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Who is Worthy? Non-Lawyer Participation in Japanese and Singaporean Lawyer Disciplinary Systems

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ARTICLE

WHO IS WORTHY? NON-LAWYER PARTICIPATION IN JAPANESE AND SINGAPOREAN LAWYER DISCIPLINARY SYSTEMS

Dr. Kay-Wah Chan * & *Helena Whalen-Bridge* **

ABSTRACT

Historically the profession of lawyers self-regulated their members' ethics through codes of conduct and disciplinary proceedings. This traditional approach to regulating lawyer performance and behavior has been increasingly subject to scrutiny and criticism. In some countries, consumer advocates and concern for access to justice for clients have combined to produce systems of regulation in which other actors have a more active role in the regulatory process. In particular, non-lawyer participation in lawyer discipline provides a voice for persons who as a group may be most affected by poor lawyering, but if the non-lawyers are lay persons, they may have little understanding of law or legal practice. This article considers and compares non-lawyer participation in disciplinary systems for lawyers in Japan and Singapore, two of the most advanced economies in Asia. Due to historical reasons, Singapore has a common law system and Japan has a civil law system, but lawyers in both countries have played a dominant role in the examination and discipline of professional infractions. Both countries have also incorporated non-lawyer participation into the disciplinary process. Singapore has inserted non-lawyers into the process and Japan has enhanced non-lawyers' participation. Why has this occurred, and to

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what effect? Both jurisdictions maintain confidentiality at most or all stages involving non-lawyers, and performance-related data regarding the impact of non-lawyers is not readily available. The article therefore considers the reasons why non-lawyers were included or why their participation was enhanced, the different degrees of involvement, how non-lawyer involvement is conceptualized and managed, and the potential issues that are raised by these approaches.

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I. INTRODUCTION

Traditionally, lawyers were disciplined for violations of ethical codes without the public's participation or access to proceedings. According to one scholar, the discipline administered by lawyers' professional organizations was slow, overly lenient to lawyers, and unresponsive to consumer concerns.¹ In the United States, most states adhered to a process overseen by the state supreme court, and administered by a disciplinary board and adjudicated by a hearing committee composed of legally trained persons.² The process was confidential to protect the reputation of the attorney.³ Lawyers investigated and made determinations in part because it was thought that only lawyers had the expertise necessary to discipline members of the legal profession.⁴ The process in other countries differed but the exclusion of non-lawyers was fairly consistent.⁵ In Europe, the Council of Bars and Law Societies of Europe ("CCBE") recommended that disciplinary proceedings be independent from state authorities, with primary responsibility resting with the bar or law society.⁶

The exclusion of non-lawyers from the attorney disciplinary process has, however, experienced change. In the United States, "[l]awyer disciplinary mechanisms have been criticized for their lack of transparency since at least the 1970s,"⁷ and in the 1990s the American Bar Association ("ABA") McKay Commission found that secrecy was the "greatest single source of public distrust" regarding disciplinary proceedings, which caused great harm to the reputation of the profession.⁸ In response to ABA recommendations and court challenges, the process in the United States has been opened up at a variety of stages.⁹ In the United Kingdom, the Legal Services Act of

1. Leslie C. Levin, *Building a Better Lawyer Discipline System: The Queensland Experience*, 9 LEGAL ETHICS 187, 187 (2006).

2. *Developments in the Law—Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547, 1597, 1599 (1994) [hereinafter *Developments in the Law*].

3. *Id.* at 1598.

4. *Id.* at 1599.

5. *See, e.g.*, Levin, *supra* note 1, at 188-91.

6. COUNCIL OF BAR AND LAW SOCIETIES OF EUR., CCBE RECOMMENDATIONS ON DISCIPLINARY PROCESS FOR THE LEGAL PROFESSION 2 (2007).

7. Panagoitis Delimatsis, *The Future of Transnational Self-Regulation: Enforcement and Compliance in Professional Services*, 40 HASTINGS INT'L AND COMP. L. REV. 1, 40 (2017).

8. ABA COMM'N ON EVALUATION OF DISCIPLINARY ENF'T, LAWYER REGULATION FOR A NEW CENTURY 30 (1992).

9. *Developments in the Law, supra* note 2, at 1598.

2007 constituted a major overhaul of the legal profession. One of the changes was the creation of the Legal Ombudsman (“LO”), an independent body responsible for overseeing the regulation of all lawyers in England and Wales.¹⁰ The Chief Ombudsman of the LO must be a lay person,¹¹ and their appointment ends if they cease to be a lay person.¹² In 2018, the LO website identified two members of the seven person board as non-lay members.¹³ The LO handles only complaints regarding “poor service,” and it refers “issues regarding professional misconduct” to the relevant approved regulator, “for example, the Bar Standards Board (for barristers) and the Solicitors Regulation Authority (for solicitors).”¹⁴ The Solicitors Disciplinary Tribunal adjudicates alleged breaches of rules and regulations applicable to solicitors, and at the time this article was written, the Tribunal had forty-six members, thirty-two Solicitor Members and fourteen Lay Members, “drawn from a wide range of backgrounds to reflect the makeup of the profession and, as far as possible, the public.”¹⁵ Sufficiently serious complaints against barristers are forwarded to the Bar Tribunals and Adjudication Service (“BTAS”), an independent organization that arranges disciplinary tribunals.¹⁶ Disciplinary tribunals have three or five people, depending on how serious the charges are.¹⁷ Tribunal members can be barristers, lay people, and judges; all tribunals include at least one lay person.¹⁸

The purported reasons for including lay persons in lawyer disciplinary processes differ across jurisdictions, but arguably comprise three main concerns. First, there is a perception that self-regulation is self-serving, and that if left on their own, lawyers will whitewash problems rather than discipline a fellow lawyer. Second,

10. See Legal Services Act (2007), c. 29, Part 6 (Eng. and Wales).

11. *Id.* § 122(2).

12. *Id.* § 122(6).

13. *About Us: Our Board*, LEGAL OMBUDSMEN <http://www.legalombudsman.org.uk/about-us/#our-board> [<https://perma.cc/D2Z8-GTV7>].

14. CATHERINE FAIRBAIRN, COMPLAINTS AGAINST SOLICITORS AND OTHER LAWYERS, 2017, HC Briefing Paper 03762, ¶ 1.6.

15. *About Us*, SOLICITORS DISCIPLINARY TRIBUNAL, <http://www.solicitorstribunal.org.uk/about-us> [<https://perma.cc/QT56-QP3B>].

16. *The disciplinary tribunal process*, BAR STANDARDS BOARD, <https://www.barstandardsboard.org.uk/complaints-and-professional-conduct/disciplinary-tribunals-and-findings/the-disciplinary-tribunal-process/> [<https://perma.cc/C9A3-DL48>].

17. *Id.*

18. *Id.*

there is the goal of consumer protection; lawyers should avoid protecting their fellow lawyers but they also need direction regarding the goals to achieve, i.e. client service and maintenance of standards. A third concern is that unless there is broader participation in the disciplinary process, it lacks moral authority.¹⁹ This strain of thought has a basis in democratic representation,²⁰ and while jury trials are quite different from lawyer disciplinary processes, they also have elements in common, as appears in the discussion of the Singapore context below.²¹ When non-lawyers are brought into the process of investigating and determining lawyer complaints, they arguably address these three issues, but they raise other concerns. The primary concern is that only legally trained persons have knowledge of the law and familiarity with the realities of legal practice sufficient to competently evaluate alleged breaches of ethical and professional rules. A related concern is that because they do not have the requisite legal knowledge, non-lawyers will have to rely on or perhaps be overwhelmed by legally trained voices, and thereby be limited in their ability to bring a consumer perspective to bear.

The questions raised in this Article are whether countries in Asia have engaged with these issues, and if so, what procedures have they adopted and why? The Article considers Japan and Singapore, two of the most advanced economies in Asia. For historical reasons, Singapore has a common law system and Japan has a civil law system. In both countries, lawyers have played a dominant role in the examination and discipline of professional infractions, but Singapore has inserted non-lawyers into the process and Japan has enhanced non-lawyers' participation. In discussing these changes, the Singapore section of the Article uses the statutory term "lay person," while the Japan section uses the term "non-*bengoshi*" [non-lawyer]; these terms mean different things in Japan and Singapore, and do not necessarily indicate a lack of legal training, but for ease of reference the introduction and conclusion use the term "non-lawyer." Why have non-lawyers been included in disciplinary proceedings in Singapore, why

19. Jennifer Gerarda Brown & Liana G.T. Wolf, *The Paradox and Promise of Restorative Attorney Discipline*, 12 NEV. L. J. 253, 280 (2012).

20. See Valerie P. Hans, *Lay Participation in Legal Decision Making: Introduction to Law & Policy Special Issue*, 25 LAW & POL'Y 83, 87 (2003); see also Stephan Landsman, *Commentary: Dispatches from the Front: Lay Participation in Legal Processes and the Development of Democracy*, 25 LAW & POL'Y 173, 173 (2003).

21. See *infra* Section III.C.

has their participation been enhanced in Japan, and what effect have these changes had? Confidentiality is maintained at most stages involving non-lawyers in both countries, and performance-related data regarding the impact of non-lawyers is not readily available. The article therefore considers the reasons why non-lawyers have been included or had their participation enhanced, the different degrees of non-lawyer involvement, how non-lawyer involvement is conceptualized and managed, and the potential issues raised by the respective approaches.

II. JAPAN

In Japan, because of its civil law tradition, lawyers [*bengoshi*], prosecutors, and judges are collectively called the legal professionals [*hōsō*]. Similar to many other countries, the regulatory regime of *bengoshi* ethics includes a disciplinary mechanism. While *bengoshi* are self-regulated, people who are not *bengoshi* (“non-*bengoshi*”) are also involved in the disciplinary system, as members of the various relevant committees. The relevant law, the Attorney Act (“the Act”),²² requires that Committees be composed of *bengoshi*, judges, prosecutors and “persons of learning and experience.”²³ The law has not defined the term “persons of learning and experience.” However, the wording “learning and experience” suggests that potential candidates may be restricted to people who are educated or further restricted to educated people of a certain social standing. The bar associations generally do not publish details regarding the background of the members of their discipline-related committees. Furthermore, committee members’ identities are generally “confidential information.”²⁴ However, there is an impression or belief that these persons of learning and experience are mainly, if not exclusively, university academics, and particularly law professors.²⁵ The disciplinary process is closed to the public.²⁶ In 2004, a reform enhanced non-*bengoshi*’s participation as one of the means to create a more transparent, prompt and effective process in

22. *Bengoshi-hō* [Attorney Act], Law No. 205 of 1949 (Japan).

23. *Id.*, art. 66-2, ¶¶ 1, 2; art. 70-3, ¶¶ 1, 2.

24. Kyoko Ishida, *Deterioration or Refinement? Impacts of an Increasing Number of Lawyers on the Lawyer Discipline System in Japan*, 24 INT’L J. LEGAL PROF. 243, 244 (2017).

25. While this article literally translates the Japanese term as “persons of learning and experience,” Ishida in her work referred them as “law professor[s]” or “academic expert[s].” See *id.* at 244, 256. The term is also translated as “academic expert(s)” in the English version of the Attorney Act available on the online Japanese Law Translation Database System, which is operated by the Ministry of Justice, Japan. *Bengoshi-hō* [Attorney Act], *supra* note 22.

26. Ishida, *supra* note 24, at 247.

order to secure the people's trust of the *bengoshi* profession, legal professionals, and the whole justice system. This suggests that non-*bengoshi* are included in the process in order to secure transparency. This Article argues that, despite the reform, there are structural weaknesses in the system. The article also analyzes why these weaknesses were not addressed in the reform.

A. THE LAWYER DISCIPLINARY SYSTEM IN JAPAN

1. Current Disciplinary System

In Japan, a *bengoshi* must join a local bar association where his or her office is situated and the Japan Federation of Bar Associations (“JFBA”),²⁷ both of which have disciplinary power over him or her.²⁸ A *bengoshi* may be disciplined if he or she violates the Act, the Articles of Association of the JFBA (“JFBA Articles”), or the Articles of Associations of the *bengoshi*'s local bar association.²⁹ Disciplinary sanction may also be imposed if a *bengoshi* commits an act that harms the order or reputation of the *bengoshi*'s local bar association.³⁰ A *bengoshi* may also be disciplined if he or she misbehaves in or outside professional activities in a manner that impairs the *bengoshi*'s own integrity.³¹ The disciplined *bengoshi* will be reprimanded, suspended from practice for no more than two years, ordered to withdraw from the local bar association, or disbarred.³²

Each local bar association has a disciplinary enforcement committee [*Kôki I'inkai*] (“DEC”) ³³ and a disciplinary action committee [*Chôkai I'inkai*] (“DAC”).³⁴ Any person can make a disciplinary request against a *bengoshi* at his or her local bar association.³⁵ A local bar association can also initiate the process.³⁶ In both of these cases, the DEC of the local bar association investigates and decides whether the case merits examination by the DAC of this

27. *Bengoshi-hô* [Attorney Act], *supra* note 22, at arts. 8, 9, 36 ¶ 1; art. 47.

28. *Bengoshi-hô* [Attorney Act], *supra* note 22, at arts. 56, ¶ 2; art. 60, ¶ 1.

29. *Bengoshi-hô* [Attorney Act], *supra* note 22, at art. 56, ¶ 1.

30. *Bengoshi-hô* [Attorney Act], *supra* note 22, at art. 56, ¶ 1.

31. *Bengoshi-hô* [Attorney Act], *supra* note 22, at art. 56, ¶ 1.

32. *Bengoshi-hô* [Attorney Act], *supra* note 22, at art. 57, ¶ 1.

33. *Bengoshi-hô* [Attorney Act], *supra* note 22, at art. 70, ¶ 1.

34. *Bengoshi-hô* [Attorney Act], *supra* note 22, at art. 65, ¶ 1.

35. *Bengoshi-hô* [Attorney Act], *supra* note 22, at art. 58, ¶ 1.

36. *Bengoshi-hô* [Attorney Act], *supra* note 22, at art. 58, ¶ 2.

local bar association.³⁷ The JFBA also has its disciplinary enforcement committee (“JFBA-DEC”) and disciplinary action committee (“JFBA-DAC”).³⁸ The JFBA can initiate the process by causing the JFBA-DEC to investigate whether the case merits examination by the JFBA-DAC.³⁹ When a case is referred to it as discussed above, the DAC or JFBA-DAC decides whether the *bengoshi* shall be disciplined and what the penalty will be.⁴⁰

When the local bar association issues a ruling not to discipline the *bengoshi* concerned, the party who lodged the disciplinary request (“complainant”) can object to the JFBA.⁴¹ An objection can also be filed if the local bar association has an unreasonable delay in concluding the disciplinary procedure or if the complainant thinks the penalty is unjustly lenient.⁴² The objection will be examined by either the JFBA-DEC or JFBA-DAC. If the case has not been referred to the local DAC, the JFBA-DEC will examine the matter.⁴³ If the objection is made against a no-discipline ruling,⁴⁴ and the JFBA-DEC considers it appropriate to refer the matter back to the local DAC, the JFBA will rescind the local bar association’s no-discipline ruling and refer the case back to the local bar association,⁴⁵ at which point that DAC shall examine the case.⁴⁶

If the matter has previously been referred to the local DAC,⁴⁷ the JFBA-DAC will examine the matter.⁴⁸ The JFBA will overturn the local bar association’s no-discipline ruling and discipline the *bengoshi* itself if the JFBA-DAC considers it appropriate to discipline the *bengoshi*.⁴⁹ If the JFBA-DAC considers that there are grounds for an

37. Bengoshi-hô [Attorney Act], *supra* note 22, at art. 58, ¶¶ 2, 3, 4.

38. Bengoshi-hô [Attorney Act], *supra* note 22, at art. 70, ¶ 1; art. 65, ¶ 1.

39. Bengoshi-hô [Attorney Act], *supra* note 22, at art. 60, ¶¶ 2, 3, 4.

40. Bengoshi-hô [Attorney Act], *supra* note 22, at art. 58, ¶¶ 5, 6; art. 60, ¶¶ 5, 6; art. 65, ¶ 2.

41. Bengoshi-hô [Attorney Act], *supra* note 22, at art. 64, ¶ 1.

42. Bengoshi-hô [Attorney Act], *supra* note 22, at art. 64, ¶ 1.

43. Bengoshi-hô [Attorney Act], *supra* note 22, at art. 64-2, ¶ 1.

44. This would be the case when the local DEC decided not to refer the case to the local DAC.

45. Bengoshi-hô [Attorney Act], *supra* note 22, at art. 64-2, ¶ 2.

46. Bengoshi-hô [Attorney Act], *supra* note 22, at art. 64-2, ¶ 3.

47. The objection is made against a local DAC’s resolution of no-discipline, or on the ground that the penalty is unjustly lenient, or the local DAC has an unreasonable delay in concluding the disciplinary procedure.

48. Bengoshi-hô [Attorney Act], *supra* note 22, at art. 64-5, ¶ 1.

49. Bengoshi-hô [Attorney Act], *supra* note 22, at art. 64-5, ¶ 2.

objection that alleges an unjust lenience in the local bar association's sanction, it will resolve to change the sanction, and the JFBA will cancel the local bar association's original sanction and impose the new sanction on the *bengoshi* itself.⁵⁰ If the JFBA-DEC or JFBA-DAC considers there are grounds for an objection made due to unreasonable delay in conclusion at the local level,⁵¹ the JFBA shall order the local bar association to proceed with the disciplinary proceedings promptly and either discipline the *bengoshi* concerned or issue a no-discipline ruling.⁵²

The JFBA-DAC or the JFBA-DEC may resolve to dismiss or reject an illegitimate or groundless objection.⁵³ The JFBA will make a ruling of dismissal or rejection accordingly.⁵⁴ No further review can be sought by the complainant, except that when the JFBA-DEC dismisses or rejects a complainant's objection against a local bar association's no-discipline ruling,⁵⁵ the complainant can apply to the Board of Discipline Review [*Kôki Shinsa Kai*] ("BDR") in the JFBA for a review.⁵⁶ If the BDR considers that the review application shall be dismissed because it is not legitimate, the JFBA will dismiss the application.⁵⁷ Otherwise, the BDR has to make a resolution either that the matter shall be remanded back to the local DAC for examination, which requires approval from two-thirds of its members present, or that it is unable to adopt such a resolution.⁵⁸ In the first situation, the JFBA will issue a ruling to remand the case back to the original local bar association.⁵⁹ In the second situation, it will reject the review application.⁶⁰ The Act requires the BDR to reflect the public opinion

50. Bengoshi-hô [Attorney Act], *supra* note 22, at art. 64-5, ¶ 4.

51. Whether the JFBA-DEC or JFBA-DAC handles the objection depends on whether the case has been referred to the local DAC or not. Bengoshi-hô [Attorney Act], *supra* note 22, at art. 64-2, ¶¶ 1, 4; art. 64-5, ¶¶ 1, 3.

52. Bengoshi-hô [Attorney Act], *supra* note 22, at art. 64-2, ¶ 4; art. 64-5, ¶ 3.

53. Bengoshi-hô [Attorney Act], *supra* note 22, at art. 64-2, ¶ 5; art. 64-5, ¶ 5.

54. Bengoshi-hô [Attorney Act], *supra* note 22, at art. 64-2, ¶ 5; art. 64-5, ¶ 5.

55. These are cases that the local DEC had ruled the requests as not meriting the local DAC's examination.

56. Bengoshi-hô [Attorney Act], *supra* note 22, at art. 64-3, ¶ 1.

57. Bengoshi-hô [Attorney Act], *supra* note 22, at art. 64-4, ¶ 4.

58. Bengoshi-hô [Attorney Act], *supra* note 22, at art. 64-4, ¶¶ 1, 5.

59. Bengoshi-hô [Attorney Act], *supra* note 22, at art. 64-4, ¶ 2.

60. Bengoshi-hô [Attorney Act], *supra* note 22, at art. 64-4, ¶ 5.

of Japan and conduct the necessary discipline review for ensuring the appropriateness of disciplinary procedures⁶¹

The disciplined *bengoshi* can use the Administrative Appeal Act⁶² to appeal to the JFBA regarding the disciplinary sanction the local bar association imposed.⁶³ The JFBA-DAC will examine the matter.⁶⁴ It may overturn the discipline sanction,⁶⁵ change the penalty or dismiss/reject the appeal.⁶⁶ The *bengoshi* can institute a lawsuit at the Tokyo High Court if the JFBA-DAC itself imposed a discipline sanction⁶⁷ or rejected/dissmised his or her appeal.⁶⁸ The *bengoshi* can also appeal against the Tokyo High Court's decision to the Supreme Court, the highest court, whose decision is final.

2. Changes from the Previous System

The disciplinary system described in subsection 1 above has been in operation since April 1, 2004, when amendments to the Act came into effect,⁶⁹ pursuant to the justice system reform. Subject to a few exceptions, the pre-reform system was similar. One of the major changes was the enhancement of non-*bengoshi*'s involvement in the investigative stage of the disciplinary procedure. Before the reform, non-*bengoshi* members in the local DEC's were non-official members; they could only express opinions and did not have voting or decision-making rights.⁷⁰ Now, they have voting and decision-making rights. Further, the BDR was established, and all of its eleven members must not be current or former *hōsō*.⁷¹ As discussed above, when the JFBA-DEC dismisses or rejects a complainant's objection against a local bar

61. *Bengoshi-hō* [Attorney Act], *supra* note 22, at art. 71, ¶ 2.

62. *Gyōsei fufuku shinsa-hō* [Administrative Appeal Act], Law No. 68 of 2014 (formerly Law No.160 of 1962) (Japan).

63. *Bengoshi-hō* [Attorney Act], *supra* note 22, at art. 59.

64. *Bengoshi-hō* [Attorney Act], *supra* note 22, at art. 59.

65. In this situation, the *bengoshi* concerned is not disciplined.

66. *Gyōsei fufuku shinsa-hō* [Administrative Appeal Act], *supra* note 62, at arts. 45, 46.

67. This will be the situation when the JFBA-DAC: (1) upon a complainant's objection, examined the matter, overturned the local bar association's no-discipline ruling and itself imposed a disciplinary sanction or considered the local bar association's penalty unjustly lenient and changed the sanction; or (2) examined the matter upon referral from the JFBA-DEC.

68. *Bengoshi-hō* [Attorney Act], *supra* note 22, at art. 61, ¶ 1.

69. The amendments were adopted in 2003.

70. Masahiko Takanaka, 懲戒制度の改正 [The Revision of the Disciplinary System], 54(7) 自由と正義 [LIBERTY & JUST.] 14, 16 (2003) (Japan).

71. *Bengoshi-hō* [Attorney Act], *supra* note 22, at art. 71-2; art. 71-3, ¶ 1.

association's no-discipline ruling, the complainant can apply to the BDR in the JFBA for a review.

Further, before the reform, dissatisfied complainants' objections against local DEC's no-discipline rulings were made to the JFBA-DAC.⁷² If it confirmed the no-discipline ruling, the complainant did not have further recourse. Now, as described in subsection 1 above, complainants' objections against local DEC's no-discipline rulings are examined by the JFBA-DEC. If it rejects or dismisses the objection, the complainant can, as discussed above, apply to the BDR for review. Therefore, the reform also accorded complainants one more opportunity of having a local DEC's no-discipline ruling reviewed.

B. STRUCTURAL WEAKNESSES IN THE DISCIPLINARY SYSTEM REGARDING NON-BENGOSHI'S PARTICIPATION

This article argues that, despite the justice system reform, the *bengoshi* disciplinary system has structural weaknesses that may affect non-*bengoshi*'s participation in regulating legal ethics. The weaknesses concern the composition of the various discipline-related committees, the appointment of members of these committees, and a lack of further recourse for the complainants beyond the bar associations. These weaknesses are analyzed below.

Because the JFBA rarely initiates the disciplinary procedure,⁷³ the DEC's are the main initial "gatekeepers." The reform has accorded its non-*bengoshi* members with voting and decision-making rights, but the Act does not specify any required proportion of non-*bengoshi* members in the DEC's. It only requires each DEC to have four or more committee members who are to be appointed from *bengoshi*, judges, prosecutors and persons of learning and experience.⁷⁴ For example, the Osaka Bar Association DEC had only six non-*bengoshi* (who were two judges, two prosecutors and two scholars) among its eighty-six members for the period from October 2006 to September 2007.⁷⁵ It was reported that the Tokyo Bar Association DEC had only nine non-*bengoshi* among its

72. Now, as described above, the objection is to the JFBA-DEC.

73. See Ishida, *supra* note 24, at 247.

74. *Bengoshi-hô* [Attorney Act], *supra* note 22, at arts. 70-2, 70-3.

75. See Osaka Shunju Kai, 春秋会政策集 - 大阪弁護士会の独自の課題 [Osaka Shunju Kai Policy Collection - Osaka Bar Association's unique challenge], OSAKA-SHUNJYU-KAI, <http://www.osaka-shunju-kai.com/seisaku/honbun7.html> (last visited Aug. 17, 2017).

109 members.⁷⁶ According to its 2017 disciplinary enforcement committee report, the Dai-Ichi Tokyo Bar Association had forty-nine *bengoshi* members and six non-*bengoshi* members in its DEC.⁷⁷ If the situation in the other bar associations is similar, non-*bengoshi* are the minority in the DECs and can easily be out-voted.

Systemic weakness is also found in the manner in which DEC members are to be appointed. The local bar association presidents make the appointments.⁷⁸ While the appointment of judges and prosecutors shall be made upon recommendations from the judiciary and the public prosecutors' office, the *bengoshi* and other committee members are appointed upon resolutions adopted at a general meeting of the bar association.⁷⁹ They are therefore chosen by the *bengoshi*. This article is not suggesting that the choice is biased or that the *bengoshi* committee members tend to be lenient. However, the system, as it is, is not structured in a way to ensure impactful non-*bengoshi* participation.

While the complainant can object against a local DEC's non-discipline ruling to the JFBA-DEC and, if the latter rejects or dismisses such objection, apply to the BDR for a review, non-*bengoshi* members are in the minority in the JFBA-DEC. Among the thirty JFBA-DEC members, there are only six non-*bengoshi* (two judges, two prosecutors, and two persons of learning and experience).⁸⁰ The JFBA-DEC may delegate matters to sub-committees.⁸¹ The Act only requires a DEC sub-committee to be composed of at least one *bengoshi*, one judge, one prosecutor, and one person of learning and experience.⁸² However, the JFBA Articles require each JFBA-DEC sub-committee to have at least seven members who shall be four or more *bengoshi*, one judge, one prosecutor, and one person of learning and experience.⁸³

76. See Isao Sugiyama, 網紀・懲戒制度の概要 [Outline of the Disciplinary System], 10(7) LIBRA 2, 3 (2010).

77. See TERUOKI NINOMIYA, 平成 29 年度網紀委員会報告 [2017 REPORT OF THE DISCIPLINARY ENFORCEMENT COMMITTEE], 第一東京弁護士会会報 [ICHIBEN BULLETIN], no.542, 7 (2018).

78. Bengoshi-hô [Attorney Act], *supra* note 22, at art. 66-2, ¶ 1; art. 70-3, ¶ 1.

79. See Bengoshi-hô [Attorney Act], *supra* note 22, at art. 66-2, ¶ 1; art. 70-3, ¶ 1. Depending on the locality of the bar association, the recommendations from the public prosecutors' office are from the chief public prosecutor or superintending prosecutor.

80. See ARTICLES OF ASSOCIATION, art. 70, ¶ 3. (JAPAN FED'N OF BAR ASS'NS) (Japan).

81. Bengoshi-hô [Attorney Act], *supra* note 22, at art. 70-6, ¶ 1; ARTICLES OF ASSOCIATION, *supra* note 80, at art. 70-3, ¶ 1.

82. Bengoshi-hô [Attorney Act], *supra* note 22, at art. 70-6, ¶ 2.

83. See ARTICLES OF ASSOCIATION, *supra* note 80, at art. 70-3, ¶ 2.

Therefore, non-*bengoshi* members are always in the minority. This is another structural weakness, although this article is not suggesting any partiality or impropriety at the JFBA-DEC.

While the complainant may apply to the BDR, which is composed of non-legal professionals only, to review the JFBA-DEC's non-discipline decision, the BDR members are appointed by the JFBA President upon resolution at a JFBA general meeting,⁸⁴ and the BDR's role is very limited. It only investigates whether the case shall be referred to the relevant local DAC. In other words, even when the BDR accepts the complainant's objection, the case is only referred back to the local DAC for examination and decision. The local DAC may decide not to discipline the *bengoshi*. This is the same for cases referred to the DACs by the DEC or the JFBA-DEC.⁸⁵

The Act has not stipulated a required proportion of non-*bengoshi* members in the DACs. It was reported that the Tokyo Bar Association DAC had seven non-*bengoshi* among its fifteen members.⁸⁶ If the situations in other DACs are the same or similar, non-*bengoshi* would be the minority. That was the situation prior to the justice system reform.⁸⁷ Given the profession's adamant attitude in strictly maintaining its self-regulation and autonomy,⁸⁸ it is highly likely that non-*bengoshi* members are still in the minority now.

84. *Bengoshi-hô* [Attorney Act], *supra* note 22, at art. 71-3, ¶ 1. This Article is not suggesting that the choice of the BDR members is biased.

85. *Bengoshi-hô* [Attorney Act], *supra* note 22, at art. 58, ¶ 6; art. 64-2, ¶ 3.

86. See Sugiyama, *supra* note 76, at 2, 5.

87. The number of *bengoshi* members exceeded the number of non-*bengoshi* members by one. See JAPAN FED'N OF BAR ASS'NS, 弁護士のあり方について [ABOUT HOW BENGOSHI SHOULD BE] (2000), available at <http://www.kantei.go.jp/jp/sihouseido/dai28/pdfs/28siryoul.pdf> [<https://perma.cc/8CF2-THK3>]. This was distributed at the 28th meeting of the Justice System Reform Council ("JSRC").

88. This is revealed from an analysis of the debate during the justice system reform. For example, at the twenty-eighth meeting of the JSRC, when questioned by a JSRC member on the reasons why non-*bengoshi* DEC members did not have voting power while *bengoshi* DEC-members did, the then JFBA President replied that there was no need to change this and gave two reasons: first, so far, the non-*bengoshi* DEC members' opinions were respected and not ignored and the DEC's duties were soundly fulfilled; and, second, the bodies with final deciding power in a disciplinary process were the DACs whose non-*bengoshi* members had voting power and there had not been a case of the *bengoshi* members using their majority to push through a decision. See 第28回司法制度改革審議会議事録 [Minutes of the 28th Meeting of the JSRC], <http://www.kantei.go.jp/jp/sihouseido/dai28/28gijiroku.html> [<https://perma.cc/NF5C-K3GB>]. Another example is the *Fundamental Plan on the Reform of the Disciplinary System* that the JFBA adopted on February 28, 2002. See 綱紀・懲戒制度の改革に関する基本方針 [Fundamental Plan on the Reform of the Disciplinary System], JAPAN FED'N OF BAR ASS'NS

Both the complainant and the *bengoshi* concerned can take the matter further to the JFBA-DAC if they are not satisfied with a local DAC's decision. The JFBA-DAC has fifteen members: eight *bengoshi*, two judges, two prosecutors, and three persons of learning and experience.⁸⁹ Therefore, the majority of the members are *bengoshi*. The JFBA-DAC can delegate matters to sub-committees.⁹⁰ Under the Act, a DAC sub-committee shall have at least one *bengoshi*, one judge, one prosecutor, and one person of learning and experience.⁹¹ However, the JFBA Articles require a JFBA-DAC sub-committee to have seven members who are composed of four *bengoshi*, one judge, one prosecutor, and one person of learning and experience.⁹² Therefore, the non-*bengoshi* members are also a minority in the sub-committees. Resolutions of the JFBA-DAC and its respective sub-committees are adopted by a simple majority of committee or sub-committee members who are present.⁹³ Therefore, the decisions on disciplinary cases are mainly (if not entirely) in the hands of the *bengoshi* profession itself.

Further, the JFBA-DAC's ruling is final and binding on the complainant. In contrast, the disciplined *bengoshi* concerned can institute a lawsuit at the Tokyo High Court. Complainants also have no further recourse (for example, the courts) regarding a no-discipline ruling from the BDR. Both the BDR and the JFBA-DAC are established within the JFBA.⁹⁴ Therefore, the complainants have no further recourse beyond the JFBA.

C. WHY WERE THE SYSTEMIC WEAKNESSES NOT ADDRESSED IN THE JUSTICE SYSTEM REFORM?

Under the justice system reform, changes were made to the *bengoshi* disciplinary system pursuant to the recommendations from

http://www.kantei.go.jp/jp/singi/sihou/kentoukai/seido/dai2/2siryou_be3.html
[\[https://perma.cc/QBQ4-TXM8\]](https://perma.cc/QBQ4-TXM8) [hereinafter JFBA Fundamental Plan]. At the very beginning of this document, the JFBA stated that the reform of the disciplinary system was from the perspective of maintaining and developing the profession's autonomy. In other words, it argued for maintenance of its self-regulation.

89. ARTICLES OF ASSOCIATION, *supra* note 80, at art. 69-2.

90. Bengoshi-hô [Attorney Act], *supra* note 22, at art. 66-5; ARTICLES OF ASSOCIATION, *supra* note 80, at art. 69-4, ¶ 1.

91. Bengoshi-hô [Attorney Act], *supra* note 22, at art. 66-5, ¶ 2.

92. ARTICLES OF ASSOCIATION, *supra* note 80, at art. 69-4, ¶ 2.

93. ARTICLES OF ASSOCIATION, *supra* note 80, at art. 69-3, ¶ 2; art. 69-4, ¶ 3.

94. Bengoshi-hô [Attorney Act], *supra* note 22, at art. 65, ¶ 1; art. 71, ¶ 1.

the Justice System Reform Council (“JSRC”) and the deliberations at the Legal Profession System Advisory Committee (“LPSAC”). The JSRC was established in 1999 to discuss the role of the justice system in Japan in the 21st century and make recommendations.⁹⁵ It presented its recommendations in a report (“the JSRC Report”) on June 12, 2001.⁹⁶ This report formed the basis for the reform. To implement the reform, the Office for Promotion of Justice System Reform (“the Promotion Office”) was established in December 2001. It had eleven advisory committees to deliberate on the details of the reform in different areas. Among them, the LPSAC handled issues concerning the system of the legal professions, including the reform of the *bengoshi* disciplinary system. This section of the article analyzes the deliberations at the JSRC and the LPSAC in order to investigate whether the existence of the structural weaknesses discussed above was realized, and if they were identified, why they were not addressed in the reform. The analysis is based on the minutes of the deliberations which are available online.

On the issue of reforming the *bengoshi* disciplinary system, the JSRC Report made a number of recommendations. These recommendations included adjusting the composition of the membership of the bodies that carry out disciplinary procedures (such as increasing the number of non-*bengoshi* members), conferring non-*bengoshi* members in the DEC’s with voting rights, and introducing a system under which the complainants can object to a review body that is made up of the citizens when their objections to DEC’s decisions have been dismissed or rejected by the JFBA.⁹⁷ It did not specify details on how this new review system would operate, such as the consequences when the new review body supports the complainant’s objection. Would the matter be referred to the local DAC or the JFBA-DAC? Alternatively, would the review body have the power to consider

95. Shihōseido Kaikaku Shingikai Setchihō [The Act on the Establishment of the Justice System Reform Council], Law No. 68 of 1998, art. 2 (Japan).

96. See 司法制度改革審議会意見書 -21世紀の日本を支える司法制度- [Recommendations of the Justice System Reform Council – For a Justice System to Support Japan in the 21st Century], THE JUST. SYS. REFORM COUNCIL, <http://www.kantei.go.jp/jp/sihouseido/report/ikensyo/index.html> [https://perma.cc/ZBM6-J9ZM], translated in *Recommendations of the Justice System Reform Council – For a Justice System to Support Japan in the 21st Century*, THE JUST. SYS. REFORM COUNCIL <http://japan.kantei.go.jp/judiciary/2001/0612report.html> [https://perma.cc/4T6M-QTV6].

97. *Id.*

whether to discipline the *bengoshi* and what the sanction would be? The JSRC Report also did not specify any requirements about the manner of appointment of non-*bengoshi* members and their proportion in the DECs, DACs, JFBA-DEC, and JFBA-DAC. Finally, the JSRC Report did not provide the complainants any further recourse against decisions made by the JFBA-DAC or the new review body.

An analysis of the minutes of the JSRC meetings⁹⁸ revealed that there was no discussion about the manner of appointment of the members of the various discipline-related committees in the bar associations. This was probably because the pre-reform Attorney Act already had provisions prescribing the manner in which such members were to be appointed. The previous version of provisions concerning DACs and the JFBA-DAC were basically similar to the current version of the Act. There was no provision in the old Act about the appointment of JFBA-DEC members and non-*bengoshi* members in local DECs. This is because the pre-reform Act did not have provision on the JFBA-DEC, and prior to the justice system reform, non-*bengoshi* members in DECs were non-official members.⁹⁹ In any case, the systemic weakness concerning the appointment of committee members was not discussed at the JSRC meetings. Therefore, not surprisingly, the JSRC Report is silent on this issue. It was also not discussed at the LPSAC meetings. This is expected because the LPSAC was given the task of implementing the reform pursuant to the JSRC Report.

Regarding the membership of the various discipline-related committees,¹⁰⁰ the JSRC Report merely recommended “an adjustment of [their] composition (such as increasing the number of non-*bengoshi* members).” There was no specification on the proportion of the membership. However, an analysis of the minutes of the JSRC meetings reveals that one JSRC member proposed that non-*bengoshi* be a majority in the committees.¹⁰¹ However, there was no consensus

98. See 司法制度改革審議会[Justice System Reform Council], THE JUST. SYS. REFORM COUNCIL, <http://www.kantei.go.jp/jp/sihouseido/gijiroku-dex.html> [https://perma.cc/XA25-WPWP].

99. The system was introduced according to an agreement among the three branches of the legal professionals in 1979. JAPAN FED’N OF BAR ASS’NS, *supra* note 87. At most, the non-*bengoshi* members could only offer their opinions, which the *bengoshi* members had no obligations to accept at all.

100. They are the local DECs, the local DACs, the JFBA-DEC, and the JFBA-DAC.

101. Toshihiro Mizuhara, a former prosecutor, brought up the issue at the 44th meeting of the JSRC. Mizuhara brought up the issue again at the 60th meeting on May 22, 2001 when the

among the JSRC members.¹⁰² Consensus is the common Japanese practice of decision-making.¹⁰³ Without a consensus, the matter was not pursued further at the JSRC. In addition, the JSRC arguably had a very tight time constraint. Although it impressively held sixty-six meetings from July 27, 1999 to June 12, 2001,¹⁰⁴ the volume of issues for its deliberation was massive. Many aspects of the justice administration system were covered. The *bengoshi* system was only one of these aspects.¹⁰⁵ Moreover, reform of the disciplinary system was just one of the many aspects of the reform of the *bengoshi* system.¹⁰⁶ Faced with a mammoth task, the JSRC did not have much time for the reform of the *bengoshi* disciplinary system. An analysis of the minutes of the JSRC meetings finds that this issue was mainly discussed at eight meetings,¹⁰⁷ seven of which were half-day

JSRC deliberated on the draft of the JSRC Report. See 第44回司法制度改革審議会議事録 [*Minutes of the 44th Meeting of the JSRC*], THE JUST. SYS. REFORM COUNCIL, <http://www.kantei.go.jp/jp/sihouseido/dai44/44gijiroku.html> [https://perma.cc/M2LM-JBMO] [hereinafter *Minutes of the 44th Meeting of the JSRC*]; 第60回司法制度改革審議会議事録 [*Minutes of the 60th Meeting of the JSRC*], THE JUST. SYS. REFORM COUNCIL, <http://www.kantei.go.jp/jp/sihouseido/dai60/60gijiroku.html> [https://perma.cc/2DUS-97Y7] [hereinafter *Minutes of the 60th Meeting of the JSRC*].

102. See *Minutes of the 44th Meeting of the JSRC*, *supra* note 101; *Minutes of the 60th Meeting of the JSRC*, *supra* note 101.

103. This is in contrast to the practice of the minority following the majority. Interestingly, at the LPSAC meetings, at least regarding the reform of the *bengoshi* disciplinary system, the practice of the minority following the majority was seemingly adopted.

104. See 司法制度改革審議会 審議経過 [*The Progress of Deliberations at the Justice System Reform Council*], THE JUST. SYS. REFORM COUNCIL, <http://www.kantei.go.jp/jp/sihouseido/report/ikensyo/singikeika.html> [https://perma.cc/KL3N-9E9V].

105. Other aspects included expansion of the population of legal professionals (judges, prosecutors and *bengoshi*), lay participation in certain criminal trials, the systems of judges and prosecutors respectively, the legal education and training system, criminal justice system, civil justice system and alternative dispute resolution. See the JSRC Report, *supra* note 96.

106. Other aspects included expansion of the scope of *bengoshi*'s activities, transparency and reasonableness of legal fees, strengthening the structure of *bengoshi*'s practices and internationalization of the profession. See *id.*

107. JSRC discussed the *bengoshi* disciplinary system mainly at the thirteenth meeting (February 22, 2000), the intensive discussion meeting (August 8, 2000), the twenty-eighth meeting (August 29, 2000), the twenty-ninth meeting (September 1, 2000), the thirty-third meeting (October 6, 2000), the forty-fourth meeting (January 23, 2001), the forty-sixth meeting (February 2, 2001) and sixtieth meeting (May 22, 2001). For the minutes of these meetings, see 第13回司法制度改革審議会議事録 [*Minutes of the 13th Meeting of the JSRC*], THE JUST. SYS. REFORM COUNCIL, <http://www.kantei.go.jp/jp/sihouseido/dai13/13gijiroku.html> [https://perma.cc/CEB3-72Q8]; 司法制度改革審議会集中審議(第2日)議事録 [*Minutes of the Intensive Discussion Meeting of the JSRC (Second Day)*], THE JUST. SYS. REFORM COUNCIL, <http://www.kantei.go.jp/jp/sihouseido/natu/natu2gijiroku.html> [https://perma.cc/2E7J-E284]; 第28回司法制度改革審議会議事録 [*Minutes of the 28th Meeting of the JSRC*], THE JUST.

meetings.¹⁰⁸ In these eight meetings, other aspects of the justice system reform were also deliberated.¹⁰⁹

At the LPSAC, the Secretariat of the Promotion Office (“the Secretariat”) had prepared a list of items for discussion and decision, which was distributed at the LPSAC’s third meeting.¹¹⁰ On the issue of

SYS. REFORM COUNCIL, <http://www.kantei.go.jp/jp/sihouseido/dai28/28gijiroku.html> [https://perma.cc/FBG4-XEGB]; 第29回司法制度改革審議会議事録 [Minutes of the 29th Meeting of the JSRC], THE JUST. SYS. REFORM COUNCIL, <http://www.kantei.go.jp/jp/sihouseido/dai29/29gijiroku.html> [https://perma.cc/HMZ9-JFDU]; 第33回司法制度改革審議会議事録 [Minutes of the 33rd Meeting of the JSRC], THE JUST. SYS. REFORM COUNCIL, <http://www.kantei.go.jp/jp/sihouseido/dai33/33gijiroku.html> [https://perma.cc/5XMB-NKU8]; Minutes of the 44th Meeting of the JSRC, *supra* note 101; 第46回司法制度改革審議会議事録 [Minutes of the 46th Meeting of the JSRC], THE JUST. SYS. REFORM COUNCIL, <http://www.kantei.go.jp/jp/sihouseido/dai46/46gijiroku.html> [https://perma.cc/77CK-3V2L]; Minutes of the 60th Meeting of the JSRC, *supra* note 101. The issue had also been briefly or just barely referred to at three other meetings: the fourth, eighth, and twelfth meetings. For the minutes of these meetings, see 第4回司法制度改革審議会議事録, [Minutes of the 4th Meeting of the JSRC], THE JUST. SYS. REFORM COUNCIL, <http://www.kantei.go.jp/jp/sihouseido/991026gijiroku4.html> [https://perma.cc/7KW6-44SE]; 第8回司法制度改革審議会議事録 [Minutes of the 8th Meeting of the JSRC], THE JUST. SYS. REFORM COUNCIL, <http://www.kantei.go.jp/jp/sihouseido/dai8/0112gijiroku.html> [https://perma.cc/74MV-AKKJ]; 第12回司法制度改革審議会議事録, [Minutes of the 12th Meeting of the JSRC], THE JUST. SYS. REFORM COUNCIL, <http://www.kantei.go.jp/jp/sihouseido/dai12/12gijiroku.html> [https://perma.cc/PK3U-AFW3].

108. The lengths of the seven meetings are 2:00 to 5:20 P.M. for the thirteenth meeting, 1:30 to 4:55 P.M. for the twenty-eighth meeting, 1:30 to 4:35 P.M. for the twenty-ninth meeting, 1:30 to 5:45 P.M. for the thirty-third meeting, 1:30 to 5:10 P.M. for the forty-fourth meeting, 1:30 to 5:10 P.M. for the forty-sixth meeting, and 1:30 to 5:55 pm for the sixtieth meeting. The exception is the meeting held on August 8, 2000, which had morning and afternoon sessions. See *Minutes of the 13th Meeting of the JSRC*, *supra* note 107; *Minutes of the 28th Meeting of the JSRC*, *supra* note 107; *Minutes of the 29th Meeting of the JSRC*, *supra* note 107; *Minutes of the 33rd Meeting of the JSRC*, *supra* note 107; *Minutes of the 44th Meeting of the JSRC*, *supra* note 101; *Minutes of the 46th Meeting of the JSRC*, *supra* note 107; *Minutes of the 60th Meeting of the JSRC*, *supra* note 101; *Minutes of the Intensive Discussion Meeting of the JSRC (Second Day)*, *supra* note 107.

109. See *Minutes of the 13th Meeting of the JSRC*, *supra* note 107; *Minutes of the 28th Meeting of the JSRC*, *supra* note 107; *Minutes of the 29th Meeting of the JSRC*, *supra* note 107; *Minutes of the 33rd Meeting of the JSRC*, *supra* note 107; *Minutes of the 44th Meeting of the JSRC*, *supra* note 101; *Minutes of the 46th Meeting of the JSRC*, *supra* note 107; *Minutes of the 60th Meeting of the JSRC*, *supra* note 101; *Minutes of the Intensive Discussion Meeting of the JSRC (Second Day)*, *supra* note 107.

110. 網紀・懲戒手続検討のたたき台 (案) [A tentative proposal for examining the disciplinary procedure (proposal), SECRETARIAT OF THE OFF. FOR PROMOTION OF JUST. SYS. REFORM, <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/seido/dai3/3siryo-g-8.pdf> [https://perma.cc/X2KU-9MMZ] [hereinafter Disciplinary Procedure Proposal]. Because of time constraints, the reform of the *bengoshi* disciplinary system was not discussed at the LPSAC third meeting despite being included in the original agenda. For minutes of the meeting, see 法曹制度検討会 (第3回) 議事録 [The Minutes of the 3rd LPSAC Meeting], SECRETARIAT

membership of the discipline-related committees, this list did not contain any proposal for the non-*bengoshi* members to be the majority. It only proposed an addition of judges, prosecutors, and persons of learning and experience to the local DEC's as official members.¹¹¹ It is not very clear why there was no mention of the proportion of the membership, but it seems that the Secretariat's list was prepared on the basis of the JSRC Report, the deliberations at the JSRC meetings as recorded in the minutes, and a document entitled the Fundamental Plan on the Reform of the Disciplinary System ("JFBA Fundamental Plan").¹¹² At the LPSAC's fourth meeting, a Secretariat official gave a detailed explanation about the drafting of certain items on the list.¹¹³ Such items were in relation to the consequences when the new review body considered that the case should be examined by a DAC.¹¹⁴ The Secretariat had added two options to the JFBA's suggestion¹¹⁵ for the LPSAC members to discuss and decide.¹¹⁶ The JFBA proposed that, when the new review body decided that a matter should be examined by the DAC, the JFBA-DEC would review the matter again and decide whether to refer the case to the DAC for examination.¹¹⁷ In other words, the new review body's aforesaid resolution has no binding power on the JFBA to refer the case to the DAC. Under both options

OF THE OFF. FOR PROMOTION OF JUST. SYS. REFORM, <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/seido/dai3/3gijiroku.html> [<https://perma.cc/AZ9Q-MK6D>].

111. See Disciplinary Procedure Proposal, *supra* note 110.

112. It was adopted by the JFBA at its special meeting on February 28, 2002. See JFBA Fundamental Plan, *supra* note 88. Copies of the JFBA Fundamental Plan were distributed at the second LPSAC meeting (held on March 12, 2002). See 第2回配布資料一覧, http://www.kantei.go.jp/jp/singi/sihou/kentoukai/seido/dai2/2siryoushiyou_list.html [<https://perma.cc/QEQ5-EFTF>]. In this meeting, a JFBA Vice-President had reported about the JFBA's responses to the justice system reform. For the minutes of this meeting, see 法曹制度検討会(第2回)議事録 [*Minutes of the 2nd LPSAC Meeting*], SECRETARIAT OF THE OFF. FOR PROMOTION OF JUST. SYS. REFORM, <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/seido/dai2/2gijiroku.html> [<https://perma.cc/6E2A-AQ5G>] [hereinafter *Minutes of the 2nd LPSAC Meeting*].

113. For the minutes of the meeting, see 法曹制度検討会(第4回)議事録 [*Minutes of the 4th LPSAC Meeting*], SECRETARIAT OF THE OFF. FOR PROMOTION OF JUST. SYS. REFORM, <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/seido/dai4/4gijiroku.html> [<https://perma.cc/DFZ2-R9NJ>] [hereinafter *Minutes of the 4th LPSAC Meeting*].

114. *Id.*

115. He was referring to the suggestion in the JFBA Fundamental Plan that if the new review body considered that the case should be examined by the DAC, the JFBA-DEC should re-examine whether the matter should be referred to the DAC.

116. See Disciplinary Procedure Proposal, *supra* note 110.

117. See JFBA Fundamental Plan, *supra* note 88.

added by the Secretariat, the new review body's resolution that the matter should be examined by the DAC could have binding power on the JFBA. The options differed regarding the majority required for such a resolution : two-thirds or a simple majority.¹¹⁸ The official explained that the JSRC Report was silent on the issue of whether the new review body's opinion should be binding on the JFBA and that this issue was an indispensable item to be discussed for inclusion in legislation on the new system.¹¹⁹ He also pointed out that, at the JSRC deliberations, there were opinions that the review body's view should have binding power, but no JSRC members clearly advocated that binding power was not needed.¹²⁰ They considered that this was an issue the JSRC left open for future examination.¹²¹ In contrast, there was debate and no consensus reached at the JSRC meetings regarding the requirement that non-*bengoshi* members were to be the majority in discipline-related committees.¹²² That might be a reason why the issue was not included in the Secretariat's list. In any case, an analysis of the minutes of the LPSAC meetings indicates that no LPSAC member had raised arguments against the proposal in the JFBA Fundamental Plan for the *bengoshi* members to be in the majority in the discipline-related committees.¹²³ This might be a relatively less important issue for the LPSAC members. The discussions about the *bengoshi* disciplinary system at the meetings were mainly, if not overwhelmingly, focused on three issues: whether the BDR's decision should be binding on the JFBA, whether a simple majority or two-thirds majority was required and, if two-thirds majority was required, whether there should be the

118. See Disciplinary Procedure Proposal, *supra* note 110

119. See *Minutes of the 4th LPSAC Meeting*, *supra* note 113.

120. *Id.*

121. *Id.*

122. The Secretariat official pointed this out in his explanation at the fourth LPSAC meeting. *Id.*

123. Minutes of the fourth, fifth, and sixth meetings of the LPSAC, see *Minutes of the 4th LPSAC Meeting*, *supra* note 113; 法曹制度検討会 (第5回) 議事録, [Minutes of the 5th LPSAC Meeting], SECRETARIAT OF THE OFF. FOR PROMOTION OF JUST. SYS. REFORM, <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/seido/dai5/5gijiroku.html> [https://perma.cc/YN3R-JCT2] [hereinafter *Minutes of the 5th LPSAC Meeting*]; 法曹制度検討会 (第6回) 議事録, [Minutes of the 6th LPSAC Meeting], SECRETARIAT OF THE OFF. FOR PROMOTION OF JUST. SYS. REFORM, <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/seido/dai6/6gijiroku.html> [https://perma.cc/5W2B-A3MM] [hereinafter *Minutes of the 6th LPSAC Meeting*].

option of requiring the JFBA-DEC to re-examine the case again when only a simple majority was reached at the BDR.¹²⁴

Similar to the JSRC, the LPSAC also faced a time constraint in its deliberations. Although it was established to focus on reforming the system of legal professionals, the LPSAC's work covered many issues. The scope included all three branches of the *hōsō* and, regarding the *bengoshi*, there were many issues to handle. Regarding *bengoshi*, the LPSAC's work covered not only the disciplinary system, but also issues such as the liberalization of the restriction on *bengoshi*'s assumption of public posts or joining the business sector, promotion of the establishment of legal consultation centers, and transparency and reasonableness of legal fees.¹²⁵ It also included issues such as the strengthening of *bengoshi*'s practice structure, transparency of the administration of the bar associations, and expansion of the quasi-legal professions' permitted scope of practice.¹²⁶ There was a tight timeline for the discussions. Reform of the lawyer disciplinary system was one of the matters scheduled for inclusion in a bill to be submitted to the National Diet in its ordinary session from January to June 2003.¹²⁷ To match this schedule, the bill was expected to be drafted and ready before January 2003.¹²⁸ Time would also be required for the drafting of the bill after the discussions at the LPSAC ended. According to the schedule that the Secretariat proposed to the LPSAC at its third meeting (held on April 16, 2002), the latter had to discuss the reform of the lawyer disciplinary system and several other issues in four meetings to be held by July 22, 2002,¹²⁹ although ultimately five meetings were

124. *Minutes of the 4th LPSAC Meeting*, *supra* note 113; *Minutes of the 5th LPSAC Meeting*, *supra* note 123; *Minutes of the 6th LPSAC Meeting*, *supra* note 123.

125. 主な検討事項と検討順序 (法曹制度検討会関係) [*Major items for examination and the order of examination (LPSAC-related)*], <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/seido/dai2/2siryou2.html> [<https://perma.cc/AR2P-ANAY>].

126. *Id.*

127. Other matters included the liberalization of the restriction on *bengoshi*'s assumption of public posts or joining the business sector and making the legal fees transparent and reasonable. *Id.*

128. For the comments provided to the LPSAC by an official of the Secretariat of the Promotion office, see *Minutes of the 2nd LPSAC Meeting*, *supra* note 112.

129. See 法曹制度検討会 進行の枠組み (案) [*A Plan for the Proceeding of the LPSAC (Proposal)*], SECRETARIAT OF THE OFF. FOR PROMOTION OF JUST. SYS. REFORM, <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/seido/dai3/3siryo-g-1.pdf> [<https://perma.cc/6ZPF-U78L>].

held from April to July in 2002.¹³⁰ In reality, the reform of the disciplinary system was only discussed at three half-day meetings on May 14, June 18, and July 9, 2002. Further, it was not the only matter that was discussed at these three meetings.¹³¹ The LPSAC therefore had a very short period of time to discuss and finalize the details of the reform.

Regarding the absence of further recourse for the complainants beyond the JFBA, the analysis above is also applicable. The JSRC Report did not provide the complainants any further recourse against the JFBA-DAC's decisions. There were some discussions at the JSRC meetings about whether there should be recourse to courts for the complainants.¹³² A main concern was the inequity between the complainants and the *bengoshi* concerned.¹³³ However, there was no consensus on the issue at the JSRC.¹³⁴ It was not included by the Secretariat as an agenda item for the LPSAC meetings and there was not much discussion on this issue at the meetings.¹³⁵

D. CONCLUSIONS REGARDING JAPAN

In Japan, the justice system reform has enhanced non-lawyer participation in the lawyer disciplinary process. However, the system has structural weaknesses. They are the composition of the various discipline-related committees, the manner in which the members of

130. For the list of the meetings, see 法曹制度検討会 [LPSAC], <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/10seido.html> [https://perma.cc/Z6GN-ME68].

131. For meeting minutes, see *Minutes of the 4th LPSAC Meeting*, *supra* note 113; *Minutes of the 5th LPSAC Meeting*, *supra* note 123; *Minutes of the 6th LPSAC Meeting*, *supra* note 123.

132. For example, see *Minutes of the Intensive Discussion Meeting of the JSRC (Second Day)*, *supra* note 107; *Minutes of the 44th Meeting of the JSRC*, *supra* note 101.

133. For example, see *Minutes of the Intensive Discussion Meeting of the JSRC (Second Day)*, *supra* note 107.

134. See *id.*; see also *Minutes of the 44th Meeting of the JSRC*, *supra* note 101; *Minutes of the 60th Meeting of the JSRC*, *supra* note 101.

135. At the fourth LPSAC meeting, an LPSAC member did raise up the issue of no further recourse for the complainants after JFBA-DAC. A JFBA Vice-President who attended that meeting responded that under the option that the JFBA proposed, a complainant would already have the request heard four times, by the local DEC, the JFBA-DEC, the BDR, and then the JFBA-DEC again, and this was more than the three trials available in civil litigations in courts. The LPSAC member did not accept the explanation but there was no debate on the issue at the meeting afterwards. For minutes of the fourth LPSAC meeting, see *Minutes of the 4th LPSAC Meeting*, *supra* note 113. For minutes of the 5th LPSAC Meeting and the 6th LPSAC Meeting, see *supra* note 123.

these committees are to be appointed, and the lack of further recourse for the complainants beyond the JFBA.

The issue of appointment of committee members was not discussed at the JSRC meetings. The other two weaknesses were pointed out at JSRC meetings, but there was no consensus among the members. Consensus, a traditional Japanese practice of decision-making, was adopted at the JSRC regarding the reform of the lawyer disciplinary system. As a result, the JSRC Report has not specified reform in these respects. When decisions depend on consensus, compromises will commonly be needed and negotiations will be lengthy. However, the JSRC faced a mammoth task, resulting in very little time for the issue of reform of the *bengoshi* disciplinary system. That could also be a factor contributing to the lack of specific and necessary details on the operation of the BDR in the JSRC Report.

To implement the recommendations in the JSRC Report regarding the system of legal professionals, which included reform of the lawyer disciplinary system, the LPSAC was established to advise on the details for relevant legislation. Because the LPSAC worked on the basis of the JSRC Report and the deliberations at the JSRC meetings, two of the three systemic weaknesses were not debated at the LPSAC meetings, and the other weakness was only briefly raised and discussed. As analyzed above, its deliberation concerning reform of the *bengoshi* disciplinary system was mainly focused on the operation of the BDR, namely whether its resolution would be binding on the JFBA, how much of a majority such resolution would require, and whether there would be an additional option of requiring the JFBA-DEC to re-examine the case. LPSAC was faced with the task of completing this significant gap in the JSRC Report, but it nevertheless had a tight timeline to provide details for the drafting of the relevant bill regarding this issue and other issues.

As stated in the JSRC Report, the aim of the reform of the *bengoshi* disciplinary system was to secure the people's trust in the *bengoshi* profession, all legal professionals, and the whole justice system by making the procedure transparent, prompt, and effective.¹³⁶ Enhancing the people's involvement or participation in the procedure was one of the means to achieve this aim. Enhancing the impact of non-*bengoshi* on the disciplinary system was not the focus. Even when the issue of providing complainants an opportunity to seek judicial review

136. For the JSRC Report, see *supra* note 96.

of the JFBA-DAC's decisions was discussed at the JSRC meetings, the debate was mainly from the perspective of mitigating the inequity between the *bengoshi* concerned and the complainants, in that judicial review was available to the former but not the latter.

Further, at the beginning of the fourth LPSAC meeting, the first LPSAC meeting that deliberated on reform of the lawyer disciplinary system, a JFBA Vice-President gave a presentation before the LPSAC members commenced their discussions.¹³⁷ In the presentation, he separated reform measures into three categories: transparency, promptness, and effectiveness. He explained the measures that the JFBA Fundamental Plan proposed for achieving each of these categories.¹³⁸ The reform measures of according voting rights to non-*bengoshi* DEC members, making them official members, and establishing the BDR were categorized as having the goal of securing the transparency of the system.¹³⁹ There were no definite opposing voices from the LPSAC.¹⁴⁰ The criteria of transparency is easily fulfilled if non-*bengoshi* are involved in the system, irrespective of the extent of such involvement.

III. SINGAPORE

A. The Lawyer Disciplinary System in Singapore

In Singapore, the current form of the disciplinary system for advocates and solicitors¹⁴¹ is a multi-step process that involves different stakeholders, including clients, lawyers, the Law Society, and

137. See *Minutes of the 4th LPSAC Meeting*, *supra* note 113.

138. *Id.*

139. *Id.*

140. At the fifth meeting, a LPSAC member had discussed about the BDR from the perspective of effectiveness of the disciplinary system but he was not addressing the categorization by the JFBA Vice-President and had not specifically criticized or opposed such categorization. For minutes of the fifth LPSAC meeting, see *Minutes of the 5th LPSAC Meeting*, *supra* note 123. For minutes of the other two LPSAC Meetings (the 4th and the 6th LPSAC Meetings), see *Minutes of the 4th LPSAC Meeting*, *supra* note 113 and *Minutes of the 6th LPSAC Meeting*, *supra* note 123.

141. A different process, helmed by the Chief Justice, is used for legal service officers and non-practicing solicitors. Legal Profession Act of 1966 (revised 2009), ch. 161, § 82A (Sing.), and regulated non-practitioners, § 82B. This Article is based on the Legal Profession Act of 1966 (revised 2009), ch. 161 (Sing.). References to this version are indicated by "Legal Profession Act," and other versions are indicated by addition of the year.

the courts. The system utilizes persons with different backgrounds to review and determine complaints, including judges, lawyers, lay persons, and legal service officers, the latter being legally trained individuals with government posts in the Singapore Legal Service.¹⁴² The stages of the disciplinary process that incorporate lay persons are not public, and there is no publicly available information about how lay persons impact the disciplinary process. Therefore, this portion of the article focuses on the factors that led Singapore to adopt lay person participation. This history suggests that in addition to exerting control over the bar's input into the legal system, incorporating lay persons and legal service officers was meant to shift Singapore away from self-regulation and toward regulation by a wider range of stakeholders. In particular, lay persons were introduced to institutionalize consideration of consumer interests. In doing so, Singapore overcame the aversion to lay person ignorance and incompetence displayed when it limited and then abolished the jury system in 1960 and 1969.

B. Current Disciplinary System

All Singapore lawyers and foreign lawyers registered with the Legal Services Regulatory Authority are regulated by the Law Society, and they are required to comply with the relevant portions of the professional conduct rules, including the Legal Profession Act¹⁴³ and the Legal Profession (Professional Conduct) Rules.¹⁴⁴ Any person, not just a client, can submit a complaint about a lawyer's conduct in breach of professional rules, and such complaints are submitted to the Law Society,¹⁴⁵ after which the matter is investigated and pursued under the Legal Profession Act. Because all advocates and solicitors and legal service officers are officers of the Supreme Court,¹⁴⁶ the Supreme Court has ultimate disciplinary jurisdiction over them.¹⁴⁷ This supervision is reflected in various aspects of the Chief Justice's role in the disciplinary procedure and the final stage of the most serious

142. Legal Profession Act, § 2 (“‘Legal Service Officer’ means an officer in the Singapore Legal Service.”).

143. Legal Profession Act.

144. Legal Profession (Professional Conduct) Rules 2015 S 706/2015 (Sing.).

145. Legal Profession Act, § 85(1).

146. *See id.* § 82(1).

147. LAW AND LEGAL INSTITUTIONS OF ASIA: TRADITIONS, ADAPTATIONS AND INNOVATIONS 365 (E. Ann Black & Gary F. Bell eds., 2011).

disciplinary cases, a hearing before the Court of Three Judges in the Supreme Court. Under the common disciplinary framework adopted in 2015, all Singapore lawyers and foreign lawyers practicing law in Singapore, referred to as “regulated legal practitioners,”¹⁴⁸ are subject to the same overall professional disciplinary processes.¹⁴⁹ This Article focuses on the disciplinary process as it applies to advocates and solicitors, the title for Singapore lawyers.¹⁵⁰

The disciplinary process in Singapore encompasses four main stages of increasing gravity: the Review Committee and the Inquiry Committee, which take place under the supervision of the Law Society; the Disciplinary Tribunal;¹⁵¹ and the final stage of the Court of Three Judges, a hearing conducted by the Supreme Court.¹⁵² To proceed under the disciplinary process, complaints need to meet certain formal requirements, e.g., be in writing and include information about other complaints regarding the advocate and solicitor, as relevant.¹⁵³ Subject to a few exceptions,¹⁵⁴ complaints received by the Law Society that comply with these requirements must be referred by the Council of the Law Society to the Chairman of the Inquiry Panel.¹⁵⁵ The Inquiry Panel contains the pool of lawyers and lay persons who can be called upon to serve on the Inquiry Committee that investigates complaints,¹⁵⁶ if the complaint gets that far.

In addition to complaints from clients, the Council of the Law Society may refer a matter to the Chairman of the Inquiry Panel on its own motion.¹⁵⁷ Any judicial office holder, the Attorney-General, the Director of Legal Services, or the Singapore Institute of Legal

148. Legal Profession Act, § 2(1) (“[R]egulated legal practitioner’ means an advocate and solicitor or a regulated foreign lawyer.”).

149. See SINGAPORE MINISTRY OF LAW, CIRCULAR ON THE ESTABLISHMENT OF THE LEGAL SERVICES REGULATORY AUTHORITY, ¶ 5(a)(ii) (2015) (Sing.).

150. Legal Profession Act, § 2(1).

151. The currently constituted “Disciplinary Tribunal” plays the same role but differs from the “Disciplinary Committee” of earlier versions of the Legal Profession Act; the change to the current “Disciplinary Tribunal” was made in 2008 in the Legal Profession (Amendment) Act 2008. See Act Supplement No. 19 § 34 (2008) (Sing.). The text of this Article uses both terms, as contained in the legislation under discussion.

152. See Legal Profession Act, § 98(7), which refers to a “court of 3 Judges.”

153. See *id.* § 85(1).

154. See *id.* §§ 85(1A), 85(4A).

155. See *id.* § 85(1A).

156. The Inquiry Panel is comprised of “advocates and solicitors (whether in practice or not), regulated foreign lawyers and lay persons.” *Id.* § 84(1).

157. See *id.* § 85(2).

Education may also refer information touching upon the conduct of a regulated legal practitioner to the Law Society.¹⁵⁸ In response to these referrals, the Council must refer the matter to the Inquiry Panel Chairman,¹⁵⁹ or if the “judicial office holder, the Attorney-General, the Director of Legal Services or the Institute . . . requests that the matter be referred to a Disciplinary Tribunal, apply to the Chief Justice to appoint a Disciplinary Tribunal.”¹⁶⁰

Where a complaint is referred to the Chairman of the Inquiry Panel, the Chairman or Deputy Chairman of the Inquiry Panel must constitute a Review Committee within two weeks.¹⁶¹ The Review Committee comprises two persons:

- A chairman, either the Chairman or Deputy Chairman of the Inquiry Panel, or “an advocate and solicitor member of the Inquiry Panel of not less than twelve years’ standing”; and
- If the subject of the complaint is:
 - an advocate and solicitor, “a Legal Service Officer who has not less than ten years’ experience”; or
 - a regulated foreign lawyer, “a member of the Inquiry Panel who is a regulated foreign lawyer of not less than ten years’ standing.”¹⁶²

Lay persons are absent from this early filter stage of proceedings.

The two-person Review Committee decides if the complaint has any substance that must be referred for further inquiry.¹⁶³ The Review Committee can require the complainant or lawyer to answer any inquiry or to furnish any record that the Review Committee considers relevant.¹⁶⁴ The Review Committee is required to start its review of the complaint within two weeks of the constitution of the Review Committee.¹⁶⁵ If the Review Committee unanimously determines that the complaint or information is “frivolous, vexatious, misconceived or

158. *See id.* § 85(3).

159. *See id.* § 85(3)(a).

160. *Id.* § 85(3)(b).

161. *See id.* § 85(6).

162. *See id.*

163. *See* Discipline Process, THE LAW SOCIETY OF SINGAPORE, <http://www.lawsociety.org.sg/Lawyer-Regulation/Discipline-Process> [<https://perma.cc/J3HE-TS9A>].

164. *See* Legal Profession Act, § 85(7).

165. *See id.* § 85(6).

lacking in substance,” it can direct the Council to dismiss the matter, providing reasons for the dismissal.¹⁶⁶ The Council must accept this decision of the Review Committee and is required to write to the complainant and the lawyer within seven days, stating the reasons why the complaint was dismissed.¹⁶⁷ If the complaint is not dismissed, it is referred back to the Chairman of the Inquiry Panel for the second stage, where an Inquiry Committee is appointed to conduct an inquiry into the complaint.¹⁶⁸

The procedure at the Review Committee level makes some actions mandatory. For example, the Council is required to accept a Review Committee’s unanimous determination “that the complaint or information is frivolous, vexatious, misconceived or lacking in substance” and should be dismissed.¹⁶⁹ The procedure imposes time limits as well. The Chairman of the Inquiry Panel must constitute a Review Committee for complaints within two weeks,¹⁷⁰ the Review Committee must begin its review of the complaint within two weeks of the constitution of the Review Committee,¹⁷¹ and where the Review Committee determines that the complaint should be dismissed, the Council is required within seven days to write to the complainant and the lawyer, stating the reasons why the complaint was dismissed.¹⁷²

The second stage of the disciplinary process is the Inquiry Committee. If the Review Committee refers the complaint or information back to the Chairman of the Inquiry Panel, the Inquiry Committee must be constituted within three weeks.¹⁷³ The Inquiry Committee is assembled by the Chairman or Deputy Chairman of the Inquiry Panel,¹⁷⁴ and is comprised of a Chairman, who is an advocate and solicitor from the Inquiry Panel of not less than 12 years’ standing,¹⁷⁵ an advocate and solicitor¹⁷⁶ and lay person¹⁷⁷ from the

166. *Id.* § 85(8)(a).

167. *See id.* § 85(9).

168. *See id.* § 85(10).

169. *Id.* § 85(8)(a); § 85(9)(a).

170. *See id.* § 85(6).

171. *See id.*

172. *See id.* § 85(9).

173. *See id.* § 85(10).

174. *See id.*

175. *See id.*, § 10(a).

176. *See id.*, § 10(b)(i).

177. *See id.*, § 10(c).

Inquiry Panel,¹⁷⁸ and a Legal Services Officer of not less than 10 years' experience.¹⁷⁹

The members of the Inquiry Panel as well as the Chairman and Deputy Chairman of the Inquiry Panel are appointed by the Chief Justice.¹⁸⁰ The overall number of persons serving on the Inquiry Panel is determined within the discretion of the Chief Justice.¹⁸¹ The Chief Justice may also remove persons from the Inquiry Panel and appoint persons to fill vacancies on the Inquiry Panel.¹⁸²

The Inquiry Panel is comprised of "advocates and solicitors (whether in practice or not), regulated foreign lawyers and lay persons."¹⁸³ Both advocates and solicitors and regulated foreign lawyers must have not less than seven years' standing,¹⁸⁴ while the Chairman and the Deputy Chairman of the Inquiry Panel must have not less than twelve years' standing as an advocate and solicitor.¹⁸⁵

In addition to qualifications for regulated legal practitioners and legal service officers, the Legal Profession Act addresses lay person qualifications. According to section 2(1), a "lay person," in relation to the Inquiry Panel or an Inquiry Committee, means an architect, an accountant, a banker, a company director, an insurer, a professional engineer, a medical practitioner or any other person (not being an advocate and solicitor or a Legal Service Officer) who meets such criteria as may be approved by the Chief Justice and the Attorney-General."¹⁸⁶

The Inquiry Committee has deadlines for beginning its work and reporting its findings. The Inquiry Committee shall commence its inquiry within two weeks of its constitution.¹⁸⁷ The deadlines for reporting its findings to the Council depend on whether the Inquiry Panel has called for any information from the lawyer.¹⁸⁸ If the Inquiry Committee has decided not to call the lawyer to explain or answer

178. *See id.* § 84(1).

179. *See id.* § 85(10)(d).

180. *See id.* §§ 84(1), 84(5).

181. *See id.* § 84(1).

182. *See id.* § 84(4).

183. *See id.* § 84(1).

184. *See id.* § 84(2).

185. *See id.* § 84(5).

186. *Id.* § 2.

187. *See id.* § 86(1).

188. *See id.*

allegations, the Inquiry Committee has two months after the date of its appointment; in any other case, it must issue its report no later than two weeks after its last meeting or “three months after the date of its appointment, whichever is earlier.”¹⁸⁹ If the Inquiry Committee cannot report its findings within this period due to complexity or serious difficulties, it can apply to the Chairman of the Inquiry Panel for an extension of the time,¹⁹⁰ which if granted cannot extend beyond six months from the date the Inquiry Committee was appointed.¹⁹¹ However, no “application for an extension of time may be made to the Chairman of the Inquiry Panel” after two months following the date of the appointment of the Inquiry Committee.¹⁹² Compared to the Review Committee stage, the Inquiry Committee stage is subject to more performance deadlines.

While conducting the inquiry, the Inquiry Committee can appoint persons to assist in making inquiries, require a person to produce for inspection any books, documents, or papers related to the inquiry, and require any person including the advocate and solicitor to give information in relation to such books, documents, or papers.¹⁹³ When an Inquiry Committee decides that an advocate and solicitor should answer allegations, the Inquiry Committee shall: deliver a copy of the complaint or information to the advocate and solicitor, together with any statutory declarations or affidavits that have been made in support; give the advocate and solicitor an opportunity to provide any written explanation he may wish to offer or advise if he wishes to be heard by the Inquiry Committee; and give due consideration to any explanation provided.¹⁹⁴

“Any questions arising at any meeting of an Inquiry Committee shall be determined by a majority of votes of the members of the Committee,” with the Chairman of the Inquiry Committee having a second vote to break a tie.¹⁹⁵ It is required that all “[a]ll the members of an Inquiry Committee shall be present to constitute a quorum for a meeting of the Inquiry Committee.”¹⁹⁶ The procedure at the Inquiry

189. *See id.*

190. *See id.* § 86(2).

191. *See id.* § 86(3).

192. *See id.* § 86(4).

193. *See id.* § 86(12).

194. *See id.* § 86(6).

195. *See id.* § 85(14).

196. *See id.* § 85(15).

Committee suggests that lay person opinion and participation have equal weight with the opinions and participation of lawyers and legal service officers, except in the case of a tied vote.

The Inquiry Committee can essentially make one of three decisions. If the Inquiry Committee is satisfied that there are no grounds for disciplinary action, it is required to make that report to the Council and state the reasons.¹⁹⁷ If the Inquiry Committee determines that no formal investigation by a Disciplinary Tribunal is required but that some measures are warranted, it is required to make appropriate recommendations,¹⁹⁸ such as alternatives including a penalty appropriate to the misconduct committed,¹⁹⁹ or a reprimand or warning.²⁰⁰ Lastly, it can recommend that a formal investigation by a Disciplinary Tribunal is required, together with the preferred charges.²⁰¹

The Inquiry Committee report goes to the Council of the Law Society, who must decide the next step within one month of receipt, a decision which can include referral back to the Inquiry Committee for further consideration.²⁰² If the Council determines that there should be a formal investigation, the Council has to “apply to the Chief Justice to appoint a Disciplinary Tribunal which shall hear and investigate the matter.”²⁰³ If the Inquiry Committee determines that a Disciplinary Tribunal is not necessary, but the Council disagrees, the Council may request the Chief Justice to appoint a Disciplinary Tribunal.²⁰⁴

In the third, more serious stage of disciplinary proceedings, the Disciplinary Tribunal is appointed by the Chief Justice.²⁰⁵ A Disciplinary Tribunal can be appointed to review a particular complaint or for a fixed period of time, within the Chief Justice’s discretion.²⁰⁶ Unlike the Inquiry Committee, where the Chairman of the Inquiry Panel is required to appoint a committee that includes a lay person,²⁰⁷

197. *See id.* §§ 86(5), 86(7)(b)(v).

198. *See id.* § 86(7)(b)(i)-(iv).

199. *See id.* § 86(7)(b)(i).

200. *See id.* § 86(7)(b)(ii).

201. *See id.* § 86(7)(a).

202. *See id.* § 87(1).

203. *Id.* § 89(1).

204. *See id.* § 87(2)(b).

205. *See id.* § 90(1).

206. *See id.* § 90(2).

207. *See id.* § 85(10)(c).

lay person participation is not required in the Disciplinary Tribunal and there is no mechanism for arranging it. The Disciplinary Tribunal comprises a President, who is a Senior Judge of the Supreme Court, or has been a Judge or Judicial Officer of the Supreme Court, or is an advocate and solicitor who is also a Senior Counsel,²⁰⁸ and as applicable, either an advocate and solicitor or regulated foreign lawyer of not less than twelve years' standing.²⁰⁹

Proceedings before the Disciplinary Tribunal are more formal than the preceding stages of the disciplinary process. Any person giving evidence to the Disciplinary Tribunal shall be legally bound to tell the truth,²¹⁰ and in addition to the procedure articulated in the Legal Profession Act,²¹¹ subsidiary legislation sets out additional procedures to be used.²¹² A Disciplinary Tribunal is required to work "expeditiously" but is not subject to the string of deadlines applicable to the Inquiry Committee, although the Law Society "may apply to the Chief Justice for directions to be given to the Disciplinary Tribunal if the Disciplinary Tribunal fails to make any finding and determination within six months from the date of its appointment."²¹³ The Disciplinary Tribunal makes one of three determinations regarding advocates and solicitors: that no cause exists for the more severe disciplinary actions under section 83 of the Legal Profession Act of being struck off the roll, suspended for a period of time, or censured; that the advocate and solicitor should be ordered to pay a penalty, reprimanded, and/or comply with remedial measures; or that there is sufficient basis for the most severe disciplinary actions under section 83 of the Legal Profession Act.²¹⁴ If the Disciplinary Tribunal determines that "sufficient gravity for disciplinary action exists under section 83,"²¹⁵ the Law Society "shall without further direction" apply for an order for the advocate and solicitor to show cause why the advocate and solicitor should not be punished.²¹⁶ Proceedings

208. *See id.* § 90(1)(a).

209. *See id.* § 90(1)(b).

210. *See id.* § 91(5).

211. *See id.* § 89-93.

212. *See* Legal Profession (Disciplinary Tribunal) Rules, G.N. No. S 596/2008 (2010) (Sing.).

213. Legal Profession Act, § 93(3).

214. *See id.* § 93(1).

215. *See id.* § 93(1)(c).

216. *Id.* at § 94(1).

regarding the order to show cause are “heard by a court of 3 Judges of the Supreme Court,” from which there is no appeal.²¹⁷

The above review of the Singapore disciplinary procedure illustrates three distinctive characteristics. First, in addition to advocates and solicitors, lay persons and legal service officers are involved in the second stage of the investigatory and decision-making process, the Inquiry Committee. Currently, while lay person views carry roughly equivalent weight at the Inquiry Committee, lay persons are absent from the first stage Review Committee and the third stage Disciplinary Tribunal. Second, the portions of the disciplinary process occurring under Law Society supervision are subject to strict time deadlines, and a number of actions are mandatory under the Legal Profession Act. Third, the Supreme Court has considerable oversight powers. Why does the disciplinary process contain these characteristics, and what are the goals of the current procedure? The answer lies in the shift in Singapore away from self-regulation and toward more control of the disciplinary process by stakeholders other than advocates and solicitors.

*C. EXPANDING PARTICIPATION IN THE DISCIPLINARY
PROCESS FOR LAY PERSONS AND LEGAL SERVICE OFFICERS
VIA THE LEGAL PROFESSION ACT*

The predecessor to the Legal Profession Act was the Advocates and Solicitors Ordinance.²¹⁸ Mr. Justice P. Coomaraswamy drafted the first Legal Profession Act,²¹⁹ which came into force in 1966.²²⁰ Prior to passage in the late fifties, only 15-20 members out of a Bar of about 180 would attend the Annual General Meeting (“AGM”), at which the Law Society Committee, the entity that investigated and determined punishment for professional breaches, was elected.²²¹ The implication was that anyone who could persuade twenty sympathizers to attend an AGM would be able to dictate the composition of the Committee.²²²

217. *Id.* at § 98(7).

218. *See* Advocates and Solicitors Ordinance, c. 188 (1934) (Sing.).

219. *See* REPORT OF THE SELECT COMMITTEE ON THE LEGAL PROFESSION (AMENDMENT) BILL (BILL NO. 20/86)], ¶ 1, at A37 (1986) (Sing.).

220. Legal Profession Act, 1966 (c. 161) (Sing.).

221. *See* REPORT OF THE SELECT COMMITTEE ON THE LEGAL PROFESSION (AMENDMENT) BILL (BILL NO. 20/86)], ¶ 4, at A37 (1986) (Sing.).

222. *See id.*

Justice Coomaraswamy was a member of the 1963-64 Committee.²²³ At the time, there were rumors about someone, who was anticipating disciplinary proceedings against him, moving to pack the meeting so that the Committee for 1964-65 would be sympathetic to him.²²⁴ Apparently this plan did not come to pass, but the incident led Justice Coomaraswamy to draft the first version of the Legal Profession Act.²²⁵

Under the 1966 Legal Profession Act, investigation and disciplinary measures were primarily in the hands of advocates and solicitors of the Law Society, with a final review provided by the Supreme Court. At this point, the investigation process had two main stages. The Council of the Society was required to appoint a standing five-person Inquiry Committee, comprised entirely of current or former members of the Council, at the start of each year.²²⁶ Upon receiving any complaint against a lawyer, the Council would direct the complaint to this Committee, which would then investigate the complaint and report its findings to the Council.²²⁷ The Council would then determine whether a formal investigation would be undertaken by a Disciplinary Committee or would take other action,²²⁸ with members of the Disciplinary Committee appointed by the Chief Justice “from time to time.”²²⁹ Each Disciplinary Committee was made up of between three and five members,²³⁰ and its function was to conduct a formal investigation of the complaint referred to it by the Council. At the end of its investigation, the Disciplinary Committee would submit its report to the Chief Justice and to the Law Society, and upon request would provide the report to the advocate and solicitor and the complainant.²³¹ If the Disciplinary Committee determined that “due cause exist[ed] for disciplinary action” against the lawyer concerned, the Society was required to proceed with the application for a show cause order under section 102 of the Act.²³²

223. *See id.* ¶ 5, at A37.

224. *See id.*

225. *See id.* ¶ 6, 9, at A38.

226. Legal Profession Act, 1966 (c. 161) (Sing.), § 88(1).

227. *See id.* § 90(1).

228. *See id.* § 91(1).

229. *See id.* § 94(1).

230. *See id.* § 94(2).

231. *See id.* § 96(3).

232. *See id.* § 97(1).

Significant amendments were made to the Legal Profession Act in 1986 due to perceived problems with the way the Law Society handled complaints and to ensure that persons who governed the legal profession were persons of integrity.²³³ Some of the problems regarding the handling of complaints, as noted by the Select Committee assigned to consider the proposed legislative changes, were:

- Occasions in which investigations took an inordinately long time;
- “[I]ncomprehensible findings” by the Disciplinary Committees of the Law Society in some cases; and
- Instances when apparently unprofessional behavior was not taken to task by the Inquiry Committee of the Law Society, which had dismissed the complaint after its preliminary investigations.²³⁴

Prior to the 1986 amendments, procedures were such that once a complaint was before an Inquiry Committee, “a shroud of secrecy descend[ed] over the whole [proceeding],”²³⁵ because all inquiries by the Law Society then were strictly confidential.²³⁶ This confidentiality allowed the public to conclude that the Law Society was trying to protect its own members by covering up for them.²³⁷ In the case of Joseph Linus, Mr. Linus was brought before a Disciplinary Committee for contravening the Solicitor’s Account Rules through misappropriating client money and permitting an employee who was not legally trained to act as an advocate and solicitor.²³⁸ A Disciplinary Committee was appointed on June 29, 1983, but their report was not submitted until June 4, 1985, almost two years later.²³⁹ Despite establishing the facts alleged against Linus, the Disciplinary Committee said that there was no cause of sufficient gravity for disciplinary action and merely recommended a reprimand.²⁴⁰ The Linus case also compared poorly with the case of Thomas Tham, an advocate and solicitor who allegedly committed criminal breach of

233. See REPORT OF THE SELECT COMMITTEE ON THE LEGAL PROFESSION (AMENDMENT) BILL [BILL NO. 20/86], ¶ 2, at B2; ¶ 5, at B11 (1986) (Sing.).

234. See *id.* ¶ 2, at B2.

235. *Id.*

236. See *id.* ¶ 5, at B6.

237. See *id.* ¶ 5, at B7.

238. See *id.* ¶ 3, at B4.

239. See *id.*

240. See *id.*

trust.²⁴¹ On January 20, 1986, Tham's client lodged a report with the police instead of the Law Society.²⁴² Police investigations were completed in seven months, and Tham was charged in court on September 25, 1986.²⁴³ In total, there were eleven cases brought up by then Attorney-General, Tan Boon Teik, to illustrate the severity of delays in investigation time.²⁴⁴

At the time Singapore was determining how to improve its attorney discipline procedure, there was a precedent outside of Singapore regarding lay person participation. The Select Committee noted that as of August 27, 1986, England and Wales had a Solicitors' Complaints Bureau, a body run by lay persons and entirely separate from the Law Society, which dealt with complaints against solicitors.²⁴⁵ The fact that the Discipline Tribunal of the Solicitors' Tribunal in England and Wales had lay representatives since 1975 also served as a support for Singapore to adopt the use of lay persons in the advocate and solicitor disciplinary system.²⁴⁶ Unlike the Solicitors Complaints' Bureau, where investigation and adjudication of complaints against solicitors were dominated by lay members, the 1986 amendment to the Legal Profession Act sought to adopt a more lawyer-friendly approach by including lay members as well as members of the Legal Service.²⁴⁷

Lay participation was formally introduced into the Singapore legal disciplinary system through the Legal Profession (Amendment) Act of 1986.²⁴⁸ Prior to this amendment, the people who sat on the Inquiry Committee and Disciplinary Committee were all lawyers.²⁴⁹ The main reason for introducing a degree of lay representation in the disciplinary system was to assure the general public who dealt with legal practitioners that standards were maintained²⁵⁰ and to "stop the belief that self-help and mutual forgiveness [was] the way lawyers

241. *See id.*

242. *See id.*

243. *See id.* ¶ 3, at B4-5.

244. *See id.* at B2-B5.

245. *See id.* ¶ 5, at B10.

246. *See id.* ¶ 78-79, at B26.

247. *See id.* ¶ 5, at B13.

248. 48 Parl. Deb. (674) (Sept. 22, 1986) (remarks of S. Jayakumar) (Sing.).

249. *See id.* at col. 671.

250. *See* REPORT OF THE SELECT COMMITTEE ON THE LEGAL PROFESSION (AMENDMENT) BILL (BILL NO. 20/86), ¶ 5, at B10 (1986) (Sing.).

maintain[ed] standards of professional conduct.”²⁵¹ It was important for the legal profession in Singapore to consider the public interest and maintain standards and the image of the Bar.²⁵² Singapore academic Tan Yock Lin stated that lay representation was introduced to “ensure that the client’s viewpoint [was] taken into account in the investigation and . . . provide a measure of transparency and public accountability in the investigation.”²⁵³

The composition of the Inquiry Committee was changed to include two advocates and solicitors, one lay person, and one legal officer.²⁵⁴ The Disciplinary Committee was changed to “(a) a person from a panel of not more than 5 persons appointed by the Chief Justice being retired judges or persons who have had not less than 12 years’ experience as advocates and solicitors; (b) an advocate and solicitor who has in force a practising certificate; (c) a legal officer who has at least 10 years’ experience; and (d) a member of the Inquiry Panel who is a lay person.”²⁵⁵ However, laypersons on Disciplinary Committees had no right to vote and were not required to be present at every meeting, nor were they required to be “personally present to constitute a quorum for the transaction of any business.”²⁵⁶ As observed by Singapore academic Jeffrey Pinsler, this took into account “the Law Society’s objection that persons without a legal background would not have the necessary understanding of the procedures and matters of law which arise at this stage of the process,” although lay persons would be “entitled to observe and participation stresses the new priority of openness.”²⁵⁷ The purpose of including the new kinds of members was to remove grounds for cynicism and criticism of the profession’s disciplinary processes as a whole, and to show that the public interest was of some importance in the Disciplinary Committee’s decision.²⁵⁸ Regarding the legal service officers, it was hoped that they would bring

251. 48 Parl. Deb. (674) (Sept. 22, 1986) (remarks of Professor S. Jayakumar) (Sing.).

252. See REPORT OF THE SELECT COMMITTEE ON THE LEGAL PROFESSION (AMENDMENT) BILL [BILL NO. 20/86], ¶ 5, at B11 (1986) (Sing.).

253. TAN YOCK LIN, THE LAW OF ADVOCATES AND SOLICITORS IN SINGAPORE AND WEST MALAYSIA 836 (Butterworths Asia ed., 2nd ed. 1998).

254. See Legal Profession (Amendment) Act 1986, § 8(b) (1986) (Sing.).

255. *Id.* §11(a).

256. See *id.* § 11(d); Legal Profession Act (revised 1990), §§ 90(6)-(7).

257. Jeffrey Pinsler, *The Singapore Lawyer*, 3 L. SOC’Y J. 9 (1987).

258. See REPORT OF THE SELECT COMMITTEE ON THE LEGAL PROFESSION (AMENDMENT) BILL [BILL NO. 20/86], ¶ 5 at B13-14 (1986) (Sing.).

to bear experience in investigation and judge issues more objectively, as they would be less bothered with the need to generate fees and would not be open to the same temptations.²⁵⁹

The reasons for including lay persons and legal service officers in the disciplinary process as they appear in the Select Committee Report are relatively clear. They were inserted to act as additional watchdogs for the disciplinary process and to represent the “consumer interest”.²⁶⁰ This view of how lay persons would interact with lawyers suggests that lay persons could at some level hold their own against lawyers, but this view contrasts sharply with the view of roughly twenty years earlier that lay persons should not act as jurors in criminal proceedings. As a legacy of its colonial history, Singapore had used jury trials for all criminal offenses, but in 1960 Singapore restricted the use of juries, and abolished it altogether in 1969,²⁶¹ primarily because of the perceived ignorance and unsuitability of jurors. The first step in 1959-60 cut back on the use of juries, from criminal offenses generally to only capital cases. At the second reading of the relevant bill in Parliament in 1959, then-Prime Minister Lee Kuan Yew noted that jury trials increased the importance of lawyer skill and agility in determinations of guilt or innocence, and that in reality the jury was not comprised of one’s peers but rather the English-educated population.²⁶² The matter was referred to a Select Committee for further consideration. In this context, some witnesses expressed faith in the jury’s ability to bring common sensibilities to justice²⁶³ and asserted the value of juror participation in the administration of justice,²⁶⁴ but there was discussion of jurors being unduly swayed by counsel²⁶⁵ and of verdicts that had gone counter to judicial directions.²⁶⁶ When

259. *See id.*

260. 48 Parl. Deb. (674) (Sept. 22, 1986) (remarks of Professor S. Jayakumar) (Sing.).

261. *See* Criminal Procedure Code (Amendment) Act (1969) (Sing.).

262. *See* 11 Singapore Legislative Assembly Debates, cols. 565-66 (1959) (Sing.).

263. *See* REPORT OF THE SELECT COMMITTEE ON THE CRIMINAL PROCEDURE CODE (AMENDMENT) BILL, Minutes of Evidence, October 16, 1959, col. 5 (1960) (Sing.).

264. *See* REPORT OF THE SELECT COMMITTEE ON THE CRIMINAL PROCEDURE CODE (AMENDMENT) BILL, Minutes of Evidence, Oct. 16, 1959, cols. 6, 16; Oct. 23, 1959, cols. 3, 24-25, 36, 40, 81, 85-86; Nov. 20, 1959, col. 36 (1960) (Sing.).

265. *See* REPORT OF THE SELECT COMMITTEE ON THE CRIMINAL PROCEDURE CODE (AMENDMENT) BILL, Minutes of Evidence, Oct. 16, 1959, cols. 21-22, Oct. 23, 1959, cols. 89-90 (1960) (Sing.).

266. *See* REPORT OF THE SELECT COMMITTEE ON THE CRIMINAL PROCEDURE CODE (AMENDMENT) BILL, Minutes of Evidence, Oct. 23, 1959, col. 90 (1960) (Sing.).

combined with the perceived need to bring the law of Singapore in line with that of Malaysia,²⁶⁷ the Select Committee voted in favor of the bill,²⁶⁸ and the bill was passed into law.²⁶⁹

Ten years after cutting back jury trials, the government sought to abolish the jury entirely. At this point in Singapore, there were “no opposition members in Parliament, and it was thus unlikely that the bill would be ‘blocked.’”²⁷⁰ Then-Minister for Law and National Development, Mr. E.W. Barker, asserted the unreliability of juries and stated that judges would provide more predictable verdicts.²⁷¹ The Prime Minister addressed Parliament again on the issue, noting that jury members seemed overwhelmed with the responsibility of finding defendants guilty if they knew the death penalty would follow,²⁷² and in the face of expert psychiatric evidence were either too impressed or confused.²⁷³ Again, a Select Committee was convened. Statements in favor of the jury were submitted, but the Committee also heard evidence that juries were not up to the task,²⁷⁴ inefficient, and corrupted or frightened into giving the wrong verdict.²⁷⁵ The Select Committee reviewed the verdict in the so-called Peeping Tom case, in which the jury convicted the defendant of culpable homicide, and not murder, by a vote of four to three.²⁷⁶ However, the verdict was flawed as five persons were required for a verdict in the group of seven.²⁷⁷ The mistake was only discovered later, when nothing could be done.²⁷⁸ There was also confusion regarding the difference between “majority” and “unanimous.”²⁷⁹ Per the Deputy Registrar of the High Court, many

267. See Andrew Phang, *Jury Trial in Singapore and Malaysia – Unmaking of a Legal Institution*, 25 MALAYSIA L. REV. 50, 53, 54 (1983).

268. See *id.* at 56.

269. See Ordinance 18 of 1960, Criminal Procedure Code (Amendment) Ordinance, 1960.

270. Phang, *supra* note 267, at 57.

271. See 29 Parl. Deb. (33) (remarks of Mr. E. W. Barker) (Sing.).

272. See *id.* at col. 53.

273. See *id.* at cols. 53-54.

274. See REPORT OF THE SELECT COMMITTEE ON THE CRIMINAL PROCEDURE CODE (AMENDMENT) BILL, at A19-A22 (1969) (Sing.).

275. See *id.* at A35, A36.

276. See *id.* at B3.

277. See Phang, *supra* note 267, at 61.

278. See *id.*

279. See REPORT OF THE SELECT COMMITTEE ON THE CRIMINAL PROCEDURE CODE (AMENDMENT) BILL, Minutes of Evidence, September 16, 1969, cols. 20, 23, 29-30, 36, 41-42, 47-48, 51-52 (1969) (Sing.).

jurors could not read the oath properly.²⁸⁰ Another problem was that superstitions prevailed among jurors, such as the belief that a pregnant woman should not pass the death sentence while carrying a child.²⁸¹ Representative jurors from the Peeping Tom case asserted that working class people were not up to the task, which should be left to intellectuals.²⁸² At the Third Reading of the Bill, Barker observed that the Select Committee had confirmed the government's view,²⁸³ and the bill abolishing the jury was passed.²⁸⁴ In an oft-quoted statement from his memoirs, Lee Kuan Yew stated that he "had no faith in a system that allowed the superstition, ignorance, biases, and prejudices of seven jurymen to determine guilt or innocence."²⁸⁵

When changes to the lawyer disciplinary process via the Legal Profession Act were debated in 1986, the 1969 abolition of the jury was mentioned in Select Committee proceedings in passing.²⁸⁶ Then Prime Minister Lee Kwan Yew noted that the reason juries were abolished was that "Singaporeans were not willing to take the decision that would lead to severe punishment for the person they are asked to sit in judgment over."²⁸⁷ The view of laypersons as incompetent was no longer put forward, and in its place was a mixed characterization: lay persons could act as consumer watchdogs, but they were limited by their unfamiliarity with the law.

In its submission to the 1986 Select Committee regarding changes to the lawyer disciplinary process, the Council of the Law Society of Singapore did not object to some participation by lay persons, but it defended its record of self-regulation, noting that due to confidentiality of disciplinary proceedings the public only heard about the most serious cases.²⁸⁸ On the assumption "that public participation would result in a greater awareness of what the profession does in this field and therefore greater public confidence in the profession, it is to be

280. *See id.* Minutes of Evidence, October 7, 1969, cols. 123, 124.

281. *See id.* col. 124.

282. *See id.* Minutes of Evidence, September 16, 1969, cols. 26, 32, 37, 43, 49, 56.

283. *See* 29 Parl. Deb., (194) (1969) (remarks of Mr. E. W. Barker) (Sing.).

284. Criminal Procedure Code, *supra* note 261.

285. LEE KUAN YEW, MEMOIRS OF LEE KUAN YEW: THE SINGAPORE STORY 144 (1998).

286. *See* REPORT OF THE SELECT COMMITTEE ON THE LEGAL PROFESSION (AMENDMENT) BILL [BILL NO. 20/86], ¶¶ 80-81, at B26 (1986) (Sing.).

287. *Id.* ¶ 63, at B23.

288. *Id.* ¶¶ B4, B.5, at A5.

welcomed in principle.”²⁸⁹ However, the Council was concerned that lay persons lacked legal knowledge.²⁹⁰ This concern led the Council to object to the inclusion of lay persons on Disciplinary Committees, in view of the need to understand rules of evidence and procedure relevant at that stage.²⁹¹

In its submission to the Select Committee, The Law Club of the National University of Singapore agreed with the objective of providing wider representation in disciplinary proceedings,²⁹² and argued that lay representatives should be incorporated into the Inquiry Panel²⁹³ as well as the Disciplinary Committee, which would help “[safe-guard] consumer interest and [minimize] the risk of the profession forwarding its interest at the expense of public interest.”²⁹⁴

Agreement regarding the ability of lay people to represent the consumer interest and be a “watchdog” over lawyers,²⁹⁵ even though it was conceded that a “lay representative would have to be guided by the legal minds on questions involving intricacies of the law” if they were included on the Disciplinary Committee,²⁹⁶ is a considerable step from jettisoning jurors from the criminal process because they are ignorant and swayed by lawyers. The Legal Profession (Amendment) Act 1986 arguably addressed the issues raised by inclusion of lay persons in the disciplinary process, in part by establishing qualifications for being a lay person, via the definition of a lay person in connection with an Inquiry Panel and Disciplinary Committee.²⁹⁷ Lay persons were required to have the profession of “architect, accountant, banker, company director, insurer, professional engineer, medical practitioner or a person who possesses such other qualifications as may be approved by the Chief Justice and the Attorney-General.”²⁹⁸ Lay persons involved in the disciplinary process would therefore have an education as well as professional training.

The additional educational requirement for lay persons in the 1986 amendments does distinguish them from the jurors described by

289. *Id.* ¶ B.6, at A5.

290. *See id.* ¶¶ 74-76, at B25.

291. *See id.* ¶¶ B11-B12, at A6.

292. *See id.* at A24.

293. *See id.* at A30.

294. *Id.* at A29.

295. *See id.* at A2.

296. *Id.* at B26.

297. Legal Profession (Amendment) Act, *supra* note 254, at § 2.

298. *See id.*

the Select Committees who examined the workings of Singapore juries. However, additional education in general would not give lay persons legal knowledge, and their inclusion in the 1986 amendments may have also been prompted by other factors. In *Fiat Justitia: A History of the Law Society of Singapore*, Kevin Tan noted that in the late 1960s and early 1970s, then-Prime Minister Lee Kuan Yew articulated his expectations for the legal profession and the Law Society in post-independent Singapore:

First, that lawyers show and carry themselves as upright, honourable members of a respected profession. Second, that lawyers understand the socio-economic milieu in which they operate and not blindly apply the foreign legal concepts they learnt at school. And third, that functional groups like the Law Society should not only lead by example in the way they conduct their affairs, but also assist the government in supporting its nation-building agenda.²⁹⁹

According to Tan, the first major confrontation between the Prime Minister and the Law Society of Singapore concerned disciplinary proceedings against two advocates and solicitors, T.T. Rajah and David Marshall.³⁰⁰ On August 16, 1972, the Council of the Law Society “was summoned to the Prime Minister’s Office in the Istana grounds to face a livid Lee Kuan Yew. Lee was furious about what he considered to be inordinate delays in the disciplinary proceeding.”³⁰¹ During the meeting, Lee scolded the Council, saying that “members of the Bar lacked discipline and that he was considering taking away the Council’s powers but had been advised against doing so by his Law Minister, [E.W.] Barker.”³⁰² Lee advised the Council that “this would be his ‘final warning’ and that if the Law Society could not discipline its members, he would not hesitate to take away their powers and ‘make fools of the Council members in public.’”³⁰³ In a 1977 speech, the Prime Minister reiterated these concerns:

There is with lawyers – as with jurors, which we have had to abolish – an unwillingness to do the unpleasant. If we are to maintain standards of integrity it means axing those who do

299. KEVIN TAN, *FIAT JUSTITIA: A HISTORY OF THE LAW SOCIETY OF SINGAPORE* 58 (2017).

300. *See id.* at 59.

301. *Id.*

302. *Id.*

303. *See id.* at 59-60.

not measure up to these standards. You know as I do, Mr. Chairman, that when it came to several crunches in the past few years, what the Council did was to flinch from the unpleasant. Instead of seeking to strike a member off the rolls and pressing for it, it has allowed members to be suspended for 6 months, or for a year, or for two years. This is not the way to maintain standards of honourable conduct.³⁰⁴

Another factor in the conflict between the Law Society and the Prime Minister was the Law Society leadership. Tan notes:

By the mid 1980s, there was a sense of restlessness at the Bar, especially among the younger lawyers, most of whom had been called to the Bar in 1970s. Many young lawyers felt that the Council was too placid and that the Society was out of touch with the general public. They wanted a more vibrant and energetic Bar who did more to serve the public.³⁰⁵

During the term of Harry Elias as President, this energy manifested in the creation of a volunteer lawyer organization to represent unrepresented criminal defendants, but “this activism within the Bar was beginning to worry the [People’s Action Party] government who viewed with grave suspicion any kind of political mobilisation.”³⁰⁶ After Francis Seow was elected President of the Law Society, he asserted the equality of the bar with the judiciary in a fiery speech at the Opening of the Legal Year.³⁰⁷ He also attracted the attention of the Prime Minister, who wondered how someone like Seow, with two previous suspensions, could take on the role of President of the Law Society.³⁰⁸

Tan notes that in the following months, “Lee Kuan Yew would make good his 1972 threat to take the Law Society to task and ‘make fools’ of its Council ‘in public.’”³⁰⁹ As the person essentially in charge of Select Committee hearings on the Legal Profession (Amendment)

304. TAN, *supra* note 299, at 61 (citing Prime Minister Lee Kuan Yew, Address at the Annual Dinner on the Law Society of Singapore, at the Shangri-La Hotel (Mar. 26, 1977), available at <http://www.nas.gov.sg/archivesonline/data/pdfdoc/lky19770326.pdf> [<https://perma.cc/N24X-M5NL>]).

305. TAN, *supra* note 299, at 64.

306. *Id.*

307. *See id.* at 72-73.

308. *Id.* at 74.

309. *See id.*

Bill,³¹⁰ Lee Kuan Yew put members of the Law Society Council on the stand, “treat[ed] them as hostile witnesses and corner[ed] them with leading questions and constant interruptions.”³¹¹ Sessions were recorded and played on prime time television every evening.³¹²

One issue raised in the Legal Profession Amendment Act was the Law Society’s ability to comment on pending legislation. In 1986, the Law Society had issued a press statement questioning the terms of proposed legislation designed to give the state control over what the “foreign press” published on Singapore.³¹³ Jothie Rajah has observed that the press statement distributed by the Law Society Council was in line with the Legal Profession Act, which at that time included in the Council’s functions examining and reporting upon current or proposed legislation should it think fit.³¹⁴ However, the government insisted that the “Law Society had, by making a public statement, breached state-Law Society relations,”³¹⁵ and had unacceptably entered the political sphere. Rajah characterizes the effect of this confrontation on the Law Society by noting that for “almost twenty years after the Hearings, the Law Society of Singapore stayed out of the public domain.”³¹⁶

The other issues in the 1986 amendments to the Legal Profession Act included the disciplinary process, discussed above, and bar leadership. In addition to introducing persons other than advocates and solicitors in the disciplinary process, the amendments provided that errant lawyers would be disqualified from standing for Council elections.³¹⁷ Cumulatively, these changes indicated a shift away from self-regulation and toward regulation by a wider group of stakeholders, but they also had the effect of limiting lawyer participation in the greater legal system.

After the amendment of the Legal Profession Act in 1986, lay participation in the Inquiry Committee³¹⁸ and the Disciplinary

310. *See id.* at 81

311. *Id.* at 80

312. *See id.*

313. *See* Jothie Rajah & Arun K. Thiruvengadam, *Of Absences, Masks, and Exceptions: Cause Lawyering in Singapore*, 31 *WIS. INT’L L.J.* 646, 658 (2013).

314. *See id.*

315. *See id.* at 659.

316. *Id.*

317. *See* TAN, *supra* note 299, at 78.

318. *See* Legal Profession Act 2001, ch. 161, § 85(10)(c) (2001) (Sing.).

Committee³¹⁹ continued until 2008.³²⁰ Following the Legal Profession (Amendment) Act of 2008, the Disciplinary Committee was reconfigured into the Disciplinary Tribunal, and lay persons were removed from this stage.³²¹ A main reason was to reduce delay, as expeditious resolution of complaints was a longstanding concern but it had proven difficult to get the requisite quorum of lay persons, legal service officers, and advocates and solicitors within a reasonable period of time.³²² Currently, lay persons have no representation on the Disciplinary Tribunal.³²³

Lay participation continues to remain a part of the Inquiry Committee today,³²⁴ as does the requirement that lay persons have education and professional training.³²⁵ A recent development in the composition of Inquiry Committees has been the recruitment of law professors as lay persons.³²⁶ Appointment of law professors as lay persons reinforces the understanding that lay persons are not necessarily the average citizen, but rather an educated person with professional standing in society.

D. CONCLUSIONS REGARDING SINGAPORE: THE EDUCATED PROFESSIONAL AS LAYPERSON

The use of lay persons in the Singapore lawyer disciplinary process raises a perennial question: how can lay persons participate in the administration of justice when they do not understand the law? Singapore has taken two different approaches to this difficulty, at different times and in different contexts. Lay persons were banished from the jury in 1969, when their deliberations without legal guidance led to perceived errors and difficulties in carrying out their duties. Lay persons have not been returned to this forum, although the issue has

319. *See id.* § 90(1)(d).

320. *See* Legal Profession (Amendment) Act 2008 (Sing.).

321. *See* Legal Profession (Amendment) Act 2008, § 34 (2008) (Sing.).

322. *See* 84 Parl. Deb., (3192) (2008) (remarks of Mr. K. Shanmugam), (3210) (remarks of Mr Low Thia Kiang (Sing.); *see also* Committee to Develop the Singapore Legal Sector, Final Report (September 2007), at 47-50.

323. *See* Legal Profession Act, § 90(1).

324. *See id.* § 85(10)(c).

325. *See id.* §2 (“lay person”).

326. THE LAW SOCIETY OF SINGAPORE, NO MOUNTAIN HIGH ENOUGH: ANNUAL REPORT 2014, at 125-26 (2014); THE LAW SOCIETY OF SINGAPORE: FOR JUSTICE, FOR COMMUNITY, ANNUAL REPORT 2016, at 132-33 (2016).

been discussed occasionally.³²⁷ More recently, lay persons were allowed to bring their perspective to bear on allegations of lawyer misconduct, but participation has been prescribed in two ways. First, lay persons do not deliberate alone; they investigate complaints jointly with legal service officers and advocates and solicitors. Legal service officers were included in the disciplinary process because they do not have the financial pressure faced by practicing advocates and solicitors, although the dynamic among these actors is unclear. Operating outside of commercial law practice, legal service officers could provide ballast to lay person views, but like lawyers their legal knowledge gives them an advantage over lay persons.³²⁸ Second, lay persons are required to have higher levels of education and be members of a profession. These restrictions on who a “lay person” is suggest that the consumer interest represented is not necessarily the person on the street, but rather persons who work with lawyers or engage legal services. The latter point is supported by the 1986 parliamentary debates regarding amendments to the Legal Profession Act, when then Minister for Law S. Jayakumar characterized lay persons as “people who are regular users of the services of lawyers”.³²⁹ These lay persons have more experience judging the quality of legal services, and their educational and professional status arguably better equips them to evaluate the propriety of lawyer behavior and perhaps assert their opinions in discussions with legally trained persons.

IV. COMPARATIVE CONCLUSIONS: WHO IS A WORTHY NON-LAWYER IN LAWYER DISCIPLINARY PROCEEDINGS?

Both the Japanese and Singaporean lawyer disciplinary systems involve people who are not lawyers. Among the various goals of lawyer discipline, both systems share a similar aim, which is to ensure the public’s trust in the profession. In terms of regulation, unlike the term “lay persons” in the Singaporean system, the Japanese term “persons of learning and experience” is not narrowly defined to include specific

327. See Koh Kheng Lian, *Jury better than proposed 5-judge Court of Appeal*, STRAITS TIMES (Sing.), Oct. 30, 1992; Brendan Pereira, *Abolishing Jury System Has Not Affected Course of Justice Here, Say Lawyers*, STRAITS TIMES (Sing.), Feb. 16, 1995; Charles Tan, *12 honest citizens to decide your fate?*, TODAY (Sing.), Aug. 5, 2005, at 3; Leong Wee Keat, *He’s 70 and ready for another ‘fight’*, TODAY (Sing.), Apr. 26, 2011.

328. See Valerie P. Hans, *Lay Participation in Legal Decision Making*, 25 L. & POL’Y & 83, 89 (2003) (raising queries regarding integrated tribunals).

329. 48 Parl. Deb. (674) (Sept. 22, 1986) (remarks of S. Jayakumar) (Sing.).

professions. Lay person participation can be said to be more restricted in Singapore than in Japan in other ways as well. Lay persons are absent in the first stage of the Review Committee, and there are no lay persons on the more serious level of the Disciplinary Tribunal, while in Japan persons of learning and experience are involved in all discipline-related committees, at both the investigative stage and the examination stage. However, in practice the use of non-lawyers in Japan appears to be more restricted than in Singapore. Persons of learning and experience seem to be mainly university academics, and particularly law professors, so their ability to contribute a “layperson” perspective may be limited. Additionally, although non-lawyers have voting power, there are structural weaknesses in the system. Two of these weaknesses, the composition of the various discipline-related committees and the lack of further recourse for complainants beyond the JFBA, were recognized at the time of the reform deliberation. They were not addressed because the JSRC adopted the traditional Japanese practice of decision-making through consensus, which is time-consuming, and the JSRC did not reach a consensus in the time available.

Both systems have incorporated non-lawyer participation in the lawyer disciplinary process, but they have also both restricted that participation considerably. Restricting participation by prescribing qualifications, formally or informally, identifies some non-lawyers as worthy participants in the lawyer disciplinary process and others as not. These limitations could address some of the drawbacks of non-lawyers, such as limited legal knowledge, but structural weaknesses in the system, like in Japan, may affect non-lawyers’ participation in the regulation of legal ethics. The question for both systems is whether their restricted form of non-lawyer participation has brought about the desired reform. Evidence of impact is primarily an empirical question that requires data not currently available, because both systems subscribe to confidentiality of proceedings at the level of non-lawyer participation.³³⁰ The desirability of confidentiality and the impact of

330. In Singapore, see Legal Profession Act, § 66(1), which states that except as necessary “for the purpose of giving effect to any resolutions or decisions of the Council and any Review Committee or Inquiry Committee, confidentiality shall be maintained in all proceedings conducted by the Council, its staff and the Review Committee or Inquiry Committee”; *see also id.* § 93(5), which states that the “findings and determination of the Disciplinary Tribunal shall be published by the Council in the Singapore Law Gazette or in such other media as the Council

non-lawyer participation therefore remain active questions for both systems to consider.

may determine which would adequately inform the public of the findings and determination.” In Japan, see Ishida, *supra* note 24 at 244, 247; as pointed out by Ishida, the proceedings in Japan are “not open to the public” and the committee members have “confidential duty.”