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Lay Participation in the Japanese Justice System

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Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (*saiban-in seido*) from Domestic Historical and International Psychological Perspectives

Kent Anderson
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ABSTRACT

The Authors introduce and critique Japan's proposed quasi-jury or lay assessor system (saiban-in seido). The proposed mixed-court will have judges and lay people deciding together both guilt and sentences in serious criminal cases. Its proponents have promised that the lay assessor system will produce better justice in the courts and a more democratic society for Japan. The Authors first expose the competing interests in the lay assessor drafting process, examining their subtly but importantly varied proposals. Second, the Authors historically review lay participation in Japan, arguing that it has failed to deliver better justice and more democracy because the existing systems have been marginalized by disuse or captured by law specialists. Third, the Authors consider the proposal in light of international psychology research suggesting that early criticism of the system may be circumspect. The Authors conclude with cautious optimism

* The Australian National University, Faculty of Law. Kent Anderson was visiting fellow at Nagoya University School of Law's Center for Asian Legal Exchange for a portion of this work. Much of the argument contained in Part III was published in Japanese at, Kent Anderson, *Gaikoku no jōshiki kara mita saiban-in seido* [The lay assessor system viewed from a foreign commonsense perspective], 940 HÔRITSU JIHÔ 37 (Feb. 2004). We wish to thank a number of people who gave advice and help, including Keisuke Hosoda, Makoto Ibusuki, Masahito Inouye, David Johnson, Hugh Selby, Susumu Takami, Fumio Tokotani, Mark West, and conference participants at the Japanese Studies Association Australia, Osaka University School of International and Public Policy, and Chuo University Law School. All of the usual rules apply: We made and accept the responsibility for all mistakes; unless otherwise indicated, translations are our own; and to the extent possible we have cited to English-language sources.

regarding the potential of the new Japanese system and a call for more research to fine-tune the proposal and rightfully introduce it as a comparative global model.

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I. INTRODUCTION

In the early 1990s, filmmaker Shun Nakahara sat thinking about his next movie. He wanted to make a farcical comedy. He remembered watching the great American classic by Sidney Lumet, *Twelve Angry Men* (1957) starring Henry Fonda, while he was a student at Tokyo University. What if he took that premise—the solemnity of twelve people sitting in a jury room and deciding the fate of one of their peers—and set it in Japan? Indeed, nothing could be more preposterous than twelve Japanese citizens deciding the fate of one of their peers. Japanese are too emotional, non-committal, non-confrontational, and hierarchically bound to be able to judge a fellow, he thought. The result of Nakahara's flash was the movie *Twelve Kind Japanese (12nin yasashii nippon-jin)* (1991).¹ The movie is played for laughs, and in it every stereotype of Japan's modern milieu is on display, including the *salary man* (business person), *shufu* (housewife), *chinpira* (small-time hoodlum), *rōdōsha* (labourer), *rōjin* (senior citizen), *kōmuin* (civil servant), *freeta* (young, under-employed person), *interi* (sophisticate), and so forth. Yet, in the end, the film, without trying to do so, seems to disprove the idea that Japanese are incapable of rational and independent decision-making. In fact, the verdict that the movie's jury arrives at and the deliberation the jury goes through in coming to its decision is exactly what those interested in the jury system's justice and democratic ideals would hope to see.

Nakahara's premise was not as bizarre as perhaps he thought. Japan had a jury system between 1923 and 1943 and continues to

1. See Internet Movie Database, JUNININ YASHASHII NIHONJIN (1991), at <http://us.imdb.com/title/tt0104330> (last visited Oct. 1, 2003).

have a number of roles for “lay participants”² in today’s justice system.³ Furthermore, just ten years after Nakahara’s film, the Prime Minister’s blue-ribbon commission on judicial reform has effectively mandated the introduction of a new jury-like scheme.⁴ This Article examines that scheme, known in Japanese as the *saiban-in seido* and in English as the “lay assessor system” or “mixed-court.”

This article seeks to accomplish a number of goals. One purpose is to inform. In contrast to many of Japan’s other current judicial reforms such as increasing the size of the bar and changing the format of legal education,⁵ Japan’s introduction of the lay assessor system is still relatively unknown in both the English and Japanese literature. Further, the details of the planned system are only now being debated and resolved. Second, this Article explains and critiques the present efforts in light of Japan’s historical participation schemes. Past efforts have in practice been marginalized and captured so that they do not achieve the justice and democratic aims sought by the drafters of the lay assessor system. Third, international empirical psychological research is used to demonstrate why ground for optimism exists regarding the proposed lay assessor system. Finally, we conclude by shifting the focus briefly to examine what Japan’s lay assessor system might mean to countries other than Japan.

Part II of this Article examines the background of the judicial reform movement of the late 1990s. In particular, it identifies and examines the rationale upon which the call for the lay assessor system has been based. Part III sets out in detail the most recent concrete proposal for the lay assessor system and pays specific attention to suggested alternative options. In doing so, the likely consequences of the design are suggested. Part IV uses domestic historical data to show why previous lay participation systems in Japan have failed to deliver the objectives identified in Part II. Those lessons are then used as a standard by which to test the lay assessor

2. At the outset, we clarify our general usage of terms, which is apologetically but necessarily nuanced. “Lay participant” (*shihō seido ni sankā suru ippan no kokumin*) refers to general citizens without a legal background who participate in the judicial process.

3. “Lawyer” (*hōritsu senmon ka*) is used broadly in the British sense to mean any person with a general legal background. “Member of the bar” (*hōsōkai*) is used to refer to any person who has passed the entrance exam to the Legal and Training Research Institute, including judges, prosecutors, and private barristers. “Barrister” (*bengoshi*) is used to refer to members of the bar who are in private practice.

4. See JRC Report, *infra* note 7, at ch IV, pt. 1(1).

5. See, e.g., Gerald Paul McAlinn, *Reforming the System of Legal Education: A Call for Bold Leadership and Self-Governance*, 2 ASIAN-PAC. L. & POL’Y J. 15 (2001); Dan Rosen, *Schooling Lawyers*, 2 ASIAN-PAC. L. & POL’Y J. 17 (2001); Yukio Yanagida, *A New Paradigm for Japanese Legal Training and Education—In Light of the Legal Education at Harvard Law School*, 1 ASIAN-PAC. L. & POL’Y J. 1 (2000).

proposal. Based on historical data, this Article argues that for the proposed system to achieve the sought-after objectives, it must rely upon the affirmative support of the prosecutor's office, the judiciary, and the government. In Part V, international psychological data is used to focus on the three primary unresolved issues for the lay assessor system: (1) the mixed court's composition, (2) its voting rules, and (3) the relationship between lay and expert factions of the court. From this alternative perspective, whether the proposed lay assessor system will deliver the desired objectives is considered and the Article comes to an optimistic conclusion regarding the psychological issues involved. The Article closes by considering briefly what Japan's lay assessor system might suggest for legal systems outside of Japan.

II. BACKGROUND TO AND RATIONALE FOR THE LAY ASSESSOR SYSTEM

A. Background of the Lay Assessor System within Japan's Judicial Reform Movement

The introduction of a jury system, or more accurately the revival of Japan's suspended jury system, is not a new proposal. In fact, every few years since the end of the World War II some scholar or group has made the proposal in various forms.⁶ These proposals, however, had not been taken seriously until the "serendipity of events" that led to the development of the Judicial Reform Council (JRC or *shihō seido kaikaku shingikai*) in June 1999.⁷ In June 2001,

6. See, e.g., Lester W. Kiss, *Reviving the Criminal Jury in Japan*, 62 LAW & CONTEMP. PROBS. 261, 262-66 (1999) (noting various attempts and studies regarding reintroducing the jury or lay assessor system); Joseph J. Kodner, *Re-Introducing Lay Participation to Japanese Criminal Cases: An Awkward Yet Necessary Step*, 2 WASH. U. GLOBAL STUD. L. REV. 231, 231 (2003); Richard Lempert, *A Jury for Japan*, 40 AM. J. COMP. L. 37, 38-39 (1992) [hereinafter Lempert, *Jury*] (noting various attempts and studies regarding reintroducing the jury or lay assessor system); Richard Lempert, *Citizen Participation in Judicial Decision Making: Juries, Lay Judges and Japan*, 2002 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 1, 13 n.44 (2002) [hereinafter Lempert, *Citizens Participation*] (providing a proposal for how Japan might introduce a jury).

Any internet search for "baishin" ["jury"] will identify numerous grassroots organizations in Japan supporting revival of the jury system. See, e.g., *Baishin saiban seido wo kangaete mimasenka* [Won't you give a thought to the jury trial system], at <http://homepage2.nifty.com/saitama-jury> (last visited Oct. 1 2003); *Baishin saiban wo kangaeru kai* [Committee to consider jury trials], at <http://baishin.houmu.org> (last visited Oct. 1, 2003); *Baishin seido wo fukkatsu suru kai* [Committee for the revival of the jury system], at <http://www.l-wise.co.jp/baishin> (last visited Oct. 1, 2003).

7. What exactly were the political influences and objectives that combined to result in the judicial reform movement during the late 1990s and early 2000s is a highly debated and speculative area. See, e.g., *Shihō seido kaikaku shingikai secchi hō*

when the JRC issued its report, which was adopted by Prime Minister Junichiro Koizumi's Cabinet, the new lay assessor system suddenly appeared to be a foregone outcome of the process.⁸

The actual implementation of the JRC's recommendations was left to the newly formed Office for Promotion of Justice System Reform (Reform Office or *shihō seido kaikaku suishin honbu*).⁹ The Reform Office is charged with implementing all of the general proposals of the JRC Report by December 2004, including the changes to admission for legal practice, legal education, and the lay assessor system. To execute its duty, the Reform Office has subdivided this work into ten categories.¹⁰

Responsibility for the lay assessor system was delegated to the Lay Assessor/Penal Matters Study Investigation Committee (Investigation Committee or *saiban-in keiji kentōkai*) chaired by Tokyo University Professor Masahito Inouye.¹¹ On March 11, 2003, the Investigation Committee presented its initial discussion paper on the lay assessor system. This discussion paper is a primary focus of this article.¹² The March 11, 2003 draft was supplemented by provisions suggested by Professor Inouye in his personal capacity on October 28, 2003 while the Diet was dissolved for elections.¹³ Professor Inouye's revisions appear to be the frontrunners for adoption because his is the most recent draft and his opinions generally take a middle ground. However, in this Article, revisions

[Act for the establishment of the Judicial Reform Council], Law No. 68 of 1999, available at <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi>. Providing perhaps the most lucid account in Japanese and English are the various writings of Professor Setsuo Miyazawa, a leading figure in the reform movement. See, e.g., Setsuo Miyazawa, *The Politics of Judicial Reform in Japan: The Rule of Law at Last?*, 2 ASIAN-PAC. L. & POL'Y J. 89, 106-10 (2001).

8. See Judicial System Reform Council, *Recommendations of the Justice System Reform Council—For a Justice System to Support Japan in the 21st Century*, ch. IV, pt. 1(1), at 80-83 (June 12, 2001), at <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html> [hereinafter JRC Report].

9. See *Shihō seido kaikaku suishin hō* [Justice system reform promotion act], Law No. 119 of 2001, arts. 8-18, available at <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi>.

10. Reform Office, *Kentō-kai no kaisai ni tsuite* [Regarding Formation of the Investigation Committees] (Dec. 17, 2001), at <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/kaisai.html>.

11. Investigation Committee, *Minutes to First Meeting* (Feb. 28, 2002), at <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai1/1gijiroku.html>.

12. Investigation Committee, *Saibanin seido ni tsuite* [Concerning the Lay Assessor System] (Mar. 11, 2003), at <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai13/13siryou1.pdf> [hereinafter Lay Assessor Proposal].

13. Chairperson Masahito Inouye, *Kangaerareru saibanin seido no gaiyō nitsuite* [Concerning the Lay Assessor System Outline Under Consideration] (Oct. 28, 2003), at <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai28/28siryou1.pdf> [hereinafter Inouye Addendum].

are treated as further alternatives to those proposed in the first draft because they are still pending Parliamentary approval.

B. Rationale for Lay Participation in the Judicial System

To assess critically the Investigation Committee's proposal and the lay assessor system in general, it is essential to identify what Koizumi's Cabinet, the JRC, and the reform advocates sought to achieve by increasing lay participation in the Japanese judicial system. In short, what is the rationale for the lay assessor system in Japan? Answering this question is necessarily difficult because a variety of supporters and critics have asserted contradictory, overlapping, and redundant objectives. Furthermore, the discussion regarding the lay assessor system has taken place within a larger debate about judicial reform in general. Nevertheless, in this section the core principles that proponents both inside and outside of Japan have given for having or increasing lay participation in a legal system are identified. This analysis is limited to direct benefits; the Article does not attempt to identify and classify the political motivations or the rationale that created the "serendipity of events" that made the lay assessor proposal viable.

Most of the classical reasons given outside of Japan in defence of the jury system have been reflected in the judicial reform debate. Some commentators assert that the purpose of increasing citizen participation is particularly necessary in Japan given its comparatively high criminal conviction rate and currently low level of citizen involvement with the legal system.¹⁴ These Japan-specific motives, however, do not include promotion of defendants' rights, which the JRC has expressly excluded as a rationale for reform.¹⁵ Considering both the general and specific claims, the arguments in favor of lay participation can be categorized into three types of arguments. These categories are (1) production of better justice, (2) promotion of a more democratic society, and (3) miscellaneous other reasons.

1. Delivering Better Justice

Perhaps the most cogent reason for lay participation in judicial matters is the belief that it will produce better justice.¹⁶ There are two intertwined threads to this argument. First is the notion that laypeople have a wide range of practical experiences and background

14. See sources cited *supra* note 5.

15. JRC Report, *supra* note 7, at ch. IV, pt. 1(4), at 84-85.

16. See, e.g., Lempert, *Jury*, *supra* note 5, at 49-52.

and, therefore, are best placed to understand and appreciate a defendant's criminality and the appropriate response.¹⁷ The second thread is that professional judges are less capable decision makers in certain situations because they hold narrower life experiences, are disconnected from popular society, over-represent certain segments of society, and either have or develop an institutional bias in favor of the prosecution or the state.

These claims are not unique to Japan.¹⁸ Nonetheless, some of them, especially with regard to judges, have particular resonance within Japan. For example, because of the historical difficulty in passing the Japanese bar exam, upon entry into the profession Japanese judges are better educated, come from richer families, and are likely to have had more limited life experiences than their non-lawyer peers.¹⁹ Further, because the Japanese judiciary is a lifelong profession modeled on the Continental system, judges do not gain a variety of experiences once they become legal professionals but instead immediately begin doing what they will do for the rest of their careers.²⁰ Japanese judicial culture also takes very seriously the ideal of absolute impartiality and this results in judges isolating themselves from greater society.²¹ This effect is exacerbated by the bureaucratic management of judges' careers in Japan, which requires constant rotation throughout the country.²² This lifestyle results in the isolation of judges and their families in judge-only housing residences, which thereby strengthens collegial bonds but weakens any ties with the public.

All of these influences are the backdrop to a criminal justice system that results in convictions in nearly every case.²³ In other

17. Kojima Akira, *Open Society through Justice System Reform*, 21 J. TRADE & INDUSTRY 33, 36 (2002) ("[The lack of lay participants in the judicial system] makes the justice system only remotely connected to the general public and prevents sound social commonsense being reflected in court proceedings.").

18. For example, though writing about the democratic aspects of the jury system in the United States, Abramson recognizes the quality-of-justice point: "The whole point [of lay participation] is to subject law to a democratic interpretation, to achieve a justice that resonates with the values and common sense of the people in whose name the law was written." JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 6 (1994).

19. See John Haley, *Judicial Independence in Japan Revisited*, 25 LAW IN JAPAN 1, 16-18 (1995).

20. *Id.* at 10-16; YASUO WATANABE ET AL., *GENDAI SHIHŌ [MODERN JUDICIAL SYSTEM]* 105-08 (4th ed. 2000).

21. See, e.g., WATANABE ET AL., *supra* note 19, at 105-08; Kazuhiro Yonemoto, *The Shimane Bar Association: All Twenty-One Members Strong*, 25 LAW IN JAPAN 115, 117 (1995) (Daniel H. Foote trans.).

22. See Setsuo Miyazawa, *Administrative Control of Japanese Judges*, in *LAW & TECHNOLOGY IN THE PACIFIC COMMUNITY* 263 (Philip S.C. Lewis ed., 1991).

23. As David Johnson points out, comparing similar cases results in less than the widely cited 99.9 percent conviction rate for Japan, but even the most generous

words, critics of the present system often argue that accompanying Japanese judges' disconnection and isolation from general society (which is cynically described as their lack of "commonsense" (*joshiki*)) is the fact that the judiciary is partial towards the police and prosecution. It is still highly debated whether this bias derives from latent personality characteristics of the elites who self-select into the profession, social and cultural assimilation within the judicial bureaucracy, or political recruitment and opportunism.²⁴ Whatever the cause of the documented judicial predisposition, it is believed that laypeople who do not have the same elite background, who are not subject to pressures to assimilate, and who have no personal political stake in court proceedings will be less constrained in making judicial decisions against the police and prosecutors. Thus, with implementation of a lay assessor system, the quality of Japanese justice will improve by tempering any narrow focus or bias of the elites with a popular perspective and common sense.

2. Promoting a More Democratic Society

The second reason cited for lay participation in a judicial system is the belief that it promotes a more democratic society.²⁵ Again this rationale intertwines two threads. First is the idea that if citizens are called for duty, they will learn about and become interested in the judicial system. In turn, with a more educated and involved public, the norms and operations of the judicial system will be brought to the attention of the citizens. This it is hoped will translate into a legal system that will be viewed as responsive to and reflective of the needs of general society. Simply stated, lay participation promotes grassroots democratic involvement, albeit through conscription.

The second thread focuses on the jury, or in this case the mixed court, as a political forum to voice consent or dissent with those norms devised in other political forums such as Parliament. The JRC and its supporters have emphasized this aspect of lay participation as a stimulus for developing a greater democratic consciousness in the general population. For example, the JRC Report comments:

[I]n Japanese society of the 21st century, it is incumbent on the people to break out of the excessive dependency on the state that accompanies the traditional consciousness of being governed objects, develop public

interpretation of the data results in the comparatively high rate of 96.6 percent. DAVID T. JOHNSON, *THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN* 215-18 (2002).

24. Compare Miyazawa, *supra* note 22, with Haley, *supra* note 19, and J. MARK RAMSEYER & ERIC B. RASMUSEN, *MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN* (2003).

25. For an in-depth examination of this idea, see ABRAMSON, *supra* note 18.

consciousness within themselves, and become more actively involved in public affairs.²⁶

This statement is consistent with earlier comments made by the JRC's chairman, Professor Emeritus Kōji Satō:

I think we have reached the situation where we have to rethink how human beings should live, that is as "autonomous individuals". I feel that the time has come to outgrow this society, which passively depends on regulation from above, and to rebuild it from a self-reliant base. The departure point is self-reliance based on the autonomous individual, so we have to prepare a social structure that facilitates this.²⁷

Again, this rationale is not unique to Japan,²⁸ but as Satō's quote suggests the supporters of this argument in the Japanese context emphasize what they see as an excessive passivity unique to Japan.²⁹

3. Other Claimed Benefits of Lay Participation

In addition to these classical rationales for lay participation in judicial proceedings, Japanese proponents have offered some additional, perhaps circumspect, reasons why a lay assessor system is particularly important for Japan now. The first supplemental motivation is the claim that adopting a lay assessor system is somehow necessary for international competitiveness in the twenty-first century.³⁰ The use by domestic reformers of arguments concerning the need to conform to allegedly international standards (*kokusai hyōjun*) and comply with foreign pressure (*gaiatsu*) has a long history in Japan.³¹ Therefore, playing this card in a Japanese climate that is concerned about its apparently waning economic

26. JRC Report, *supra* note 7, at ch. IV.

27. Carol Lawson & Simon Thornley, *Translation: "Perceptions of the Current State of the Japanese Legal System": Interview with Kōji Satō, Chairman of Japan's Judicial Reform Council*, 4 AUSTL. J. OF ASIAN L. 76, 80 (2002).

28. See, e.g., Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381 (1999) (arguing for reinforcement of the personal responsibility rationale for juries in the United States).

29. This idea of excessive passivity unique to Japan is consistent with the concept of *amae* or "indulgent dependency," which has been debated extensively within the social psychology literature. See, e.g., Y. Muramoto et al., *Conceptual and Empirical Analysis of "amae": Exploration into Japanese Psychosocial Space (3)*, Paper Presented at the 43d Congress of the Japan Group Dynamic Association, Gakushuin Univ. (Nov. 1995); Y. Muramoto et al., *Indigenous Analysis of the Japanese Concept "amae" (indulgent dependence): Motivational Factors of "amae,"* Paper Presented at the 13th Cong. of the International Association of Cross-Cultural Psychology, Bellingham, USA (Aug. 3-8, 1996).

30. JRC Report, *supra* note 7, at ch. IV; Lawson & Thornley, *supra* note 26, at 77-79.

31. See, e.g., MIKISO HANE, *MODERN JAPAN: A HISTORICAL SURVEY* ch. 4 (2d ed. 1992) (discussing domestic reformers during the late-Tokugawa to early-Meiji period who came to power and mobilized the country by using the threat of foreign pressure).

power is likely to be effective. However, as is discussed below, this comparative argument is weak because Japan already has numerous vehicles for lay participation in judicial proceedings. Furthermore, lay assessor or jury systems are not universal in the global community, and important differences exist between classic jury and lay assessor systems that tend to be shaped by domestic history and contemporary concerns.³²

The second miscellaneous argument made by the lay assessor proponents is that adopting the lay assessor system will make trials shorter and more efficient.³³ Because there currently is no need for the court system to accommodate people who have jobs and other obligations elsewhere, Japanese court procedure, including what is known as pre-trial procedure in common law jurisdictions, has developed so that a trial progresses over a series of hearings occurring approximately once a month.³⁴ Thus, Japanese trials appear comparatively long and inefficient, particularly when inaccurately contrasted with the post-jury empanelment phase of the common law trial.³⁵ Nevertheless, commentators all over the world would agree that making trials shorter and more efficient is an important and legitimate objective. Introducing legal novices to the process, however, will not directly make trials quicker or more efficient. In fact, the contrary result is more likely.³⁶ Stated differently, if one of the objectives of the greater judicial reform movement is to make the trial process shorter and more efficient—as it clearly is—this can be achieved directly through other means. Suggesting that the lay assessor system will accomplish this goal obscures the issue. As such, the Investigation Committee's focus on other methods for efficiency rationalization—in conjunction with the committee's awareness that initially the new lay assessor proceeding will be slow and cumbersome and its view that these costs must be set against the higher order rationales—is more enlightened.³⁷

32. See WORLD JURY SYSTEMS (Neil Vidmar ed., 2000).

33. See Shingo Miyake, *Judicial Reform Proponent Seeks Larger Role for Citizens*, NIKKEI WKLY., Mar. 31, 2003, available at 2003 WL 10474486.

34. J. MARK RAMSEYER & MINORU NAKAZATO, JAPANESE LAW: AN ECONOMIC APPROACH 139-41 (1999).

35. See JOHNSON, *supra* note 23, at 14-15.

36. *Id.*; John Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985). Note also one of the reasons for suspending the jury trial discussed below was that it consumed more time, money, and material resources. See *infra* note 122.

37. See, e.g., Investigation Committee, *Keiji saiban no jujitsu/jinsokuka ni tsuite (sono 1)* [Regarding the movement for expedience and meaningfulness to criminal trials (Part 1)], § I.1.(3) (May 30, 2003), at <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai19/19siryou1-1.pdf>; Investigation Committee, *Keiji saiban no jujitsu/jinsokuka ni tsuite (sono 2)* [Regarding the movement for expedience and

4. Summary of Rationales for Lay Participation

Three broad rationales cut through the murkiness of conflicting and overlapping claims about the need for more lay assessor participation in the judicial process. First is the belief that involving the general public will improve judicial decisions by incorporating popular common sense and by insulating the process from career judges' narrower institutional and operational focus. Second is the hope that adopting a lay assessor system will promote a more democratic society by engaging the public and providing an alternative political forum. Third are the questionable claims that a lay assessor system is somehow demanded internationally and that it will produce quicker, more efficient trials. These objectives are used as benchmarks for testing the proposed lay assessor model against domestic historical and international psychological data in the remainder of this Article.

III. THE PROPOSED LAY ASSESSOR SYSTEM

On March 11, 2003, the Promotion Office's Investigation Committee introduced its discussion paper on the lay assessor system. Although this paper is merely intended to be a sounding board (*tatakidai*) to advance the debate, it appears clear that this document is setting the agenda and largely foreshadows the bill that is to be introduced in 2004.³⁸ Exposing and examining the issues in contention at this consensus-building stage presents the true political interests at play in this debate and the political compromises that will eventually emerge.³⁹ As others have documented, this is a process that historically has been purposefully veiled in Japan to preserve the illusion of harmony.⁴⁰ Thus, it is worth conducting a detailed examination of the proposal and the options that it incorporates. Nevertheless, analysis of these *political* factors is left for a later time; instead, the focus here is on documenting the debate and suggesting the *legal* implications of the various alternatives.

meaningfulness to criminal trials (Part 2)] (July 18, 2003), at <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai22/22siryou2-2.pdf>.

38. See Gary Schaefer, *Japan Unveils Proposals for First Experiment with Jury System*, ASSOCIATED PRESS NEWSWIRE, Mar. 12, 2003.

39. See Gregory Noble, *Reform and Continuity in Japan's Shingikai Deliberation Councils*, in BEYOND JAPAN INC.: TRANSPARENCY AND REFORM IN JAPANESE GOVERNANCE (Jennifer Amyx & Peter Drysdale eds., 2003).

40. FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 213-14 (1987).

A. Type and Composition of Mixed Courts

As noted above, the JRC proposal made clear that the Investigation Committee was to consider the mixed court rather than a classical all-citizen jury mechanism.⁴¹ Nonetheless, the exact numerical composition of judges and citizens in the lay assessor system has engendered some of the most vehement debate within the Investigation Committee—even to the extent that it has at times monopolized all discussion.⁴² The proposal and Professor Inouye's addendum add detail to the JRC's general direction by suggesting three options for the composition of the mixed court.⁴³ The first option consists of three judges and either two or three lay assessors.⁴⁴ Considering the proposed majority voting rules discussed below, three lay assessors acting by themselves might constitute a majority for some decisions, although judges acting alone could constitute a majority if the option with only two lay participants is selected. Perhaps not surprisingly it is suggested that this latter option of having two lay participants is supported by the judiciary and prosecutor's office.⁴⁵

The proposal also contains an alternative mixed court composition of either one or two judges accompanied by nine or eleven lay assessors.⁴⁶ Such a lay-dominated group is more similar to common-law twelve-person juries than civil-law three-person mixed courts. This proposal is supported by practicing lawyers through the Japanese Federation of Bar Associations (JFBA or *Nihon bengoshi rengō kai, nichibenren*).⁴⁷

A third proposal is contained in Professor Inouye's addendum. That draft advocates three judges joined by four lay participants, and it leaves open the option of five or six citizens in the alternative.⁴⁸ Pursuant to some variations of the majority voting rules reviewed below, under this proposal the lay participants could unite to override opposition by the professional judges, and the professional judges would need support of some of the lay participants to constitute the

41. JRC Report, *supra* note 7, at ch. IV, pt. 1.

42. See, e.g., Investigation Committee, *Gijiroku dai 13 kai* [Minutes of 13th meeting] (Mar. 11, 2003), at <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai13/13gijiroku.html> [hereinafter *Minutes 13th Meeting*].

43. In addition, the Investigation Committee's proposal recognized the practical need for calling and empanelling supplemental or reserve assessors (*hojū saiban in*) to serve in the event that one of the regular assessors was unable. Lay Assessor Proposal, *supra* note 12, at § 1(1)(i).

44. *Id.* § 1(1)(a)(A *an*).

45. See Miyake, *supra* note 33.

46. Lay Assessor Proposal, *supra* note 12, § 1(1)(a)(B *an*).

47. See JFBA, *Saibanin seido "tatakidai" ni tai suru iken* [Opinion regarding the "sounding board" on the lay assessor system] (May 30, 2003), at http://www.nichibenren.or.jp/jp/katsudo/sytyou/iken/data/2003_23.pdf [hereinafter *Nichibenren*].

48. Inouye Addendum, *supra* note 13, § 1(1)(a)-(i).

majority necessary to convict. This is a compromise between the two other alternatives, and because it presents a middle ground between the others and is the most recently developed, it is the leading proposal.

B. Powers of Lay Assessors

The JRC proposal makes clear that the primary power of the assessors is to determine both guilt and sentencing of defendants.⁴⁹ Furthermore, the proposal suggests that if the chairing judge deems it appropriate, assessors may also offer their opinions on and discuss matters of procedure and issues of law, although it is expressly stated elsewhere that the final decision on these issues will be made by the judge or judges.⁵⁰ The draft does not clarify what issues will be considered legal, procedural, or factual, and given that such explication has largely been unnecessary under the current all-encompassing bench trials and comprehensive *kōso* appeals discussed below, these minor details may prove significant in actual practice. Under the proposal, in exercising their powers assessors may question witnesses, seek information from the judge, and request testimony of the defendant.⁵¹ The assessor's affirmative role during the trial is different from the traditionally passive role of jurors, who generally are not free to interact with the other trial parties.⁵²

Empowering lay members to participate in both the guilt and sentencing phases of criminal trials is practically very significant. Nothing suggests that the pre-trial practices of police and prosecutors, which results in the overwhelming number of defendants in Japan confessing to their crimes, will change.⁵³ Thus, for all but a few showcase trials, the lay participants' primary role will not be impersonating Henry Fonda and deciding the defendant's guilt or innocence, but rather it will be assisting with finding an appropriate punishment. This is important because U.S. research suggests that lay participants tend to be less sympathetic to defendants and more punitive than judges.⁵⁴ Extending these suppositions any further

49. Lay Assessor Proposal, *supra* note 12, § 1(2)(a).

50. *Id.* §§ 1(2)(u), 1(3)(i).

51. *Id.* § 1(2)(i).

52. See, e.g., Tom M. Dees, III, *Juries: On the Verge of Extinction?*, 54 SMU L. REV. 1755, 1769-84 (2001) (reviewing the movement in the United States to reinvigorate jurors from their traditionally passive role).

53. See JOHNSON, *supra* note 23, at 216 (noting nearly 94 percent of criminal trials are where confessions have been obtained).

54. L.J. Stalans & A.J. Lurigion, *Lay and Professionals' Beliefs about Crime and Criminal Sentencing: A Need for Theory, Perhaps Schema Theory*, 17(3) CRIM. JUST. & BEHAV. 333 (1990); L.J. Stalans & S.S. Diamond, *Formation and Change in*

invites excessive speculation, but one can foresee that, contrary to the reformers' expectations, these conclusions suggest the introduction of the mixed court will in fact make criminal justice in Japan slower and harsher.

C. Decisions by Mixed Courts

The proposal provides three options for the requisite majority to render a judgment. All three options contemplate all of the judges and assessors participating in a joint consultation and voting process in which a simple majority of both judges and citizens wins.⁵⁵ Each option, however, adds slightly different additional requirements. Option A requires that at least one judge and one assessor consent to any majority opinion.⁵⁶ This is the only option that survives in Professor Inouye's addendum.⁵⁷ Option B requires that at least one judge and one assessor be in the majority only when a decision is against the defendant.⁵⁸ In other words, a majority of lay assessors unsupported by any judge could vote to acquit a defendant, but to convict him, the majority would need at least one judge to consent. Option C provides that where the decision is against the defendant, the decision must be supported by a majority of the judges and at least one assessor.⁵⁹ Given the notion that lay participation is needed because judges are too willing to confirm prosecutors' indictments, Option C is an interesting rule. Option C leaves the decision with the judge for many cases and fails to trust the citizen members to decide when all lay assessors want to convict but no judge has been convinced by the prosecutor's case.

It seems clear, therefore, that defendants under the new system will not be protected by the requirement of unanimity seen in the classic jury model.⁶⁰ Instead, protection from the dominance of one group is provided for by requiring a mixture of lay assessors and professionals to agree on the decision. How this protection is afforded and the implications of the protection are still very unclear at this stage. Furthermore, the voting dynamic is dependant on the threshold issue of the court's composition, which remains unsettled.

Lay Evaluations of Criminal Sentencing: Misperception and Discontent, 14(3) LAW & HUMAN BEHAV. 199 (1990).

55. Lay Assessor Proposal, *supra* note 12, § 1(3)(a).

56. *Id.* § 1(3)(a)(A *an*).

57. Inouye Addendum, *supra* note 13, § 1(3)(a).

58. Lay Assessor Proposal, *supra* note 12, § 1(3)(a)(B *an*).

59. *Id.* § 1(3)(a)(C *an*).

60. See ABRAMSON, *supra* note 18, at ch. 5 (reviewing the tradition of unanimous jury decisions in England and the United States from 1367 until 1967 and 1972, respectively, and arguing for a return to unanimous decisions for democratic reasons).

Practicing lawyers, as represented by the Japanese Federation of Bar Associations (JFBA), reject the majority approach and argue for a unanimity requirement.⁶¹

The Investigation Committee's draft also is ambiguous regarding the procedure by which the voting process will occur. It is implicit that deliberations among judges and assessors will be done communally rather than as separate deliberations by subgroups of judges and lay assessors as some have advocated.⁶² Further, it is unclear who will direct the discussion and voting process and by what means these processes will take place. Far from being a trivial point that might be addressed in the court rules or by custom, these procedural issues are crucial. First, as should be obvious, procedure often determines outcome. Second, numerous commentators have voiced, in the tired old Orientalists' terms, concern about Japanese lay participants' ability to play an active role in deliberation.⁶³ Third, as is discussed below, even absent any unique Japanese cultural or social reasons, foreign experience and empirical research suggest that ensuring active lay participant involvement in the process is extremely difficult at best.⁶⁴ Practicing lawyers have also recognized the proposal's lack of rules concerning the relationship between judges and lay assessors and made some recommendations in this area.⁶⁵

D. Claims Covered by Mixed Courts

A consensus that the mixed court shall only adjudicate in trials for serious crimes seems to have been achieved.⁶⁶ However, the Investigation Committee proposal sets out three different options for defining what are serious matters justiciable by the mixed court.

The first option uses the current standard by which criminal cases are automatically heard by a panel of three judges at the trial stage (*hōtei gōgi jiken*).⁶⁷ This covers a variety of 183 crimes that

61. Nichibenren, *supra* note 47, at 4-5.

62. See Kodner, *supra* note 5, at 251-52 (recommending that professional and lay judges deliberate apart from each other).

63. See, e.g., Kiss, *supra* note 5, at 273-78, 283 ("Japanese cultural characteristics such as the hierarchical nature of Japanese society, the high level of trust for authority figures in Japanese society, Japanese group consciousness, and the desire to maintain harmony would make it difficult for a mixed court system to function effectively.")

64. See Kodner, *supra* note 5, at 247-49 (reviewing failings of German lay assessor system to achieve meaningful participation by lay participants despite their four-year terms).

65. Nichibenren, *supra* note 47, at 30.

66. See JRC Report, *supra* note 7, at ch. IV, pt. 1(3).

67. Lay Assessor Proposal, *supra* note 12, § 1(4)(a)(A *an*); Saibansho hō [Courts Act], Law No. 59 of 1947, art. 26(2), available at <http://law.e-gov.go.jp/cgi->

generally carry a minimum sentence of one year imprisonment.⁶⁸ In actual cases in the year 2000, this standard would have resulted in 4,569, or 6.7 percent, of the 68,190 defendants formally charged having their cases heard by lay assessors.⁶⁹

The second option would provide a lay assessor trial for any defendant charged with a crime that carried a possible penalty of death or life imprisonment.⁷⁰ This covers fifty-five crimes, including murder, rape resulting in death, robbery resulting in death, and arson where people are present.⁷¹ This standard is a subset of the first proposal, as all crimes under this definition would be covered under the first option. In 2000, this standard would have resulted in 2,348, or 3.4 percent, of all criminal trials being heard by lay assessor panels.⁷²

The third option is the narrowest. Under this rule, only intentional crimes resulting in the death of the victim would be covered.⁷³ Forty-one crimes fit within this definition.⁷⁴ The third option, while the narrowest, is not coterminous with the other options and includes some crimes not covered by either of the other two options. Using this standard, for 2000 there would have been 789 people, or 1.1 percent of the total number of defendants, eligible for a mixed trial.⁷⁵

Professor Inouye's draft adds another choice that combines the second and third options.⁷⁶ This results in slightly broader coverage than the second option but narrower than the first. It is estimated that this standard would allow about 2,800 cases annually, or approximately 4.1 percent of criminal trials, to be heard by lay

bin/idxsearch.cgi (n.d.) (defining claims heard by three-judge panels). All of the options, however, exclude claims under Criminal Code articles 77 and 78 for civil war and conspiracy. Lay Assessor Proposal, *supra* note 12, § 1(4)(a).

68. Investigation Committee, *Zaimai ichiran* [Summary of applicable crimes] (Mar. 11, 2003), at <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai14/14siryou1-1.pdf> [hereinafter *Summary of Applicable Crimes*].

69. Investigation Committee, *Tsūjō dai issjin jiken* [General cases at first instance] (Mar. 11, 2003), at <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai14/14siryou1-2.pdf> [hereinafter *General Cases at First Instance*].

70. Lay Assessor Proposal, *supra* note 12, § 1(4)(a) (B an).

71. *Summary of Applicable Crimes*, *supra* note 68.

72. *General Cases at First Instance*, *supra* note 69.

73. Lay Assessor Proposal, *supra* note 12, § 1(4)(a) (C an).

74. *Summary of Applicable Crimes*, *supra* note 68.

75. Investigation Committee, *Shiryō 1-3* [Attachment 1-3] (Mar. 11, 2003), at <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai14/14siryou1-3.pdf>.

76. Inouye Addendum, *supra* note 13, § 1(4)(a)(a).

assessors.⁷⁷ Again, this appears to be a compromise position to reflect a split between supporters of the first and second options.⁷⁸

It is interesting to note that the debate surrounding the options in this area does not seem to be about the substantive differences among the various definitions—that is, which crimes are best adjudged by the community rather by legal experts.⁷⁹ Instead, the debate appears to be focused on the pragmatic procedural question of what is the ideal volume of cases to be heard by mixed courts, which definition best produces that volume, and whether the system should be introduced gradually.⁸⁰ Thus, those who support a comprehensive lay assessor system tend to favor the first option, while those who seek the narrowest effect of the new system favor the third option.⁸¹ The focus on the number of cases, to the exclusion of substantive differences among the definitions, is consistent with early comments that the purpose of the lay assessor system is not to better guarantee defendants' rights but to improve the system of justice and to encourage democratic involvement.⁸² Of course, subsumed within the applicable-cases debate is a critical question that is not addressed anywhere in the proposal: How many cases can the court system, under its current or revised budget, efficiently and economically process? As is discussed below, because the Investigation Committee is focused on the legal and procedural aspects of the system, it does not directly address this question. Regardless, this is a question that politicians will have to consider in the final proposal.

The proposal confirms that if there are pendent or ancillary claims to the lay assessable claim those can also be heard by the empanelled mixed court.⁸³ Similarly, in instances in which the prosecution changes an indictment from a crime covered by the mixed court to a charge not covered by the system, the judges and assessors

77. *Reform Panel Eyes 4 to 6 Lay Judges*, ASAHI SHIMBUN, Oct. 30, 2003, available at 2003 WL 60237266.

78. Masahito Inouye, "Kangaerareru sanbanin seido no gaiyō nitsuite" no setsumei [Explanation of "concerning the lay assessor system outline under consideration"] (Oct. 28, 2003), at 11, available at <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai28/28siryou4.pdf> [hereinafter Inouye Explanation].

79. Investigation Committee, "Saiban-in seido ni tsuite" no setsumei [Explanation of "concerning the lay assessor system"], at 4-5 (Mar. 11, 2003), available at <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai13/13siryou1-2.pdf> [hereinafter *Explanatory Notes*]; *Minutes 13th Meeting*, *supra* note 42, at 4.

80. Investigation Committee, *Gijiroku dai 14 kai* [Minutes of 14th meeting] (Mar. 25, 2003), at <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai14/14gijiroku.html> [hereinafter *Minutes 14th Meeting*].

81. *Id.*; Nichibenren, *supra* note 47, at 6 (supporting the broadest definition).

82. JRC Report, *supra* note 7, at ch. IV, pt. 1(3) ("The new participation system is to be introduced not for the individual defendants, but rather because it has important significance for the general public and as an adjudication system.").

83. Lay Assessor Proposal, *supra* note 12, § 1(4)(a)(i).

may still deliberate together on the charge.⁸⁴ However, the ultimate decision in that case will be decided by the judge or judges alone.⁸⁵ Thus, in applying these subsidiary rules, defendants will receive the benefit (or detriment) of the lay assessor system for more claims than those strictly covered by the definition that is eventually adopted.

Whatever standard is adopted, it is important to appreciate that whether a lay assessment panel is convened is solely at the prosecutor's discretion. First, as has been well-documented by others, the decision regarding whether even to bring a formal charge or to suspend prosecution is at the prosecutor's discretion.⁸⁶ Second, the prosecutor has the discretion to bring charges for a crime within the definition adopted or a charge for a similar offence not covered by the definition. Third, the prosecutor has the discretion to over-engage the system by charging a defendant with an applicable crime and then changing it to a non-applicable crime or by including pendent non-lay-assessable claims along with the primary claim covered by the definition. Furthermore, the judiciary and defendants have no discretion regarding whether to engage or suspend the system. Defendants and judges have no control over whether an applicable or non-applicable charge is brought, and if one is brought they have no right to waive a hearing by a lay assessor panel, even when the defendant admits guilt.

The prosecutor's control has at least three, and likely more, important implications. First, although one of the primary motivations of the judicial reform movement was to limit the power and discretionary control of the prosecutor's office, the lay assessor system as designed will in fact increase that office's power. Second, given that the prosecutor's office will control the flow of cases into the system by being able to increase or decrease the number of mixed-court trials, the pressure to, in effect, "plea bargain" will increase, something that is at least formalistically antithetical to Japanese prosecutorial culture.⁸⁷ Third, the inability to waive the process even in confessed and summary cases will have serious efficiency implications and economic costs for the entire system.⁸⁸

84. *Id.*

85. *Id.*

86. *See, e.g.,* JOHNSON, *supra* note 23, at 104-16.

87. *See id.* at 107-16, 210 n.28 (discussing factors motivating a prosecutor's decision to suspend prosecution, which is akin to plea bargaining).

88. Again, this position is justified by the rationale that the purpose of the lay assessor is not defendants' rights but improving democracy and the justice that the system provides. JRC Report, *supra* note 7, at ch. IV, pt. 1(3).

E. Selection of Lay Assessors

The Investigation Committee proposes that assessors be selected randomly from voter rolls in the district where the case is being heard.⁸⁹ Those who are called have an obligation to appear for in-court juror selection procedures and, if empanelled, the trial. They also have a duty to act truthfully, fairly, and diligently.⁹⁰ It is interesting that they are further under an obligation to voice an opinion at deliberations, a provision presumably included to address the fear of passivity of lay assessors but seemingly hortatory as it is practically impossible to enforce. There are penalties for breaching any of these duties.⁹¹ In further support of these obligations, employers and others are prohibited from penalizing persons nominated or selected for duty.⁹²

The proposal also provides three options for limiting who might be called.⁹³ Under the first option, people under thirty years of age would be excluded, and under the second option people under twenty-five would be excluded. The default rule of no explicit age restriction would exclude people under the suffrage age of twenty.⁹⁴ The Inouye addendum mandates an age requirement of twenty-five years.⁹⁵ Again, this seems to reflect a compromise position which possibly fulfils the JRC's call for the lay assessor system "to reflect sound social commonsense."⁹⁶ Nevertheless, it is hard to see how such age limitations will not compromise the democratic objective sought by the overall lay assessor plan. In any event, these options have raised only limited discussion.⁹⁷

The proposal also excludes a number of people from eligibility. Among those excluded are people who do not have a junior high school education (nine years of education) and those who have been imprisoned or are imprisoned or indicted.⁹⁸ Most politicians are also excluded, as are most lawyers and quasi-lawyers, including members

89. Lay Assessor Proposal, *supra* note 12, § 2(1).

90. *Id.* § 3(2)-(3).

91. *Id.* § 7.

92. *Id.* § 8.

93. *Id.* § 2(1)(B *an*)-(C *an*).

94. Kōshoku senkyo hō [Public Office Election Act], Law No. 100 of 1950, art. 9, available at <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi> (n.d.).

95. Inouye Addendum, *supra* note 13, § 2(1).

96. Inouye Explanation, *supra* note 78, at 12-13.

97. See *Minutes 14th Meeting*, *supra* note 80, at 42-45; A "Jury" System for Japan, MAINICHI SHIMBUN, Mar. 17, 2003 (conspicuously not discussing the age variations). *But see* Nichibenren, *supra* note 47, at 7-8 (arguing younger adults should not be excluded).

98. Lay Assessor Proposal, *supra* note 12, § 2(2).

of the bar, legal academics, and government lawyers.⁹⁹ In addition, people involved with the case directly or indirectly, such as relatives, cannot act as assessors.¹⁰⁰ The proposal also includes a list of persons who may opt out of service. This includes people over age seventy, students, and people who have served in a lay judicial capacity in the recent past.¹⁰¹

In addition to these categorical exceptions, more ambiguous exclusions exist for those with prejudices or beliefs that impair their ability to act neutrally¹⁰² and those with illnesses or other unavoidable reasons that would make serving as an assessor a hardship.¹⁰³ In applying these various exceptions, it is envisaged that there will be limited voir dire questioning.¹⁰⁴ The Investigation Committee has suggested that the exception for illness or other unavoidable reasons might be interpreted flexibly to release those with child or other primary caregiver duties and business people whose absence would cause significant economic detriment.¹⁰⁵ In applying this standard, it will be important to see whether the courts generously exercise the exception to the point of endangering the representativeness of the group of lay assessors eventually empanelled. This is what has happened to a large degree in the United States; it also reflects the criticisms of the Narrow Lay Participation Organs in Japan discussed below.¹⁰⁶

F. Procedure of Mixed Courts

Adopting the lay assessor system will require fundamental changes in Japanese criminal procedure and trial practice. Currently, trials are held pursuant to monthly hearings,¹⁰⁷ but because assessors cannot be empanelled for such a duration, new procedures will have to be developed to facilitate consecutive trials. The proposal acknowledges this fact but does not fully address the issue. Thus, the proposal merely notes that the revised practice should emphasize speed and easy comprehension, and it must be studied further.¹⁰⁸

99. *Id.* § 2(3)(a).

100. *Id.* § 2(4).

101. *Id.* § 2(5).

102. *Id.* §§ 2(2)(a)(u), 2(2)(i), 2(6).

103. *Id.* § 2(5)(ki).

104. *Id.* § 2(9).

105. *Explanatory Notes, supra* note 79, at 8.

106. *See* ABRAMSON, *supra* note 18, at ch. 3.

107. *See* RAMSEYER & NAKAZATO, *supra* note 34, at 139-40, 269 n.17 (noting also that this is despite the fact that, for example in civil matters, the Code of Civil Procedure article 182 [Minji soshō hō, Law No. 109 of 1996] and various court rules require the courts to hold hearings on a continuous basis as much as possible).

108. Lay Assessor Proposal, *supra* note 12, § 4(1)-(6).

Similarly, the proposal notes that possible modification of the rules of evidence warrants further study, but in principle they will have to be modified to encourage speed and easy comprehension.¹⁰⁹ The proposal, however, does not address the fact that jury-based systems have developed highly refined evidentiary rules to prevent lay participants from being unduly prejudiced, and Japan's rules have not evolved in this manner because of the country's historical custom of bench trials.¹¹⁰ Similarly, as noted above, the proposal is silent regarding the procedural rules judges are to employ during deliberations with lay assessors.

Post trial procedure also will need to be modified. Regarding the drafting of judgments, the proposal makes clear that judges will write them.¹¹¹ Others have pointed out that from an accountability and transparency perspective, placing this power exclusively in the hands of judges can be extremely problematic when combined with a majority voting rule and lack of confirmation power by the lay assessors.¹¹²

It is unclear whether assessors will be required to sign the judgments and whether their obligations will end with the announcement or signing of the judgment.¹¹³ Professor Inouye's draft advocates that the lay assessors will not sign the judgments and will be discharged when the decision is announced.¹¹⁴ The different options have important practical implications for the assessors and on the costs of the system, because non-discharged assessors would presumably still have a commitment to the proceeding that would preclude their return to work or other obligations pending final approval. On the other hand, if lay assessors are discharged without signing the judgment, nothing ensures the accuracy and transparency of the proceedings' record, which is of course where its precedential value lies. This balance is likely tipped by the fact that if the lay assessors are required to sign the judgments, the probable result will

109. *Id.* § 4(7).

110. See RAMSEYER & NAKAZATO, *supra* note 34, at 145-46, 270 n.34 (noting that little attention is given to evidentiary rules in Japan because the judge himself decides what is and is not admissible).

111. Lay Assessor Proposal, *supra* note 12, § 4(8)(a).

112. See Lempert, *Citizen Participation*, *supra* note 5, at 12 (noting that professional judges are capable of providing legal rationale for decisions "regardless of what actually motivated [them]").

113. Lay Assessor Proposal, *supra* note 12, § 4(8)(i). Three options are presented: (A) pursuant to which the lay assessors are required to sign the judgments, and their duty terminates when the final judgment is handed down; (B) pursuant to which the lay assessors are required to sign the judgments, but their duty terminates when the decision is announced; and (C) pursuant to which lay assessors do not have to sign the judgments, and their duty terminates when the decision is announced.

114. Inouye Addendum, *supra* note 13, § 4(8).

be the disclosure of their identities, which is a significant concern of the Investigation Committee.¹¹⁵

The process and standard of appeal for lay assessor cases is also undecided. The underlying issue arises because, reflecting Japan's present bench trial system, first appeals (*kōso*) may be based on mistakes of fact as well as law.¹¹⁶ The first option in the Investigation Committee's proposal is to keep this *kōso* appeal.¹¹⁷ This is also the position endorsed in Professor Inouye's addendum.¹¹⁸ The second option, however, limits first appeals to issues of law.¹¹⁹ An alternative to this option is also to allow appeals of sentencing.¹²⁰ The third option, similar to the *kōso* appeal, would allow appellate judges to hear issues of sentencing and facts as well as law, but it also would require the appellate court to annul a mixed court's factual and sentence determinations, which presumably would entail a significantly higher standard than simply remanding or overturning a decision.¹²¹ The final option would create an entirely new appellate system that incorporates lay assessors.¹²²

Thus, the first and third options would continue to allow, in essence, two bites at the factual cherry. This, of course, would introduce the possibility of judges overruling lay assessors on arguably the latter's area of expertise, viz., a commonsense understanding of facts and the appropriate punishment. On the other hand, the second option avoids appellate judges overruling lay assessors on the latter's expertise, but the lack of the second bite allowed by the *kōso* appeal is said to have undermined the former jury system as discussed below.¹²³ The fourth option of creating a new appellate system incorporating lay assessors would address many of the shortcomings of the other approaches but would entail the creation of an additional level of infrastructure.

G. Publicity of Mixed Courts

One of the most controversial aspects of the proposed lay assessor system is its rules regarding trial publicity. Under the

115. Inouye Explanation, *supra* note 78, at 20.

116. RAMSEYER & NAKAZATO, *supra* note 34, at 145.

117. Lay Assessor Proposal, *supra* note 12, § 5(A an).

118. Inouye Addendum, *supra* note 13, § 5.

119. Lay Assessor Proposal, *supra* note 12, § 5(B an).

120. *Id.* § 5(B an).

121. *Id.* § 5(C an).

122. *Id.* § 5(D an).

123. See, e.g., Mamoru Urabe, *Wagakuni ni okeru baishin saiban no kenkyū* [A study on trial by jury in Japan], in 9 SHIHŌ KENSHŪSHO CHŌSA SŌSHO [THE SERIES IN INVESTIGATIONS BY THE LEGAL TRAINING AND RESEARCH INSTITUTE] 1, 1968, translated in THE JAPANESE LEGAL SYSTEM 483, 485-88 (Hideo Tanaka ed., 1976).

proposed rules, lay assessors are obligated, upon penalty of imprisonment and fines, not to divulge any information regarding the deliberations, individual opinions, or voting of the mixed court.¹²⁴ Professor Inouye's draft narrows this proposal slightly by forbidding leaking of "secrets obtained in the execution of the job."¹²⁵ In application and as alluded above, this rule would seem to preclude any mixed court judgment from including important details such as the size of the majority that rendered the decision and the split between the judges and citizens. This, in turn, undermines any transparency in the application of the rules concerning the necessary composition of a majority prescribed elsewhere in the proposal.

The publicity rules also ensure that Japanese lay participants will not be able to write tell-all biographies as some jurors in the murder trial of O.J. Simpson did.¹²⁶ It is interesting that redress for this situation is already partially covered by private law in Japan. The matter arose when Chihiro Isa wrote a confession regarding his experience as a juror in an assault and murder case in Okinawa, which as a protectorate of the United States until 1972 had criminal jury trials.¹²⁷ The defendant in the case later sued Isa for tortious injury and in 1987 won ¥500,000 (approximately U.S.\$3,500) in a decision that was confirmed by the Japanese Supreme Court in 1994.¹²⁸ Needless to say, the fines and imprisonment envisioned under the lay assessor proposal will probably exceed this private law liability.

In addition to these existing private law limitations and proposed restrictions on lay assessors, the proposal prohibits third parties from contacting lay assessors for information.¹²⁹ Reinforcing this, the proposal provides that the court is prohibited from divulging any personal information about lay assessors.¹³⁰ The proposal also prohibits the mass media or any other person from soliciting information or trying to influence the lay assessors; those not adhering to the rule are punished with fines and imprisonment.¹³¹

124. Lay Assessor Proposal, *supra* note 12, at § 7(2).

125. Inouye Addendum, *supra* note 13, at § 8(2).

126. See, e.g., MICHAEL KNOX & MIKE WALKER, *THE PRIVATE DIARY OF AN O.J. JUROR: BEHIND THE SCENES OF THE TRIAL OF THE CENTURY* (1995).

127. CHIHIRO ISA, *GYAKUTEN: AMERIKA SHIHAI SHITA OKINAWA NO BAISHIN SAIBAN [REVERSAL: A JURY TRIAL IN OKINAWA UNDER AMERICAN CONTROL]* (1977).

128. Judgment of Feb. 8, 1994, 48 MINSHŪ 2-149 (Sup. Ct., Feb. 8, 1994); James J. Nelson, *Culture, Commerce, and the Constitution: Legal and Extra-Legal Restraints on Freedom of Expression in the Japanese Publishing Industry*, 15 UCLA PAC. BASIN L.J. 45, 64-66 (1996) (discussing the case); Dan Rosen, *Private Lives and Public Eyes: Privacy in the United States and Japan*, 6 FLA. J. INT'L. L. 141, 154 (1990) (covering the case through the Tokyo High Court).

129. Lay Assessor Proposal, *supra* note 12, §§ 3(2), 7(2).

130. *Id.* § 8(1).

131. *Id.* §§ 7(3), 8(3).

Included within this restriction, the press is instructed to censor itself regarding information that might prejudice the assessors before or during a mixed trial. Similar to the protests that recently helped defeat the Japanese Human Rights Commission bill from enactment,¹³² the mass media has organized vigorous protests of these provisions on civil libertarian and freedom of speech grounds.¹³³ The JFBA also unequivocally rejects the calls for restricting the media's coverage of lay assessor trials.¹³⁴

H. Costs of the Mixed Court Proposal

As noted above, the costs of the lay assessor system are largely ignored by the Investigation Committee. One area where it is addressed is a provision for compensation of lay assessors' travel, necessary lodging, and *per diem* expenses.¹³⁵ It is not expected that this will be a major cost of introducing the system, however. Rather, significant costs are likely to be incurred in initiating the new system, creating the necessary infrastructure for the system, and administering the new proceedings.

Initiating the lay assessor system will require a number of start-up costs. Court officials, including judges, will need to be trained in the requirements and special considerations of dealing with non-legally trained people. In addition, introduction of the system will likely need to be accompanied by a public awareness campaign to educate defense lawyers and to inform the public about the system. Some of these expenses are already being incurred: the Supreme

132. Leon Wolff, *Future of Human Rights Regulation in Japan*, 14 HUMAN RIGHTS DEFENDER (Dec. 2003).

133. Nihon minkan hōsō renmei [Japanese Union of Private Broadcasters], *Saibanin seido to shuzai/hōdō to no kankei ni tsuite no iken* [Opinion regarding the relationship with collecting data information and the lay assessor system] (May 15, 2003), at <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai17/17siryou3.pdf>; Nihon shinbun kyōkai [Japanese Newspapers Association], *Saibanin seido ni taisuru kaiken* [Position regarding the lay assessor system] (May 16, 2003), at <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai17/17siryou1.pdf>; Nihon zasshi kyōkai [Japanese Magazine Association], *Hōdō no jiyū wo odokasu "saibanin seido" no mondai ten* [Problem areas with the "lay assessor system" that threaten freedom of expression] (May 16, 2003), at <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai17/17siryou2.pdf>; *The Media and a Jury System*, JAPAN TIMES, Nov. 13, 2002.

134. Nichibenren, *supra* note 47, at 37-38.

135. This is likely to be consistent with the Prosecutorial Review Commission amounts (e.g., up to ¥8700 per night for accommodations). *Kensatsu shinsa kai hō* [Prosecutorial Review Commission Act], Law No. 147 of 1948, arts. 29, 39, available at <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi>; *Kensatsu shinsa-in nado no ryōhi, tōjitsu oyobi shukuhakuryō wo sadameru seirei* [Order Regulating Prosecutorial Review Commissions Costs for Lodging, Transportation, and Per Diem], Order No. 31 of 1949, available at <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi>.

Court, prosecutor's office, and JFBA are all engaging in research in anticipation of the lay assessor system's adoption.¹³⁶

Even assuming the various actors are up to speed, the infrastructure of the court system will need to be modified to accommodate lay assessors. For example, courtrooms will need to be modified to accommodate more people,¹³⁷ more conference rooms in courthouses will be required for deliberation, and the entire system, from parking to toilets, will need to be expanded to handle the additional traffic.¹³⁸

Administering the lay assessor system on a daily basis will be more costly than the present system run by trained law experts. Some of these costs can be calculated. For example, an on-going induction program for new lay assessors will likely be necessary. Most of the recurring administration expenses, however, are incalculable beforehand. For example, conducting lay assessor trials will necessarily be more complex, and therefore more time consuming, than trials heard by professionals. The entire procedure will need to be slowed down to a level sufficient for a layperson to understand. More debate will be required on evidentiary matters given the possible heightened prejudicial effect on amateurs, and more time will be required for deliberation to avoid any taint of judicial dominance. In short, adopting the lay assessor system will be costly in both the short- and long-term. Nonetheless, it is not clear to what extent this has been considered or whether this will eventually affect whatever system the legislature adopts.

136. See, e.g., Ministry of Justice, *Saibanin seido oyobi kensatsu shinsa kai seido ni tsuite no iken boshū no kekka gaiyō* [General summary results for solicited opinions on the lay assessor system and prosecutorial investigation committee] (July 18, 2003), at <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai22/22siryou1.pdf> (this report is a 294 page summary of 842 opinions collected regarding the lay assessor system); Nichibenren, *supra* note 47.

137. This raises a host of interesting subsidiary questions such as how lay participants are treated architecturally. See, e.g., JUDICIAL ADMINISTRATION AND SPACE MANAGEMENT: A GUIDE FOR ARCHITECTS, COURT ADMINISTRATORS, AND PLANNERS (F. Michael Wong ed., 2001). Japan faced similar issues in the modern era in removing the prosecutors from a raised dais in light of post-war reforms and accommodating juries during the pre-War era.

138. See Kiss, *supra* note 5, at 282 n.177 (noting the infrastructure costs in refitting courtrooms to accommodate juries and noting this was discussed in the South African context by Marshall S. Huebner, *Who Decides? Restructuring Criminal Justice for a Democratic South Africa*, 102 YALE L.J. 961, 975 (1993)). Only two courtrooms fitted with jury-boxes remain in Japan, and both are attached to universities in Kyoto (Ritsumeikan) and Yokohama (Toin) as museums.

I. Summary of the Investigation Committee's Proposal

Although a number of crucial details are still being debated, based on the Investigation Committee's interim proposal, the fundamental structure of the lay assessor system and the likelihood of its eventual adoption appear predictable. The system will be a mixed panel of both professional judges and non-expert citizens deliberating together on all matters and deciding issues of fact and sentencing by some mixed majority vote. Only serious crimes will be heard under the system, and the procedure cannot be avoided by defendants or waived by courts. There will likely be restrictions on publicity around and about lay assessor trials. The core issues of exactly what the composition of the mix between judges and laypeople will be and what specific crimes will be considered serious enough to be heard have not yet been decided. Furthermore, the proposal also leaves largely unaddressed the critical issues of procedure and funding. These two items may indeed be the "devil in the details" that in hindsight are critical to whether the lay assessor system achieves the dual objectives of better justice and a more democratic process.

IV. DOMESTIC HISTORICAL CONTEXT

As the JRC recognized,¹³⁹ Japan's judicial system historically has had a number of roles for laypeople to play. Therefore, the question arises as to why these existing schemes have failed to achieve the outcomes cited as rationales for adopting the new lay assessor system—i.e., better justice and greater democratic involvement. The answer to this question should provide a useful standard by which to test whether the current proposal will likely fulfill its objectives.

The following section parses out the standard and tests the present lay assessor model against it. First, this section provides a rough categorization of a number of different schemes in which laypeople in Japan historically have participated in judicial decision making as either "Broad Lay Participation Organs" or "Narrow Lay Participation Organs." Next, background and historical data on the various schemes' use are introduced. From this data, there are two major failings of the current organs that have prevented them from achieving the general objectives of lay participation: Broad Lay Participation Organs have been marginalized by non-use, and Narrow Lay Participation Organs have been captured by non-

139. JRC Report, *supra* note 7, at ch. IV, pt. 1, § 2.

laypeople. These lessons are then applied to test the present lay assessor proposal. This section concludes by finding that the current proposal addresses some of the limitations but remains vulnerable to others. Based on this finding this section argues that the overall success of the lay assessor system is contingent on the affirmative support of the prosecutor's office, the judiciary, and the government.

A. Broad Lay Participation Organs

The term "Broad Lay Participation Organs" is used to refer to those schemes that involve a wide cross-section of the general population in some aspect of the judicial decision making process. The classic example is the jury system. Typically, Broad Lay Participation Organs call for participants from the general population without regard to any special qualifications or abilities of the people. Broad Lay Participation Organs are also characterized by being separated from the input or influence of legal specialists during deliberation. In practical terms, this means there is a greater risk that Broad Lay Participation Organs will technically misapply the law but a lesser risk that they will be elitist or bereft of commonsense understanding.

1. Juries (1923-1943)

Japan enacted a jury system in 1923, effective in 1928, as part of the so-called Taisho Democracy Movement.¹⁴⁰ The system was suspended in 1943 because of disuse and increasing authoritarianism.¹⁴¹ Because the law was only suspended, it remains on the books and can be reinitiated. In fact the *Courts Act* of 1947 anticipates and provides for the return of juries.¹⁴²

Japan's jury system had twelve jurors chosen at random from literate male citizens over thirty years of age who had resided in the same city for two years or longer and paid not less than ¥3 in national tax over the prior two consecutive years.¹⁴³ Thus, the eligibility requirements were not broadly representative of society. However, they shadowed eligibility for suffrage¹⁴⁴ and were not out-

140. Baishin hō [Jury Act], Law No. 50 of 1923, available at <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi> (n.d.).

141. Baishin hō no teishi ni kan suru hōritsu [Act Regarding the Suspension of the Jury Act], Law No. 88 of 1943, available at <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi>.

142. Saibansho hō [Courts Act], Law No. 59 of 1947, art. 3(3), available at <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi> (n.d.).

143. Baishin hō [Jury Act], art. 12.

144. See HANE, *supra* note 31, at 229 (noting suffrage was limited to males who paid ¥3 in annual tax in 1919, which covered slightly more than five percent of the population).

of-place when compared to other countries' contemporaneous requirements, such as those of the United States that historically had restricted eligibility to property-owning white males.¹⁴⁵ Japan's jury system was only used in trials in which the criminal defendant was subject to a penalty of death or life imprisonment, or imprisonment for a minimum of one year and a maximum of three years. The defendant could opt out of a jury trial for crimes with punishments of death or life imprisonment, but a jury trial was required when the defendant was charged with other eligible offences. The jury deliberated by itself, and its decisions were by majority. The jury only answered special verdicts on matters of fact rather than offering general guilty or innocent judgments.¹⁴⁶ Furthermore, similar to judgments notwithstanding the verdict (JNOV or *judgment non obstante veredicto*) in U.S. civil jury trials,¹⁴⁷ the Japanese judge could call a retrial if he disagreed with the jury's decision.¹⁴⁸ In addition, because the jury alone ruled on matters of fact, appeals from jury verdicts only allowed appellate judges to overturn on matters of law.¹⁴⁹ This is the same as the present common law rule on appealing jury verdicts; however, it differs from the standard *kōso* practice in Japan where appeals on matters of fact are allowed. The justification for the *kōso* rule derives from the notion that appellate judges are equally if not better positioned to make factual determinations as trial judges. Also significant, a defendant who chose a jury trial and lost, bore the cost for the empanelment.¹⁵⁰

Despite defendants initially electing jury trials frequently—143 were held in 1929 over time their popularity declined precipitously. In 1942 there were only two.¹⁵¹ Commentators offer a wide variety of explanations for the decline of juries; most focus on the effect of structural elements of the jury law and on defendants' and their legal counsels' strategic considerations.¹⁵² They suggest that because jury verdicts were technically non-binding (that is, the judge could order a retrial if he disagreed) and because the jury issued its verdict on special verdict forms that judges drafted without the input of counsel,

145. For example, non-white male jurors were still rare in many U.S. states until the 1960s, and property qualifications were not eliminated in England until 1972. See ABRAMSON, *supra* note 18, at 108-15; JOHN BALDWIN & MICHAEL MCCONVILLE, JURY TRIALS 94 (1979).

146. Baishin hō [Jury Act], arts. 29, 77, 88, 91.

147. See FED. R. CIV. P. 50.

148. Baishin hō [Jury Act], art. 95.

149. Baishin hō [Jury Act], art. 101.

150. Baishin hō [Jury Act], art. 107.

151. See Urabe, *supra* note 123, at 482 n.(a) (providing a chart listing the number of cases tried by jury between 1928 and 1942).

152. See, e.g., *id.* at 485-91 (giving explanations for the unpopularity of jury trials).

there was little benefit to defendants in electing juries. Instead, defendants selected bench trials to ingratiate themselves with the trial judges and to maintain the option of a *kōso* appeal. These criticisms are important today because many of the provisions for the new lay assessor system (such as the inability of a defendant to elect out of the system, the questions over appeal rights, and the majority decision making rules) have been influenced by analysis of this earlier experience.

This critique of the old jury system, however, might not be as predictive for the proposed lay assessor scheme as its drafters assume. In other words, the Investigation Committee might be mistaken in relying too much on the lessons of the old jury system to educate their design of the new lay assessor program. First, the lynchpin of the structural arguments against the jury law—that defendants were not better off in jury trials—is undermined by the data. For the 484 jury trials held over the fifteen years of use, 16.7 percent resulted in acquittal.¹⁵³ This is significantly higher than the nearly perfect conviction rate experienced today.¹⁵⁴ In short, juries mattered and they benefited defendants. Second, in a comparative context, the combination of structural and strategic reasons that commentators suggest caused the decline of the jury trial in Japan is somewhat circumspect. The United States has the same combination of structural elements in civil cases, yet it has not resulted in the elimination of juries in that country. Finally, it seems equally if not more plausible that the decline of the jury reflected the changing political and social climate of Japan in the 1930s and 1940s.¹⁵⁵ That is, the decline of the Taisho Democracy Movement and the rise of an authoritarian state mobilized for war made all parties more inclined to rely on the state sanctioned judges rather than newly introduced popular democratic institutions.¹⁵⁶ Whatever the cause for the demise, it is significant that only fifteen juries were empanelled during the last five years of the law. In other words, before the law was suspended it was already marginalized into irrelevance by non-use.

153. *Id.* at 485.

154. See JOHNSON, *supra* note 23, at 215-18.

155. See HANE, *supra* note 31, at ch. 12 (describing the political climate at the time which was one of rising militancy). Supporting this interpretation is also the suspension law itself, which provided: "The Jury Act will be made effective again after the end of the present war at a date as proscribed by accompanying Imperial order." Baishin hō no teishi ni kan suru hōritsu [Act Regarding the Suspension of the Jury Act], Law No. 88 of 1943, supp. art. 3, available at <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi> (n.d.).

156. See Lempert, *Citizen Participation*, *supra* note 5, at 10 (noting also decline of juries in Spain, German, and Russia with rise of militarism and autocracy).

2. Prosecutorial Review Commissions

Prosecutorial Review Commissions (*kensatsu shinsa kai*) are lay advisory bodies composed of eleven citizens who may review prosecutors' exercise of discretion in decisions not to prosecute.¹⁵⁷ There are 201 Commissions with at least one in each of Japan's fifty district court jurisdictions.¹⁵⁸ Much like the proposed lay assessor system and the old jury system, members of the commissions are selected at random from voter rolls; however, they sit for six months and meet quarterly or as called.¹⁵⁹ A case comes before a Prosecutorial Review Commission when a victim, proxy, or a Commission itself brings a complaint against the prosecutor's office for failure to pursue an alleged offence.¹⁶⁰ The scheme evolved in response to American Occupation reformers advocating a grand jury system to control over-indicting by prosecutors and the specific-Japan situation in which under-indicting by prosecutors was, and remains, the primary problem.¹⁶¹ Once a complaint has been brought, a Commission reviews the allegations and the prosecutors' explanation for not bringing charges. Based on the evidence, the Commission then issues non-binding recommendations regarding whether an indictment should be issued.¹⁶²

Prosecutorial Review Commissions are not well known and correspondingly are not often engaged.¹⁶³ In 2000 only about 0.21 percent of the 884,700 non-indictments resulted in a complaint.¹⁶⁴ Furthermore, even when engaged, the process rarely results in any action. Of the few cases brought, only in 5.5 percent did Commissions recommend that prosecutors reconsider or indict, and in only thirty-four percent of these cases did prosecutors take that advice.¹⁶⁵ In

157. See *Kensatsu shinsa kai hō* [Prosecutorial Review Commission Act], Law No. 147 of 1948, available at <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi>; Howard Meyers, *The Japanese Inquest of Prosecution*, 64 HARV. L. REV. 279 (1950); Mark D. West, *Prosecutorial Review Commissions: Japan's Answer to the Problem of Prosecutorial Discretion*, 92 COLUM. L. REV. 684 (1992).

158. SECRETARY GENERAL SUPREME COURT OF JAPAN, SAIBANSHO DE-TA BUKKU 2002 [COURT DATA BOOK 2002] 1 (2002) (on file with authors).

159. *Kensatsu shinsa kai hō* [Prosecutorial Review Commission Act], arts. 4, 14, 21.

160. *Kensatsu shinsa kai hō* [Prosecutorial Review Commission Act], arts. 2(3), 30.

161. See West, *supra* note 157, at 695-96.

162. *Kensatsu shinsa kai hō* [Prosecutorial Review Commission Act], art. 27.

163. See West, *supra* note 157, at 698-700 (providing statistics on how infrequently the commissions are used).

164. *Heisei 12 nen ni okeru keiji jiken no gaikyō (jō)* [General situation of criminal cases in 2000 (part I)], 54(2) HŌSŌ JIJŌ (2001), at <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai2/03.pdf> [hereinafter *General Situation*]. See also West, *supra* note 157, at 698-700 (providing comparable figures from the 1980s).

165. *General Situation, supra* note 164.

other words, the Prosecutorial Review Commissions directly effect less than four cases for every 100,000 non-indictments. Recent high-profile complaints under the scheme brought the Commissions much needed publicity, but the prosecutor's refusal to act on the Commission's recommendations has undermined any popular confidence or renewed commitment to the system.¹⁶⁶

In response to these obvious shortcomings, reformers (including the JRC) have advocated for more publicity for the system and for a change to make the Commissions' recommendations binding on prosecutors.¹⁶⁷ Indeed, the Lay Assessor Investigation Committee is also charged with reforming the Prosecutorial Review Commission.¹⁶⁸ Nonetheless, as with juries, the larger lesson of the Prosecutorial Review Commission is that no matter how well a system is designed to promote community involvement, if that system is not used, no benefits will result.

B. Narrow Lay Participation Organs

The term Narrow Lay Participation Organ is used to refer to schemes that have roles for specific private individuals with special skills or qualifications.¹⁶⁹ For example, the Family Court has the option of designating people of high standing in the community as Judicial Commissioners (*shihō iin*) to provide commonsense advice and assist with settlements.¹⁷⁰ Typically, individuals involved in Narrow Lay Participation Organs are nominated and selected from the community for a term of years based on their high standing in the community and special knowledge or experience. The lay participants in the Narrow Lay Participation Organs are not generally given exclusive decision making power as in Broad Lay Participation Organs, but they are assisted or accompanied by legal professionals in exercising their deliberative power. In practical terms, and in contrast to the broader schemes, this means that there is a lower risk that Narrow Law Participation Organs will make technical legal

166. West, *supra* note 157, at 700 (discussing the Japanese Communist Party wire-tapping and Boeing-JAL cases from the late 1980s and early 1990s).

167. JRC Report, *supra* note 7, at ch. IV, pt. 2(2).

168. Chairman Masahisa Inouye, *Kangaerareru kensatsu shinsa kai seido kaisei no gaiyō nitsuite* [Regarding the outline on the reform of the prosecutorial review commission system to consider] (Nov. 11, 2003), at <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai29/29siryou1.pdf>.

169. There are some similarities between Japan's Narrow Law Participation Organs and the so-called "blue-ribbon juries" of super-qualified jurors used in the United States until the late 1960s and early 1970s. See ABRAMSON, *supra* note 18, at 99-100 (describing the "blue-ribbon juries").

170. RAMSEYER & NAKAZATO, *supra* note 34, at 140 n.17.

errors but a greater risk that they will be unrepresentative of the general population.

1. Summary Court Judges

Like the Justice of the Peace or magistrate system in England, lay participation may be injected directly into the judicial process by using non-lawyer judges. In principle, Japan has followed this option. To allow for common experience to guide the lowest and highest courts in Japan, neither Summary Court judges nor Supreme Court justices are required to be lawyers.

Summary Courts are courts of limited jurisdiction that hear civil cases with less than ¥900,000 in controversy and prosecution of crimes punished by fines or less than fifteen days' imprisonment.¹⁷¹ The Summary Court system was based on the English magistrate system and U.S. small-claims courts.¹⁷² Thus, because the courts are envisioned to be easily accessible to all citizens, there are 438 Summary Courts throughout Japan and in 2002 there were 806 judges.¹⁷³ Unlike judges of the courts of general jurisdiction and appeal, Summary Court judges are not required to be members of the bar.¹⁷⁴ Instead, they are only required to pass the general civil servants' exam and be employed by the court system or justice ministry for three years.¹⁷⁵ In sharp contrast to Justices of the Peace in England but similar to magistrates in Australia and small-claims court judges in the United States, the ranks of Summary Court judges in Japan have in fact been monopolized by retired members of the bar and former, lifelong employees of the various judicial administration organs.¹⁷⁶ In short, far from being private citizens with common experiences, Summary Court judges in fact are people who have been ensconced in the legal world for their entire professional life.

2. Supreme Court Justices

Like Summary Court judges, the requirements for the highest jurists in the land—Supreme Court justices—were drafted with the

171. Saibansho hō [Courts Act], Law No. 59 of 1947, art. 33, available at <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi> (n.d).

172. HIROSHI ODA, *JAPANESE LAW* 72 (2d ed. 1999).

173. SECRETARY GENERAL SUPREME COURT OF JAPAN, *supra* note 158, at 1, 16.

174. Saibansho hō [Courts Act], arts. 44, 45.

175. Saibansho hō [Courts Act], arts. 44(1)(4)-(5), 45.

176. See ODA, *supra* note 172, at 72 (citing K. Konno, *Kansai no minji jibutsu-kankatsu kakuchō* [The expansion of jurisdiction of summary courts], in ARUBEKI SHIHŌ WO MOTOMETE [IN QUEST OF JUSTICE] 113-14 (Tokyo Bar Assoc. ed., 1983)).

expectation that one-third of the bench would not be composed of professional lawyers. The *Courts Act* specifies that while ten of the fifteen justices must be selected from among those who have distinguished themselves as judges, prosecutors, barristers, summary court judges, or legal academics, the remaining five positions need not be legal specialists.¹⁷⁷

In practice, however, the court has never been divided among legal professionals and general citizens of high standing. Instead, it has been and remains dominated by lawyers. Twelve of the current fifteen justices are members of the bar: six are former judges, two were prosecutors, and four were barristers.¹⁷⁸ One is a former legal academic; another is a former diplomat who has three law degrees and previously was the government official responsible for international law. Justice Kazuko Yoko'o, the only woman on the court, is the only non-lawyer; she graduated with a liberal arts degree and previously worked for the Ministry of Health and Welfare.¹⁷⁹ Historically as well, lawyers have dominated the top court. Of the 138 justices in the post-War era there were fifty-three judges, forty-five barristers, fifteen prosecutors, twelve legal academics, six diplomats (all of whom had a legal education and were charged with international law responsibilities prior to joining the bench), five Directors of the Cabinet's Legislation Bureau, and two former bureaucrats.¹⁸⁰ The other bureaucrat in addition to Justice Yoko'o was the only other woman justice, Hisako Takahashi, who worked in the Ministry of Labor.¹⁸¹ Thus, rather than realize the ideal of a Supreme Court with two-thirds legal competency and one-third broad-based expertise, Japan has allowed lawyers and other quasi-lawyers to capture the highest court much as they have the lower courts.

3. Conciliators

Regardless of the existence of the court system, most disputes, in Japan and elsewhere, are not resolved by a judge. Not unlike most

177. Saibansho hō [Courts Act], Law No. 59 of 1947, art. 41(1)(1)-(6), available at <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi> (n.d.).

178. Supreme Court, *Justices of Japan*, at http://courtdomino2.courts.go.jp/shokai_e.nsf/View01?OpenView (last visited Oct. 1, 2003).

179. *Id.*

180. Supreme Court, *Saikōsai no saibankan no shōkai* [Introduction to justices of the supreme court], at http://courtdomino2.courts.go.jp/shokai_J.nsf/History?OpenPage (last visited Oct. 1, 2003).

181. *Id.* By implication, this also raises the important question that if a woman was desired on the highest court why the appointment had to go outside the traditional legal branches to find a suitable person. This in turn sends a mixed message to women who aspire to be lawyers.

other systems, Japan has a number of official and semi-official officers who facilitate the settlement process in addition to judges. In many cases, these roles have been created specifically to inject common experience into the dispute-resolution process and to avoid the legalistic nature of formal proceedings. That is, these roles have been created largely for the same purpose as the lay assessor system.

By number of cases, the chief dispute-resolution mechanism in Japan is court-sponsored conciliation (*chōtei*).¹⁸² Conciliation is a semi-judicial mediation service employed as an alternative to formal litigation. It covers civil matters and family matters but not criminal proceedings. Nevertheless, it is arguable that greater popular involvement with civil and family conciliation proceedings would at least partially satisfy the deficiencies driving the demand for lay involvement in the criminal system (for example, the greater democratization of society would be accomplished regardless of whether participation was in civil or criminal matters). Thus, discussion of the success or failure of lay participation in the conciliation process is relevant to identifying potential weaknesses in the proposed lay assessor system.

At the center of the conciliation process are conciliators. Conciliators are stipend employees of the court system. Two conciliators and a judge form a conciliation panel that tries to facilitate private settlement.¹⁸³ Conciliators are divided into two categories: civil-matter conciliators and family-matter conciliators. These individuals are selected by the relevant District, Family, and Summary Courts from the local population for their “specialist [i.e., non-legal] knowledge and experience” (*senmontekina chishiki keiken*).¹⁸⁴

In 2002 there were 13,028 civil conciliators and 12,292 family conciliators; 5,225 of the total number of conciliators are both civil and family officers.¹⁸⁵ In comparison, there are 3,094 regular and Summary Court judges.¹⁸⁶ Of the civil conciliators, the most common professions represented are barrister (fifteen percent) and amalgamated professionals (twenty percent), a category that covers patent attorneys, tax attorneys, CPAs, appraisers, and so forth.¹⁸⁷ The largest group of civil conciliators are those who do not note an

182. In 2001 alone there were 367,404 civil conciliations filed. SECRETARY GENERAL SUPREME COURT OF JAPAN, *supra* note 158, at 50, 67.

183. DAN FENNO HENDERSON, CONCILIATION AND JAPANESE LAW 200-04 (1965).

184. Minji chōtei hō [Civil Conciliation Act], Law No. 222 of 1951, art. 8, available at <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi> (n.d.); Kaji shinpan hō [Family Trial Act], Law No. 152 of 1947, art. 22-2, available at <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi> (n.d.).

185. SECRETARY GENERAL SUPREME COURT OF JAPAN, *supra* note 158, at 17.

186. *Id.* at 16.

187. *Id.* at 17.

outside occupation (thirty percent), however, these are largely retired members of the bar and former clerks of the Court and Justice Ministry.¹⁸⁸ In sum, approximately sixty-five percent of civil conciliators have a legal background. The same is true for family conciliators, even though the Family Court tries to have at least one woman on each conciliation panel—and women are under-represented in the various legal professions.¹⁸⁹ A representative survey of family conciliators suggests twenty-six percent are retired public officials mostly from the court and prison systems, seventeen percent are retired members of the bar, thirteen percent are educators (a category that includes many legal academics), and nine percent are professionals along the lines of patent attorneys.¹⁹⁰ That sixty-five percent of conciliators have a legal background has led one researcher to conclude the “occupational backgrounds of the [conciliators] indicate that they come from among people with higher social status in local communities.”¹⁹¹ The flip-side of this conclusion is that conciliators do not inject common experience into the proceedings because lawyers, retired lawyers, quasi-lawyers, and other similar professionals have commandeered the common person’s role.

C. Other Lay Organs

There are a plethora of other roles in Japan through which common or non-legal experience is supposed to be introduced into the dispute resolution process.¹⁹² These roles have also tended to suffer from both the failings of the broad and narrow lay organs, namely marginalization into obscurity and capture by legal experts broadly

188. *Id.*

189. Women comprise twelve percent of the judiciary, between four and ten percent of the prosecutors, and ten percent of barristers. *Id.* at 16; JOHNSON, *supra* note 23, at 90 n.3; JFBA, *Kaiinsū no suii* [Change in membership numbers] (2000), at <http://www.nichibenren.or.jp/jp/katsudo/toukei/suii2.html>.

190. Masayuki Murayama, *Does a Lawyer Make a Difference? Effects of a Lawyer on Mediation Outcome in Japan*, 13 INT’L J. L., POL’Y & FAM. 52, 57-58 (1999).

191. *Id.* at 58.

192. In addition to the various organs noted below there are Psychiatric Review Boards (PRB, *seishin iryō shinsa kai*). *Seishin hoken oyobi seshin shingai sha fukushi ni kan suru hōritsu* [Act Concerning the Welfare of the Mentally Handicapped and Mentally Protected], Law No.123 of 1950, arts. §§ 13-13, 38, available at <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi>. The PRB system was created by amendment in 1988 to monitor and hear complaints from persons involuntarily institutionalized. IAN NEARY, HUMAN RIGHTS IN JAPAN, SOUTH KOREA AND TAIWAN 154 (2002). There are five members of the PRBs, including three doctors, one “person with a background in law,” and one generalist. *Id.* Thus, they are Narrow Lay Participation Organs, but dominated by medical professionals rather than lawyers. *Id.* at 156. Furthermore, like the old jury system and the Prosecutorial Review Commissions, resort to the PRBs is rare, and only 30 cases per year result in release. *See id.* at 153-57.

defined. The most notable role of this type is arbitration. Like conciliation, arbitration is limited to civil and commercial matters, but if it is functioning to achieve the dual objectives of lay participation, it could relieve some of the pressure for reform of the criminal system.

Japan has a variety of organs supporting arbitration. One of the selling points of arbitration is said to be that it avoids over-legality and formality by allowing technical experts rather than legal experts (i.e., judges) to adjudicate.¹⁹³ In Japan, however, as with conciliators, the lay role has been captured by legal professionals and, like juries, the entire system has been marginalized by lack of use. For example, the Japan Commercial Arbitration Association's (JCAA) Panel of Arbitrators list is composed of seventy-six percent members of the bar, fourteen percent legal academics, and only ten percent from the business field. Similarly, the association's list of recommended mediators is eighty-three percent members of the bar, four percent legal academics, and only thirteen percent from business or other areas.¹⁹⁴ Moreover, the JCAA historically has heard far fewer than ten cases a year.¹⁹⁵ Japan's other primary arbitration organization, the Japan Shipping Exchange, which is limited only to maritime claims but hears many more cases, is composed of arbitrators seventy-eight percent of whom are from business and labor organizations and only twenty-three percent of whom are legal academics or members of the bar.¹⁹⁶

A number of other in-court and out-of-court opportunities for lay participation exist in the Japanese justice system. For example, as noted above, the Summary Courts in Japan may call one of the 6,053 laypersons known as Judicial Commissioners (*shihō iin*) to give advice and assist with settlement,¹⁹⁷ however, Summary Judges only

193. See, e.g., International Chamber of Commerce, *Advantages of Arbitration*, available at <http://www.iccwbo.org/court/english/arbitration/introduction.asp> (last visited Oct. 1, 2003) (stating that the ICC allows for dispute resolution through the use of persons who have specialized competence in the relevant field).

194. Japan Commercial Arbitration Association (JCAA), *Panel of Arbitrators* (Jan. 1, 1997) (on file with authors).

195. See JCAA, *Jigyō hōkoku sho* [Report on Business] (2002), at <http://www.iccwbo.org/court/english/arbitration/introduction.asp> (noting that despite increases in filings only nine cases were resolved in 2002); ODA, *supra* note 172, at 83 (noting an average of five cases a year in the mid 1990s).

196. Japan Shipping Exchange, *Heisei 14-15 nendo kaiji chūsai iinkai chūsainin meibo* [List of Arbitrators on the Maritime Arbitration Council 2002-2003] (June 4, 2003), at <http://www.jseinc.org/tomac/commission/chusainin.asp>.

197. Minji soshō hō [Code of Civil Procedure], Law No. 109 of 1996, art. 279; Supreme Court, *Shihō iin seido ni tsuite* [Regarding the judicial commissioner system], at http://court.domino2.courts.go.jp/_4925648a00553f2a.nsf/0/76248b23e11a948449256caa00017fb6?OpenDocument&Highlight=0,_v2276i44m8088hjogh3qg_ (last visited Oct. 1, 2003).

deem assistance of Judicial Commissioners necessary in around four percent of all cases.¹⁹⁸ Similarly situated are the 6,038 Family Court Councillors (*san'yo-in*); lawyers are the most represented profession in this group.¹⁹⁹ More ubiquitous but equally obscure are the 49,000 Voluntary Probation Officers (*hogo shi*) and 14,000 Human Rights Protection Officials (*jinken yōgo in*).²⁰⁰

The JRC identified revitalization of the existing lay participation roles as a priority, along with the introduction of the lay assessor system. The efforts to date, however, have not resulted in much improvement. For example, the test for notary publics (*kōshōnin*) was revised to encourage lay participation in this highly lucrative area that has been completely monopolized by retired justice ministry and court officials.²⁰¹ Unfortunately, not a single general applicant passed the revised exam even though eighty-eight percent of the judicial bureaucrats who took the test passed.²⁰²

Another example of a failed effort is the reform system's main mechanism for change itself, the Deliberative Councils (*shingikai*). It is interesting that the reforms to the Deliberative Council system have arguably resulted in more legal and less lay representation. Deliberative Councils historically have played a crucial role in defining and drafting the government's legislative reform agenda but have been criticized for being captured by interested parties such as industry and bureaucracy.²⁰³ The recent diversification of the various

198. General Secretariat, *Shihō tōkei nenpō, Minji gyōsei hen* [Annual Report of Judicial Statistics, Civil and Administrative Cases], vol. 3, at 33 (Sup. Ct. (Japan) 2002).

199. Kaji shinpan hō [Family Trial Act], Law No. 152 of 1947, arts. 3, 10, available at <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi> (n.d.); SECRETARY GENERAL SUPREME COURT OF JAPAN, *supra* note 158, at 18; Supreme Court, *San'yo-in* [Councillors], at <http://www.courts.go.jp/kouhou/mado/qanda.html> (last visited Oct. 1, 2003) (noting the most common profession is barrister, representing ten percent).

200. Hogoshi hō [Probation Officer Act], Law No. 204 of 1950, art. 1, available at <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi>; Jinken yōgo in hō [Human Rights Protection Officers Act], Law No. 139 of 1949, art. 1, available at <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi>; Ministry of Justice, *Jinken yōgo in seido no gaiyō* [Outline of the human rights protection officials system] (Jan. 1, 2001), at <http://www.moj.go.jp/SHINGI/011221/refer04.html>; Ministry of Justice, *Q&A Hogoshi* [Questions and answers regarding voluntary probation officers] (Jan. 1, 2002), at <http://www.moj.go.jp/HOGO/hogo10.html> (noting that voluntary probation officers are predominantly not lawyers and also that they are not cross-representative as they are overwhelmingly elderly).

201. Kōshōnin hō [Notary Public Act], Law No. 53 of 1909, available at <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi>; WATANABE ET AL., *supra* note 20, at 133-35 (noting of the almost 600 notary publics appointed by the government more than 500 of them are former judges, prosecutors, or justice bureaucrats; that their average age is over sixty-five; and that they are extremely well-compensated).

202. *Laymen Fail Notary Public Test*, YOMIURI SHIMBUN, Aug. 11, 2003, available at 2003 WL 5139093.

203. See generally Noble, *supra* note 39, at 113-33.

councils, however, which now include over 1,700 national members, has in very large part resulted in an increase of legal academics and members of the bar serving in council positions rather than more popular representatives. Despite this, some gains have been made in female representation.²⁰⁴

D. Conclusions Regarding Historical Lay Participation

Two clear warnings emerge from this assessment of the historical lay assessor systems in Japan. First, many of the systems, particularly the Broad Lay Participation Organs, are marginalized by non-use and obscurity. Second, most of the Narrow Lay Participation Organs are not injecting any common experience into judicial proceedings since legal professionals, broadly defined, have captured most of the places for private citizens. Because of these two shortcomings, it is not surprising that reformers have perceived the need for yet another lay participation organ to achieve the goals of greater public involvement.

The question that remains is whether the proposed lay assessor system will avoid the pitfalls of all past and present lay participation organs and be able to deliver better justice and a more democratic society. As is evident from these past cases, only actual experience will tell whether the mixed court program will be able to avoid either obsolescence because of a combination of optional elements and strategic incentives, or well-intentioned capturing by lawyer-wannabes. The pre-enactment design of the program, however, will make success or failure more likely. Thus, the drafters of the current proposal have tried to dodge some previous pitfalls. For example, the proposed scheme is carefully drafted to exclude all quasi-lawyers from eligibility, thereby ensuring that the role is not captured by the legal profession. In addition, the drafters have conspicuously ensured that the system is not optional, which undermined the old jury and the Prosecutorial Review Commissions systems.

Some of the proposed structural elements, however, might be used in ways that circumvent the objectives of the scheme. Most obvious, how the definition of applicable crimes is drawn will affect the breadth of the reforms' effect. If the narrowest definition is used, only one percent of the criminal cases that reach the courts will

204. See Kent Anderson, *Comparative Approaches to Continuing Legislative Reform: Considering Insolvency Law Reform in Japan and Several Common Law Countries*, Law in Asia and Near Future Conference (Nov. 10, 2001), at <http://www.copymart.gr.jp/iiaassy/asia.html>; Cabinet Office, Gender Equality Bureau, *Kuni no shingikai ni okeru jyōsei iin no sankaku jyōkyō shirabe* [Investigation regarding the status of women member participation in national deliberative councils] (Sept. 30 2001), at <http://www.gender.go.jp/ratio/010930.html>.

invoke a lay assessor panel. Moreover, this narrow gateway has the potential to be closed further in practice if prosecutor's offices modify their charging policy to implicate even fewer cases within the definition of lay assessable crimes. On the other hand, if the broadest definition for lay assessment claims is used invoking 6.7 percent of criminal cases and if the prosecutor's offices employ a liberal charging policy, they have the ability to overload the system both in cost and time, which will subsequently cause its meltdown. This power to regulate the flow of cases will reside solely with the prosecutor's offices, as neither the court nor an accused may decline a mixed-court trial, even if the defendant confesses. Thus, not only is the success or failure of the system dependant upon the prosecutors appropriately regulating the stream of cases, the prosecutors themselves will face a changing environment where the pressure to resort to U.S.-style plea bargaining will develop. In short, as presently designed, support by the prosecutor's office is crucial to its success.²⁰⁵

Commitment to the lay assessor ideal by the judiciary is also essential for the system to deliver the objectives of improved justice and democratic engagement. The apprehension about the marginalization of the lay role by professional judges has been one of the central concerns for critics and supporters in Japan.²⁰⁶ Thus, it is surprising that the proposal does not contain any structure or guidance regarding the procedure for the deliberative phase of the trial. Indeed, the current set-up—with judges leading a discussion voted on by a majority of members—seems ripe for abuse. This has been a problem in other jurisdictions with mixed courts such as Germany, where judges dominate the deliberations and lay assessors essentially go along for the ride.²⁰⁷ Further, the German system is better protected against this abuse than the proposed Japanese system because German lay assessors are appointed for a number of years during which they can accumulate enough legal sophistication to achieve the self-confidence necessary to disagree with a judicial professional.²⁰⁸ In comparison, the Japanese one-time appointment system seems particularly susceptible to lay assessors' deference, not on the basis of age or social status, but rather on legal knowledge and

205. Given that "the influence of the jury on the conduct of litigation in the United States goes far beyond the jury trials that actually take place," ABRAMSON, *supra* note 18, at 6, one possible result in Japan's case is that the prosecutor's office will become more willing to "plea bargain" cases around the lay assessor requirement, something which to date it has opposed. See JOHNSON, *supra* note 23, at 245-47.

206. See, e.g., Kodner, *supra* note 5, at 251.

207. See *id.* at 247-48 (collecting and reviewing sources).

208. *Id.*

experience.²⁰⁹ It bears repeating that the warning here is not that the general Japanese public is incapable or hampered in making decisions or conclusions contrary to those in power. Indeed, the seventeen percent acquittal rate for the pre-War jury and the prosecution requests in high profile cases from the Prosecutorial Review Commission prove the people's ability. Rather, the caution is to ensure that those in power are not given the opportunity to manipulate the system so that it becomes irrelevant because of obscurity or capture. Sufficient procedural protections of the deliberation process will help to prevent such manipulation.

The call for a new lay assessor system suggests that the historical mechanisms for lay participation in the Japanese judicial system have failed to deliver the dual goals of improved justice and a greater democratic society. A critical evaluation of these historical lay participation schemes suggests that they have failed because they have been marginalized to inconsequence or the layperson's role has been overtaken by legal experts. Using this lesson as a standard by which to test the likelihood of the proposed lay assessor scheme for achieving its ambitious goals suggests that the drafters have avoided some of the most obvious pitfalls and may be poised for success. Successful application of the new regime, however, will require the commitment of the government to fund the project sufficiently, the prosecutor's office to regulate an appropriate flow of cases, and the judiciary to strive for meaningful participation by the lay participants through appropriately structured deliberation procedures. Thus, contrary to the speculation of many who argue in Orientalist terms that the largest hurdle for success of the proposal will be overcoming the public's dependence and deference to authority, as so vividly shown in Nakahara's film and by the psychological data reviewed below, history suggests that the common people are the one factor that may be regarded with confidence.²¹⁰

209. See Lempert, *Citizen Participation*, *supra* note 5, at 11 (noting that, in general, "deference by the lay assessors [to professional judges] is natural and seems regularly to occur," but continuing—*erroneously in our opinion*—that "[i]n Japan, where deference to age and status is built into the culture more than in most Western societies, lay assessors would be likely to be even more influenced by professional judges' opinions than the lay participants in European mixed tribunals").

210. In this respect, the Japanese experience may prove to be like the U.S. one. See ABRAMSON, *supra* note 17, at 5 ("My own experience . . . has convinced me that jurors are smarter than assumed by lawyers. . . .").

V. INTERNATIONAL PSYCHOLOGY CONTEXT

This section shifts the focus from historical and domestic review of the lay assessor system proposal to a consideration of international empirical social psychological research. This approach is undertaken to show the broader context in which the domestic analysis reviewed above takes place. The data and norms discussed in this portion derive from studies of small-group decision-making in mixed courts and all-lay juries conducted in Europe, North America, and Japan. This analysis is introduced here because continued empirical investigation of jury systems by psychologists and socio-legal researchers will be crucial for understanding the role and results of Japan's lay assessor system and for appropriate planning, evaluation, and refinement of the system. This section is organized around the three primary issues in the debate about Japan's lay assessor system: (1) the numerical composition of the mixed court; (2) the voting rules to be used; and (3) the resulting relationship between lay and expert factions. In examining these points using some of the available international psychological research, the question whether the proposed lay assessor system can deliver the goals sought by the JRC must be asked. Although a number of concerns are noted, such as the majority voting requirement, we conclude that based on the most recent empirical psychological data, the proposed model fares well in creating a system that should improve trial decisions and contribute to a more democratic society.

A. Numerical Composition of the Mixed Court

As mentioned above in Part III, there are a number of proposals regarding the composition of the mixed court. These include (1) three judges and two or three lay assessors, (2) one or two judges and nine or eleven lay assessors, and (3) three judges and four to six lay assessors. The last two options mirror the norm in European mixed juries in which citizens form a numerical majority on the mixed court in an attempt to balance the potential for judges to gain an influential status-based majority on the court.²¹¹ Needless to say, each of these proposed compositions will have different implications when

211. Y. Ohtsubo et al., *How Can Psychology Contribute to Designing a Mixed Jury System in Japan?: Ongoing Debates and a Thought Experiment*, Paper Presented at the Fourth Conference of the Asian Association of Social Psychology, Melbourne, Austl. (July 2001), available at <http://www.nara-u.ac.jp/soc/staffs/ohtsubo/english.htm>.

combined with each of the three different proposals for majority voting rules discussed above.

Empirical evidence seems crucial for making the final decision about composition. Ohtsubo, Fujita, and Kameda (2001) conducted a relevant computer simulation that modeled the likely effect of different numerical compositions of a mixed court on final-verdict guilty rates.²¹² This approach was based on Davis' (1973) Social Decision Scheme (SDS) modeling approach²¹³ that uses the distribution of initial individual verdict preferences to predict the likelihood that a jury will return a particular final verdict. This modeling cannot, of course, predict the precise decision making dynamics of real deliberating juries; however, similar methodology has been elaborated for analysis of the progression of actual deliberations from initial verdict preferences to final collective decision.²¹⁴ In the Ohtsubo et al. (2001) simulation, the researchers used status-based weightings in a weighted majority process model²¹⁵ to reflect the assumed power and status differentials existing between the lay and expert factions within a mixed court. Modeling was done on a variety of panel combinations and with varying levels of initial agreement between panel members entered as inputs into the simulation.

The results of the modeling were surprising. The modelers found that increasing the size of the lay assessor faction does not straightforwardly²¹⁶ increase the influence of the lay assessor faction.²¹⁷ Specific examples of modeled courts composed of three judges and six, nine, or twelve lay assessors were highlighted as examples (only the three judge and six lay assessor model closely resemble the actual JRC proposals, but all of the information is nonetheless insightful). Under different model settings corresponding to the assumed influence of the judge's initial verdict preferences, it was found that increasing the size of the citizen faction from six to nine to twelve lay assessors in deliberation with three judges resulted in somewhat unexpected patterns of final verdict guilty rates.

Three examples of the complex patterns of guilty rates obtained under the different assumed conditions were as follows. First, guilty

212. *Id.*

213. James H. Davis, *Group Decision and Social Interaction: A Theory of Social Decision Schemes*, 80 *PSYCHOL. REV.* 97, 97-125 (1973).

214. See Garold Stasser & James H. Davis, *Group Decision Making and Social Influence: A Social Interaction Sequence Model*, 88 *PSYCHOL. REV.* 523, 523-51 (1981).

215. Erich Kirchler & James H. Davis, *The Influence of Member Status Differences and Task Type on Group Consensus and Member Position Change*, 51 *J. PERSONALITY & SOC. PSYCHOL.* 83, 83-91 (1986).

216. We use "straightforwardly" to mean positively and monotonically.

217. We use "influence of the lay assessor faction" to mean operationalized as a not-guilty judgment tendency.

rates were unaffected by increasing the size of the lay assessor faction from nine to twelve when judicial influence was set low and moderate initial disagreement was assumed. This was true despite a detectable change in attitude among lay assessors toward greater leniency by having six instead of nine lay assessors under these conditions. Second, a leniency influence proportional to an increase of the number of lay assessors (six to nine to twelve) was obtained when judicial influence was given a low rating and initial disagreement was set at a more acute level. Third, guilty rates were affected by lay assessors' more lenient judgment tendencies only following increases from a lay faction size of nine to twelve under conditions of high judicial decision making power and moderate or acute initial disagreement. The authors concluded from these results that increasing the number of lay assessors alone is clearly not the way to avoid undesirable levels of judicial dominance under all conditions.

From this simulation it is clear that the effect of the mixed court's composition will be altered by the level of initial disagreement (which may be chiefly uncontrollable and related to the facts of each case) and the differential impact of the judge and lay assessor factions. Differential impact may be inherent in the group relations created by mixed court procedures such as the majority voting rule chosen from Options A, B, and C outlined above. Notably, Options B (at least one judge and one lay assessor in the majority that convicts) and C (a majority of judges and at least one assessor for convictions) suggest that differential levels of decision support be required from within each of the factions. The precise effect of each proposed voting rule and composition has not been modeled as yet, although this is possible if the model settings used by Ohtsubo et al. (2001) can be adjusted to adequately capture the structural effect of the combination of proposed voting rule and court composition. This could be done by adding new rules to the models, adjusting the judgment tendencies, altering assumptions about the relative initial agreement level, and adjusting the assumed decision making power or influence weightings of each faction. It may be more difficult, however, to model accurately voting options B and C, especially because they imply different decision rules based on the type of case outcome (conviction versus acquittal). If these conditional rules can be translated into rates of likely initial verdict agreement between factions and/or relative decision making power of each faction, then SDS modeling may provide some useful estimates of each proposal's likely effect on guilty verdict rates. Ohtsubo et al. (2001) rightly conclude that without greater accuracy in the specification relevant parameters and

systemic goals, the SDS modeling approach cannot produce a recommended optimal numerical composition.²¹⁸

Of interest is the fact that Ohtsubo et al. (2001) claim to be searching for the optimal ratio of lay citizens to expert judges that would result in *equality* of decision making power. This statement raises important issues. Is the achievement of *equal* decision making power on a mixed court an appropriate goal? Would a better goal be to strike an appropriate balance between different *types* of expert and lay influence such that the citizens and judges maintain distinct but perhaps complementary decision making roles within an appropriate deliberation environment? This is different from seeking *equal* influence for both factions on all matters.²¹⁹ Ohtsubo et al. (2001) admit, as a justification for their status-weighting assumption,²²⁰ that judges and jurors will have different judgment tendencies. They make the interesting comment that if these judgment tendencies did not differ between judges and lay assessors, there would be little point in introducing lay participation in criminal trials since lay participation would add little to the process of adjudication by the judge alone.

Furthermore, these researchers remain concerned that not all results from Western empirical research on juries are applicable to the Japanese proposals. Their modified (weighted majority process) SDS models do not allow them to investigate the effect of possible cultural variables on deliberations. Therefore, more subtle evaluation tools will be needed to investigate the specific deliberation dynamics observed in Japanese mixed court deliberations and to reveal how to best manage the mutual influence of each faction upon outcome variables other than guilty verdict rates. From this research, it appears that achieving better justice and democracy via the mixed court composition requires further investigation. This is especially warranted because intuitive predictions based on increasing the size of the lay faction to achieve equality of decision making power may not directly achieve, or be the only way to achieve, the desired goals of the lay assessor system.

218. It is worth noting that systemic goals assumed by Ohtsubo et al. were a tradeoff between judicial dominance and lay assessor faction size. See *supra* note 211 and accompanying text.

219. See *infra* note 225 and accompanying text (discussing the difference between intellectual and judgmental tasks as well as between expert influence and mere coercion).

220. That is, the assigning of higher guilty decision rates for judges than lay assessors within the model.

B. Voting Rules

The Investigation Committee proposed three options for voting rules, although all contemplate a majority rather than a unanimous decision. Martin, Kaplan, and Alamo (2003)²²¹ claim that results from all-citizen jury research suggest that deliberations resulting in unanimity and deliberations resulting in a majority verdict can be remarkably similar in nature. Despite this suggestion, they do note that requiring unanimity tends to produce more hung juries. Also, jurors in these deliberations perceive the decision making process to be more satisfactory, more thorough, and fairer. Unanimous decision rules also seem to produce greater juror confidence in the collective verdicts than majority verdict rules.²²²

The fact that different decision rules produce different subjective perceptions is important in the context of managing group relations on a mixed court. Despite their drawback, unanimous voting requirements on mixed panels may avoid creating additional group tensions between expert and lay factions. Unanimity may also be a procedurally simpler option than adopting one of the three more complex majority verdict options already proposed. These majority-verdict options may reinforce status-based and expertise-based group differences inherent in mixed courts and lead to negative perceptions of process when dissenters' views can be effectively ignored. To the extent that the proposed rules may minimize the perceived relative importance of lay assessors' votes, any form of majority voting rules could be psychologically dangerous.

Furthermore, implementing procedures for judgment writing under the proposed majority-voting rules could be problematic. Procedural injustice may also be perceived by dissenters whose views are not included formally in the court's record. Whether this would decrease public enthusiasm about lay participation or on public perceptions of the legitimacy of the mixed court's work is yet to be seen. It would seem more sensible, however, for the mixed court to adopt voting procedures that encourage consensual judgments rather than requiring them to justify majority decisions (especially majority convictions) to the members of the mixed courts themselves or to the public at large. There may be psychological benefit in adopting unanimous decision rules that assume that the mixed court, although diversely constituted, could possibly reach consensus.

221. Ana M. Martin et al., *Discussion Content and Perception of Deliberation in Western European Versus American Juries*, 9(3) PSYCHOL., CRIME & LAW 247, 249 (2003).

222. *Id.* See C. Nemeth, *Interactions between Jurors as a Function of Majority vs. Unanimity Decision Rules*, 7(1) J. APPLIED SOC. PSYCHOL. 38, 54-56 (1977).

Nemeth and colleagues argue that unanimity rules increase the quality of the decision making process and the psychological rigor of deliberations.²²³ These researchers have observed that those holding minority positions in decision making groups can become useful devil's advocates who stimulate both the quality and quantity of arguments used during deliberations. Nemeth suggests that these benefits justify not only extra time and expense of deliberating to unanimity but also the associated higher risk of creating hung juries. Needless to say, a procedure for resolving hung juries is required if unanimous decision rules are adopted, especially if majority verdicts are not allowed after several unsuccessful attempts to reach unanimity are made by the mixed court. With majority voting rules, this procedural complexity is avoided but perhaps at a psychological cost. Keeping in mind these strong recommendations for unanimous verdicts in the interest of better justice and more democracy, it is interesting to note that most of the European mixed juries use a non-unanimous decision rule.²²⁴

C. *The Relationship Between Lay and Expert Factions*

It is perhaps trite to suggest that judges will exert status-based influence over lay assessors, and a number of studies suggest that deference by lay assessors tends to occur in mixed courts.²²⁵ What is more interesting from a psychological perspective is knowing when and how both professional judges *and lay citizens* may influence each other during mixed court deliberations. This more subtle understanding of the dynamics of mutual influence across a status boundary is needed if the common tensions and benefits arising from conflict and cooperation within mixed courts are to be anticipated.

223. C.J. Nemeth, *Dissent, Diversity and Juries*, in SOCIAL INFLUENCE IN SOCIAL REALITY: PROMOTING INDIVIDUAL AND SOCIAL CHANGE 23 (F. Butera & G. Mugny eds., 2001). See generally C.J. Nemeth et al., *Devil's Advocate Versus Authentic Dissent: Stimulating Quantity and Quality*, 31(6) EUR. J. SOC. PSYCHOL. 707, 707-20 (2001).

224. Martin et al., *supra* note 221, at 247.

225. See, e.g., R. Arce et al., *Empirical Assessment of the Escabinado Jury System*, 2 PSYCHOL., CRIME & LAW 175 (1996) (showing post-deliberation verdict change toward the judge's verdict by lay assessors observed in mock trial deliberations with one professional judge and five lay assessors). See also Alfonso Palmer, *Experimental Study of the Effects of Juror Composition*, 18 BOLETIN DE PSICOLOGIA 49 (1988), cited in Ana M. Martin et al., *Discussion Content and Perception of Deliberation in Western European Versus American Juries*, 9(3) PSYCHOL., CRIME & LAW 247 (2003) (noting the greater change of initial verdicts within mixed juries during deliberations by lay assessors but not by the expert judges).

1. Effect on Verdict and Perceptions of Experience

Research on the functioning of mixed courts is a relatively small part of jury literature, but some recent work provides a more detailed understanding of mutual influence processes and mutual perceptions within deliberating mixed courts. Martin, Kaplan, and Alamo (2003) provide a recent review of important European research on mixed juries. Their review reaches back to work by Brandstätter, Bleckwenn, and Kette (1984), who investigated the decision making process of mixed industrial tribunals in the then Federal Republic of Germany.²²⁶ In these tribunals, composed of two lay assessors and one professional judge, lay assessors attributed more “expert power” to the professional judge rather than to the fellow lay assessor. Most of the lay judges interviewed perceived status differences to exist and deference to occur because of the task-relevant knowledge and decision making expertise of the professional judge.

This result could be simply interpreted as coercion—an exercise of the greater social power of judges on a mixed tribunal. But it could also be interpreted as understandable deference of lay assessors to professional judges. This deference might result because judges are perceived to be professionals who can provide highly beneficial, task-relevant expertise crucial for completing the collective decision making task within a task-focused group.

To understand the nature of this influence better, Kaplan and Martin (1999)²²⁷ and Martin et al. (2003) examined and directly measured the *type* of influence perceived to be mutually exerted by lay and expert factions within mixed courts discussing their verdict and sentencing decisions. The researchers also measured lay assessors’ subjective reactions to the influence exerted within mixed court deliberations. In Kaplan and Martin’s (1999) study, two mock expert judges and three mock lay assessors deliberated in one of two types of cases involving mock violations of a university’s behavioral code.²²⁸ The first type of case utilizes “intellective” processing, involving mainly fact finding and determination of the truth of witnesses’ evidence. The second type of case, a “judgmental case,”

226. Hermann Brandstätter et al., *Decision-making of Industrial Tribunals as Described by Professional and Lay Judges*, 33 INT’L REV. APPLIED SOC. PSYCHOL. 137, 137 (1984), cited in Ana M. Martin et al., *Discussion Content and Perception of Deliberation in Western European Versus American Juries*, 9(3) PSYCHOL., CRIME & LAW 247 (2003).

227. Martin F. Kaplan & Ann Martin, *Effects of Differential Status of Group Members on Process and Outcome of Deliberation*, 2 GROUP PROCESSES & INTERGROUP RELATIONS 347 (1999).

228. *Id.* at 348.

involves mainly judgment calls and evaluative decision making requiring more appeals to normative consensus about blameworthiness and the application of discretionary legal tests.

Kaplan and Martin (1999) found that the expert judges (trained law students) influenced their mixed courts more when the case was judgmental rather than intellectual. The experts were also more active and engaged discussants in judgmental cases. It is interesting that lay assessors in these mock deliberations were more influential than experts in intellectual as opposed to judgmental cases. These results suggest that different factional members on a mixed court can have a different, and perhaps complementary, influential effect on each other during different types of decision making tasks that may arise.

Martin, Kaplan, and Alamo (2003) conducted further research using a similar experimental design where intellectual and judgmental case deliberations occurred concerning breaches of a university's behavioral code. These deliberations between expert or legally trained assessors (law students) and lay assessors (psychology students) were also compared to deliberations of all-lay juries.

Results tend to support the general findings of Kaplan and Martin (1999), although, at times, the data are not as clear or as strong as in the earlier study. Expert judges were more active discussants in judgmental cases than in intellectual cases. They were also observed to exert more normative influence than informational influence in discussions about both verdict and sentence. In deliberations over penalty, the experts were rated as making more normative statements than lay assessors in judgmental cases and more normative justifications of penalties in intellectual cases.

The distinction between "informational" and "normative" influence is somewhat controversial within social psychology and relates to the dichotomy outlined by Deutsch and Gerard (1955)²²⁹ and others since them. Social and legal psychologists typically fear "normative influence" insofar as it is a form of coercive status-based or identity-based pressure exerted to persuade someone about which social values and behaviors are appropriate in context. It is considered less pure and more illegitimate than influence caused by assessment of the quality of information and the logic or strength of the evidence alone ("informational influence").

Of interest is the fact that post-deliberation reflections from mixed court members in a study of Martin et al. (2003) differed across the experimental design, *even though verdict choices did not differ*

229. See Morton Deutsch & Harold Gerard, *A Study of Normative and Informational Social Influences upon Individual Judgements*, 51 J. ABNORMAL & SOC. PSYCHOL. 629, 629 (1955).

among various types of mixed courts or types of cases. In general, lay jurors reported greater participation in intellectual cases where they, although not the experts in these cases, perceived that more factual issues were discussed. Lay assessors also suggested that they were influenced more by experts in judgmental cases,²³⁰ which they rated as involving more deliberative tension than in intellectual cases.

It is important to note that when asked to rate the basis of the power exerted by experts in both judgmental cases and intellectual cases, lay assessors suggested that the basis of experts' influence was "relevant knowledge regarding the task" rather than any other possible basis for normative influence (to coerce, to receive reward, etc.).²³¹ In this sense, the lay assessors were suggesting again, as they perhaps did in Brandstätter et al. (1984), that this form of influence was respected and perceived to be legitimate, beneficial, and crucial to the success of the collective decision making goal of the mixed court. Relevant to this finding was that mixed juries made more statements about legal rules than all-lay juries did. Martin et al. (2003) concluded that if lay assessors perceived these contributions of experts as truly relevant expertise, rather than a form of unjustified status-based coercion, then lay assessors welcomed this deference, seeing it "more as advice and help than coercion."²³² This seems likely in light of the results from this study that suggest lay assessors perceived themselves to exert greater informational influence in intellectual cases. This meant that during at least some of these deliberations, lay assessors did not perceive that they were always deferring to the experts on the mixed court but rather had their own domain of expertise and exerted influence on those issues. Attempting to replicate these findings on actual mixed courts, or with real judges participating in mock trials, seems valuable.

From these studies it appears that deference to expert judges on task-relevant dimensions can occur in mixed juries and that lay assessors do not always find this form of influence detrimental. Anticipating the Martin et al. (2003) conclusions, Ohtsubo et al. (2001) suggested that perhaps mixed court deliberation "calls for informational influence from both judges and lay jurors regarding different matters, and equal shares of normative influence."²³³ The thrust of this statement—that each faction in mixed juries is influential at different times and for different reasons—appears true

230. This is as indexed by lay assessor perceptions that experts exerted greater pressure to get to agreement and for others to withhold their opinions, and that the experts seemed less convinced by others and influenced others more.

231. J.R.P. French & B. Raven, *The Bases of Social Power*, in *STUDIES IN SOCIAL POWER* 150, 150-67 (D. Cartwright ed., 1959) (deriving options).

232. Martin et al., *supra* note 221, at 261.

233. Ohtsubo et al., *supra* note 211, at 20.

from Kaplan and Martin's (1999) data and from the Martin et al. (2003) study. These data suggest that mutual influence may be possible across any status boundary created on mixed courts and that perhaps the "high status" judges can be influenced by the "low status" lay assessors at least some of the time.

In light of these data it may be theoretically important to stress that a *combination* of normative and informational social influences may typically be used by any person attempting to persuade. Therefore, rather than labelling influence only as "informational" or "normative," influence in contexts such as mixed courts may be better expressed as "referent informational influence."²³⁴ Turner and colleagues prefer this term because it better captures the simultaneous relevance of both social identities *and* perceived informational integrity in attempts to influence in decision making contexts, especially those structured by a desire to use a prototypical style of reasoning for the task at hand or as a way of using a prototypical style of reasoning condoned by fellow members of a shared decision making group.²³⁵ This terminology allows us to better suggest that some expert influence of lay citizens by professional judges in mixed courts falls far short of a petty tyrannical exercise of undue coercion, social pressure, and pure normative influence.

Therefore, Turner's theory of referent informational influence suggests that in a Japanese mixed court with a conscientious career judge, it will be considered appropriate for lay assessors to seek actively the guidance of experts and to incorporate the benefit of this wisdom and experience into the resulting *collective* decision making. In other words, citizens may respect and exploit the legal knowledge of experts during mixed deliberations, especially on judgmental cognitive tasks such as those involving application of the law to found facts, or the clarification of the precise legal issue or the use of a particular legal test. In many ways, this interpretation of influence within the mixed court deliberations suggests there may be more psychological support for the deliberating lay assessor than is often found in many all-citizen juries. Results from Kaplan and Martin (1999) in particular suggest that lay assessors are naturally drawn to intellectual (fact finding) tasks and can be quite influential (because of their status *and* the quality of their arguments) in collective discussions about factual interpretations, even though they need to be

234. See generally JOHN C. TURNER, SOCIAL INFLUENCE 34-47 (Tony Manstead ed., 1991).

235. John C. Turner et al., *Referent Informational Influence and Group Polarization*, 28(2) BRIT. J. SOC. PSYCHOL. 135, 137-47 (1989). See also K. Sugimoto, *Group Polarization Phenomenon in Relation to the Process of Referent Informational Influence*, 40(2) JAPANESE J. EXPERIMENTAL SOC. PSYCHOL. 137 (2001) (demonstrating these processes in the Japanese context).

influenced at times by legal experts more experienced in the challenge of judgmental tasks.

The benefit of these complementary roles would be amplified if positive evaluations of the mixed court experience and the factional relationship are obtained from lay assessors in evaluations of the lay assessor system. Such positive evaluations have been obtained from lay citizens in some mock trial work conducted in Japan by Masahiro Fujita. This program of mock mixed court trial work is ongoing and is a highly relevant source of psychological evidence about the procedural benefits and disadvantages of mixed courts in Japan. Although the exact psychology of mutual influence processes has not been analysed in this research, as in the mock mixed court research discussed above, positive subjective reports have been recorded from mock Japanese lay assessors, and these bode well for the proposed system.

In one completed study,²³⁶ Fujita empanelled 198 eligible citizens and twenty-nine judges or attorneys from Osaka. This sample was split into twenty-three mixed courts that deliberated on a fictitious case. The mock lay assessors gave post-deliberation reports suggesting that they were more optimistic about the mixed court experience *after* they had deliberated their case than they had been before the deliberation. This experience made mock lay assessors more confident that in any future mixed court deliberation they would be able to express freely their personal views. If this socialization effect were to occur as a result of lay participation in Japan's new jury system, the JRC and other supporters of the reforms would be advancing both goals of better justice and a more democratic society. Also important, Fujita took explicit measures of collectivistic orientation²³⁷ (a factor said to prevent active deliberation and increase deference to people of higher status) and social power cognition²³⁸ (a measure of the extent to which a person is likely to defer to higher status of others). Neither of these measures adversely affected expectations and subjective reports of the mock lay assessors. Also, neither of these measures affected the weight that the mock lay assessors afforded to the views of experts during deliberations. These results suggest, preliminarily, that more democracy can be achieved

236. Masahiro Fujita, *Can Japanese Citizens Play Active Roles in "Saiban-in Seido"? [Japanese New Mixed Jury System]: Survey Research with Mock Mixed Juries*, Poster Presented at the Psychology & Law International, Interdisciplinary Conference, Edinburgh (July 7-12, 2003).

237. See Susumu Yamaguchi, *Collectivism amongst the Japanese: A Perspective from the Self*, in *INDIVIDUALISM AND COLLECTIVISM: THEORY, METHOD AND APPLICATIONS* (U. Kim et al. eds., 1994).

238. Y. Imai, *The Relationship between Perceived Social Power and the Perception of Being Influenced*, 31(3) *JAPANESE PSYCHOL. RESEARCH* 97 (1989).

with mixed courts. If the relationship between factions works this well in practice, there seems to be little reason to assume that democracy and better justice via mixed courts is impossible to achieve in Japan.

2. Japanese Deference, Social Identity, and Collectivism

The results from Fujita's mock trial research are useful to keep in mind as this section briefly considers some cultural arguments commonly raised against the proposed mixed court deliberations in Japan. First, it is worth noting that *all* jury reformers in *all* countries face the difficult task of selecting the most appropriate jury trial procedure for their socio-legal culture. If the procedural choices are aptly made, then it is likely that the implementing government, parties to legal proceedings, the legal profession, the decision makers, and society as a whole will be protected from negative unintended consequences. The importance of making evidence-based procedural choices is paramount regardless of whether the proposed reforms constitute refinement of an all-lay jury system²³⁹ or an existing mixed court system, or whether reformers are suggesting the introduction of a new type of jury trial not previously used in that country (as is the case with the mixed court proposal in Japan).

Unfortunately, some criticisms of the JRC proposal have been based chiefly upon cultural arguments that at times appear to be gross stereotypes about Japanese psychology. One of the most common cultural arguments used against the lay assessor model is that most Japanese citizens will simply *and routinely* defer to the views of their high-status superiors (the judges) on a mixed court. The argument is that if the Japanese automatically defer to judges in this context, this reaction alone will eliminate any possible benefit of lay participation in justice. Unquestioning deference to authority will render the presence of the lay assessors on a mixed court redundant because of the lack of active participation, influence, and effect that the lay jury member's views will have upon the verdict and sentencing decisions made.

This skepticism voiced about proposed Japanese lay participation in justice but not, say, about German or French lay participation, seems to flow from a simplistic form of cross-cultural psychology. This approach simply suggests that all Western citizens are individualistic in social-value orientation and are robustly critical

239. See New Zealand Law Commission, *Juries in Criminal Trials*, Report No. 69 (2001), at <http://www.lawcom.govt.nz> (reviewing refinement currently being done in New Zealand based on extensive empirical research).

of authority. In contrast, Japanese citizens are said to be collectivist and psychologically dependent on authority.

We suggest that this simplistic approach deserves revision in light of recent research findings and conceptual understandings of Japanese collectivism. Also, the approach should be re-evaluated in light of the fact that the proposed legal reforms explicitly aim to socialize citizens toward a more active use of the legal system and a reduction of unquestioning deference. The simplistic belief that Japanese citizens will always defer to authority explicitly motivated Kōji Satō and the JRC to propose broad reforms of the existing legal system and legal education.²⁴⁰ In many ways, the JRC was very aware of the prevalence of this cultural criticism and believed that it was a cultural characteristic that, if true, could be changed through reform and leadership. The approach of Satō and his colleagues, then, assumes that Japanese culture and psychology is fluid and can change over time in response to external demands and legal reform. Those more pessimistic than the JRC may underestimate the potential for Japanese cultural and psychological change. The JRC and some other government officials seem to be placing their faith in the Japanese psyche and its potential for change where needed. Japan is not alone in having to consider cultural consequences²⁴¹ of the operation of any implemented jury system. Like other countries, they must accept the obligation to monitor constantly the performance of their jury system.

We encourage skeptics to revise the rather simplistic cross-cultural assumption of automatic deference. Some academic commentators²⁴² have relied problematically on dated attitudes about the Japanese psyche and social structure based on analyses from the War World II era.²⁴³ Japanese group relations and societal structure must be considered in light of more recent Japanese social psychological research into the nature of Japanese self-identity, group relations, and collectivism.²⁴⁴ Just as Fujita's work reviewed above begins to challenge the cultural skeptics' claim, more recent work by social psychologists such as Toshio Yamagishi, Masaki Yuki, and

240. See Lawson & Thornley, *supra* note 27 (providing Satō's arguments).

241. Martin et al., *supra* note 220, at 262 (recommending that more cultural variables be considered in the general research work conducted on mixed courts).

242. WORLD JURY SYSTEMS, *supra* note 31, at 353 (citing LESTER W. KISS, REVIVING THE CRIMINAL JURY IN JAPAN).

243. See, e.g., RUTH BENEDICT, THE CHRYSANTHEMUM AND THE SWORD: PATTERNS OF JAPANESE CULTURE (1946).

244. See T. Yamagishi et al., *Collectivism and In-group Bias*, 1(3) ASIAN J. SOC. PSYCHOL. 315 (1998) (providing explanations of (network) collectivism); M. Yuki, *Intergroups Comparison Versus Intragroup Relations: A Cross-Cultural Examination of Social Identity Theory in North American and East Asian Cultural Contexts*, 66(2) SOC. PSYCHOL. Q. 166, 166 (2003).

colleagues has helped to elaborate understandings of Japanese collectivism. For example, Yamagishi and colleagues' theory of "network collectivism" suggests that a complex balance is struck in the Japanese psyche between socio-relational concerns and individual cognitive traits. Further, Yuki has recently shown that although group homogeneity seems to predict group loyalty and harmonious group relations in the United States, Japanese collective behavior and group relations often result from individual perceptions of the relational structure of the group, of individual differences within the group, and interpersonal connectedness between group members. These understandings may help to evaluate critically the claims of automatic deference to authority figures as a cultural bar to adequate participation of lay assessors on Japanese mixed courts. In some sense, Yuki's work may suggest that the precise interpersonal and intragroup relations on each Japanese mixed panel as constituted may be more important for predicting active deliberation than can otherwise be predicted by the less subtle claim of universal deference to authority.

D. Optimistic Conclusions About Psychological Concerns

Our brief review of the psychological literature does not provide all the answers that Japanese reformers are seeking. Ground for optimism exists that the proposed system can at least partially achieve the JRC's goals of better justice and more democracy. Perhaps aspects of the proposed system simply need to be implemented before realistic evaluation of the actual procedures (or a pilot scheme) can be made. Further mock trial research or modeling studies may also be beneficial. In order to promote research, the Japanese government can choose to make any newly implemented system accessible to research by social psychologists who are able to evaluate the social psychological effect of the chosen procedures. The reality of this access is questionable because recent reports of proposed jury secrecy laws are not encouraging.²⁴⁵

From the analysis of the available psychological research it can be concluded that current proposals about composition are yet to be adequately tested, especially in terms of the effect that the proposed majority voting rules may have on deliberation dynamics. The simplistic notions of automatic deference to authority for either status-based or cultural reasons seem to be inaccurate understandings of the likely psychological dynamics that will be created on future Japanese mixed courts. Managing the subjective experience of both lay assessors and judges on mixed courts seems to

245. See *Reform Panel Eyes 4 to 6 Lay Judges*, *supra* note 76 .

be a challenge that is not unique to Japan, or even more difficult to achieve in Japan. More research is needed on these and other points to continue the fruitful emerging lines of research and sensitive methodologies currently available. Continuing this research agenda will not only benefit the implementation and refinement of the Japanese system, but it can provide insights to the users of mixed tribunals internationally.

Given these concerns, speculation about whether any benefit of the proposed lay participation would be less than that typically achieved in European countries could be made. Perhaps more revealing, however, is why critics of the proposed Japanese reforms have been so hasty to build criticisms upon assumptions about Japanese psychology when such cultural assumptions were not similar to the initial concerns about the use of mixed courts in European countries. If it is appropriate to consider culture-specific psychology to achieve legal reform, it is surely important that that psychology aptly describe the prevailing culture and its diversity. If not, a form of rather insensitive reform and ill-placed skepticism about legal and social reform may be thrust upon Japan. This could stymie useful reform by allowing relevant research to be regrettably ignored and overshadowed by intuitive, habitual, and inapplicable cultural assumptions.

VI. CONCLUSION

The lay assessor proposal is intended to improve Japanese justice and Japanese democratic participation. This examination of the reform from the domestic historical and international psychological contexts serves an important function in informing observers, inspiring foreign initiatives and research directions, and contributing to the debate. Before the lay assessor system can be conclusively critiqued, a number of important final decisions about procedure still need to be made. As a result of these analyses, however, optimism about the initiative is well-based. In summary, more attention should be paid to justification of the mixed court's composition, choice of voting rules, delineation of eligible cases, and provision of appeal rights so as to create the most workable and ideologically satisfactory solution. A system that provides better justice and more democracy would also need to minimize judicial dominance or coercion in deliberations (which may not be as strong as assumed in all cases), acknowledge the complementary deliberative roles of judges as well as lay assessors, and avoid effective exclusion of lay assessors that leads to capture of the institution by elites such as expert judges and the prosecutor's office. Adoption of unanimous voting rules on the mixed court may be one way of achieving these

goals. Determining the effect of any interaction between voting rules and court composition is important and could be determined by further analysis.

Well-chosen procedures can help to achieve better justice and more democracy. This is true even if it is difficult to assess the effect of the new system on efficiency and cost control in the early years of the system. The historical review provided in this Article is useful for investigating the ability of the proposed system to achieve these goals for two reasons. First, it highlights structural factors that led to the decline in popularity of the first jury system used in Japan; second, it emphasizes the extent to which other available avenues for lay participation in Japan have become captured by legal or political elites.

There are a number of comparative law issues that will arise from the eventual passage of the Japanese lay assessor system that warrant future detailed investigation. For example, it will be important to test whether the Japanese system of selecting lay assessors at random from eligible voters avoids the problem of capture by elites. A comparison with European experience may also shed light on whether active lay participation is better produced by Japan's proposed single trial term or by the European model of mixed court tenure for a number of years. Other comparisons between the procedure of European and the Japanese mixed courts could be made to further understanding of which mixed court procedures best achieve particular goals.

Monitoring of the Japanese mixed court experience will also be informative to countries such as Australia and the United Kingdom, where jury trials are waning as the sole form of lay participation in justice. Countries that use quasi-judicial mixed tribunals for administrative and specialized adjudication and decision making (e.g., mental health tribunals, social security review tribunals, probation and parole panels etc.) will benefit from more research on the psychological processes operating upon citizens and legal or other professionals. Even for countries dedicated to jury trials such as the United States, the Japanese case will provide important comparative data on issues such as the importance of unanimity versus majority voting rules, the effectiveness of small-group legal decision making, and the effect of expert or other forms of influence upon the decision making of lay citizens on mixed courts. It is hoped that these dynamics, when viewed in a comparative context, will also contribute to a better understanding of Japanese law and psychology by further questioning the use of cultural assumptions such as Japanese passivity, dependence, consensus, and deference to authority. Such comparisons all demand future research effort.

VII. ADDENDUM

On May 21, 2004, the Japanese Diet passed an act creating a lay assessor system.²⁴⁶ Passage was made possible following a compromise by the parties of the Coalition government on January 26, 2004.²⁴⁷ The new Komeito party had advocated the lawyers' position of a large lay contingent of seven people with two professional judges, while the Liberal Democratic Party had pursued the bureaucracy's position of only four lay representatives and three judges.²⁴⁸ The compromise was built on a two-track approach that would allow for smaller mixed courts in uncontested cases and larger mixed courts when the defendant challenges the allegations.

The key features of the new law include the following. First, in contested cases the panel will be composed of six lay members and three professional judges.²⁴⁹ For cases in which the defendant has confessed or does not dispute the charges, the panel will be made up of four lay persons and one professional judge.²⁵⁰ In both events, the panel will determine the verdict and sentence by a simple majority of all members, although at least one layperson and one judge must consent to the majority.²⁵¹ The proceeding will apply to defendants accused of crimes where the maximum penalty is death or indefinite imprisonment with hard labor, or where the victim dies because of an intentional criminal act.²⁵² Lay participants will be selected by lot from voter rolls; this effectively places the age minimum at twenty years of age. The law does not include a new appeal procedure; thus, the standard *kōso* appeal in which three appellate judges will be able to hear the issues of facts, as well as law, will continue. Finally, the law provides that the procedure will come into force "within five years of its publication"—viz., by May 2009.²⁵³ Needless to say, these determinations leave many questions unanswered and much area for future research.

246. Saiban in no sankā suru keiji saiban ni kan suru hōritsu [Act Regarding Lay Assessor Participation in Criminal Trials], Law No. 63 of 2004, available at <http://www.kantei.go.jp/jp/singi/sihou/hourei/saibanin.html> (n.d.) [hereinafter Lay Assessor Act].

247. *Three Judges, Six Lay Assessors Deliberation: Coalition Party Reaches Agreement on System Design*, ASAHI SHIMBUN, Jan. 27, 2004.

248. *Lay Judges Accord a Compromise*, YOMIURI SHIMBUN, Jan. 28, 2004.

249. Lay Assessor Act, *supra* note 246, art. 2(2).

250. *Id.* art. 2(3).

251. *Id.* art. 67(1)-(2). Where there is no majority for a sentencing decision, there is a means to limit the harshest option until a majority develops.

252. *Id.* art. 2(1).

253. *Id.* *supp.*, art. 1.