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Special Feature: The Future of Lay Adjudication in Korea and Japan

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Recommended Citation

Fukurai, Hiroshi and Hans, Valerie P., "Special Feature: The Future of Lay Adjudication in Korea and Japan" (2012). *Cornell Law Faculty Publications*. Paper 1092.

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YONSEI LAW JOURNAL

VOL. 3 NO. 1, MAY 2012

SPECIAL FEATURE: THE FUTURE OF LAY ADJUDICATION IN KOREA AND JAPAN

INTRODUCTION

Hiroshi Fukurai & Valerie P. Hans***

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I. INTRODUCTION

Three years after Korea introduced the jury system for the first time in its history, and two years following the Japanese introduction of a mixed court in which citizen and professional judges decide serious criminal cases, the Second East Asian Law and Society Conference was held on September 30th and October 1st, 2011 in the vibrant city of Seoul, South Korea. This Special Issue of the *Yonsei Law Journal* offers an opportunity to present work on some of the key issues that were discussed and debated at this remarkable conference. In particular, the special issue offers new research on the advent of lay

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participation in legal decision making in East Asia at a very auspicious period in time.

II. THE 2011 SECOND EAST ASIAN LAW AND SOCIETY CONFERENCE IN SEOUL, SOUTH KOREA

The international conference was jointly organized by the Law and Society Association (LSA), Collaborative Research Network on East Asian Law and Society (CRN-EALS), the Korean Society for the Sociology of Law, and Yonsei University, School of Law. The CRN-EALS was first established in 2007 under the authorization of the LSA. Since the LSA meeting in Montreal in 2008, the CRN-EALS has regularly organized many sessions at Law and Society meetings and successfully held its first East Asian Law and Society Conference in February 2010 in Hong Kong. In this second East Asian Law and Society Conference, with the theme of “Dialects and Dialectics: East Asian Dialogues in Law and Society,” more than 150 delegates came together from the U.S., Japan, China, Hong Kong, Taiwan, Sweden, Malaysia, Hong Kong, Australia, Singapore, and many other countries in the world.

The Conference began with the Welcome Remarks by Yonsei University Law Professor Jeongoh Kim and a keynote speech by Aoyama Gakuin Law School Professor Setsuo Miyazawa, followed by a total of thirty-six concurrent sessions. Presentations by these panel sessions covered a wide range of law and society topics, including the Fukushima nuclear disaster, legal professions, corporate governance, lay adjudication, gender and law, legal education, citizenship and migration, law and language, dispute resolution, constitutional review, media and internet law, criminal justice, and legal pluralism, among many others. The Conference also concluded with a Plenary Session with presentations by University of Washington Law School Dean Kellye Y. Testy, Korea University Professor Hasung Jang, and University of Wisconsin Professor John Ohnesorge. University of Pittsburg Professor Douglas Branson chaired the session, while American Bar Foundation Professor Terence Halliday and University of Sydney Professor Luke Nottage participated as discussants. The conference proceedings were also created and distributed to conference participants under the leadership of Yonsei Law Professor Chulwoo Lee.

Conference presentations and collaborative scholarly exchanges all revealed the depth of academic energy, keen interests in ongoing judicial changes and reforms, and multiplicities of scholarly research recognizing recent transformative changes and legal development in East Asia. The exchanges also provided collaborative possibilities and fertile grounds for future

sociolegal research and regionally-specific studies in East Asia.

III. LAY ADJUDICATION IN EAST ASIA: A PRIME MOMENT IN HISTORY

The timing of the conference, and of this Special Issue, could not be more significant. As we noted, in 2008, Korea introduced a jury element in its legal system,¹ and a systematic review of the jury system is scheduled to be undertaken in 2013. Likewise, Japan's mixed court will be subject to its first thorough governmental review process in 2012.² In both countries, the courts and research scholars have studied the consequences of introducing a lay element into their justice systems. Thus, it is an excellent moment to take stock. The publication of these articles devoted to the Korean and Japanese lay participation systems provide detailed insights, and should prove to be helpful in the review process. But even more fundamentally, they offer theoretical insights about the purposes and phenomenon of lay adjudication.

Japan introduced its version of lay adjudication, *Saiban-in seido* (a quasi-jury or mixed tribunal) system in 2009. Several accounts of the period of time leading up to the adoption of *Saiban-in seido* suggest that it was the product of compromise between those who wanted no change to the exclusive use of professional judges in Japanese courts and those who wanted an all-citizen jury system. Many grassroots organizations and progressive civic activists had advocated for the introduction of all-citizen jury trials for decades.³ Unlike America's or

¹ Gukminui hyeongsajaepan chamyoe gwanhan beopryul [Act for Civil Participation in Criminal Trials], Law No. 8495, June 1, 2007, art 1(1) [hereinafter the Jury Act]. An official English translation is posted at UC Santa Cruz Professor Hiroshi Fukurai's homepage, available at <http://people.ucsc.edu/~hfukurai/>. See also Jae-Hyup Lee, *Korean Jury Trial: Has the New System Brought About Changes?* 12 ASIAN-PAC. L. & POL'Y J. 58 (2010).

² Kent Anderson & Emma Saint, *Japan's Quasi-Jury (Saiban-in Law): An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials*, 6 ASIAN-PAC. L. & POL'Y J. 283 (2004) (citing Article 8 "Where additional investigation into the status of the law's implementation is recognized as necessary three years after the law comes into effect, ... the Government will create the necessary measures ... [in order to] facilitate the people's participation in justice to realize adequately its role").

³ See generally Hiroshi Fukurai, *The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT'L L. J. 315 (2007). The most prominent grassroots organization that has been opposing the *Saiban-in* system and promoting the re-introduction of Japan's all-citizen jury system is called "Baishin Seido o Fukkatsusuru Kai [The Organization to Resurrect the Jury System]." The organization has its own radio program every Sunday to educate the public about many problems of the mixed tribunal system and promote the reintroduction of the jury system. Its main homepage is: <http://baishin.blog.fc2.com/> (last visited Apr. 19, 2012). Another prominent organization that began to question the merit of the mixed tribunal system is called "Baishin Saiban

Korea's all-citizen jury, the *Saiban-in* panel consists of three professional and six citizen judges. Deliberative participation of bureaucratic judges, however, has worried many progressive activists who warned that professional judges would dominate lay judges in deliberation and verdict.⁴ Examining the conviction rates in Japanese trials with and without lay participation is instructive. Japan had a previous brief foray into the world of juries. During fifteen years of jury operation from 1928 to 1943, Japan's all-citizen jury acquitted defendants in 81 out of 484 cases (17% acquittal rate).⁵ Prior to the introduction of the *Saiban-in* trial, when only professional judges decided case outcomes, Japan's professional judges convicted 99.9% of all indicted suspects in criminal matters, leading one scholar to call Japan a "prosecutor's paradise."⁶

What has happened since lay citizens have joined professional judges to decide serious criminal cases? Recent research on Japan's mixed tribunal system has suggested the strong influence of professional judges on the deliberation and verdict.⁷ As results, Japan's mixed court system continues to exhibit a near perfect conviction rate (99.9%). Mixed panels convicted nearly all defendants indicted by Japanese prosecutors since its introduction in 2009.⁸

The polarity of verdict patterns between Japan's pre-war jury trial and today's mixed panel suggests that the absence of professional judges in the deliberative process likely benefits the defendant, while professional judges' participation in deliberation tends to go against the interests of the defendant. As Hans observes, citizen participation in the administration of justice seems to protect against certain professional tendencies in a government's judiciary.⁹ For example, Japanese judges appear to be influenced by confession evidence extracted under physical and psychological duress or even torture while in police or prosecutors' custody.¹⁰

o Kangaeru Kai [Research Group on Jury Trial]."

⁴ TAKEO ISHIMATSU, KOKEN TSUCHIYA & CHIHIRO ISA, ENZAI O UMU SAIBANIN SEIDO [A QUASI-JURY SYSTEM THAT LEADS TO WRONGFUL CONVICTIONS] (2007); CHIHIRO ISA, *SAIBAN-IN SEIDO WA KEIJI SAIBAN O KAERUKA* [DOES THE QUASI-JURY SYSTEM CHANGE CRIMINAL TRIALS?] (2006).

⁵ See generally CHIHIRO SAEKI, BAISHIN SAIBAN NO FUKKATSU [THE RESURRECTION OF JURY TRIALS] (1996).

⁶ DAVID T. JOHNSON, *THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN* 215 (2002) (citing numerous sources to substantiate Japan's near perfect conviction rates).

⁷ See generally Makoto Ibusuki, "Quo Vadis?" *First Year Inspection to Japanese Mixed Jury Trial*, 12 *ASIAN-PAC. L. & POL'Y J.* 24 (2010).

⁸ *Id.*

⁹ Valerie P. Hans, *What Difference Does a Jury Make?* YONSEI L.J. (this issue)

¹⁰ TAKASHI MARUTA, BAISHIN SAIBAN O KANGAERU [RESEARCH ON JURY TRIALS] 11-4 (1991); Hiroshi Fukurai & Kaoru Kurosawa, *Impact of the Popular Legal Participation on Forced*

The less than 0.1% acquittal rate in Japan stands in contrast to Korea's 8.8% acquittal rate in the first two years of its jury system.¹¹ As Han and Park observe in their article, in the current Act authorizing jury determinations of serious criminal cases in Korea, the verdict of the jury is advisory and does not bind the judge, who reaches an independent verdict after hearing the jury's decision.¹² In addition, if jurors cannot agree unanimously on a decision, the judge may consult with them. However, in contrast with the Japanese system, there is at least an opportunity for independent decision making on the part of the lay citizens. Although the acquittal rate in Korean jury trials is not as large as in common law countries with fully independent juries that reach binding decisions, it exceeds that of Japan.¹³

The jury system is a political institution. The advent of lay participation in legal decision in the countries of Korea and Japan has an interesting political twist. In each country, there is now an opportunity for citizen judgments in criminal cases involving foreign military personnel. Korea and Japan hold two of the largest U.S. military bases in the world. Japan serves as a strategic home to the U.S. Third Marine Division, the U.S. Seventh Fleet, and the U.S. Forces Japan. More than 48,000 active military personnel are stationed at one-hundred-eight U.S. military bases that have been strategically established throughout the Japanese islands, including Okinawa.¹⁴ Additionally, 45,000 American dependents and 27,000 civilian employees of the Department of Defense also live inside or near the military bases. Korea also serves as a home to the Eight U.S. Army Division, the U.S. Air Forces Korea, and the U.S. Naval Forces Korea, with nearly 30,000 military personnel strategically placed at

Confessions and Wrongful Convictions in Japan's Bureaucratic Courtroom: A Cross-National Analysis in the U.S. and Japan, 7 US-CHINA L. R. 3-7 (2010) (citing numerous causes of Japan's wrongful convictions, including the use of substitute prisons, limited access to defense council, physical and psychological torture and violence to obtain forced confessions, Japanese judges' uncritical attitudes toward the use of confession documents, and the absence of pre-trial release of the accused and the lack of Miranda rights in criminal process).

¹¹ Jae-Hyup Lee, *Korean Jury Trial: Has the New System Brought About Changes?* 12 ASIAN-PAC. L. & POL'Y J. 58-64 (2010) ("In a majority of cases (91.2%), the jury found the defendants guilty").

¹² Sang Hoon Han & Kwang Bai Park, *Citizen Participation in Criminal Trials of Korea*, YONSEI L.J. (this issue).

¹³ Neil Vidmar, Sara Sun Beale, Mary Rose & Laura F. Donnelly, *Should We Rush to Reform the Criminal Jury? Consider Conviction Rate Data*, 80 JUDICATURE 286 (1997) (finding federal and state conviction rates over a period of 50 years ranged from a low of about 60% to a high of 85%).

¹⁴ See U.S. Dep't of Defense, *Base Structure Report Fiscal Year 2011 Baseline: A summary of DoD's Real Property Inventory 7* [hereinafter *Base Structure*], available at <http://www.acq.osd.mil/ie/download/bsr/bsr2011baseline.pdf>. See also U.S. Dep't of Defense, *Active Duty Military Personnel Strength by Regional Area and by Country 3*, Mar. 31, 2011, available at <http://www.globalsecurity.org/military/library/report/2011/hst1103.pdf>. See also CHALMERS JOHNSON, *NEMESIS* 178 (2008) (using various governmental data, Johnson stated that "the United States had stationed some 36,365 uniformed military personnel in Japan, not counting 11,887 sailors attached to the Seventh Fleet at its bases at Yokosuka (Kanagawa Prefecture) and Sasebo (Nagasaki Prefecture)").

eighty-two U.S. armed forces bases on the Korean Peninsula.¹⁵ A similar number of military dependents and civic employees also reside inside or near military bases, airfields, and other military facilities.

These American military bases generate wide employment opportunities for local residents and help support many commercial industries and business establishments in nearby communities.¹⁶ At the same time, local residents who live near military bases have, over the years, experienced criminal victimization by foreign soldiers, their families, and civic military employees. Incidents have included bar fights, drug violations, rapes, murders, muggings, robberies, criminal trespass, abductions, arsons, and hit-and-run accidents.¹⁷ Research has also documented the fact that the U.S. military presence spurred the creation of sex industries and the establishment of many brothels outside military bases in Korea, Okinawa, Vietnam, Thailand, and the Philippines.¹⁸

The Status of Forces Agreements that the U.S. government signed with Korea and Japan have so far successfully shielded many American soldiers, their dependents, and civic employees from local prosecution in the courts. Instead, the crimes have typically been processed in U.S. military courts. However, Korean and Japanese citizens observe what appear to be only limited consequences for wrongdoing. Between 1998 and 2004 in Japan, for instance, the U.S. government processed 2,024 crimes and accidents through its military justice system.¹⁹ Only one case led to a court-marshal; commanders ordered “administrative discipline” in 318 instances, and other remaining 1,700 instances went unpunished.²⁰ Local governments and many grassroots organizations have demanded renegotiation of the Status of Forces Agreements in order to secure the right to exercise primary jurisdiction over crimes committed by foreign troops and their families in local communities.²¹ Recent judicial reforms in Korea and Japan, nonetheless, have begun to challenge the status quo. Local

¹⁵Base Structure, *supra* note 14. See U.S. Dep’t of Defense, Briefing by Defense Secretary Gates and Minister of National Defense Lee Sang-Hee from the Pentagon Briefing Room, Arlington, VA, Oct. 17, 2008, available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4306>.

¹⁶ Johnson, *supra* note 14, at 178.

¹⁷ *Id.*, at 179-90.

¹⁸ Isabelle Talleyrand, *Military Prostitution: How the Authorities Worldwide Aid and Abet International Trafficking in Women*, 27 SYRACUSE J. INT’L L. & COM. 152-54, 160 (2000); U.S. Dep’t of State, Trafficking in Persons Report 99 (2004).

¹⁹ *Only the Removal of U.S. Bases Can Ensure the End of U.S. Military Crimes*, JAPAN PRESS WEEKLY, June 18, 2005.

²⁰ *Id.*

²¹ Park Si-soo, *Seoul Poised to Seek Revision of SOFA*, KOREA TIMES, Oct. 11, 2011, available at http://www.koreatimes.co.kr/www/news/nation/2011/10/116_96475.html; *New Organ Eyed for Revision of Accord on U.S. Military in Japan*, DAILY MAINICHI, Apr. 2, 2012, available at <http://mainichi.jp/english/english/newsselect/news/20120402p2g00m0dm036000c.html>.

residents who have long been victimized by military felons now are being given the opportunity to adjudicate illegal activities and unethical conduct of military personnel who live in their communities.

In Japan, in May of 2010, a mixed court tried an American soldier, convicting and sentencing a nineteen-year-old U.S. serviceman to three to four years in a Japanese prison.²² The trial became the first ever lay adjudication of American military crimes in Japan. In December 2010, another American soldier was tried in Okinawa for illegal entry and sexual assault.²³ He too was convicted, and sentenced to three years and six months in Japanese prison.²⁴

Still, today, not a single U.S. soldier has been tried by the Korean jury, mainly due to the Korean Jury Law requirement that the consent of the defendant is needed for jury trial.²⁵ Such a requirement *de facto* has prevented lay adjudication of military felons in Korea. When Korea's jury system is reviewed in 2013, there will be an opportunity to examine and modify various aspects of jury trial proceedings, including the possible elimination of the defendant's consent requirement. That would enable lay adjudication of crimes committed by American military personnel in Korea.

These beginnings of lay adjudication of military crimes carry an important symbolic meaning to the citizenry, and deserve to be carefully monitored. While the demands to end the U.S. military occupation or renegotiate the Status of Forces Agreements will continue, citizens of Korea and Japan may learn some important lessons from each other's experience about the political significance of citizen legal participation in military cases. It offers a way of asserting some measure of independence and sovereignty.

And speaking of independence, both Korea and Japan lay participation reforms offer fascinating insights about how best to structure legal decision making by citizens to ensure full engagement and power for lay decision makers. Undoubtedly, as they undertake their systematic reviews of the two systems, policymakers in Japan will want to consider whether lay judges are able to play significant roles in the mixed court. We expect some lawyers to advocate for various procedural and other mechanisms in order to promote lay voices, or to

²² See generally Hiroshi Fukurai, *People's Panel v. Imperial Hegemony: Japan's Twin Lay Justice Systems and the Future of American Military Bases in Japan and South Korea*, 12 ASIAN-PAC. L. & POL'Y J. 95 (2010).

²³ *Kyosei Waisetsu Chisho Beihei no Koso Kikyaku [Denial of Appeal Made by American Soldier Convicted of Sexual Assault]*, OKINAWA TIMES, May 11, 2011.

²⁴ *Id.*

²⁵ The Jury Act, art. 36 (1) ("when a defendant manifests that he/she desires a participatory trial, [a presiding judge shall] commence preparatory proceedings").

modify Japan's professional judges' influence over lay participants. Of course, effective antidotes might be to reinstitute Japan's Jury Act, which was suspended by the military government in 1943, or to introduce the modern version of all-citizen jury trial. The Venezuelan government introduced both the all-citizen jury and mixed court systems in 1999.²⁶ Japan can certainly duplicate such an effort. Meanwhile, progressive grassroots organizations and civic groups continue to educate the public on the benefit of all-citizen jury trials, while mounting the political pressure on the Japanese government to consider the introduction of the modern jury system.²⁷

IV. ARTICLES IN THE SPECIAL ISSUE

The five articles in this Special Issue of *Yonsei Law Journal* provide a sampling of key issues and questions raised at the conference.

Professor Valerie Hans takes up the important question: What difference does it make to include a lay fact finder in a legal system? Her article identifies the fact finding differences that theorists predict will distinguish lay and professional judges. Professional judges have an obvious advantage over lay judges in their legal knowledge and experience. But lay fact finders represent a broader range of the public and are able to incorporate their insights based on closer understanding of community norms of justice and fairness. Hans draws on empirical research to illustrate the strong overlap in case outcomes for professional and lay judges. When they do not overlap, lay judges tend to be more lenient toward defendants in their judgments of culpability and punishment.

In an informative piece, Professor Sang Hoon Han and Professor Kwangbai Park provide a detailed look at the first four years of the advisory jury experiment in Korea. One key feature of the Korean jury trial is that it depends on the defendant's consent. This has clearly reduced the proportion of cases heard by juries. For example, defendants requested that their cases be tried by juries in just 6.8% of eligible felony cases. A substantial number of these initial requests were subsequently withdrawn or were rejected for various reasons by the courts, so that ultimately defendants had their cases heard by juries in only 2.9% of eligible felony trials. However, Han and Park show that the number of requests has steadily

²⁶ STEPHEN THAMAN, STRAFPROZESSRECHT UND MENSCHENRECHTE: FESTSCHRIFT FÜR STEFAN TRECHSEL 765-79 (Andreas Donatsch et al., eds., 2002).

²⁷ See Fukurai, *supra* note 3.

increased over the four year period. Other statistics, concerning the jury selection process, the length of the trial and the jury deliberation, and the fate of jury trial outcomes at the appellate level provide very useful information about how the new jury system is operating. As with other analyses showing strong overlap between the professional judges and lay jurors in their case judgments,²⁸ these data will be invaluable as Korean policymakers consider whether to modify features of the advisory jury system, including the requirement for the defendant's consent.

Professors Hiroshi Fukurai and Sunsul Park's paper makes two important suggestions for Korea's lay adjudication systems: (1) a possible introduction of Japan's Prosecution Review Commissions (PRC) as Korea's new grand jury system; and (2) an elimination of defendants' consent required for jury trial, thereby allowing the lay adjudication of American military personnel. Recent sex and bribery scandals of Korean prosecutors forced the Korean government to examine the possible introduction of a grand jury system in order to institute the effective oversight of Korean prosecutors and criminal justice officers. Fukurai and Park first examine the U.S. grand jury system in which the civic panel is asked to make a decision to indict the accused. Under Japan's PRC system, the citizen panel is asked to examine and review the appropriateness of the prosecutor's failure to bring an indictment against the accused. Fukurai and Park suggest that Japan's PRC may be better positioned with an ability to critically evaluate the decision-making process in the prosecutor's office. The PRC is also empowered to examine and possibly reverse Korean prosecutors' non-indictment decisions involving U.S. military personnel. The article concludes that lay adjudication of military felons further strengthens the sense of geopolitical independence and sovereignty in Korea.

The article by Professor Mami Okawara presents a forensic linguistic analysis of a Japanese criminal case of complicity in a lay adjudication trial. After the introduction of the *Saiban-in* system in 2009, a mixed panel of professional and citizen judges presided over serious and violent criminal cases, including a complicity case where multiple accomplices were implicated in the same crime. Though different citizen judges were chosen for the trial of each accomplice in the complicity case, the professional judges presided over all trials of accomplices in the identical case. Using the court transcript, Okawara's article analyzes the danger of having the same professional judges in all the trials, thereby questioning the objective and impartial application of their judgment in each of complicity trials. The paper

²⁸ Sangjoon Kim, Jaihyun Park, Kwangbai Park & Jin-Sup Eom, *The First Three Years of the Korean Jury System: Judge-Jury Agreement in Criminal Cases*, 12 J. EMPIRICAL LEGAL STUD. (forthcoming 2013).

also analyzes the danger of excessive prosecutorial coaching of accomplices to serve as prosecution witnesses, and questions the authenticity of their testimony and statements. Professor Okawara recommends that lay judges be informed of professional judges' potential involvement in other complicity cases and the extent of prosecutors' contact and preparation of testimony by their witnesses.

Professor Mari Hirayama examines all sex crimes adjudicated by the *Saiban-in* panels for the first two years of its operation (n=208). She warns that not all sex crimes were tried by the *Saiban-in* panel. Many sex offenses such as indecent assault or grouping were placed outside the scope of the *Saiban-in* trial.²⁹ Nonetheless, her analysis finds that the severity of punishment rendered in sex crime trials was greater than the punishment in other criminal trials. She points out that lay judges' sentences exceeded prosecutors' recommended punishment in some sex crime cases. While many crime victims participated in sex crime trials, Professor Hirayama suggests that more research is needed on the effective use of victim participation programs in order to protect victims' privacy and facilitate the equitable proceeding of sex crime trials in Japan.

V. CONCLUSION

Today South Korea and Japan are major economic and political partners in East Asia. Research concerning the system of lay adjudication in Korea and Japan carries important theoretical and practical implications for how best to include lay citizens in legal decision making. In addition, there are important political dimensions to the reform. The recent introduction of lay participation systems in both Korea and Japan have created the potential for local residents to serve as lay judges to try military felons in their local courts, thereby creating an effective institution of checks-and-balances between the U.S. military forces and the local citizenry.

The Second East Asian Law and Society Conference, at which many papers in this Special Issue were discussed and presented, is thus a testimonial to the emergence of exciting scholarship and international collaboration among progressive researchers and critical scholars to engage in comparative and creative analysis and studies on the system of lay

²⁹ JAPANESE MINISTRY OF JUSTICE, WHITE PAPER ON CRIME 2008, Part 6, Section 2 (1) (Section 2: *Saiban-in* (Lay Judge) System) (2009), available at http://hakusyo1.moj.go.jp/en/57/nfm/n_57_2_6_0_2_1.html.

adjudication. Exciting research is emerging to answer a number of politically relevant research questions on the role and function of citizen participation in legal decision-making. The articles in this Special Issue thus illustrate the new and incisive ways in which comparative research and collaborative scholarship can inform domestic and international policies and democratic processes in Korea, Japan, and other neighboring countries in East Asia.