctly asserted that all lay assessor juries rendered more "not guilty" verdicts than professional judges.\textsuperscript{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.\textsuperscript{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.\textsuperscript{197} Specifically, The trial of O.J. Simpson made an impact upon the Japanese public.\textsuperscript{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.\textsuperscript{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.\textsuperscript{200} Others argued that Americans were better equipped to serve on an all citizen jury.\textsuperscript{201}

\textbf{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.\textsuperscript{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.\textsuperscript{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,
and predictable decisions and furthering the goal of discovering the truth.\textsuperscript{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.\textsuperscript{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.\textsuperscript{206} The Supreme Court selected, trained, promoted, assigned and rotated all judges.\textsuperscript{207} The selected judges receive additional legal training and education through the Supreme Court's Legal Training and Research Institute (LTRI).\textsuperscript{208} Japanese judges rise through the judicial ranks for maintaining decisions that were consistent with the opinions of higher judges.\textsuperscript{209} The judges came from similar educational backgrounds; the judiciary lacked diversity.\textsuperscript{210} The judges were criticized for being isolated and out of touch with public opinions.\textsuperscript{211} They work long hours and rotate to different parts of the country.\textsuperscript{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.\textsuperscript{213} Other critics have indicated that the Japanese judges did not demonstrate warmth towards crime victims.\textsuperscript{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.\textsuperscript{215} This model consisted of three professional judges and four lay members.\textsuperscript{216} The Democrats supported a more liberal model consisting of one professional judge and ten lay members.\textsuperscript{217} One group proposed a moderate model consisting of two judges and seven

\textsuperscript{204} Weber, supra note 80, at 153.
\textsuperscript{205} Id. at 155.
\textsuperscript{206} Id. at 139.
\textsuperscript{207} Id.
\textsuperscript{208} Id.
\textsuperscript{209} Weber, supra note 80, at 140.
\textsuperscript{210} Id. at 152.
\textsuperscript{211} Id.
\textsuperscript{212} Id.
\textsuperscript{213} Id.
\textsuperscript{214} Id.
\textsuperscript{216} Id.
\textsuperscript{217} Id.
citizens.\textsuperscript{218}

\textbf{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{221} The JSRC recognized respect for individuals pursuant to Article 13 of the Japanese Constitution and popular sovereignty under Article 1.\textsuperscript{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.\textsuperscript{223} In its Interim Report, the group described the role of the justice system, legal profession, and the people.\textsuperscript{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.\textsuperscript{225}

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

\begin{itemize}
  \item \textsuperscript{218} \textit{Id.}
  \item \textsuperscript{220} \textit{See generally} JSRC \textbf{INTERIM REPORT supra} note 20.
  \item \textsuperscript{221} \textit{Id.} at ch. I.
  \item \textsuperscript{222} \textit{Id.}
  \item \textsuperscript{223} \textit{Id.} at ch. I.
  \item \textsuperscript{224} \textit{Id.} at ch. I, pt. 2, para. 1.
  \item \textsuperscript{225} \textit{Id.} at ch. I, pt. 3, para. 2 (1) – (3).
  \item \textsuperscript{226} JSRC \textbf{INTERIM REPORT supra} note 20, at ch. II, pt. 1, para. 1.
  \item \textsuperscript{227} \textit{Id.}
  \item \textsuperscript{228} \textit{Id.} at ch. II, pt. 1, paras. 3 & 4.
  \item \textsuperscript{229} \textit{Id.} at ch. II, pt. 1, para. 5.
\end{itemize}
process. 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. The group recommended US style graduate level law schools. It addressed accreditation of the law schools, the future vision of undergraduate legal education, a new national bar exam, apprenticeship training and continuing legal education. The group stressed the need for a "larger stock of legal professionals" with a "wide range of activities in various fields." 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. It recommended improving legal ethics and making lawyer discipline clearer and more effective and improving the consciousness of prosecutors.

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." 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. Proceedings should be "easily seen, understood, and worthy of reliance by the people." 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."

The JSRC outlined three basic policies necessary for justice reform, which would contribute to maintaining a free and fair society. 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.
233. _Id._ at ch. III, pt. 2, para. 2(5)
234. _Id._ at ch. III, pts. 2, 3, 4 & 5.
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._
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. 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. 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. 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. 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. 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.

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”). 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.” 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.”

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.
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). 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.

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 act...

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. 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.

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.

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.\textsuperscript{271} The professional judges interpret laws and ordinances and render decisions concerning litigation procedure.\textsuperscript{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.\textsuperscript{273}

Lay jurors (assessors) must carry out their duties with honesty and fairness in accordance with the law.\textsuperscript{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.\textsuperscript{275} The Lay Assessor Act provides for utilization of reserve lay assessors, referred to as “juror alternates” in US courts.\textsuperscript{276} Lay assessors and reserve lay assessors are compensated for travel, per diem, and hotel expenses, pursuant to the Rules of the Supreme Court.\textsuperscript{277}

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

\textsuperscript{271} Id. at 240; Shonen ho [Juvenile Ace], Law No. 168 of 1948, art 55 (“Transfers to Family Court”) (Japan).
\textsuperscript{272} Lay Assessor Act, supra note 4, at 241.
\textsuperscript{273} Id.
\textsuperscript{274} Id. at 242.
\textsuperscript{275} Id.
\textsuperscript{276} Id.
\textsuperscript{277} Id.
\textsuperscript{278} Lay Assessor Act, supra note 4, at 243, n. 24.
\textsuperscript{279} Id. at 244.
\textsuperscript{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.  

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;  

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.  

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.\textsuperscript{284}

The judge maintains discretion to disqualify a potential lay assessor when the judge believes that the individual is unable to act fairly.\textsuperscript{285} The judge may submit juror questionnaires to prospective jurors in advance of jury selection.\textsuperscript{286} The questions can be designed to determine whether the jurors will conduct the trial fairly.\textsuperscript{287} Jury selection shall take place in the presence of the judges, prosecutor, defense counsel, and court clerks.\textsuperscript{288} The judge may permit the accused to be present when necessary.\textsuperscript{289} Jury selection shall not be open to the public.\textsuperscript{290} The chief judge presides over jury selection.\textsuperscript{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.\textsuperscript{292} The judge may also raise the issue \textit{sua sponte}.\textsuperscript{293} If the judge decides not to appoint a prospective juror, the judge shall state a reason\textsuperscript{294} and any party may appeal the court’s decision.\textsuperscript{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.\textsuperscript{296}

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

\textsuperscript{284} Lay Assessor Act, \textit{supra} note 4, at 248-49.
\textsuperscript{285} Id. at 249.
\textsuperscript{286} Id. at 254.
\textsuperscript{287} Id. at 255.
\textsuperscript{288} Id. at 256.
\textsuperscript{289} Id.
\textsuperscript{290} Lay Assessor Act, \textit{supra} note 4, at 256.
\textsuperscript{291} Id.
\textsuperscript{292} Id. at 257.
\textsuperscript{293} Id.
\textsuperscript{294} Id.
\textsuperscript{295} Lay Assessor Act, \textit{supra} note 4, at 258.
\textsuperscript{296} Id.
\textsuperscript{297} Id. at 265.
\textsuperscript{298} Id.
\textsuperscript{299} Id. at 266.
questions and inspects witnesses.\footnote{300}{Id.}

The jury trial proceeds with the prosecutor and defense attorney providing opening statements.\footnote{301}{Lay Assessor Act, supra note 4, at 267.} Lay jurors may question the witnesses.\footnote{302}{Id.} During the trial, victims (or a representative upon victim death) may state their opinions and are then subject to juror questioning.\footnote{303}{Id. at 268.} If the defendant provides a voluntary statement, then the jurors may, upon informing the chief judge, request a statement from the defendant.\footnote{304}{Id. at 269.} Jurors shall be present in court when the verdict and judgment are rendered.\footnote{305}{Id. at 268.} 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.\footnote{306}{Id.}

Professional judges and jurors (“lay assessors”) shall deliberate together.\footnote{307}{Lay Assessor Act, supra note 4, at 273.} Lay assessors shall state their opinions during the deliberations.\footnote{308}{Id.} 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.\footnote{309}{Id. at 274.} During deliberations, the chief judge shall, at a minimum, state their judicial opinions on matters of law and trial procedure and lay assessors shall follow the judges’ legal opinions.\footnote{310}{Id. at 273.} 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.\footnote{311}{Id.} Reserve lay assessors participate in deliberations by listening to all deliberations by the professional judges and joint deliberations by expressing their opinions.\footnote{312}{Lay Assessor Act, supra note 4, at 274.}

The verdict of the jury is rendered by a majority vote, including the vote of at least one professional judge.\footnote{313}{Id. at 273.} Upon a conviction, the jury also

\begin{footnotes}
\item[300] Id.
\item[301] Lay Assessor Act, supra note 4, at 267.
\item[302] Id.
\item[303] Id. at 268.
\item[304] Id.
\item[305] Id. at 269.
\item[306] Id.
\item[307] Lay Assessor Act, supra note 4, at 273.
\item[308] Id.
\item[309] Id. at 274.
\item[310] Id. at 273.
\item[311] Id.
\item[312] Id.
\item[313] Lay Assessor Act, supra note 4, at 274.
\item[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
\end{footnotes}
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. 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.

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

No one may contact a lay assessor or reserve lay assessor about the defendant’s case or for the purpose of learning trial secrets. Violation of this law carries a fine of up to 200,000 Japanese yen. 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. 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. Prosecutors, defense counsel and defendants are prohibited from revealing the name of lay assessors and their answers to juror questionnaires in jury selection. Violation of this law carries a fine of up to 500,000 Japanese yen and/or imprisonment for up to one year.

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. 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.\textsuperscript{328} The Japanese government spent hundreds of millions of US dollars on the new justice system.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{333} The Promotions Office filmed a television drama, conducted mock trials throughout the country and published posters, newsletters, and flyers.\textsuperscript{334}

The Promotions Office conducted public opinion surveys.\textsuperscript{335} Surprisingly, in a 2005 poll, 70% of people survey stated that they did not want to serve on a jury panel.\textsuperscript{336} Those surveyed expressed their apprehension of judging people and finding guilt.\textsuperscript{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%)."\textsuperscript{338} A Japanese Supreme Court survey disclosed that those caring for children or the elderly did not wish to serve as jurors.\textsuperscript{339}

\begin{flushright}
330. Wilson, supra note 149, at 494-95.
332. \textit{Id.} at 771, n. 297.
333. Anderson & Ambler, supra note 215, at 68.
334. \textit{Id.}
335. \textit{Id.} at 69.
336. \textit{Id.}
338. Mclanahan, supra note 30, at 770, n. 293.
339. Anderson & Ambler, supra note 215, at 69. See Caregivers Reluctant to Be Lay
\end{flushright}
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...
that specify the role and participation of the lay jurors when the professional judges determine issues of law.\textsuperscript{349} They further recommend rules to regulate the role of the professional judge when the panel is expressing opinions during deliberations.\textsuperscript{350}

\textit{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.\textsuperscript{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.\textsuperscript{352}

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

\textsuperscript{349} Id.
\textsuperscript{350} Anderson & Ambler, supra note 215, at 67-68.
\textsuperscript{351} Wilson, supra note 149, at 498.
\textsuperscript{354} Thaman, supra note 50.
\textsuperscript{356} Id. at 100-01.
\textsuperscript{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. 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.

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. 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. The lay jury in Spain must obtain a guilty verdict with seven out of nine lay jurors voting. The Spanish jury may acquit with five out of nine jurors voting. Russian all lay juries may convict with a vote of seven out of twelve jurors in agreement. A vote of six out of twelve is required to acquit. However, Russian jurors must attempt to obtain a unanimous verdict during their first three hours of deliberation.

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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. 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. The prosecution may appeal the acquittal based upon issues of law and procedural error and seek a re-trial upon reversal.

In contrast, US court participants are bound by acquittals pursuant to the Fifth Amendment to the US Constitution, which prohibits Double Jeopardy. However, in US jurisdictions, individuals can face accusations even following an acquittal on criminal charges. 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.”

C. Confessions and Police Interrogations

Traditionally, obtaining a confession has been “at the heart” of the Japanese criminal justice system. 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.”

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

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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 KENPO [KENPO] [CONSTITUTION], art. 39 (Japan), available at http://history.hanover.edu/texts/1947con.html.
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. 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. The judge typically issues the detention warrant to hold the accused in custody for a period up to ten days. 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.

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.” In past years, police have used the theory of “voluntary accompaniment” and “arrest on other charges” when an arrest or detention is not made.

An accused is required to appear before the police or prosecution for questioning when under arrest or under detention. 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. While not required under law to appear for questioning, the accused is voluntarily submitting to interrogation. 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.

Japanese courts have rendered different opinions when confronted with 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.”

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 KENPÔ [CONSTITUTION](Japan), available at [http://history.hanover.edu/texts/1947con.html.; See also KEIJI SOSHÔHO [KEISOHO] [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/adboecddanti-corruptioninitiative/46814489.pdf.
382. Foote, supra note 380, at 87.
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.
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


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 KENPÔ [KENPÔ] [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.


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.
415. Wilson, supra note 149, at 503.
416. NIHONKOKU KENPO [KENPO] [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 hall 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.
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.
national debate on abolishing the death penalty and suspension of executions. 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.

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.” 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. Ogawa’s predecessors, Hideo Hiraoka and Satsuki Eda, were reluctant to issue death warrants for executions. Mr. Yamagishi requested a nationwide debate and the suspension of executions.

Justice Minister Ogawa, who had just assumed his position in January 2012, issued three death warrants, thereby approving the executions by hanging. 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. Justice Minister Ogawa stated, “the death penalty has been supported in lay judge trials.” 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. The judgment shall contain a written description of the jury’s judgment, the sentence and the reasoning for the same. The verdict shall

428. Id.
429. Id.
430. Id.
432. Yamagishi, supra note 433.
433. Kyodo, supra note 437.
434. Id.
435. Id.
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.\textsuperscript{438}

Under the voting scheme, one professional judge is required to join the vote of guilt.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{442} The Ministry of Justice is leading the review and formed a group tasked with analyzing the court reforms.\textsuperscript{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.\textsuperscript{444} Others anticipate some minor court revisions addressing the types of criminal charges covered.\textsuperscript{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.\textsuperscript{446} Others express concern that juries have increased acquittal verdicts in drug cases.\textsuperscript{447} Some scholars anticipate revisions to juror confidentiality mandates. They further expect jurors and defense attorney to gain increased access to information obtained during

\textsuperscript{438} Id.
\textsuperscript{439} Hirano, supra note 430.
\textsuperscript{440} Levin & Tice, supra note 365 (“Acquittal is by majority vote but convictions must also obtain the concurrence of at least one professional judge.”).
\textsuperscript{441} Ibusuki, supra note 442, at 34.
\textsuperscript{442} Lay Assessor Act, supra note 4.
\textsuperscript{444} Id.
\textsuperscript{445} Id.
\textsuperscript{446} Id.
\textsuperscript{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

450. Id.
451. Ibusuki, supra note 442, at 44.
453. Ibusuki, supra note 442, at 44.
454. Id.at 47.
456. Id.
457. Id.
group requests that the government disclose more information regarding death penalty cases.\textsuperscript{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.\textsuperscript{459} Six percent of the 210 people who responded to the survey indicated that the judges tried to influence them.\textsuperscript{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.\textsuperscript{461} These citizens sentenced 903 of the 904 people convicted in 858 cases.\textsuperscript{462} Fifteen percent indicated that the professional judges tried “somewhat” to influence them for a total equating to 21%.\textsuperscript{463} However, 73% of those who responded to the survey indicated that they did not believe that the professional judges directed them during deliberations.\textsuperscript{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.\textsuperscript{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.\textsuperscript{466} The new system commenced in May 2009 and the first actual lay trial took place in August 2009.\textsuperscript{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.\textsuperscript{468} Scholars have offered explanations for the lower number of completed jury trials.\textsuperscript{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

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{458} Id.
\item \textsuperscript{459} 21\% of Lay Judges Felt Decisions Guided By Pros, \textsc{The Japan Times} (August 2, 2010), http://www.japantimes.co.jp/text/nn20100802a1.html.
\item \textsuperscript{460} Id.
\item \textsuperscript{461} Id.
\item \textsuperscript{462} Id.
\item \textsuperscript{463} Id.
\item \textsuperscript{464} Id.
\item \textsuperscript{465} Anna Watanabe, \textit{Japan’s ‘Lay Judge’ System To Be Revised}, \textsc{Asian Correspondent} (June 3, 2012), available at http://asiancorrespondent.com/83631/japans-lay-judge-system-to-be-revised/.
\item \textsuperscript{466} Ibusuki, \textit{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\%).
\item \textsuperscript{467} Setsuko Kamiya, \textit{Lay Judges Present Ideas to Make System Better}, \textsc{The Japan Times} (Jan. 21, 2012), http://www.japantimes.co.jp/text/nn20120121f2.html.
\item \textsuperscript{468} Ibusuki, \textit{supra} note 442, at 36.
\item \textsuperscript{469} Id. at 37-38.
\end{enumerate}
\end{footnotesize}
review of the prior five year period.\textsuperscript{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.\textsuperscript{471} However, prosecutors filed approximately 138 indictments per month during the first year.\textsuperscript{472}

One expert has characterized prosecutors as commencing with an "extra measure of caution"\textsuperscript{473} and offered three explanations for this prosecutor caution, as follows: avoid uncertainties, allocate resources efficiently, and maintain a high conviction rate.\textsuperscript{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.\textsuperscript{475} More emphasis is now placed on pre-trial proceedings.\textsuperscript{476} Prosecutors have broader discovery requirements. Previously, prosecutors were only required to disclose evidence that they sought to introduce at trial.\textsuperscript{477} Prosecutors must now disclose more of their collected evidence, even if it shows weaknesses in their case.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,

\textsuperscript{470} Johnson, supra note 41.
\textsuperscript{471} Id.
\textsuperscript{472} Id.
\textsuperscript{473} Id.
\textsuperscript{474} Id.
\textsuperscript{475} Fukurai, supra, note 169, at 822.
\textsuperscript{476} Id.
\textsuperscript{477} Id.
\textsuperscript{478} Id.
\textsuperscript{479} Ibusuki, supra note 442, at 38.
\textsuperscript{480} Id.
\textsuperscript{481} Id.
contested cases averaged 10.5 months to complete.\footnote{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.\footnote{483} This means that from the onset of prosecution (indictment) to disposition (sentencing), cases were concluded in just over three months.\footnote{484} In 2010, District Courts resolved their 62,840 contested and uncontested cases in just 2.9 months following commencement of prosecution.\footnote{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.\footnote{486} Of those individuals who confessed, the average case was resolved in 7.4 months.\footnote{487} Of those who denied their charges, the average case was resolved in 9.8 months.\footnote{488} Therefore the average case was resolved in 8.3 months.\footnote{489} Of those cases tried by jury, the median case was resolved in three to four days of trial in 2010.\footnote{490} Of the 1,506 cases, 73\% were tried in five days or less.\footnote{491} Ninety four percent of the cases were tried in ten days or less.\footnote{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

\footnote{482}{Id.}
\footnote{484}{Ibusuki, supra note 442, at 38.}
\footnote{487}{Id.}
\footnote{488}{Id.}
\footnote{489}{Id.}
\footnote{490}{Id.}
\footnote{491}{Id.}
\footnote{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.

A total of 3,173 people have been tried by Japanese juries since the reform inception through December 2011. 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. 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/nfmu/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/Chapter4/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/h00100400100h.jpg (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

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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.
499. Id. at 40.
500. Id.
502. Id.
503. Id.
504. Id.
505. Id. at 46.
506. Id.
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. 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.

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. Other major foreign countries did not have any significant changes during the same time period. In 2011, Japan had 4,196 people per attorney. 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.

Japan has reduced the number of people per judge from 2005 to 2011 by 13% In 2005, Japan maintained 51,905 people per judge. In 2011, the number of people per judge declined to 44,932. 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.

Japan increased its number of prosecutors. From 2005 to 2011, Japan experienced a 13% decrease in the number of people per prosecutor. In 2011, Japan maintained 71,500 people per prosecutor. 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. From 2005 to 2011, the United States saw an 11% “increase” in the number of people per prosecutor with 9,455 people per prosecutor.

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

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508. *Id.* at 13.
509. *Id.* at 15.
510. *Id.* at 17
511. *Id.*
512. *Id.*
514. *Id.*
515. *Id.*
516. *Id.*
517. *Id* at 19.
518. *Id.*
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.
532. Id.
533. Id.
534. Id.
represented by counsel. In 2000, 97% of individuals were represented. In 2005, individuals retained counsel in 98% of the cases. In 2010, indicted individuals were represented more than 99% of the time.

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

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

In appeals pending in the High Courts, 95% of individuals retained counsel in 2010. This percentage rose slightly from 2005, when 93% of individuals were represented by counsel for their appeals. 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. In 2010, individuals with appeals pending in the High Courts were represented by court-appointed counsel in 74% of the cases.

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.
544. Id.
545. Id.
546. Id.
High Courts from the District Courts.\footnote{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).} Either the defense or the prosecution may appeal.\footnote{Id.} The High Court may reverse and order a new trial.\footnote{Id.} 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.\footnote{Id.} The average case involving a confession was tried 3.5 times.\footnote{Id.} The average case involving a denial of the criminal charge resulted in being tried 4.4 times.\footnote{Id.}

In 2009, 75,128 cases were heard in District Courts and the death penalty was imposed in nine cases.\footnote{Id.} Four of the cases involved robbery offenses and five cases involved homicide.\footnote{Id.} Life sentences were imposed in sixty-eight cases.\footnote{Id.} Life sentences were handed down in fifty robbery cases and eighteen homicide cases.\footnote{Id.}

F. Jurors

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

By December 2009, 5,000 citizens were summonsed to appear for trial and almost 80 percent appeared for jury selection.\footnote{Id.} 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.\footnote{Id.} Almost 17% of the jurors were primarily responsible for the care of a child

\begin{itemize}
  \item\footnote{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).}
  \item\footnote{Id.}
  \item\footnote{Id.}
  \item\footnote{Id.}
  \item\footnote{Id.}
  \item\footnote{White Paper on Attorneys, supra note 492, at 47.}
  \item\footnote{Id.}
  \item\footnote{MINISTRY OF JUSTICE, WHITE PAPER ON CRIME app. 2-4 (2010), available at http://hakusyo1.moj.go.jp/en/59/image/image/h008002004-1h.jpg.}
  \item\footnote{Id.}
  \item\footnote{Id.}
  \item\footnote{Fukurai, supra note 169, at 815.}
  \item\footnote{Id.}
  \item\footnote{Id. at 815}
  \item\footnote{Id. at 816}
  \item\footnote{Id.}
  \item\footnote{Id. at 816}
  \item\footnote{Fukurai, supra note 169, at 816.}
  \item\footnote{Id.}
or elderly person.\textsuperscript{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.\textsuperscript{565} The majority of the jurors were male, middle-aged and full-time workers.\textsuperscript{566} Nearly 20\% maintained the primary responsibility for the care of a child or elderly person.\textsuperscript{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.\textsuperscript{568} Full-time homemakers comprised approximately 10\% of the jurors.\textsuperscript{569} Individuals without employment, including retired persons, made up 5\% to 7\% of the jurors in both the 2009 and 2010 surveys.\textsuperscript{570}

\textbf{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.

\textit{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.

\textsuperscript{564} Id.
\textsuperscript{565} Id. at 817.
\textsuperscript{566} Id.
\textsuperscript{567} Id.
\textsuperscript{568} Fukurai, supra note 169, at 817.
\textsuperscript{569} Id.
\textsuperscript{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, kidnappings, 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. 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. The JSRC further recommended increasing the bar passage rate from 3% to over 70%.

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

The Japanese legal education reforms have faced a rocky start. Seventy-four graduate level law schools opened. Graduation from one of these law schools became a requirement to sit for the exam. 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. 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%. As a result, the number of law school applicants dropped. Japan should stabilize its legal education system by regulating the number of law schools student enrollment, maintaining high quality standards in legal education, and

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. 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 “nodders” 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.