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BOOK REVIEW

PROSPECTS FOR CITIZEN PARTICIPATION IN CRIMINAL TRIALS IN JAPAN

SAIBAN'IN SEIDO [THE LAY JUDGE SYSTEM]. By Takashi Maruta.
Tokyo: Heibonsha. 2004. ¥ 720.

*Reviewed by Colin P.A. Jones**

Judges in Japanese courts were all children of the same type of high-income parents, all studied at the same leading high schools, went to the same bar exam preparatory schools, graduated from the same universities, studied at the same [legal] training institute and, without ever experiencing any other profession, spend most of their lives in court with colleagues who all share the same mode of thinking.¹

With this one sentence, Kansei Gakuin Daigaku Law School's Professor Takashi Maruta captures two of the fundamental problems facing the Japanese judiciary—its elitism and its isolation from the rest of society. The Japanese are, of course, aware of this problem, as is evidenced by various popular books describing problems with the judiciary.² Individual judges are also cognizant of the need to obtain greater acceptance of their role in society.³ Compared to many western countries, the judiciary in Japan

* Associate Professor, Doshisha University Law School. A.B. (U.C. Berkeley) 1986; LL.M. (Tohoku University) 1990; J.D./LL.M. (Duke University School of Law) 1993. Admitted to the bars of New York (1994) and Guam (2004). The book reviewed here is a non-academic work intended for the general Japanese reader. The reviewer intends, through a series of such reviews, to give western readers some insights into the way the legal system in Japan is explained to and understood by the general public in that country.

¹ TAKASHI MARUTA, SAIBAN'IN SEIDO [THE LAY JUDGE SYSTEM] 43 (2004). All translations from the Japanese are by the reviewer unless otherwise noted.

² See, e.g., MIKA YANAGIHARA, ET AL., SAIBANKAN WO SHINJIRU NA [Don't Trust Judges] (Takarajimasha bunko) (2001); HIROSHI YAMAGUCHI & TAKAHIKO SOEJIMA, SAIBAN NO HIMITSU [THE SECRET OF TRIALS] (1997); YOMIURI SHINBUN SHAKAIBU, DOKYUMENTO SAIBANKAN [JUDGES: THE INSIDE STORY] (2004) [hereinafter JUDGES: THE INSIDE STORY].

³ For example, a number of judges are quoted expressing their awareness of their perceived separation from the rest of society, and the need to gain social acceptance of their activities. JUDGES: THE INSIDE STORY, *supra* note 2, at 76, 79, 183, 220, 223, 228; see also Yoshinori Asami, *Shiho ni okeru kisei kanwa to wa [What judicial deregulation means]*, in SAIBANKAN WA UTTERU [JUDGES MAKE AN APPEAL!]

is a relatively weak branch of government and convincing people to accept its authority is, paradoxically, one of the principal means through which such authority is maintained.⁴

Japan experimented with a criminal jury system in the pre-war period,⁵ but this was replaced after World War II with the current system, where defendants are generally tried by three person panels of career judges.⁶ Over 99% of defendants appearing before such tribunals are found guilty.⁷ Such statistics suggest that criminal trials in Japan are highly predictable affairs, but also suggest a dark side to the way crimes are investigated and prosecuted. Indeed, *enzai jiken*—wrongful convictions—and the way in which they are generated are a staple of Japanese writing on the criminal justice system.⁸ If nothing else, Japan's high conviction rate suggests the degree to which the court system is, in many ways, just another Japanese bureaucracy. It is a highly trained and specialized one, of course,

249 (Nihon Saibankan Nettowāku ed., 1998) (essay by a judge which starts out with the common perception of courts in Japan as being scary, difficult to approach, a world above the clouds, etc.).

⁴ See, e.g., JOHN O. HALEY, *AUTHORITY WITHOUT POWER* 118 (1991). (“As in other civil law systems, Japanese courts do not enjoy the broad equitable powers of common law courts to fashion remedies, nor do they exercise contempt powers.... No means of coercion to enforce compliance with judicial orders exists.”) Yamaguchi (a practicing lawyer) and Soejima (a journalist) go so far as to refer to trials in Japan as “a ceremony for the maintenance of a social illusion.” YAMAGUCHI & SOEJIMA, *supra* note 2, at 94. As an indication of the ease with which the court's authority can be flaunted by recalcitrant litigants, their chapter on enforcement of civil judgments is entitled, “So You Finally Got a Judgment! But the Judgment is Only Good for Wiping Your Ass.” *Id.* at 45-74. As will be discussed below, from a statistical point of view, Japanese judges arguably do not even have the power to set free defendants arrested and prosecuted for crimes, even where the evidence against them is inadequate. See, e.g., Charles Scanlon, *Japan Considers Jury System*, BBC News World Edition (Mar. 12, 2003), available at <http://news.bbc.co.uk/2/hi/asia-pacific/2844185.stm> (“Japanese courts have a conviction rate of 99.9%. They hear about a million cases each year, but barely 50 people are acquitted.”). The way this works in practice is illustrated by a recent case from Northern Japan of a man accused of murdering a retired dentist and stealing her money. While the Aomori District Court found him guilty of stealing the money, he was found innocent of the murder charge based on the absence of any significant evidence. The Sendai High court overturned the acquittal and found him guilty of murder also, citing the defendant's destruction of evidence as the reason for the lack thereof. See *Sendai Court Overturns Not Guilty Verdict in Murder Case*, JAPAN TODAY, Apr. 19, 2005; *Aomori no Gōtō Satsu ni Gyakuten Yūzai* [Reversal Guilty Verdict in Aomori Murder-Robbery], TŌNIPPŌ (Apr. 19, 2005), http://www.toonippo.co.jp/news_too/intro2005/0419/nto0419_14.asp.

⁵ MARUTA, *supra* note 1, at 59-62; see also DAVID T. JOHNSON, *THE JAPANESE WAY OF JUSTICE* 42-43 (2002).

⁶ See, e.g., JOHN O. HALEY, *THE SPIRIT OF JAPANESE LAW* 95 (1998).

⁷ Maruta gives a conviction rate of 99.9%. MARUTA, *supra* note 1, at 11. The Supreme Court of Japan's *Annual Report of Judicial Statistics for 2003—Volume 2 Criminal Cases* gives a national total of 78,364 convictions (*yūzai*) against 67 acquittals (*muzaï*) (together with a total of slightly under 2,000 other dispositions). As noted by Haley, since Japan does not have a plea system, the statistics include defendants who have admitted their guilt but still need to be formally found guilty by the court. This means that the conviction rate for defendants whose guilt is at issue is lower, but is still put by Haley at close to 90%. HALEY, *supra* note 4, at 128.

⁸ See, e.g., TOSHIKI ODANAKA, *ENZAI WA KŌSHITE TSUKURARERU* [THIS IS HOW WRONGFUL CONVICTIONS ARE MADE] (1993).

but nonetheless a bureaucracy that is focused on preserving its own authority by justifying the status quo generated by government acts, whether by prosecutors or otherwise.⁹ As part of a bureaucracy, individual judges actually have little autonomy.¹⁰

In 2002, against a background of anti-bureaucratic *kisei kanwa* (deregulation), Japan's Diet passed legislation to implement a system of citizen participation in serious criminal trials.¹¹ This "lay judge" system (*saiban'in seido*) is scheduled to start operating in 2009 and is explained succinctly and with great insight by Professor Maruta in his short book on the subject.

The new system reflects the view by at least some of Japan's leaders that Japanese people need to cease relying passively on a (hopefully) benevolent and paternalistic government and instead be encouraged to take a more active role in the development of society.¹² The legal system in particular has traditionally been regarded by the average Japanese person as the frightening and exclusive domain of judges, prosecutors, and lawyers—a domain which good upstanding citizens should have nothing to do with.¹³ However, as Professor Maruta indicates, the new "lay judge" system that ultimately resulted from the Japanese legislative process is clearly designed to minimize any real impact that the citizen participants might have on the

⁹ See HALEY, *supra* note 6, at 93. Japan's *kensatsu* or *kenji* are sometimes translated as "procurator," but since this term is likely unfamiliar to U.S. readers, I have used the term "prosecutor" throughout.

¹⁰ Although technically only bound by their good conscience and the constitution, Japanese judges are subject to reappointment every ten years, and reassignment to new courts and new geographical locations even more frequently. Denials of reappointment have been rare, but the threat of doing so together with the frequent reassignments have been used by the Supreme Court of Japan ("SCJ") to ensure that judges manage their case loads efficiently, do not issue opinions that deviate significantly from SCJ precedents, and (as asserted by some) to control the ideology of individual judges. See, e.g., Jirō Nomura, *Nihon no Saibankan [Judges in Japan]* 56-60 (1992); Percy Luney Jr., *The Judiciary: Its Organization and Status in the Parliamentary System*, 53 L. & Contemporary Probs. 135 (1990). *Judges: The Inside Story* includes a brief vignette of a judge who believes his career has been sidelined for having expressed the view that judges should be elected when young. JUDGES: THE INSIDE STORY, *supra* note 2, at 226-227; see also TOSHIKI ODAKA, ET AL., *Jiyū no nai Nihon no Saibankan [Japanese Judges Who Have No Freedom]* (1998) (regarding the limited autonomy of judges). But see HALEY, *supra* note 6, at 106-108 (regarding the continuing autonomy of the judiciary as a whole).

¹¹ *Saiban'in no Sanka Suru Keijisaiban ni Kansuru Hōritsu* [Law Regarding the Criminal Trials in Which Lay Judges Shall Participate], Law No. 63 of 2002 [hereinafter Law].

¹² MARUTA, *supra* note 1, at 50-51 (quoting from an opinion paper issued by the Legal System Reform Committee (*Shihō Seido Kaikaku Shingikai*)); see also Setsuo Miyazawa, *The Politics of Judicial Reform in Japan: The Rule of Law at Last?*, 2 ASIAN-PACIFIC LAW & POL. J. 89 (2001).

¹³ On June 24, 2005 the reviewer attended a symposium on legal system reform in Osaka where this was a common theme expressed by panelists representing the judiciary, the media and the public in general. One of the handouts at this panel was a hand-drawn picture reflecting a representative "average citizen's" view of the courts: two frowning lawyers in suits guarding a ladder that went up to a cloud. On the cloud stood three *oni* (devils) with clubs (i.e., the judges).

outcome of trials. The system retains the three career judges and adds six “lay judges”¹⁴ to create a nine person tribunal.¹⁵ However, cases where key facts are not at issue (e.g., where the defendant has confessed, and only sentencing remains) may be heard by a tribunal consisting of one career and four lay judges.¹⁶ Verdicts and other decisions of the tribunal are reached through a majority, but a majority that must reflect the opinion of at least one judge.¹⁷ Since the three judges in a full tribunal can be expected to vote as a bloc in almost all cases,¹⁸ only two citizen participants need to vote with them a for a guilty verdict to issue (or one of “innocent” (*muzai*), though this will probably continue to be rare, even under the new system). Thus, the real goal seems to be limited to creating the *appearance* of civic participation by having lay judges ratify decisions that are still largely controlled by the judiciary.¹⁹

There is nothing inevitably “Japanese” about this new system. As Maruta points out, numerous public forums were held prior to the relevant legislation being drafted, and numerous attending citizens expressed a desire that a jury-like system be introduced. A quote from a Japanese high school student at one of these forums is telling: “I think a trial by twelve socially conscious citizens would be better than the trials now by judges who are used to guilty verdicts.”²⁰ Despite such public sentiments, however, the Supreme Court of Japan (“SCJ”)²¹ announced its virulent opposition to any jury-like system, relying on almost mendacious interpretations of published research on jury trials in the United States to conclude that juries frequently reached the wrong conclusions.²² Indeed, despite having been traditionally

¹⁴ Some commentators use the term “juror” to refer to *saiban’in*. Since a great deal of Professor Maruta’s book involves comparisons of the present system to a U.S. style jury system, I have used the term “lay judge” to avoid confusion when comparing them to jurors..

¹⁵ MARUTA, *supra* note 1, at 133; *see also* Law, *supra* note 11, art. 2-2.

¹⁶ Law, *supra* note 11, art. 2-3.

¹⁷ *Id.* art. 67-1.

¹⁸ As Maruta notes, even the Supreme Court of Japan, which has 15 members and is designed to ensure it includes members chosen from outside the judiciary, has issued unanimous opinions in approximately 95% of the cases it has heard in recent decades. MARUTA, *supra* note 1, at 117; *see also supra* note 10 (regarding the limited autonomy of judges).

¹⁹ MARUTA, *supra* note 1, at 119 (noting that one of the problems that would have been be confronted by the criminal justice system if a U.S.-style jury system had been introduced would be maintaining the 99.9% conviction rate).

²⁰ *Id.* at 89.

²¹ When discussing the SCJ, it is important to bear in mind that the term refers both to the fifteen justice court, but also to its secretariat and other organs (some of which are staffed by judges), which in effect comprise the administrative body of the entire judiciary. *See, e.g.*, NOMURA, *supra* note 10, at 179-186 (regarding the role of the SCJ secretariat). In particular, Nomura notes that many of the judges holding key roles in the SCJ bureaucracy have little actual trial experience. *Id.* at 182.

²² MARUTA, *supra* note 1, at 81-83. The studies cited by the SCJ included: ROSKILL COMMITTEE ON FRAUD TRIALS, IMPROVING THE PRESENTATION OF INFORMATION TO JURIES IN FRAUD TRIALS (1986); J.

reluctant to find any government conduct unconstitutional, the SCJ actually argued that a jury system might violate the constitution by infringing upon the role of the judicial branch.²³ It even went so far as to lobby the leading political party to ensure that the legislative branch did not allow the efforts to introduce a jury system to succeed.²⁴

Many of the arguments that the SCJ and other opponents of the jury system made focused on the burdens such a system would impose on others—the burden on the average citizen, the cost to the national budget, the need to amend numerous other laws, and so forth.²⁵ Ultimately, these would only be secondary to a greater, vaguely convincing, but poorly definable argument: that the jury system “did not fit the Japanese character.”²⁶ Maruta does a skilful job of disassembling the cultural argument behind this line of reasoning. He cites both the stereotypical version of Takeo Kawashima’s view of Japanese legal consciousness—that Japanese have no consciousness of rights or contract and prefer amicable settlement to conflict resolution—as well as John Haley’s refutation of the myths underlying the cultural explanations of the Japanese legal system.²⁷

Maruta is clearly in the Haley camp and notes that the cultural stereotyping of the Japanese view of law perfectly suits the needs of those in power—the corporate and bureaucratic elites.²⁸ He further explains that the cultural arguments against the adoption of a jury system could be divided into two conflicting types, both of which involved essentially negative characterizations of the Japanese people. The first line of argument is traditional: Japanese people are used to being judged by their “superiors” rather than their peers; they are emotional, and they prefer harmony to conflict and vagueness to clear decisions one way or the other.²⁹ Accordingly, the jury system is unsuited to them and could in fact lead to results “contrary to the essence of criminal procedure.”³⁰ The second line of argument says that *modern* Japanese people are selfish and lack any sort of public spirit and hate having things that they cannot agree with imposed on

BALDWIN & M. MCCONVILLE, *JURY TRIALS* (1979); S. MCCABE & R. PURVES, *THE SHADOW JURY AT WORK* (1974); H. KALVEN JR. AND H. ZEISEI, *THE AMERICAN JURY* (1966). Maruta notes that at least one of these works points to a conclusion opposite to that of the SCJ, that judges and juries tend to reach the same conclusions in the great majority of cases. MARUTA, *supra* note 1, at 83.

²³ MARUTA, *supra* note 1, at 83-84.

²⁴ *Id.* at 84.

²⁵ *Id.* at 81-85 (summarizing the SCJ’s objections); *id.* at 86 (summarizing the Ministry of Justice’s objections).

²⁶ *Id.* at 98.

²⁷ *Id.* at 105-106.

²⁸ *Id.* at 109.

²⁹ *Id.* at 99.

³⁰ *Id.*

them.³¹ Accordingly, a jury system would fail for lack of civic-mindedness. But in Maruta's view, rather than having anything to do with the Japanese character (whatever it may be), the issue of citizen participation in trials is a systemic one—whether citizens will assume a separate and active role in trials or simply supplement the existing activities of the professional judges.³²

Maruta characterizes the real objections to a jury-like system: “without the supervision and control of a professional career judge, who knows what citizens of this nature might do.”³³ Thus, the legal elite's desire to preserve the famous predictability of Japanese criminal trials, rather than any “cultural” factors, is the real reason why Japan opted for a judge-led system based on European models, rather than a U.S. style jury system. And yet, as Maruta cleverly points out, all of the cultural arguments about the Japanese character assume that the judges themselves are outside the culture, when in fact, the judiciary fits the stereotypical view of Japanese culture more than any other sector of society. Judges operate in a rigidly hierarchical system (based on years of service and geographical posting), are evaluated on an ongoing basis by the JSC secretariat, are subject to daily psychological controls (they generally live in special public dormitories), and generally exhibit a high degree of adherence to group norms.³⁴

With an LL.M. from University of Michigan and having authored several previous works on the jury system, Professor Maruta is clearly a proponent of the U.S. model. He does not spend a lot of time explaining the U.S. jury system in detail but does attempt to explain the significance of civil participation in the legal system from a decidedly American viewpoint:

The notion that “doubts are resolved in favor of the defendant” would actually develop some reality. By forcing some introspection into the way police conduct investigations that compel confessions, the jury system would revive the basic principles of a criminal trial regarding evidentiary and other laws that are guaranteed by the constitution and the code of criminal procedure. In other words, basic human rights in criminal trials would be much more strictly protected.³⁵

³¹ *Id.* at 100. Maruta's characterization of this argument quotes extensively from the comments of a retired judge.

³² *Id.* at 121.

³³ *Id.* at 109, 115.

³⁴ *Id.* at 116-117.

³⁵ *Id.* at 120.

It is doubtless this viewpoint informs Professor Maruta's opinions of the system that Japan has adopted, which he both summarizes and criticizes in some detail. To begin with, the scope of crimes for which the system will even be used is very small—crimes subject to the death penalty or life imprisonment, and crimes where intentional conduct results in the death of the victim.³⁶ While the lay and career judges together will deliberate and decide matters regarding the findings of fact, the application of law and sentencing require a majority—including at least one career judge—in order to reach a verdict. In addition, the career judges alone make all decisions regarding the *interpretation* of applicable law and all procedural matters.³⁷

Some of the other aspects will seem familiar to the western lawyer—there are voir dire-like procedures for choosing the lay judges from a pool of candidates; prohibitions on contacting lay judges; and provisions regarding their summoning, compensation, qualification, and disqualification.³⁸ However, as an example of the paternalistic assumptions behind the system, Maruta notes that although currently the minimum age for lay judges is 20 (the age of majority), it was originally proposed that the age be 25.³⁹ According to one participant in the legislative deliberations: “[a]t the age of 20, many people are students, and it cannot be said that they have adequate social experience. In order to make it a stable system, it would be appropriate to use people of 25 or over as lay judges.”⁴⁰ This proposal was eventually dropped, possibly due to the embarrassing fact that career judges and prosecutors participating in the trial might themselves be under the age of 25.⁴¹

This is not the only example of lay judges being subject to a potentially higher standard than career judges. One of the most disturbing aspects of the new system is the lifetime obligation imposed on all lay judges to not disclose secrets of their deliberations or other secrets learned during the course of the trial.⁴² Violation of this obligation is subject to criminal penalties.⁴³ Thus, the deliberation room may potentially become a

³⁶ *Id.* at 133.

³⁷ *Id.*

³⁸ Law, *supra* note 11, arts. 11, 25, 34-36.

³⁹ As noted by Maruta, how the members of this committee were chosen is unknown, but it is clear that they were members who could be expected to develop a system acceptable to the SCJ and the Ministry of Justice. MARUTA, *supra* note 1, at 124-125. Cryptically, while minutes of committee meetings were made public, individual members' comments were only recorded anonymously. *Id.* at 125-127.

⁴⁰ *Id.* at 130.

⁴¹ *Id.* Law professors are also excluded from serving as jurors, possibly because they might make the judges look bad. *Id.* at 199. Law, *supra* note 11, art. 15-1.

⁴² Law, *supra* note 11, art. 79.

⁴³ Violators may be fined up to ¥500,000 or imprisoned for up to six months. *Id.*

sort of Star Chamber, not for the defendant but for the lay judges themselves: if the career judges bully them or ignore their views or otherwise act inappropriately, the threat of criminal sanctions may prevent lay judges from raising the issue elsewhere. According to Maruta, if one of the purposes of trying cases before lay judges is to increase public awareness of the legal system, it is odd that the system is designed to discourage lay judges from relating their experiences to family and friends. Moreover, the confidentiality obligations will make it easier for career judges to lead or browbeat lay judges into reaching a “correct” verdict without the process being subject to outside scrutiny. While the confidentiality provisions may reflect a desire to protect the rights of other lay judges, they also seem designed to prevent the system from generating additional criticism of the judiciary. After all, the career judges themselves are not subject to such stringent confidentiality obligations.⁴⁴

Confidentiality is, of course, a legitimate concern in Japan where the fear of death or other extra-judicial sanctions lurks at the fringes of the legal system, particularly in cases involving organized crime or other fringes of society.⁴⁵ And given the limited powers of the judiciary itself, prospective lay judges may have legitimate concerns regarding their safety in the event of becoming involved in trials involving underworld elements. Given that there have been instances of judges themselves asking to be anonymous in such trials, these concerns are probably well-founded.⁴⁶ More mundane is the concern that the need to take time off from work to participate in trials may result in lay judges suffering disadvantages at their workplace.⁴⁷ Although the relevant legislation includes a provision prohibiting discrimination against workers who have been chosen as lay judges, there are no clearly defined penalties for violations.⁴⁸ The lay judge system has thus been structured as a civic obligation rather than a right, which may explain why approximately 70% of Japanese surveyed in 2003 expressed a desire not to participate.⁴⁹

In addition to discussing the burdens imposed on lay judges, Maruta

⁴⁴ *Id.* at 196.

⁴⁵ HALEY, *supra* note 4, at 183-184.

⁴⁶ MARUTA, *supra* note 1, at 178-179.

⁴⁷ According to a 2003 Japanese government opinion poll, some respondents who had expressed reluctance to participate in trials as lay judges did so because they believed it would cause them difficulties at work. *Saiban'in Seido ni Kansuru Yoron Chosa [Opinion Poll Regarding the Lay Judge System]*, <http://www8.cao.go.jp/survey/h16/h16-saiban/index.html> [hereinafter *Opinion Poll*]. Although Maruta notes some of the concerns of workers and the self-employed, he believes that there are few work-related excuses that truly outweigh the social need for civic participation. *Id.* at 173-176.

⁴⁸ Law, *supra* note 11, art. 71.

⁴⁹ *Opinion Poll*, *supra* note 47.

also expresses grave concerns over how the new system will operate within the existing criminal justice system, concerns that go to the heart of Japan's criminal procedures and its 99.9% conviction rate. Under the current system, evidence in criminal trial is primarily documentary, involving long, complex investigative reports, heavy with legalese, which can only be read and reread if one has the luxury of a lengthy trial period.⁵⁰ To involve lay jurors in a meaningful manner, this will have to be changed to a completely new system, one based primarily on the oral presentation of evidence in a form understandable to the lay judge over a relatively short period of time.⁵¹ Concentrated proceedings will in turn require a change to the current system where a defendant is usually locked up for months pending trial, with limited access to a lawyer.⁵² Furthermore, the current system of allowing written confessions and other investigative reports to be used in evidence must also be eliminated in order for the new system to work.⁵³ Maruta even makes the radical (in the Japanese context) suggestion that that all police interrogations should be videotaped so that such tapes can be shown to the lay judges, as this would go a long way to reducing criticism of the police for coercing or tricking defendants into confessing (presumably by eliminating such conduct).⁵⁴ Thus, in Maruta's view, fundamental procedural reforms will be needed to make the new system work, flawed though it may be. In this sense, the lay judge system may prove to be the thin edge of the wedge for criminal justice reform.

The amendment of existing procedural laws is, of course, part of the process of implementing the new system, and a great deal of work remains

⁵⁰ MARUTA, *supra* note 1, at 153-156. Japanese trials are famously trial consuming. It took eight years to try and convict Chizuo Matsumoto (a/k/a Shoko Asahara), the leader of the cult behind the 1995 sarin gas attack on the Tokyo subway system. See Norimitsu Onishi, *Cult Guru Sentenced to Death in Tokyo*, HERALD TRIBUNE, Feb. 28-29, 2004, at 1. This is despite it having been a foregone conclusion in the minds of many, this reviewer included, that he would be found guilty and sentenced to death. Writing of the trial in 1997, Yamaguchi and Soejima predicted: "As for Aum Shinrikyō's Shōko Asahara, it is basically a sure thing that he will get the death penalty . . . His punishment will be the death penalty; it's already decided. So the only remaining problem is how to write up that conclusion." YAMAGUCHI & SOEJIMA, *supra* note 2, at 86-87. Part of the reason trials take so long is because there is no compelling reason that it should be otherwise under the current system—an absence of a body of citizens who are only available for a limited time, as indicated by Maruta. Another reason, relating to the limited powers of judges to force proceedings to move faster, is explained in *Judges: The Inside Story*: "Japanese criminal procedure law is founded on what you might call 'good faith'" explains one veteran judge. The attorneys participate in good conscience, organize the points of dispute and advance the litigation. The system is built on that premise [tatema], and does not anticipate situations where, for example defense counsel refuses to stipulate to a single piece of evidence. 'When that is turned against you, there is no way of reining it in.'" *Id.* at 20.

⁵¹ *Id.* at 150-151.

⁵² *Id.* at 151-152.

⁵³ *Id.* at 151-156.

⁵⁴ *Id.* at 200.

to be done in this area⁵⁵; but one wonders the degree to which Professor Maruta's expectations will be met. Indeed, one can easily imagine the prospect of "inconveniencing the lay judges" as being an additional weapon prosecutors and judges can use to limit a defendant's ability to exercise his rights under an otherwise unchanged procedural regime. Indeed, the enabling legislation includes a provision which could easily be used to justify all sorts of procedures disadvantageous to the defendant, in the interests of getting the lay judges home as soon as possible.⁵⁶

Yet, Professor Maruta remains hopeful. Because the law requires a review of the system three years after its implementation, he hopes that during this period the problems he has pointed out will become evident, and it will be realized that they can only be resolved by adopting a true jury system.⁵⁷ Thus, despite the overall highly critical tone of his book, he encourages readers to participate in the new system nonetheless and closes on the hopeful note that perhaps the new system is simply a prologue to more meaningful citizen participation in the justice system.⁵⁸

At the same time, his concerns about how the system could function in practice are serious and easily understood. In the first chapter of the book, Professor Maruta puts himself into a hypothetical trial under the new system. His fictional alter-ego is called to the local courthouse and chosen as a lay judge. The case before the court involves a young woman defendant who is charged with murdering her lover. He is an abusive man, but she loves him—loves him so much that she has decided to keep his baby, with which she has recently become pregnant (she has had two abortions previously, both at his command). She waits for him to come home. He is late, and she suspects he has been seeing another lover. She asks where he has been, but he refuses to tell her and acts as though he may turn violent. She has something important to tell him, so to ensure that he listens she goes to the kitchen and gets a carving knife. He taunts her to stab him. She tells him that she is pregnant but that she is going to keep the baby. He tells her to get an abortion and comes at her menacingly. She holds the knife with both hands protectively over her womb and he charges at her. The knife lodges near his heart. When the ambulance arrives she is trying to staunch the bleeding and shouting, "Don't die!"

At issue is the defendant's intent. The lay judges generally agree that

⁵⁵ *Id.* at 194.

⁵⁶ Law, *supra* note 11, art. 51 ("[Professional] Judges, prosecutors and lawyers will endeavor to make the proceedings speedy and understandable so that the lay judges may adequately carry out their responsibilities, while ensuring that the burden imposed upon lay judges is not excessive.").

⁵⁷ MARUTA, *supra* note 1, at 200-201.

⁵⁸ *Id.* at 201-203.

she did not intend to kill him. They are people of different backgrounds and experience; some understand many of the defendant's actions that night, except for why she would want to have such a man's child. The consensus among them is that she did not intend to kill the victim. Then one of the career judges patiently lectures to the "amateurs" how criminal intent is established: the type of weapon used (the judge makes a point of how the defendant chose a carving knife rather than a vegetable knife), the way she held the knife, the location of the wound, the fact that she pulled the knife out (resulting in the loss of blood which killed him), and so forth. The lecturing judge has doubtless seen this sort of case before in his career and the factors in establishing intent can be categorized, numbered, and counted. Here, enough factors point toward intent to kill. It is a mechanical exercise for the career judiciary. Two lay judges are convinced, and the defendant is found guilty of intentional killing. Professor Maruta clearly believes it should have been otherwise.

It is a fictional example, of course, but it is skillfully done and leaves one with the impression that career judges may actually look forward to the introduction of lay judges into the system as these lay judges may become a captive audience of ordinary folk, an audience whom career judges can impress, up close and personal, with their hard-acquired expertise. It may be that the new Japanese system ends up, at least initially, less a way for Japanese society to participate more in the judicial system, than a way for the judiciary to participate more in Japanese society.