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TRIAL BY ONE'S PEERS: THE NEED TO EXPAND JAPAN'S LAY JUDGE SYSTEM

Harrison L.E. Owens[†]

Abstract: As a civil law-based country, Japan's legal system has historically placed a strong emphasis on the formalistic application of code provisions to cases by professional judges without a jury. Within the criminal justice system, prosecutors have played a highly significant role in all cases. They exclusively make the decision to indict an alleged criminal, conduct investigation of crimes, initiate a criminal case, and they also control and supervise enforcement of a conviction. In addition, the Prosecutors Office of Japan has historically emphasized the need to obtain a high rate of convictions to maintain the Japanese public's trust in, and high regard for, the Office. Critics have highlighted these factors as contributing to a criminal justice system that has displayed a disconcerting 99.8% conviction rate. Although this phenomenon may be partially explained by prosecutors' careful screening of cases and exercising of their discretion not to indict, a notable lack of external checks on the power of prosecutors has rendered the criminal justice system subject to considerable criticism in recent times. This dynamic has raised concerns regarding the due process rights of defendants and led to long-standing calls for reforms. The 2009 adoption of a lay judge system in Japan, in which citizens participate in the decision-making process of certain criminal trials alongside professional judges, was directed at increasing the accountability of prosecutors and the transparency of the criminal justice process. Although the majority of cases heard under the lay judge system have not demonstrated significant reductions in the conviction rate, there have been indications that the lay judge system counter-balances several concerning aspects of the Japanese criminal justice system. This comment argues that Japan should expand the lay judge system beyond its current narrow scope to encompass either a greater variety of criminal cases or require that all criminal trials are heard by the lay judge system in order to more equally safeguard the due process rights of criminal defendants and decrease the expansive role played by Japanese prosecutors in the criminal trial process.

I. INTRODUCTION

A high rate of conviction in a criminal justice system would normally warrant scrutiny—Japan's conviction rate of 99.8% merits considerably more concern.¹ Ryūichi Hirano, a leading criminal justice scholar and former president of Tokyo University, described the Japanese criminal justice system as “abnormal” and “diseased.”² This view is based in part on

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¹ Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CALIF. L. REV. 317, 318–19 (1992) [hereinafter Foote, *Benevolent Paternalism*].

² Ryūichi Hirano, *Genkō keijisoshō no shindan* [Diagnosis of Current Criminal Procedure], in 4 DANDŌ SHIGEMITSU HAKASE KOKI SHUKUGA RONBUNSHŪ [COLLECTION OF WORKS TO COMMEMORATE

the belief that there are no checks on the power of prosecutors, who play a central role in criminal justice proceedings.³ The Japanese criminal justice system appears to emphasize the rehabilitation and reintegration of offenders, but does so through close monitoring and intense investigation of those under suspicion to the disadvantage of personal autonomy.⁴ Placing significant trust in prosecutors and other authorities in the criminal justice system and broadly granting them discretion⁵ enables this close scrutiny. However, this trust and discretion is not accompanied by effective checks and balances, which is highlighted by prosecutorial mistakes and findings of unintentional or intentional bias within the system.⁶ When combined with the significant influence wielded by prosecutors in criminal justice proceedings, this lack of external accountability raises concerns regarding the transparency of a system that produces such a high conviction rate.⁷ Japanese authorities, aware of these sentiments and the attendant concerns, have taken various steps to reform the criminal justice system in order to create a more balanced forum to prosecute defendants.⁸ The Japanese government established the Justice System Reform Council in 1999, which issued statements regarding the need for reforms to increase respect for individuals and popular sovereignty, and render the justice system more familiar and accessible to the general public.⁹

One of the most significant reforms has been the implementation of a lay judge system in 2009.¹⁰ This new system mandates that a mixed panel of lay and professional judges hear certain cases to jointly determine the guilt

THE SEVENTIETH BIRTHDAY OF DR. SHIGEMITSU DANDŌ] 407, 407 (Yasuhara Hiraba et al. eds., 1985), translated in 22 L. IN JAPAN 129, 129 (1989).

³ Foote, *Benevolent Paternalism*, *supra* note 1, at 319, 321–22.

⁴ *Id.* at 321.

⁵ Marcia E. Goodman, *The Exercise and Control of Prosecutorial Discretion in Japan*, 5 UCLA PAC. BASIN L. J. 16, 17–18, 59 (1986).

⁶ Foote, *Benevolent Paternalism*, *supra* note 1, at 322; see also Akira Kitani, *Saibankan no shokumu* [The Duties of Judges], in HŌGAKU SEMINĀ ZŌKAN, SŌGŌ TOKUSHŪ SHIRĪZU 27, GENDAI NO SAIBAN [HŌGAKU SEMINAR EXTRA NUMBER, SPECIAL COMPREHENSIVE SERIES NO. 27, PRESENT-DAY TRIALS] 243, 247–48 (1984) (describing the perceived difficulties of issuing an acquittal due to the high likelihood of attack on the judgment).

⁷ See DAVID T. JOHNSON, THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN 215 (2002).

⁸ See, e.g., JAPAN FED'N OF BAR ASS'NS, JUSTICE SYSTEM REFORM, http://www.nichibenren.or.jp/en/about/judicial_system/justice_system_reform.html (last visited Nov. 11, 2015).

⁹ *Id.*

¹⁰ Saiban-in no sanku suru keiji saiban ni kansuru hōritsu [Act Concerning Participation of Lay Assessors in Criminal Trials], Law No. 63 of 2004 [hereinafter Lay Assessors Act].

and sentence of the defendant.¹¹ However, at this time the scope of cases that these mixed panels may hear is limited to relatively serious cases that carry the potential for significant sentences.¹²

The implementation of a lay judge component in the Japanese criminal justice system may have a positive effect as a check on prosecutorial power and influence. It will also introduce a novel perspective into prosecuting defendants and counter the lack of accountability and imbalance of power that the criminal justice system currently exhibits by imposing an external check on prosecutors. As such, the lay judge system should be expanded beyond its limited role to encompass a wider range of criminal cases. This broadening may take the form of either requiring lay judge panels to hear every criminal case, with an opt-out provision made available to defendants, or widening the variety of sentences requested in cases heard by lay judge panels. Such an expansion would allow more defendants to benefit from a reduction in the formalistic approach to cases. This could lead to a lower conviction rate for those tried for criminal offenses, a check on the influence of prosecutors in the Japanese criminal justice system, and greater protection for criminal defendants' due process rights.

II. THE HISTORICAL STRUCTURE OF THE JAPANESE CRIMINAL JUSTICE SYSTEM

Generally, Japan is regarded as having a civil law system primarily based on the German model.¹³ This is due in part to its emphasis on codified law. Japan's first Constitution, known as the Meiji Constitution, was promulgated in 1889 and took effect in 1890 and reflected the restoration of the Emperor as the central figure in the Japanese political system.¹⁴ It also codified the rights and duties of Japanese citizens, which included guarantees of various basic liberties and due process rights.¹⁵ Guarantees of citizens' rights were paralleled with the creation of a judiciary and system of courts in which these rights could be enforced.¹⁶ These included a conditional guarantee of public trials and the protection of judges'

¹¹ Ingram Weber, *The New Japanese Jury System: Empowering the Public, Preserving Continental Justice*, 4 E. ASIA L. REV. 125, 126 (2009).

¹² Lay Assessors Act, *supra* note 10, art. 2, para. (i)–(ii).

¹³ *The World Factbook: Japan, Government*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/ja.html> (last visited Nov. 21, 2015).

¹⁴ DAI Nihon TEIKOKU KENPŌ [MEIJI KENPŌ] [CONSTITUTION], ch. I.

¹⁵ *Id.* ch. II.

¹⁶ *Id.* ch. V.

positions.¹⁷ The Meiji Constitution was supplemented by the enactment of five major Codes that supplied the bulk of substantive Japanese law, which were divided into civil, civil procedure, criminal, criminal procedure, and commercial provisions.¹⁸ The Penal Code was promulgated in 1880 and enforced in 1882.¹⁹ Interestingly, Japan instituted a jury system for criminal trials in 1923.²⁰ However, this system was suspended in 1943 and was not reinstated following the end of World War II.²¹

The conclusion of World War II and the subsequent U.S. occupation of Japan brought several significant changes to the Japanese legal system. Foremost among these changes was the adoption of a new Japanese Constitution in 1947 that was heavily influenced by the U.S. Occupation.²² This new Constitution expanded the rights of citizens, including the guarantee of due process rights and access to courts.²³ In addition, the new Constitution articulated the structure of the modern Japanese court system.²⁴

The tiered court system provided for in the Japanese Constitution remains in place today. Article 76 vests all judicial power in the Supreme Court and inferior courts, which are all incorporated into a unitary national judicial system.²⁵ The Supreme Court is the court of last resort, and hears certain appeals and cases examining the constitutionality of any law, order, rule, or disposition.²⁶ The preceding tier of the Japanese justice system is composed of High Courts, each of which is made up of a President and other High Court judges.²⁷ These High Courts generally hear appeals against judgments rendered in District and Summary Courts, and as such may review cases heard by lay judge panels. Three-judge panels hear most cases, although five-judge panels hear insurrection cases.²⁸ Crimes of insurrection

¹⁷ *Id.* ch. V, arts. 58, 59.

¹⁸ Jody Chafee, et al., *Introduction: Nature of the Japanese Legal System*, 1 *BUS. L. IN JAPAN* 3, 3 (2008).

¹⁹ Ken Mukai & Nobuyoshi Toshitani (D.F. Henderson trans.), *The Progress and Problems of Compiling the Civil Code in the Early Meiji Era*, in 1 *L. IN JAPAN: AN ANNUAL* 25, 26 n.1 (1967).

²⁰ Baishinho [Jury Act], Law No. 50 of 1923.

²¹ Baisinho no Teishi ni Kansuru Horitsu [An Act to Suspend the Jury Act], Law No. 88 of 1943.

²² Yasuhiro Okudaira, *Forty Years of Constitution and Its Various Influences*, 53 *L. & CONTEMP. PROBS.* 17, 22–29 (1990).

²³ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], arts. 31, 32.

²⁴ *Id.* ch. VI.

²⁵ *Id.* art. 76.

²⁶ *Id.* art. 81.

²⁷ U.N. Asia & Far E. Inst. for the Prevention of Crime and the Treatment of Offenders, *Criminal Justice in Japan*, 5 (2011), http://www.unafei.or.jp/english/pdf/CJSJ_2011/00CJSJ_2011.pdf [hereinafter *Criminal Justice in Japan*].

²⁸ *Id.*

concern actions of individuals or groups attempting to overthrow the government of Japan, or otherwise subvert the constitutional order.²⁹ Such cases, along with judicial disciplinary actions, are required to be heard by a five-judge panel under Japanese law.³⁰

District Courts are the courts of first instance for many cases, except for those reserved for Summary Courts (minor crimes) and High Courts (insurrection crimes and judicial discipline cases).³¹ Historically, a single judge tried the majority of cases, with three-judge panels hearing criminal cases involving possible sentences of death, life imprisonment, or imprisonment with a minimum period of more than one year.³² It is within these District Courts that the new lay judge system is now applied to certain types of offenses.³³

A. *The Historical Role of Judges in the Japanese Criminal Justice System*

Countries with civil law systems rely on comprehensive codes that are designed to articulate all foreseeable offenses, applicable court procedures, and sentences assigned to each type of offense.³⁴ This contrasts with common law systems, which use both legislatively-created statutes and precedent established by judges in past cases as authority.³⁵ As a result, the roles of judges in common law and civil law systems are very different as well. Common law judges are given discretion to interpret and apply the law to the facts of a given case, and their decisions may become precedent for later cases.³⁶ In contrast, civil law judges are only expected to apply code provisions to the facts presented by each case, necessarily restricting their discretion in interpreting the implicated provisions.³⁷ Although the Japanese legal system has adopted several aspects of common law systems,

²⁹ See generally KEIHŌ [PEN. CODE] part II, ch. II.

³⁰ Percy R. Luney, Jr., *The Judiciary: Its Organization and Status in the Parliamentary System*, 53 L. & CONTEMP. PROBS. 135, 145–146 (1990).

³¹ Criminal Justice in Japan, *supra* note 27, at 5; NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 81.

³² See Criminal Justice in Japan, *supra* note 27, at 5.

³³ *Id.*

³⁴ *The Common Law and Civil Law Traditions*, U.C. BERKELEY SCH. OF L., <https://www.law.berkeley.edu/library/robbins/pdf/CommonLawCivilLawTraditions.pdf>, 1 (last visited Nov. 21, 2015) [hereinafter *Common Law and Civil Law Traditions*].

³⁵ *Id.*

³⁶ See Geoffrey Hazard, *Responsibilities of Judges and Advocates in Civil and Common Law: Some Lingering Misconceptions Concerning Civil Lawsuits*, 39 CORNELL INT'L L. J. 59, 64–68 (2006) (comparing the levels of discretion possessed by civil and common law judges).

³⁷ *Common Law and Civil Law Traditions*, *supra* note 34, at 1.

such as the 1948 implementation of direct and cross-examination of witnesses,³⁸ the role of judges is still relatively restricted compared to their common law counterparts.

The Justices of the Supreme Court of Japan are appointed by the Cabinet, except for the Chief Justice, who is appointed by the Emperor after being nominated by the Cabinet.³⁹ A majority of Japanese judges begin their careers immediately upon graduation from the Legal Training and Research Institute, and spend their entire career within the court system.⁴⁰ Lower court judges may also be appointed by the Cabinet, and are selected from a list of nominations submitted by the Supreme Court.⁴¹ To be eligible for selection, an individual must have practiced law as an assistant judge, a public prosecutor, an attorney, or a law professor for at least ten years.⁴² These practices ensure that Japanese judges are highly attuned to the practices of the Japanese legal system and its civil law structure, either through prior practice or by spending their entire career on the bench.

Recently, the role of judges has shifted away from its historical civil law confines to be more proactive and closer to parity with the role of prosecutors.⁴³ This shift has been primarily embodied by judges taking an active role in policymaking through the conscious shaping of legal standards with policy considerations in mind.⁴⁴ This practice is exemplified by the Japanese Supreme Court's *Shiratori* decision, which expanded previously narrow interpretations of defendants' right to retrial when clear evidence was discovered.⁴⁵ This decision marked a significant departure from prior interpretations, and enunciated a clear standard rather than brief and abstract constitutional or statutory language.⁴⁶ Over the past two decades, there have been additional signs of the judiciary taking a more active role in the criminal justice field. For example, judges have begun to closely scrutinize

³⁸ Caslav Pejovic, *Civil Law and Common Law: Two Different Paths Leading to the Same Goal*, 32 VICT. U. WELLINGTON L. REV. 817, 834, n. 43 (2001).

³⁹ Criminal Justice in Japan, *supra* note 27, at 6.

⁴⁰ John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy and the Public Trust*, in LAW IN JAPAN: A TURNING POINT 99, 99 (Daniel H. Foote ed., 2007).

⁴¹ Criminal Justice in Japan, *supra* note 27, at 6.

⁴² *Id.*

⁴³ See Daniel H. Foote, *Policymaking by the Japanese Judiciary in the Criminal Justice Field*, 72 J. OF THE JAPANESE ASS'N FOR SOC. OF L. 6, 7 (2010) [hereinafter Foote, *Policymaking*].

⁴⁴ *Id.*

⁴⁵ See Saikō Saibansho [Sup. Ct.] May 20, 1975 (1st P.B.), 29 SAIKŌ SAIBANSHO KEJI HANREISHŪ [KEISHŪ] 177 (holding that Article 435, item 6 of the Code of Criminal procedure, which grants the right to retrial when newly-discovered, clear evidence requires reversal of a prior conviction, would be evaluated under the comprehensive evaluation and reasonable doubt standards).

⁴⁶ Foote, *Policymaking*, *supra* note 43, at 13.

confession statements offered by prosecutors, culminating with the Supreme Court upholding a Tokyo High Court order that prosecutors disclose investigative records, including police memoranda, so that a confession's voluntariness can be evaluated.⁴⁷

Similarly, the Japan Federation of Bar Associations has enacted reforms that significantly expand defendants' rights of access to counsel, such as allowing suspects to meet with a lawyer once free of charge with the costs financed by bar associations.⁴⁸ In addition, there have been marked developments of the right to publicly-provided counsel to indigents beginning with the suspect stage, establishment of a statutorily-based discovery system, institution of pre-trial coordination procedures intended to expedite trials, and a variety of other reforms based on recommendations from the Justice System Reform Council.⁴⁹ The Supreme Court's role as the institution charged with responsibility for judicial administration ensured that the Court was heavily involved in developing the legislation enacting these reforms, and has since been active in the implementation and interpretation of the new practices.⁵⁰ These upward trends of judicial proactivity and defense counsel's parity with prosecutors has continued to the present day and percolated down to the lower courts of Japan, as evidenced by an upward trend of judges rejecting prosecutorial requests for detention of suspects since 2003, rising to a rate of 1.6% in 2013.⁵¹

B. The Role of Prosecutors in the Japanese Criminal Justice System

The Prosecutors Office of Japan is composed of the Supreme Public Prosecutors Office, eight High Public Prosecutors Offices, fifty District Public Prosecutors Offices, and 438 Local Public Prosecutors Offices.⁵² Prosecutors represent the public interest against criminal defendants. Though they fall under the executive power vested in the Cabinet, prosecutors are guaranteed independence from the political process.⁵³ Prior to World War II, this independence was implicitly accorded to prosecutors

⁴⁷ Saikō Saibansho [Sup. Ct.] Dec. 25, 2007 (3rd P.B.), 61 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 895.

⁴⁸ See Foote, *Policymaking*, *supra* note 43, at 36.

⁴⁹ *Id.* at 36–37.

⁵⁰ *Id.* at 37.

⁵¹ Daniel H. Foote, Faculty of Law, Univ. of Tokyo and Univ. of Wash. Sch. of Law, Address at the Law and Society Association Annual Meeting: Criminal Justice Reforms in Japan (Act 1): A Changing Dynamic for Prosecutors? (May 30, 2015) [hereinafter Foote, Criminal Justice Reforms].

⁵² Criminal Justice in Japan, *supra* note 27, at 3.

⁵³ *Id.* at 4.

despite their placement within the structure of the Ministry of Justice.⁵⁴ Following the occupation of Japan by the United States, the Japanese criminal justice system was fundamentally altered, but the independence of prosecutors was retained.⁵⁵ In contrast, the United States is the only country in the world where prosecutors are generally elected by popular vote.⁵⁶ The U.S. approach was designed to give citizens greater control over the government, eliminate patronage appointments, and increase the responsiveness of prosecutors to the communities they served.⁵⁷ In practice, the Japanese prosecutors' independence is manifested by their high level of discretion in pursuit of their goals; prosecutors have the ability to investigate crimes and indict criminal suspects, and also may suspend the prosecution of defendants.⁵⁸ The prosecutor must establish every element of the charged offense beyond a reasonable doubt.⁵⁹

Japan has been described as a system of "substantive justice," in contrast to a "procedural justice" system such as that of the United States.⁶⁰ Historically, the Japanese criminal justice system has been structured to uncover the "truth" as the first step in the justice process.⁶¹ Supporters of this system have argued that it was effective in controlling crime, as evinced by Japan's low crime rate, a high clearance rate of criminal cases, and a relatively small prison population.⁶² However, this led to a parallel de-emphasis on the importance of suspects' individual rights and a focus on obtaining confessions regardless of whether suspects' rights were violated in the process.⁶³ When coupled with the independence accorded to prosecutors

⁵⁴ A. Didrick Castberg, *Prosecutorial Independence in Japan*, 16 UCLA PAC. BASIN L. J. 38, 39 (1997).

⁵⁵ *Id.*

⁵⁶ Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 YALE L. J. 1528, 1530 (2012).

⁵⁷ *Id.* at 1531.

⁵⁸ Castberg, *supra* note 54, at 39–40.

⁵⁹ SUPREME COURT OF JAPAN, OUTLINE OF CRIMINAL JUSTICE IN JAPAN 24 (2013), http://www.courts.go.jp/english/vcms_lf/20140417-criminal-design.pdf (last visited Nov. 11, 2015) [hereinafter OUTLINE OF CRIMINAL JUSTICE].

⁶⁰ Arne F. Soldwedel, *Testing Japan's Convictions: The Lay Judge System and the Rights of Criminal Defendants*, 41 VAND. J. TRANSNAT'L L. 1417, 1430 (2008).

⁶¹ Jean Choi DeSombre, *Comparing the Notions of the Japanese and the U.S. Criminal Justice System: An Examination of Pretrial Rights of the Criminally Accused in Japan and the United States*, 14 UCLA PAC. BASIN L. J. 103, 103 (1995).

⁶² Matthew Wilson, *The Dawn of Criminal Jury Trials in Japan: Success on the Horizon?*, 24 WISC. INT'L L. J. 835, 836–37 (2007) (noting that Japan is proud of its judicial system, and that the judiciary does not consider the system as in need of repair); Nicholas D. Kristof, *A Safer Society -- A Special Report: Japanese Say No to Crime: Tough Methods, at a Price*, N.Y. TIMES (May 14, 1995), <http://www.nytimes.com/1995/05/14/world/safer-society-special-report-japanese-say-no-crime-tough-methods-price.html?pagewanted=all>.

⁶³ David A. Seuss, *Paternalism Versus Pugnacity: The Right to Counsel in Japan and the United States*, 72 IND. L. J. 291, 319 (1996).

and their drive to acquire convictions in cases brought to trial, as discussed below, these forces converged to create a system that lacks external checks, which created considerable cause for concern.

Although the Court controls the proceedings of the case, the prosecutor plays a fundamental role in bringing the case and developing facts at trial. When a crime first occurs, the Public Prosecutors Office may take over after the police carry out their own investigation and subsequently refer the case to the Office.⁶⁴ However, the Public Prosecutors Office may also initiate its own criminal investigation and arrest suspects, without a preceding police investigation and referral.⁶⁵ The investigations conducted by the Public Prosecutors Office are intensive and centered around the questioning of suspects, with a consequent emphasis placed on non-verbatim “confession statements” and “witness statements.”⁶⁶ These “confession statements” have been described as short, stereotyped, largely abstract, reconstructed accounts drafted in order to closely mirror the legal elements of the crime being charged.⁶⁷ Following the completion of the investigation, prosecutors have complete discretion to charge or not charge the suspect, although internal checks within the Prosecutors Office may limit this freedom.⁶⁸ If prosecutors elect to charge the suspect, they exercise significant control and supervision over the subsequent trial, which takes place even if a confession or guilty plea has been obtained from the suspect.⁶⁹ Finally, prosecutors are responsible for supervising the execution of judgments imposed upon guilty defendants.⁷⁰

Although there are similarities in the functions of Japanese and U.S. prosecutors, there are significant differences in the means by which they perform such functions and the final results produced by their work. The

⁶⁴ MINISTRY OF JUSTICE, THE PUBLIC PROSECUTORS OFFICE AND THE COURSE OF CRIMINAL PROCEEDINGS, <http://www.moj.go.jp/ENGLISH/CRAB/crab-02-1.html> (last visited Nov. 11, 2015).

⁶⁵ *Id.*

⁶⁶ Daniel H. Foote, *Confessions and the Right to Silence in Japan*, 21 GA. J. INT'L & COMP. L. 415, 418 n.15, 424 (1991) [hereinafter Foote, *Confessions*].

⁶⁷ *Id.* at 418.

⁶⁸ Criminal Justice in Japan, *supra* note 27, at 3; Group 2, The Role of Prosecution in the Screening of Criminal Cases, in U.N. Asia & Far E. Inst. for the Prevention of Crime and the Treatment of Offenders, 1997 Annual Report & Resource Material Series No. 53, 326, 343 (1998) [hereinafter The Role of Prosecution in the Screening of Criminal Cases].

⁶⁹ OUTLINE OF CRIMINAL JUSTICE, *supra* note 59, at 21–30; U.N. Asia & Far E. Inst. for the Prevention of Crime and the Treatment of Offenders, The Criminal Justice System in Japan: Prosecution, in U.N. Asia & Far E. Inst. for the Prevention of Crime and Treatment of Offenders, 1997 Annual Report & Resource Material 53, 39, 42 (1998), http://www.unafei.or.jp/english/pdf/RS_No53/No53_10FP.pdf [hereinafter The Criminal Justice System in Japan: Prosecution].

⁷⁰ The Criminal Justice System in Japan: Prosecution, *supra* note 69, at 41.

education of Japanese prosecutors is centralized at the Legal Training and Research Institute, and the Prosecutors Office is nationally centralized.⁷¹ While attending the Legal Training and Research Institute, students undergo a one-year training course consisting of two months of collective training and a series of two-month periods of experience-based learning with district courts, district public prosecutor's offices, and bar associations.⁷² This curriculum essentially provides students with apprenticeships within a variety of practice areas, in contrast to the almost purely academic legal training in the United States.⁷³ Another important aspect of this approach to legal education is that all entrants to the legal profession are exposed to the Prosecutors Office's culture and methods prior to beginning their practice.

The culture of the Prosecutors Office merits discussion with regard to how it influences the attitude prosecutors take toward charging suspects and conducting criminal trials. As discussed above, Japan has historically accorded significant discretion and independence to prosecutors, especially regarding the decision to indict.⁷⁴ The decision of whether to indict is considered central to the role of Japanese prosecutors, and as a result prosecutors have been known to pay less attention to advocacy and evidentiary presentation at trial than to the investigation and interrogation aspects of the criminal justice process.⁷⁵ This independence and focus on investigations is quickly internalized by new prosecutors, and the frequent rotation of prosecutors between offices ensures that there is a high level of consistency from office to office across Japan, stemming from shared norms and professional goals.⁷⁶ There is also a high level of consistency in the pre-reform goals of prosecutors across the Office, with a significant majority placing "discovering the truth" and "proper charge decisions" as the primary objectives, above even "protecting the public."⁷⁷

Several other fundamental characteristics of the Prosecutors Office might explain the high rate of convictions seen in criminal cases brought to trial. First, there has been a long-standing emphasis on obtaining

⁷¹ Castberg, *supra* note 54, at 40.

⁷² *The Legal Training and Research Institute of Japan*, SUPREME COURT OF JAPAN, http://www.courts.go.jp/english/institute_01/institute/index.html (last visited Nov. 12, 2015).

⁷³ Castberg, *supra* note 54, at 41.

⁷⁴ B. J. George, Jr., *Discretionary Authority of Public Prosecutors in Japan*, 17 L. IN JAPAN 42, 48 (1984).

⁷⁵ Masahito Inouye, Waseda Law Sch. Faculty, Address at the Law and Society Association Annual Meeting: Criminal Justice Reform in Japan Act II (May 30, 2015).

⁷⁶ Castberg, *supra* note 54, at 43-44.

⁷⁷ JOHNSON, *THE JAPANESE WAY*, *supra* note 7, at 98 (Table 3.1: Prosecutor Objectives in Japan and the United States).

confessions from suspects because of the view that they are the best evidence of truth, and because confessions reportedly played an important role in maintaining public trust in the early Japanese criminal justice process.⁷⁸ In addition, there is a strong trend of prosecutors deciding not to indict, which is called “suspension of prosecution.”⁷⁹ Prosecutors may decide to suspend prosecution when they feel that society and the defendant would not benefit from punishment being meted out.⁸⁰ This is codified in the Japanese Code of Criminal Procedure, which states that public prosecution may not be instituted when it is unnecessary to prosecute based on the character, age, and environment of an offender, and the weight, circumstances, and conditions surrounding the offense.⁸¹ Scholars have postulated that this practice began shortly after the Meiji Restoration in 1868 as a means of reducing the number of minor criminal cases burdening the early court system, and has been retained due to its focus on rehabilitation rather than its administrative efficiency.⁸² This practice may contribute to the remarkably high conviction rate achieved by the Japanese criminal justice system, as it allows prosecutors flexibility in their decision whether to bring indictments in borderline cases. However, this decision still remains entirely within the remit of the prosecutors themselves. That prosecutors have flexibility in deciding does not alleviate potential concerns raised by the lack of external checks on Japan’s criminal justice system.

The wide latitude of influence and discretion accorded to public prosecutors under the pre-reform criminal justice system is often cited by critics as the primary driving force behind its disconcerting conviction rate of 99.8%.⁸³ Others argue that the entire criminal justice system, as currently structured, favors the prosecution by emphasizing the power of prosecutors to elicit confessions from suspects and independently conduct their own investigations into crimes.⁸⁴ For example, the prosecutors or police can hold a criminal suspect in pretrial detention for up to twenty-three days without

⁷⁸ YOSHIRŌ HIRAMATSU, *KINSEI KEIJSOSHŌHŌ NO KENKYŪ* [A STUDY OF THE LAW OF CRIMINAL PROCEDURE IN THE RECENT ERA] 831, summarized and translated in 22 L. IN JAPAN 105, 121–22 (1989).

⁷⁹ Castberg, *supra* note 54, at 55.

⁸⁰ *Id.*

⁸¹ KEIJI SOSHŌHŌ [KEISOHŌ] [C. CRIM. PRO.], 1948, art. 248.

⁸² Dando Shigemitsu, *System of Discretionary Prosecution in Japan*, 18 AM. J. COMP. L., 518, 518 (1970); Satsumae Takeshi, *Suspension of Prosecution: A Japanese Longstanding Practice Designed to Screen Out Offenders from Penal Process*, in U.N. Asia & Far E. Inst. for the Prevention of Crime and Treatment of Offenders, Report for 1977 and Resource Material Series No. 15, 102–03 (1977).

⁸³ Foote, *Benevolent Paternalism*, *supra* note 1, at 318–22.

⁸⁴ See, e.g., NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] art. 38; MINJI SOSHŌHŌ [MINSOHŌ] [C. CIV. PRO.] 1996, § 319; OUTLINE OF CRIMINAL JUSTICE, *supra* note 59, at 10 (table showing Dispositions by the Supreme Court).

access to counsel.⁸⁵ In addition, evidence in criminal trials has historically been largely limited to written documentation prepared by the prosecution, especially confession statements.⁸⁶ The defense counsel's role was significantly diminished, creating what scholars termed a "cooperative adversary system."⁸⁷ Finally, judges reported that they felt as if they were simply "confirming the results of the investigation" under the pre-reform system.⁸⁸ These roles and viewpoints illustrate the significant difference in power held by prosecutors relative to defense counsel and judges under the pre-reform criminal justice system.

Alternatively, the prosecutor's role in the Japanese criminal justice system may be viewed as a "screening" mechanism for cases that increases the efficiency of the system.⁸⁹ "Case screening" is defined as a series of procedural steps that forms the decision as to whether to proceed with a criminal case in a court of law or whether it should be concluded by any other means.⁹⁰ Advocates of this prosecutorial function emphasize that the process increases the overall efficiency in a system by dispensing of cases lacking merit and ensuring that the proper person is being accused.⁹¹

Another argument proffered to help explain the significant conviction rates exhibited by the Japanese criminal justice system pertains to the potential incentives for prosecutors to obtain confessions. For example, the historical emphasis placed on obtaining confessions may have led prosecutors to go to extreme measures to coerce confessions that supported their cases.⁹² This historical emphasis survived even after post-World War II American Occupation authorities established new rights for defendants, such as the warning requirement and right to silence, as subsequent statutory modifications significantly undermined these protections.⁹³ Also, stories have emerged of innocent citizens confessing to crimes they did not commit

⁸⁵ Soldwedel, *supra* note 60, at 1436.

⁸⁶ Foote, *Policymaking*, *supra* note 43, at 22–28; Foote, *Criminal Justice Reforms*, *supra* note 51.

⁸⁷ Daniel H. Foote, *Reflections on Japan's Cooperative Adversary Process*, in *THE JAPANESE ADVERSARY SYSTEM IN CONTEXT: CONTROVERSIES AND COMPARISONS* 29 (Malcolm M. Feeley & Setsuo Miyazawa eds., 2002).

⁸⁸ Takeo Ishimatsu (Daniel H. Foote trans.), *Are Criminal Defendants in Japan Truly Receiving Trials by Judges?*, 22 L. IN JAPAN: AN ANNUAL 143, 152 (1989).

⁸⁹ *The Role of Prosecution in the Screening of Criminal Cases*, *supra* note 68, at 326–27 (1997).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Japanese Justice: Confess and Be Done With It*, *THE ECONOMIST* (Feb. 8 2007), <http://www.economist.com/node/8680941> [hereinafter *Japanese Justice*]; Foote, *Confessions*, *supra* note 66, at 428.

⁹³ Foote, *Confessions*, *supra* note 66, at 429.

after being subjected to lengthy interrogations and holding periods by the police and prosecutors.⁹⁴ In addition, several instances of miscarriages of justice in death penalty cases came to light, which contributed to a widespread public perception that trials were essentially ceremonial rather than substantive forums for trying criminal defendants with no real presumption of innocence.⁹⁵ These anecdotes suggest that the emphasis placed on confessions, coupled with the significant power and discretion accorded to prosecutors, is a significant concern. As such, they highlight the need to institute checks on the Japanese criminal justice process that will counteract the power of prosecutors and accord greater protections to the rights of criminal defendants.

III. DUE PROCESS RIGHTS IN JAPAN

Although the Japanese Constitution does not explicitly guarantee the due process rights of defendants, two provisions have been interpreted to collectively guarantee this right. Article 31 of the Japanese Constitution states that no person shall be deprived of life or liberty, or suffer imposition of a criminal penalty, except according to procedure established by law.⁹⁶ Article 32 provides that no person shall be denied their right of access to the court system.⁹⁷ Article 31 requires that any restriction on the rights and liberties of Japanese citizens be preceded by at least procedural due process.⁹⁸ Article 32 represents the closest equivalent to procedural due process as it appears in the U.S. Constitution, stating that “[n]o person shall be denied the right of access to the courts.”⁹⁹

In actual practice, due process in Japan may accord significantly less protection than its U.S. counterpart, in spite of these constitutional provisions.¹⁰⁰ Although the post-World War II Occupation Authorities hoped to achieve “‘fundamental change of the criminological attitude’ in

⁹⁴ See, e.g., Norimitsu Onishi, *Pressed by Police, Even Innocent Confess in Japan*, N.Y. TIMES (May 11, 2007), http://www.nytimes.com/2007/05/11/world/asia/11japan.html?pagewanted=all&_r=0 (describing examples of convictions based on confessions obtained after significant police coercion).

⁹⁵ Daniel H. Foote, *From Japan's Death Row to Freedom*, 1 PAC. RIM L. & POL'Y J. 11, 12–13, 30–31 (1992).

⁹⁶ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 31.

⁹⁷ *Id.* art. 32.

⁹⁸ Noriho Urabe, *Rule of Law and Due Process: A Comparative View of the United States and Japan*, 53 L. & CONTEMP. PROBS. 61, 65 (1990).

⁹⁹ U.S. CONST. art. XIV; NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 32; Mark A. Levin, *Civil Justice and the Constitution: Limits on Instrumental Judicial Administration in Japan*, 20 PAC. RIM L. & POL'Y J. 265, 290 (2011).

¹⁰⁰ Foote, *Benevolent Paternalism*, *supra* note 1, at 332.

Japan” through constitutional protections and statutory revisions, current practice does not reflect a strong commitment to these principles.¹⁰¹ First, the Constitution’s specific language, although relatively similar to that of the United States, is narrower than even the rhetoric of the Occupation authorities.¹⁰² Second, Japanese courts have narrowly interpreted constitutional provisions in order to safeguard the significant levels of discretion accorded to investigative authorities such as police and prosecutors.¹⁰³ For example, although Article 35 of the Japanese Constitution protects citizens against searches and seizures, the Code of Criminal Procedure provides an exception for searches incident to arrest.¹⁰⁴ Japanese courts have allowed for a wide application of this exception, requiring only “a connection, in time, between search and seizure...and arrest...but which comes first...is not relevant.”¹⁰⁵ When combined with the prosecutor’s significant discretion to conduct investigations into suspected criminal acts, this wide interpretation of the exception to a constitutional protection demonstrates how the rights of defendants may be circumscribed under the existing framework of Japanese criminal law.

Another contrast regarding due process rights between Japan and the United States is the nature of pretrial rights accorded to criminal defendants by courts. In the United States, there is a historical emphasis on procedural justice in order to protect the constitutional rights of the accused.¹⁰⁶ As discussed below, several commentators view the relevant provisions of the Japanese Constitution as guaranteeing very similar procedural due process rights to the accused in Japan.¹⁰⁷ Alternatively, scholars argue the Japanese criminal justice system emphasizes substantive justice that focuses on achieving a just result, rather than simply ensuring just process.¹⁰⁸ Critics argue this emphasis may incentivize courts to find an accused guilty as opposed to protecting his or her rights, using the prosecutor’s significant

¹⁰¹ *Id.* at 331 (quoting SUPREME COMMANDER FOR THE ALLIED POWERS, GOVERNMENT SECTION, POLITICAL REORIENTATION OF JAPAN: SEPTEMBER 1945 TO SEPTEMBER 1948, Vol. 1, 227 (1948)); Foote, *Confessions*, *supra* note 66, at 417, 426–27.

¹⁰² Foote, *Confessions*, *supra* note 66, at 416–17.

¹⁰³ *Id.* at 429.

¹⁰⁴ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 35; KEIJI SOSHŌHŌ [KEISOHŌ] [C. CRIM. PRO.], 1948, art. 220(1).

¹⁰⁵ Foote, *Benevolent Paternalism*, *supra* note 1, at 333; Saikō Saibansho [Sup. Ct.] June 7, 1961, 15 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 915, 920, *translated in* HIROSHI ITOH & LAWRENCE W. BEER, THE CONSTITUTIONAL CASE LAW OF JAPAN: SELECTED SUPREME COURT DECISIONS, 1961–70 157–61 (1978).

¹⁰⁶ DeSombre, *supra* note 61, at 103.

¹⁰⁷ *See, e.g.,* Levin, *supra* note 99, at 290 (Article 32 guarantees “right to access to the courts,” which is Japan’s closest counterpart to procedural due process in U.S. constitutional law.)

¹⁰⁸ DeSombre, *supra* note 61, at 103.

discretion to obtain confessions as an example.¹⁰⁹ The characteristics of this pro-prosecution approach to confessions include the accused's duty to submit to questioning upon arrest or detention, the exclusion of defense counsel during interrogation, and prosecutorial discretion to designate the time, place, and duration of a meeting between the accused and his counsel.¹¹⁰ Although several judicial decisions have placed procedural limits on pre-prosecution detention, such practices have recently drawn criticism in Japan and internationally as a primary cause of wrongful arrests, coerced confessions, and convictions of innocents.¹¹¹ When combined with prosecutors' focus on obtaining confessions from suspects as a dispositive part of the later trial process, these pro-prosecution characteristics of interrogations likely play a significant role in the ability of prosecutors to maintain a high proportion of convictions in the cases brought to trial.¹¹²

IV. THE NEW JAPANESE LAY JUDGE SYSTEM

The wide discretion afforded to Japanese prosecutors, and the consequent disadvantage to defendants, has led to several reform attempts of the Japanese criminal justice system to create a more balanced forum. These reform efforts have included providing counsel for suspects prior to indictment at public expense and other steps to strengthen the defense counsel's role throughout the trial process, including the videotaping of interrogations and confessions (discussed further below).¹¹³ Further steps taken to balance the power held by prosecutors and defense counsel consist of expanding the discovery system, as well as deemphasizing the use of written witness and confession statements (which are non-verbatim under Japanese practice), in favor of in-court testimony by live witnesses subject to cross-examination.¹¹⁴ The calls for such reforms have spanned decades, but only recently have begun to be implemented.¹¹⁵ Although these new practices constitute a significant constellation of reforms toward

¹⁰⁹ *Id.* at 103, 107.

¹¹⁰ *Id.* at 109.

¹¹¹ See B. J. George, *Rights of the Criminally Accused*, 53 L. & CONTEMP. PROBS. 71, 89 (1991) (procedural limits on prosecutor's ability to detain suspects prior to prosecution); *Japanese Justice*, *supra* note 92.

¹¹² See *Japanese Justice*, *supra* note 92 (discussion of pro-prosecution practices that increase likelihood of coerced confessions).

¹¹³ *Id.*; Daniel H. Foote, *Citizen Participation: Appraising the Saiban'in System*, 22 MICH. ST. INT'L L. REV. 755, 765 (2014) [hereinafter Foote, *Citizen Participation*].

¹¹⁴ *Id.* at 765.

¹¹⁵ *Id.*

guaranteeing the rights of suspects and defendants, they have been insufficient.¹¹⁶

The lack of efficacy demonstrated by prior reforms has in part led to enactment of the Act Concerning Participation of Lay Assessors in Criminal Trials (“Lay Assessors Act”), which in turn led to the implementation of a lay judge system in 2009.¹¹⁷ In the years leading up to enactment of the Lay Assessors Act, two schools of thought emerged regarding the best format for the new lay judge system. One of these schools advocated for an Anglo-American type of jury system for the purpose of democratizing the highly bureaucratic Japanese judiciary system and preventing miscarriages of justice by judges.¹¹⁸ The second school preferred the adoption of a Continental-European type of mixed panel court consisting of professional judges and lay persons, which would prevent mistakes by inexperienced juries and insufficient appellate remedies due to a lack of a detailed reason for the jury verdict.¹¹⁹ The lay judge system ultimately enacted by the Japanese criminal justice reformers reflects the Continental-European mixed panel format.¹²⁰

It has been argued that the introduction of the lay judge system will act as an essential step toward allowing prior reforms to gain more effectiveness and achieve their goal of changing the Japanese criminal justice system.¹²¹ This legislation mandated that criminal trials in District Courts involving crimes punishable by death, imprisonment for an indefinite period,¹²² or imprisonment with hard labor be heard by a mixed panel of lay judges and professional judges.¹²³ These mixed panels would also hear cases in which the victim died as a result of an intentional criminal act.¹²⁴ Establishing an adjudicatory body composed of lay citizens was intended to expand the decision-making process in criminal trials to be more representative of the views of the general public, and to introduce a greater

¹¹⁶ Soldwedel, *supra* note 60, at 1434.

¹¹⁷ See generally Lay Assessors Act, *supra* note 10.

¹¹⁸ Masahito Inouye, *Introduction of the Saiban-in System and Reformation of Criminal Procedure in Japan*, 55 SEUL L. J. 441, 445 (2014).

¹¹⁹ *Id.*

¹²⁰ Lay Assessors Act, *supra* note 10, art. 2(2).

¹²¹ Foote, *Citizen Participation*, *supra* note 113, at 765.

¹²² Criminal Justice in Japan, *supra* note 27, at 31.

¹²³ Lay Assessors Act, *supra* note 10, art. 2(1)(i)–(ii).

¹²⁴ *Id.*

degree of transparency and accountability into the Japanese criminal justice system.¹²⁵

Cases covered by the Lay Assessors Act are heard by either a panel of three professional judges and six lay judges, or a panel consisting of four lay judges and the Chief Judge.¹²⁶ The lay judges involved in such panels are selected by lottery from the general population, based on voter rolls.¹²⁷ However, there are also several reasons why an individual may not serve as a lay judge, including not having completed the requisite compulsory education, currently serving as or having served as a judge or lawyer, or by being a National Diet member.¹²⁸ Some individuals are permitted to decline being selected as a lay judge on the grounds of being seventy years or older, being a student, having served as a lay judge within the past five years at the time of selection, or having been involved in a related case.¹²⁹

The new system mandates that lay judges play an active role in the trial and the court's decision-making process. In contrast to jurors in the United States, lay judges in the Japanese system are able to question witnesses concerning dispositive issues in the cases that the lay judges will assist in deciding.¹³⁰ Similarly, lay judges may question the victims or victims' counsel regarding the meaning of their testimony, or the defendant if he or she makes a voluntary statement.¹³¹ Deliberations regarding the trial are conducted with empaneled judges and lay judges, and lay judges are required to express their opinion regarding the case.¹³² Throughout the process, the presiding judge acts as an educator regarding the applicable law and precedent, but does not necessarily control the deliberation process.¹³³ Finally, the verdict issued by the court is reached by a majority opinion of the panel, which must include both a professional judge and a lay judge.¹³⁴

¹²⁵ Hiroshi Fukurai, *A Step in the Right Direction for Japan's Judicial Reform: Impact of the Justice System Reform Council (JSRC) Recommendations on Criminal Justice and Citizen Participation in Criminal, Civil, and Administrative Litigation*, 36 HASTINGS INT'L & COMP. L. REV. 517, 518 (2013).

¹²⁶ Lay Assessors Act, *supra* note 10, art. 2(2); Interview with Daniel H. Foote, Prof. of Law, Univ. of Wash. and Univ. of Tokyo, in Seattle, Wash. (Oct. 20, 2015) (The Chief Judge and four lay judge format has not been used to date and currently no prospects exist for its use.).

¹²⁷ Lay Assessors Act, *supra* note 10, art. 13.

¹²⁸ *Id.* art. 14–15.

¹²⁹ *Id.* art. 16–17.

¹³⁰ *Id.* art. 56.

¹³¹ *Id.* art. 58–59.

¹³² *Id.* art. 66(1)–(2).

¹³³ *Id.* art. 66(3)–(4).

¹³⁴ *Id.* art. 67(1).

If there is a divergence of opinion regarding the length of sentence and no majority that meets the requirements of the statute, an opinion is formed by adding the number of least favorable opinions to the number of opinions for the next favorable position until a majority is achieved.¹³⁵ All of these aspects of the lay judge system indicate a much greater level of involvement and participation of lay judges in the trial process than jurors in the United States, and demonstrate why their inclusion in the Japanese criminal justice system may significantly impact the existing prosecution dynamic of Japanese courts.

An interesting aspect of lay judges beyond their active participation is the restrictions placed on their interaction with the public and press. Throughout the trial, lay judges are exposed to new ways of viewing the criminal justice process and its impact on society through their engagement with each stage of the trial process.¹³⁶ However, lay judges are unlikely to share these views of the criminal justice process system with the general public under the current provisions of the Lay Assessors Act. For example, the Lay Assessors Act bars lay judges from disclosing secrets learned during deliberation or other privileged information learned in the exercise of their duties following the conclusion of a trial.¹³⁷ This broad prohibition—which applies to the subjective opinions of lay judges, the opinions of other participants in the deliberations, and the number of those who held such opinions¹³⁸—limits the press and public’s awareness of courts’ decision-making processes, which is especially concerning given the significant cases lay judges oversee. These provisions are quite strict, as any violation is subject to punishment of a fine up to ¥500,000 and/or imprisonment for a term up to six months.¹³⁹ The restrictions are also vague enough to apply to almost any information related to the deliberations. As such, several critics warn that if professional judges are not open to allowing lay judges to participate in deliberations, these provisions will inhibit the disclosure of these practices.¹⁴⁰ Therefore, they may hinder the introduction of increased transparency in the criminal justice system, despite the inclusion of lay

¹³⁵ *Id.* art. 67(2).

¹³⁶ See DIMITRI VANOVERBEKE, JURIES IN THE JAPANESE LEGAL SYSTEM: THE CONTINUING STRUGGLE FOR CITIZEN PARTICIPATION AND DEMOCRACY 156 (2015).

¹³⁷ Lay Assessors Act, *supra* note 10, art. 9(2).

¹³⁸ *Id.* art. 70.

¹³⁹ *Id.* art. 79(1).

¹⁴⁰ David T. Johnson, *War in a Season of Slow Revolution: Defense Lawyers and Lay Judges in Japanese Criminal Justice*, 9 ASIA-PAC. J. 1, 3–4 (2011), <http://japanfocus.org/site/view/3554>.

judges, and reduce the ability of the public to learn how a conviction and sentence were decided.

Even more broadly, lay judges may not commit acts that will injure the public's trust in the fairness of the trial or harm the dignity of the trial.¹⁴¹ Similar to the restrictions regarding information gained during deliberations or the trial by lay judges, these provisions do not supply any examples or explanations of what types of activities may violate the restrictions. While the confidentiality provisions may reflect a desire to protect the rights of lay judges and ensure that an open discussion may be conducted without fear of later repercussions, they also appear designed to prevent the lay judge system from generating additional criticism of the judiciary.¹⁴² This perception has garnered significant criticism from the mass media, who argue that the confidentiality provisions impose sharp limits on whether lay judges can talk about their experiences in any significant capacity.¹⁴³ In addition, these issues may potentially be left to the discretion of the professional judges involved with the trial at issue. If this is the case, there may be a significant chilling effect on how lay judges interact with the press and public regarding the trial process. Any violations of these provisions are also subject to a significant fine and potential imprisonment.¹⁴⁴ When coupled with the restrictions placed on lay judges regarding information from deliberations and the trial process and the harsh penalties assigned to disclosure, the broad and vague prohibitions on harming the dignity of the trial likely act as a factor inhibiting any increase in the transparency of the Japanese criminal justice system.

V. IMPACT OF THE LAY JUDGE SYSTEM THUS FAR

A. *Overall Impact on the Conviction Rate*

The characteristics of the approach described earlier by the Japanese criminal justice system to defendants' due process rights are worrisome, as they appear to prioritize achieving convictions over enforcing constitutional protections. When combined with the wide latitude accorded prosecutors to investigate criminal incidents and elicit confessions and judicial incentives to deal with cases efficiently, it is perhaps unsurprising that the conviction

¹⁴¹ Lay Assessors Act, *supra* note 10, art. 9(3)–(4).

¹⁴² Colin P.A. Jones, *Prospects for Citizen Participation in Criminal Trials in Japan*, 15 PAC. RIM L. & POL'Y J. 363, 370 (2006).

¹⁴³ Foote, *Citizen Participation*, *supra* note 113, at 760.

¹⁴⁴ Lay Assessors Act, *supra* note 10, art. 79(1).

rate achieved by Japanese prosecutors stands at 99.8%. The lay judge system, which introduces ordinary citizens' views into courts' decision-making processes, is designed to increase the accused's due process rights. However, the scope of trials heard by lay judges is currently restricted to very serious cases, and it is therefore unlikely that lay judges would be able to greatly alter the existing overall convictions rate.

Statistics have suggested that the narrow scope of cases heard by the lay judge system may in fact hinder its overall impact. For example, although the lay judge system was meant to temper the power of prosecutors and ensure that defendants are accorded the full extent of their rights, in one category of cases lay judges have actually tended toward more severe penalties than seen under the previous system.¹⁴⁵ Specifically, lay judges have demonstrated a tendency to impose disproportionately harsh punishments on perpetrators of sex crimes than in the past.¹⁴⁶ In fact, in two such trials the sentences handed down by lay judges exceeded the sentence demanded by the prosecutors.¹⁴⁷ Despite these harsher sentences, the public and even several members of the judiciary reacted positively to the decisions due to the perception that the prior sentencing scheme for such actions was too lenient.¹⁴⁸ From this perspective, the lay judge system's assignment of harsher sentences in some cases comports with the goals of the system, as this practice may reflect the sentiments of the general public more closely. Therefore, rather than a cause of concern, these cases may represent the lay judge system's achievement of its goal to more accurately represent the views of the public in the criminal justice process. It must be noted, however, that this trend may face opposition in light of a recent Supreme Court decision that altered the term handed down by a lay judge panel to reduce the prison sentence of a couple convicted for fatally abusing their one-year-old daughter in 2010.¹⁴⁹ The five-judge First Petty Bench unanimously decided to shorten the fifteen-year sentences handed down by the lay judge, which exceeded the ten-year sentences sought by the prosecutors.¹⁵⁰ The Supreme Court stated that “[s]entences given at lay

¹⁴⁵ Mai Kemmochi, *Five Years of the Saiban-In System in Japan*, PACE LAW LIBRARY BLOG (Nov. 13, 2014), <https://library.blogs.law.pace.edu/2014/11/13/five-years-of-the-saiban-in-system-in-japan/>.

¹⁴⁶ Mari Hirayama, *Lay Judge Decisions in Sex Crime Cases: The Most Controversial Area of Saiban-In Trials*, 3 YONSEI L. J. 128, 133 (2012).

¹⁴⁷ *Id.* at 134–135.

¹⁴⁸ *Id.* at 135–136.

¹⁴⁹ Ji Ji, *In a First, Supreme Court Shortens Harsh Lay Judge Sentence*, THE JAPAN TIMES (Jul. 24, 2014), <http://www.japantimes.co.jp/news/2014/07/24/national/crime-legal/in-a-first-supreme-court-shortens-harsh-lay-judge-sentence/>.

¹⁵⁰ *Id.*

judge trials should be respected, but their fairness compared with the results of other trials should be maintained.”¹⁵¹ This position may indicate that future lay judge sentences that significantly exceed those sought by prosecutors can be subject to scrutiny and reversal on appeal.

In addition, over the first three years of the lay judge system, the acquittal rate of mixed panel trials was under 0.5%, a relatively insignificant variation from the acquittal rate under the prior system.¹⁵² Although this may be seen as a signal that the system has failed in its ultimate purpose or that lay judges are overly focused on the plight of the victim, some critics argue that this phenomenon is counter-balanced by a decrease in the number of death penalty sentences and an increase in the proportion of deferred judgment probation rates.¹⁵³ Deferred judgment probation is an alternative form of sentencing in which a court gives the defendant probation, and dismisses the criminal case entirely after probation is successfully completed.¹⁵⁴ It has also been reported that Japanese lay judges empathize with both victims and defendants, and regard their duty of determining guilt and sentencing the defendant seriously.¹⁵⁵ In addition, another factor that may be at play regarding the lack of a significant change in the conviction rate may be prosecutors' careful screening of borderline cases that will be heard by lay judge panels, or charging lesser crimes that would avoid such review.¹⁵⁶ In light of these countervailing factors, there may be other explanations for the lack of variation in acquittal rates between the lay judge system and the prior professional judge system.

B. Drug Smuggling Cases

An interesting category of cases that has diverged from the previous professional judge system's trends involves drug smuggling. The regulation of illicit substances in Japan is governed primarily through four statutes: 1) the Narcotics and Psychotropics Control Law;¹⁵⁷ 2) the Cannabis Control Law;¹⁵⁸ 3) the Opium Law;¹⁵⁹ and 4) the Stimulants Control Law.¹⁶⁰ The

¹⁵¹ *Id.*

¹⁵² Foote, *Citizen Participation*, *supra* note 113, at 764–65.

¹⁵³ *Id.*

¹⁵⁴ *Deferred Judgement*, BLACK'S LAW DICTIONARY (10th ed. 2014).

¹⁵⁵ Mai Kemmochi, *supra* note 144; David T. Johnson, *Early Returns from Japan's New Criminal Trials*, 3 ASIA-PAC. J. (2009), http://japanfocus.org/-david_t_-johnson/3212/article.html, [hereinafter Johnson, *Early Returns*].

¹⁵⁶ Foote, *Citizen Participation*, *supra* note 113, at 765.

¹⁵⁷ Mayaku Oyobi Kōseishinyaku Torishimari Hō [Narcotics and Psychotropics Control Law], Law No. 14 of 1953.

¹⁵⁸ Taima Torishimari Hō [Cannabis Control Law], Law No. 124 of 1948.

Narcotics and Psychotropics Control Law was designed to regulate and supervise the production, distribution, and use of narcotics, and was also aimed at treating narcotics addicts.¹⁶¹ It applied to a significant number of substances, and assigned penal sanctions to offenders.¹⁶² The Cannabis Control Law similarly imposes harsh penal sanctions on offenders, with possession of relatively small amounts being punishable by five-year prison sentences and illegally growing cannabis being punishable by seven-year prison sentences.¹⁶³ The Opium Law, enacted in 1954, was less stringent as it allowed farmers to grow opium poppies with permission from the Minister of Health and Welfare to ensure that narcotics used for medical purposes remained available.¹⁶⁴ The Stimulant Control Law, first enacted in 1951, assigned ten years imprisonment and a significant fine to traffickers and manufacturers, and these penalties steadily increased through 1990.¹⁶⁵ Taken together, these laws form a statutory scheme that was enacted in response to significant drug problems in post-war Japan, and therefore reflected the harsh approach taken toward drug offenders.

Following World War II, Japan saw a dramatic increase in the rate of drug abuse, particularly stimulants.¹⁶⁶ Japan suffered significant public health effects from this trend, such as rising rates of amphetamine psychosis and narcotics addiction among the population.¹⁶⁷ In response to these increasingly negative public health impacts, and influenced by the U.S. Occupation authorities, Japan enacted a series of aggressive anti-drug laws that formed the basis for the legislative response against rising substance abuse.¹⁶⁸ Historically, Japanese authorities have treated violations of anti-drug laws very harshly and pursued violations aggressively; at one point one-third of Japanese inmates had been sentenced for violating anti-drug

¹⁵⁹ Ahen Hō [Opium Law], Law No. 71 of 1954.

¹⁶⁰ Kakuseizai Torishimari Hō [Stimulants Control Law], Law No. 252 of 1951.

¹⁶¹ Toshiyoshi Tominaga, Deputy Director, Compliance and Narcotics Division, Pharmaceutical and Food Safety Bureau, Ministry of Health, Lab., and Welfare, Control on Medical Narcotics in Japan: Science and Policy, Presentation at the 2005 International Symposium on Drug Control Strategy, Powerpoint Slide 4 (Oct. 26, 2005).

¹⁶² *Id.* at 4–5.

¹⁶³ Jon Mitchell, *Cannabis: The Fabric of Japan*, JAPAN TIMES (Apr. 19, 2014), <http://www.japantimes.co.jp/life/2014/04/19/lifestyle/cannabis-the-fiber-of-japan/#.VjaBXHdF1t>.

¹⁶⁴ See Frank F.Y. Huang, Christine Rose Ramirez & Michael S. Vaughn, *Drug Abuse and Anti-drug Policy in Japan: Past History and Future Directions*, 35 BRIT. J. OF CRIMINOLOGY 491, 496–97 (1995).

¹⁶⁵ *Id.* at 510.

¹⁶⁶ *Id.* at 498.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 498–99.

laws.¹⁶⁹ This high proportion of incarcerations based on drug offenses stems partly from the broad scope of Japan's anti-drug statutes, coupled with the lengthy sentences assigned to drug offenders.¹⁷⁰ The harsh treatment of drug offenders, and the wide range of offenses that merit such punishment, may be due in part to education programs that place the cause of addiction on poor self-control, rather than social conditions, and the political pressure from the United States to participate in the "war on drugs" through harsh domestic sanctions placed on drug offenders.¹⁷¹

The early statutes embodying the Japanese policy toward drug use have been supplemented by further legislation that built upon and expanded the existing foundation of Japan's illicit substance policy.¹⁷² This legislation has increased the scope of Japan's drug laws to include international efforts toward reducing the trafficking of illicit substances.¹⁷³ As such, it represents a continuing effort by Japan to deal with the problem of substance abuse through aggressive enforcement of anti-drug laws and an overarching no-tolerance policy.

Within the context of the historically harsh and punitive treatment of drug offenders by the Japanese criminal justice system, the recent trend of acquittals in certain drug smuggling cases heard by the lay judge system takes on potential significance. Although the overall acquittal rate of cases heard by lay judges over the first three years of the new system was only 0.5%, there has been a statistically significant shift in the number of acquittals *given* in drug smuggling cases heard by lay judge panels.¹⁷⁴ A common theme among the cases was the defendants' testimony that they were unaware that drugs were contained in luggage they had been asked to carry by third parties while traveling.¹⁷⁵ Under the historic policy of the Japanese criminal justice system to aggressively prosecute infractions of the

¹⁶⁹ *Id.* at 510; see Elmer H. Johnson, *Foreigners in Japanese Prisons: Inmate Adaptations and Prison Accommodations*, 19 J. OF CRIM. JUST. 281, 288, 290 (1991).

¹⁷⁰ Kokusai-teki Na Kyōryoku No Motoni Kisei-Yakubutsu Ni Kakawaru Fusei-Kōi Wo Jochō-suru Kōi-tō No Bōshi Wo Hakaru Tameno Mayaku Oyobi Kōseishinyaku Torishimari Hō-tō No Tokurei-tō Ni Kansuru Hōritsu [Law Concerning Special Provisions for the Narcotics and Psychotropics Control Law, Etc. and Other Matters for the Prevention of Activities Encouraging Illicit Conducts and Other Activities Involving Controlled Substances Through International Cooperation], Law No. 94 of 1991, art. 2 *et seq.* [hereinafter Law Concerning Special Provisions for the Narcotics and Psychotropics Control Law].

¹⁷¹ Huang et al., *supra* note 164, at 511.

¹⁷² Law Concerning Special Provisions for the Narcotics and Psychotropics Control Law, *supra* note 170.

¹⁷³ *Id.* art. 21.

¹⁷⁴ Foote, *Citizen Participation*, *supra* note 113, at 764.

¹⁷⁵ *Id.*

strict anti-drug legislation discussed above, it is unlikely that such a rate of acquittals would have been possible. As such, this class of cases represents a concrete example of how implementing the lay judge system has materially decreased the conviction rate in the Japanese criminal justice system.

This line of drug smuggling cases resulting in acquittals under the lay judge system is significant for two reasons. First, these cases represent a significant departure from the prior system in terms of acquittal rates, and a countertrend to the tendency of lay judge panels to assign harsher penalties in sex crime cases than those previously assigned by professional judges. Although drug smuggling cases may represent a minority percentage of the overall number of those heard by lay judges, they demonstrate that the potential for variation from existing trends exists. Such a marked divergence from the previous trends for this class of cases heard by lay judges acts as a counterpoint to the arguments that the lay judge system has been unsuccessful in its goal of altering the dynamics that existed under the previous system.

The second reason that the series of acquittals for drug smuggling cases is significant lies in the nature of the cases and defendants. Among the types of cases heard by the lay judge system, the drug smuggling cases that have resulted in acquittals have involved relatively sympathetic defendants. For example, those acquitted defendants have included senior citizens who credibly claimed that they were unaware that the drugs at issue were present in the luggage they had been asked to carry by third parties.¹⁷⁶ Also, much of the Japanese criminal justice system's aggression toward drug law infractions has been based on public policy concerns and the health of drug users themselves, rather than the harms inflicted on other victims.¹⁷⁷ These factors may indicate that these drug smuggling cases represent the potential benefits offered by the lay judge system in cases that are less serious than those in which the conviction rate remains similar to those under the prior system. Specifically, the variation in the conviction rate may indicate that the due process concerns raised by the 99.8% conviction rate under the previous system may be most effectively alleviated in cases other than the most serious offered by the criminal justice system. As such, the leniency shown by lay judges in drug cases may indicate that the system is working as intended, possibly reducing the formalistic application of code provisions and the power of prosecutors over the trial process.

¹⁷⁶ *Id.*

¹⁷⁷ Huang et al., *supra* note 164, at 507–09.

Due to the departure from the prior conviction rates seen in drug smuggling cases heard under the new lay judge system, along with the nature of the cases and defendants, this vein of cases demonstrates how the lay judge system may assist in protecting defendants' rights and reducing prosecutors' dominance in the trial process. The lay judge system arguably has performed its intended purpose in the types of cases it is suited for, as drug smuggling cases are largely victimless crimes and acquitted defendants were generally unaware of their possession of drugs. It appears that several of these cases are characterized by ordinary citizens credibly claiming that they were unaware of any wrongdoing, and thus may be distinguishable from the other types of serious cases heard by lay judge panels.¹⁷⁸ As such, drug smuggling cases could represent the type of case in which an increased amount of variation in the outcome is indicative of greater respect for the due process rights of defendants. This trend of cases demonstrates that the expansion of the scope of the lay judge system beyond its current limited scope may alleviate the due process concerns present under the old system, and thereby protect the rights of defendants in the Japanese criminal justice system.

C. *Future Reforms: Videotaping of Interrogations and Confessions*

Implementation of the lay judge system in Japan has also given renewed impetus to efforts to implement additional external checks on the criminal justice process. One of the most significant of these has been the push for videotaping the interrogations of suspects and the resulting confessions.¹⁷⁹ This practice has been adopted in numerous other countries, including England, Canada, Australia, and parts of the United States.¹⁸⁰ Under the historical practices of the Japanese criminal justice system, defense counsel would not be present during witness questioning sessions, and prosecutors would prepare a summarized version of the witness's responses following questioning.¹⁸¹ Despite hearsay rules, these summaries were generally admitted either as a substitute for or in addition to in-court testimony, under exceptions that have been broadly interpreted.¹⁸² When

¹⁷⁸ Foote, *Citizen Participation*, *supra* note 113, at 764.

¹⁷⁹ JOHNSON, *THE JAPANESE WAY*, *supra* note 7, at 273.

¹⁸⁰ *Id.*

¹⁸¹ See Foote, *From Japan's Death Row to Freedom*, *supra* note 95, at 16 n.15 (description of confessions); see also Soldwedel, *Testing Japan's Convictions*, *supra* note 60, at 1435–36 (discussing restricted access to defense counsel during holding through prosecutorial discretion or police practices).

¹⁸² Foote, *Benevolent Paternalism*, *supra* note 1, at 346; Masahiro Hiratani, *Kyōjutsu chōsho no yakuwari-saiban no tachiba kara [The Role of Records of Statements-From Standpoint of the Judiciary]*, in 2 KEHI TETSUZUKI [CRIM. PROC.] 879 (Makoto Mitsui et al., eds., 1988).

paired with the ability of prosecutors and police to hold suspects for extended periods of time, this practice understandably led to concerns about the veracity of confession statements.

There have been long-standing calls for the implementation of external checks that would counteract these practices, with the most prominent being the push for videotaping confessions and interrogation sessions.¹⁸³ Proponents of this reform argue that it would ensure that confessions are obtained voluntarily and are credible.¹⁸⁴ Furthermore, this practice would serve as a direct check on police power in the interrogation room and thereby protect the due process rights of suspects.¹⁸⁵

When the idea of videotaping interrogations was first proposed, it was met with significant opposition from prosecutors and police and was not adopted.¹⁸⁶ However, with the advent of the lay judge system, the judiciary indicated it would more closely scrutinize confessions' voluntariness.¹⁸⁷ The inclusion of lay judges led to concerns that they may base their perceptions on the confession statement, and therefore judges likely raised their standards for determining voluntariness.¹⁸⁸ In addition, the inclusion of lay judges in the trial process reduced the practicality of using written transcripts of interrogations during the trial process and concurrently emphasized the need for oral testimony.¹⁸⁹ These concerns were paralleled by renewed calls for the videotaping of interrogations conducted by police and prosecutors in order to increase the transparency of the criminal justice process.¹⁹⁰ These views and the renewed push for electronic recording of the interrogation process were at least partially in response to the implementation of the lay judge system.¹⁹¹ Consequently prosecutors began to partially videotape some criminal interrogations in August 2006, with the police following suit

¹⁸³ JOHNSON, *THE JAPANESE WAY*, *supra* note 7, at 273.

¹⁸⁴ *Id.*

¹⁸⁵ See David T. Johnson, *Policing in Japan*, in *THE SAGE HANDBOOK OF MODERN JAPANESE STUDIES* 222 (James D. Babb ed., 2015) (describing the substantial power of the police in Japanese society and the lack of substantive scrutiny of their practices).

¹⁸⁶ David T. Johnson, *Justice System Reform in Japan: Where are the Police and Why Does It Matter?*, in *HORITSU JIHO* 1, 8 (Takao Suami & Makoto Ibusuki eds., 2004).

¹⁸⁷ Foote, *Policymaking*, *supra* note 43, at 35.

¹⁸⁸ *Id.*

¹⁸⁹ Johnson, *Early Returns*, *supra* note 155.

¹⁹⁰ See, e.g., Minoru Matsutani, *Hiraoka Urges "Active" Debate on Executions*, *THE JAPAN TIMES* (Sept. 20, 2011), <http://search.japantimes.co.jp/news/2011/09/20/news/hiraoka-urges-active-debate-on-executions/#.VifLEn7nIV> (Japanese Justice Minister supporting transparency of interrogation process, possibly through videotaping interrogation sessions).

¹⁹¹ Interview with Daniel H. Foote, Professor, Univ. of Wash. & Univ. of Tokyo, in Seattle, WA (Oct. 20, 2015).

in 2008.¹⁹² As such, although complete videotaping of interrogations has not yet begun, the lay judge system has demonstrated that it may serve as a driving force for future reforms implementing external checks on the Japanese criminal justice system.

VI. THE LAY JUDGE SYSTEM OF JAPAN SHOULD BE EXPANDED TO PROTECT THE RIGHTS OF CRIMINAL DEFENDANTS MORE FULLY

As discussed above, mixed panels of lay and professional judges only hear a narrow range of cases.¹⁹³ These are limited to the most serious cases in the Japanese criminal justice system, those that are punishable by death, imprisonment for an indefinite period, or imprisonment with hard labor, and cases in which the victim died as a result of an intentional criminal act.¹⁹⁴ Arguably, the narrow range of cases heard and their serious nature has greatly contributed to the rate of acquittal under the lay judge system only being 0.5% of all the cases heard in the Japanese criminal courts.¹⁹⁵ This possibility is supported by the fact that the subset of drug smuggling cases in which the defendants credibly professed ignorance of the presence of the drugs and were older citizens heard by lay judges have resulted in a surprising rate of acquittals.¹⁹⁶ In light of the possibility that the lay judge system will more effectively reach its goals of increasing the protection of defendants' due process rights and decreasing the influence of prosecutors, the scope of the lay judge system should be expanded to encompass a wider variety of criminal cases.

As discussed above, the text of Japan's Constitution accords defendants procedural due process protections.¹⁹⁷ However, these rights have been interpreted very narrowly by judges in order to safeguard the high levels of prosecutorial discretion granted under the prior formulation of the Japanese criminal justice system.¹⁹⁸ The lay judge system represents a means to enhance the protections provided to criminal defendants under the Japanese Constitution. Although it is understandable that cases that merit the most serious criminal penalties may not lead to a high level of variation in conviction rates between the two systems, the trend of acquittals in drug smuggling cases suggests that less serious cases might be a rich forum for

¹⁹² Johnson, *Early Returns*, *supra* note 155, at 4.

¹⁹³ Lay Assessors Act, *supra* note 10, art. 2(1)(i)–(ii).

¹⁹⁴ *Id.*

¹⁹⁵ Foote, *Citizen Participation*, *supra* note 113, at 764.

¹⁹⁶ *Id.*

¹⁹⁷ Nihonkoku Kenpō [Kenpō] [Constitution], arts. 31, 32.

¹⁹⁸ Foote, *Benevolent Paternalism*, *supra* note 1, at 332.

lay judges to demonstrate a departure from the prior system. This increase in acquittals could indicate that there will be a variation in the conviction rate as compared to that under the prior system in other types of cases, and highlights the potential shortcomings in the due process protections of the prior Japanese criminal justice system. Therefore, expanding the lay judge system to apply to a greater variety of, if not all, criminal cases would fulfill the spirit of the Japanese Constitution's due process provisions by ensuring that a greater number of criminal defendants receive more balanced trials.

Expanding the scope of the lay judge system would also benefit criminal defendants by decreasing prosecutorial power in a wider variety of cases. As discussed above, prosecutors have historically played a very significant role in the criminal trial process, and their influence has been identified as a key factor in the 99.8% conviction rate under the previous system.¹⁹⁹ This significance is compounded by the symbiotic relationship between police, the prosecutors, and courts under the old system.²⁰⁰ The lay judge system represents a means of decreasing the ability of prosecutors to dictate the course and outcome of criminal trials, as evidenced by the trend of acquittals in drug smuggling cases heard under this system.²⁰¹ Formerly, the extremely high rate of conviction was universal across all types of cases, and thus any variation in conviction rates may be indicative of a significant change in the dynamics of the Japanese criminal justice system. That it has occurred in a class of cases considered very serious in Japan arguably indicates that this trend could manifest itself in other types of cases beyond the current scope of the lay judge system. Although one cannot predict with certainty the extent to which the rate of conviction would vary under an expanded lay judge system, it will result in a reduction of the 99.8% rate seen under the prior system.

Another parallel phenomenon supporting the theory that lay judges counterbalance prosecutorial discretion is the actions of prosecutors themselves since the introduction of the lay judge system. Specifically, the number of indictments in the categories of cases that will fall within the current scope of the lay judge system has dropped significantly.²⁰² This may be due to prosecutors reducing the severity of charges and sentences sought in borderline cases in order to place the cases outside the lay judge system

¹⁹⁹ See Foote, *Confessions*, *supra* note 66, at 429.

²⁰⁰ JOHNSON, *THE JAPANESE WAY*, *supra* note 7, at 215.

²⁰¹ Foote, *Citizen Participation*, *supra* note 113, at 764.

²⁰² *Id.* at 765.

and ensure that only a professional judge hears them.²⁰³ Although this is already beneficial to Japanese criminal defendants inasmuch as it limits the discretion of prosecutors to bring excessive charges, this practice suggests that it could exist beyond the current restricted scope of the lay judge system. Expanding the scope of the system to encompass all criminal cases would further limit the discretion of prosecutors, and accord this heightened protection against potential abuses of discretion to the breadth of the Japanese criminal justice system. Therefore, the expansion of the lay judge system represents an opportunity to address the problem of excessive prosecutorial discretion and power, and conversely increase the rights of Japanese criminal defendants. As discussed above, previous attempts to correct the imbalance of power wielded by defense counsel and prosecutors did not achieve significant success.²⁰⁴ The implementation of the lay judge system has acted as an essential step toward fully realizing the potential of these measures as a means of reforming the Japanese criminal justice system.²⁰⁵

These factors indicate the potential benefits that may manifest upon expansion of the lay judge system to encompass all criminal cases in Japan. First, it may increase the power of the due process rights of defendants enunciated in the Japanese Constitution. This would take on special significance as a departure from previous case law that supported expanded prosecutorial discretion at the expense of defendants' due process rights. Second, the lay judge system has already curtailed the extent of prosecutorial discretion by increasing the variety in trial outcomes in certain types of cases. This limiting of prosecutorial discretion is further evidenced by the altered behavior of prosecutors themselves, as there has been a decrease in indictments of charges that would merit review by a mixed panel of lay and professional judges. Increasing the scope of the lay judge system would further address the expansive role of prosecutors. When coupled with the increased due process protections accorded defendants, this increase may substantially alleviate the existing concerns with the Japanese criminal justice system that have persisted despite institution of the lay judge system.

Admittedly, expanding the lay judge system to be a mandatory requirement for all criminal cases is likely impracticable, in part due to the much higher demand for lawyers required for an expanded system and the

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

additional administrative costs associated with lengthier trials. Therefore, two approaches that balance these concerns with increasing the protections accorded to defendants may be adopted. First, reforms could mandate that all criminal trials in Japan be heard by lay judges, with the option for a defendant to opt out of their case being heard by a lay judge panel. This provision would allow defendants an expeditious trial if they have given a bona fide, voluntary confession or otherwise decided not to contest the case. Conversely, it would ensure that defendants challenging the charges against them are accorded the benefits of lay judge panels hearing their case. Although there may be a risk of many defendants opting out, such as to avoid negative publicity or due to pressure from the prosecution, this provision could be phased out as the lay judge system is adapted to its increased scope if this becomes an issue.

Alternatively, the lay judge system could be expanded beyond its current narrow range of cases, as defined by the sentences assigned to those found guilty of the charge against them. Under the current provisions of the Lay Assessor Act, lay judge panels only hear cases for crimes punishable by death, imprisonment for an indefinite period, or imprisonment with hard labor.²⁰⁶ Therefore, relatively few cases are heard by lay judge panels and those that are heard are very serious by nature. The lay judge system could be expanded to include more tiers of the Japanese Criminal Code's sentences, such as hearing cases involving crimes punishable by imprisonment without work and those carrying significant fines.²⁰⁷ This approach could be tailored to fit the current capabilities of the Japanese criminal justice system, and subsequently expanded if the capacity of the system is increased. This method would allow for a gradual integration of the attendant costs of expanding the lay judge system, while providing its protections to a wider range of cases in the interim. If necessary, this method could also include an opt-out provision that would allow defendants charged with lesser crimes to go through an attenuated trial in cases that are uncontested. Regardless of which expansion scheme is adopted, increasing the scope of the lay judge system will offer greater protections to Japanese criminal defendants, and may be accomplished while balancing these benefits with the costs attendant with such an expansion.

²⁰⁶ Lay Assessors Act, *supra* note 10, art. 2(1)(i)–(ii).

²⁰⁷ KEIHŌ (PEN. C.) arts. 13, 15.

VII. CONCLUSION

Historically, as a civil law-based system, the Japanese criminal justice system has limited the discretion of judges to act beyond the applicable code provisions in criminal cases. In fact, Japanese judges may be incentivized to quickly process cases rather than ensure that the due process rights of criminal defendants are recognized. Conversely, Japanese prosecutors have been accorded significant discretion and power throughout the trial process, including investigatory powers and controlling and supervising the carrying out of a sentence. As a byproduct of this structure, the Japanese criminal justice system has been historically characterized by a conviction rate of 99.8%. Although both of these patterns have seen changes in recent years, due to greater judicial activism and the institution of reforms to alleviate prosecutorial influence, the high conviction rate and central role played by prosecutors have not been greatly altered.

The lay judge system of Japan, in which citizens participate in the decision-making process of certain criminal trials, was instituted in 2009 to address this concerning dynamic. Within the first three years of the lay judge system's hearing of cases, the acquittal rate stood at only 0.5%. However, there were several promising trends. For example, a significant number of acquittals were given in drug smuggling cases heard by lay judges. Also, there has arguably been a decrease in the discretion of prosecutors since the institution of the lay judge system, as indicated by prosecutors deciding to bring charges that would avoid the case being heard by lay judges in borderline cases.

The effects of the lay judge system on the conviction rate in drug smuggling cases, reduction in the influence of prosecutors over the trial process, and increased impetus given for further reforms indicate that the lay judge system should be expanded beyond its current scope to encompass a greater variety of criminal trials. This increase in scope could either be accomplished by requiring that all criminal cases be heard by lay judge panels with an opt-out choice made available to defendants in uncontested cases, or widening the types of cases heard by lay judge panels based on the requested sentences. Both approaches would more fully protect the due process rights of criminal defendants in the Japanese criminal justice system while balancing the increased costs attendant to such an expansion. As such, expanding the lay judge system would serve to alleviate the concerns that served to drive the initial implementation of the lay judge system itself, and more fully protect the rights of Japanese criminal defendants.