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ASSESSING THE DIRECT AND INDIRECT IMPACT OF CITIZEN PARTICIPATION IN SERIOUS CRIMINAL TRIALS IN JAPAN

Matthew J. Wilson[†]

Abstract: In Japan, the idea of citizen involvement in the judicial process has gained greater acceptance over the past decade. On May 21, 2009, Japan implemented its *saiban'in seido* or “lay judge system” as part of monumental legal reforms designed to encourage civic engagement, enhance transparency, and provide greater access to the justice system. About eight years before this historic day, a special governmental committee known as the Justice System Reform Council (“JSRC”) set forth wide-sweeping recommendations for revamping Japan’s judicial system. The underlying goals targeted three pillars of fundamental reform, namely: (i) a justice system that is “easier to use, easier to understand, and more reliable;” (ii) a legal profession “rich both in quality and quantity;” and (iii) a popular base in which citizens’ trust in the legal system is enhanced through their participation in legal proceedings. The JSRC viewed the judicial system as an engine capable of propelling both economic and societal change. It believed that lay judge participation could function as a piston in this engine by helping shift Japan away from centralized control and heavy bureaucratic regulation. Lay participation was consistent with the perceived need for Japanese citizens to not only break away from excessive dependency on the government, but also to develop greater civic consciousness, become more actively involved in public affairs, and better integrate community values into the justice system.

From the outset, the creation and implementation of the lay judge system have been strongly controlled by the status quo such that direct impact on the outcome of individual criminal trials has been minimized. However, the value of this monumental court reform in Japan has been educational, indirect, and real. This Article examines the direct impact of the lay judge system, describes several of the indirect benefits of the new system, and then explores the potential of the system going forward. This analysis is done through the lens of Malcolm Feeley’s 1983 work entitled *Court Reform on Trial*.

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I. INTRODUCTION

Japan’s recent implementation of monumental legal and court reforms has significantly impacted the courts, the legal system, individuals, and even society as a whole. Interestingly, these reforms did not necessarily stem from a concerted public movement, blaring calls for change, extensive media pressure, or even foreign influence. According to many, the justice system was not broken. Rather, major reforms to Japan’s legal and court systems evolved in response to increasing concerns about a stagnant economy,

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mounting debt, and floundering direction. During the 1990s, Japanese policymakers and business leaders progressively believed that widespread legal reforms could help spark economic recovery, satisfy evolving needs associated with globalization, and prepare the nation for the century ahead.

With an eye on infusing energy into the economy through concrete measures and structural solutions, Prime Minister Keizo Obuchi established a special governmental committee in July 1999 known as the *Shiho Seido Kaikaku Shingikai* or the Justice System Reform Council (“JSRC”). It was significant that the Prime Minister established the JSRC separately from the traditional forces of the justice system—the Ministry of Justice, Supreme Court, and Japan Federation of Bar Associations (“JFBA”).¹ Because the JSRC was answerable directly to the Prime Minister, its mission extended well beyond the charge of a conventional committee and its sweeping recommendations would be widely regarded and accepted by the government.

One major judicial reform arising from the JSRC’s deliberations involved the incorporation of citizens into Japan’s criminal justice system through the establishment of *saiban’in*² (often translated as “lay judge,” “lay assessor,” or “citizen judge”) trials in certain cases. In Japan’s modern era, professional judges had almost exclusively handled the reins of the justice system. Tribunals consisting of one or three professional judges conducted criminal trials, civil proceedings, and all appeals in Japan. Public participation in criminal or civil trials as a lay judge or juror was a foreign concept.

This new foray by Japan into the world of lay participation in trials constitutes one of the most fascinating modern experiments in court reform. Before this major court reform, Japan was the lone member of the Group of Eight nations without a system requiring citizen participation in the trial process.³ Albeit largely misguided, jury trials in the United States and United

¹ Caleb Jon F. Vandenbos, *Patching Old Wineskins: Heightened Deference Towards Saiban’in Findings of Fact on Koso Appeal Is Not Enough*, 24 WASH. INT’L L.J. 391, 397 (2015). See also Setsuo Miyazawa, *Successes, Failures, and Remaining Issues of the Justice System Reform in Japan: An Introduction to the Symposium Issue*, 36 HASTINGS INT’L & COMP. L. REV. 313, 314 (2013).

² Translated literally, the word *saiban’in* (裁判員) means “trial member.” It refers to a citizen participant serving on a mixed panel of professional judges and citizen judges in the quasi-jury system described in this Article.

³ Matthew J. Wilson, *Japan’s New Criminal Jury Trial System: In Need of More Transparency, More Access, and More Time*, 30 FORDHAM INT’L L.J. 487, 513–14 (2010) [hereinafter Wilson, *Japan’s New Criminal Jury Trial System*] (citing *Lay Judge System Starts in Japan amid Lingering Concerns*, Thai Press Repts., May 25, 2009, 2009 WLNR 9772569).

Kingdom had increasingly come under greater scrutiny and sharper criticism in recent decades.⁴ However, court reformers in Japan, Asia, and other parts of the world have conversely gravitated toward citizen participation in the trial process.⁵

At least among reformers and policymakers in Japan (and subsequently other East Asian countries), there has been sufficient support to enable citizen participation into the criminal justice process to facilitate greater public engagement and achieve more transparency. This phenomenon has been seen in Japan, South Korea, Taiwan, and even China.

By way of background, the Diet of Japan adopted a proposal to establish mixed or quasi-jury trials pursuant to the *saiban'in ho* or Act Concerning Participation of Lay Assessors in Criminal Trials (the “Lay Judge Act”) on May 21, 2004.⁶ Based on the JSRC’s recommendations, this transformational legislation enabled the creation of *saiban'in* trials to adjudicate certain serious criminal cases. Pursuant to this Act, the Japanese courts would now select citizens to assist in adjudicating cases involving homicide, robbery resulting in bodily injury or death, bodily injury resulting in death, unsafe driving resulting in death, arson of an inhabited building, kidnapping for ransom, abandonment of parental responsibilities resulting in the death of a child, and other serious cases involving rape, drugs, and counterfeiting.⁷

Stakeholders impacted by this experiment with citizen participation in serious criminal cases approached the new *saiban'in* system and its objectives with reactions ranging from excitement to opposition.⁸ Optimists saw the new system as a vehicle for fostering positive societal change, enhancing democratic engagement, and bringing transparency to Japan’s sheltered criminal justice system. Conversely, others strongly believed that the court system was never broken, and should not be touched by common citizens who are inexperienced and generally uneducated in the complexities of the law.⁹

⁴ Jason M. Solomon, *The Political Puzzle of the Civil Jury*, 61 EMORY L.J. 1331, 1349–50 (2012).

⁵ MATTHEW J. WILSON, HIROSHI FUKURAI & TAKASHI MARUTA, CIVIL JURY TRIALS IN JAPAN: CONVERGENCE OF FORCES 112–33 (2015); Nancy S. Marder & Valerie P. Hans, *Introduction to Juries and Lay Participation: American Perspectives and Global Trends*, 90 CHI.-KENT L. REV. 789, 820–21 (2015).

⁶ *Saiban'in no Sanka Suru Keiji Saiban ni Kansuru Horitsu* [Act Concerning Participation of Lay Assessors in Criminal Trials], Law No. 63 of 2004 (Japan), *translated in* Japanese Law Translation, <http://www.japaneselawtranslation.go.jp> [hereinafter Lay Judge Act].

⁷ *Id.* art. 2.

⁸ WILSON ET AL., *supra* note 5, at 28–37.

⁹ *Id.*

After five years of preparation, *saiban'in* trials or “lay judge trials” officially commenced in 2009. Here, Japanese voters are enlisted to serve on a mixed tribunal consisting of professional judges and lay judges to adjudicate a criminal case.

Because Japan invested extraordinary amounts of time, energy, and financial resources in preparing for citizen participation in the new lay judge system, the first trial met with enormous anticipation. This translated into much excitement and fanfare for the first lay judge trial. Traditional and non-traditional media coverage were at an unparalleled level.¹⁰ Obtaining a seat in the courtroom was nearly impossible.¹¹ Japan’s efforts and energy in rolling out the system were nothing short of remarkable.

Nearly a decade removed from the first trial, it is instructive to analyze the success of the system to date and its prospects going forward. To date, many works (including my own) have evaluated the lay judge system from various perspectives. Unlike other articles, however, this work assesses the *saiban'in* system through the theoretical lens set forth in Professor Malcolm Feeley’s acclaimed book *Court Reform on Trial*.¹²

In his groundbreaking work penned in 1983, Professor Malcolm Feeley examines the process of innovation and planned change with a focus on several criminal court reforms across the United States during that period.¹³ He sets forth a formula for assessing the likely success of criminal court reforms. Also, he identifies potential pitfalls and stumbling blocks along the way to successful court reform, and explains why court reform may not succeed. Although Feeley focuses on the United States, his formula can be applied to Japan’s experience with lay participation in its criminal justice system.

Noting that each stage in the change process of a court system has its own distinct challenges and hazards, Professor Feeley advocates that each stage of innovative change should be considered separately to best analyze the prospects of successful court reform. Feeley defines the “stages of innovation” as i) *diagnosis*; ii) *initiation*; iii) *implementation*; iv)

¹⁰ *Id.* at 40–41.

¹¹ See Makoto Ibusuki, *Quo Vadis? First Year Inspection to Japanese Mixed Jury Trial*, 12 *ASIAN-PAC. L. & POL’Y J.*, 29–31 (2010).

¹² MALCOM FEELEY, *COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL* (1983).

¹³ *Id.* at 35.

routinization; and v) *evaluation*.¹⁴ By separately analyzing these phases in the context of one of the major recent changes to the Japanese criminal justice system, one can more realistically predict the chances of success.

In evaluating the success of any court reform, Feeley postulates that success in the United States is much more likely when i) there are highly trained professionals performing complex tasks; ii) authority is diffused and flexible rather than centralized; iii) duties are ambiguous rather than formally codified; and iv) roles and mobility are flexible rather than rigidly stratified. Conversely, he perceives that two primary factors have the potential of discouraging innovation.¹⁵ Specifically, the higher the volume of production, the greater the need for established routine and the lower the incentive to change. Further, the greater that the change emphasizes efficiency, the likelier the program change will be discouraged.¹⁶

This Article dives into the *saiban'in* system in the context of Feeley's formula and general observations. Because this lay judge system is new and unique, its progress to date and future prospects are ripe for continued analysis and study.¹⁷ Before diving into each element associated with reform and innovation, it is helpful to establish a foundation for discussion by describing the modern history of the Japanese justice system and characteristics of court reform.

II. FOUNDATIONAL UNDERSTANDING

Through a remarkable recovery from the devastation sustained during the Second World War, Japan rose to a position of prominence and respect across the world. The country's post-war development plan, featuring market-friendly policies, balanced budgets, and market liberalization, ignited rapid economic growth that seemed limitless for decades.¹⁸ Between 1955 and 1973, Japan experienced average growth of up to nine percent per year.¹⁹ As stated by Prime Minister Hayato Ikeda in 1964, Japan's "vital challenge .

¹⁴ *Id.*

¹⁵ *Id.* at 38.

¹⁶ *Id.*

¹⁷ *Id.* at 35.

¹⁸ Kazumi Funahashi, *Japan's Post-WWII Recovery Can be a Lesson for the World*, DAILY SIGNAL, Nov. 19, 2012, <http://dailysignal.com/2012/11/19/japans-post-wwii-recovery-can-be-a-lesson-for-the-world/>.

¹⁹ See Wataru Takahashi & Shuji Kobayakawa, *Globalization: Role of Institution Building in the Japanese Financial Sector*, 11 fig. 1 (Bank of Japan, Working Paper No. 03-E-7 2003), https://www.boj.or.jp/en/research/wps_rev/wps_2003/data/wp03e07.pdf.

. . . whether domestically or internationally, is to promote stable economic growth and reduce the disparity between the rich and poor.”²⁰ Four years later, Japan had become the second largest economy in the world after the United States.²¹

Over time, Japan progressively became renowned for its efficiency, quality, and stability. Now one of the most advanced societies in the world, Japan provides its citizens with a high overall quality of life. Among other things, the country has excelled in its per capita income, technological advancement, convenience, safety, cleanliness, literacy, and life expectancy.²² Japan’s “economic miracle” stands as a model for emerging nations and economies recovering from difficult circumstances.²³

From a political and legal standpoint, Japan became the most democratic country in East Asia in the post-war era. Immediately after Japan announced its decision to surrender to the United States in 1945, General Douglas MacArthur accepted an appointment as Supreme Commander for the Allied Powers (“SCAP”) to oversee the occupation of Japan. Shortly thereafter, he declared, “To the Pacific basin has come the vista of a new emancipated world. Today, freedom is on the offensive, democracy is on the march.”²⁴

In effectuating change to the government and legal systems, General MacArthur believed that changes should be based on familiar institutions and continuity, at least to the extent possible. Thus, in order to facilitate the stabilization and recovery of Japan, SCAP employed as much of the existing Japanese governmental structure as possible.²⁵ Naturally, the Allied Occupation involved significant changes designed to facilitate a full-scale democratic government.²⁶ Without question, the American influence on the Japanese judicial and legal systems was significant.²⁷ The influence included the adoption of a new constitution primarily drafted by American lawyers, new laws modeled after U.S. counterparts, strengthening of the judiciary, and

²⁰ Kuzami Funahashi, *supra* note 18.

²¹ FEELEY, *supra* note 12, at 36.

²² WILSON ET AL., *supra* note 5, at 5.

²³ *Id.*

²⁴ Gen. Douglas MacArthur, VJ Day Broadcast (Sept. 2, 1945), in GENERAL MACARTHUR: SPEECHES AND REPORTS 1908–1964, at 136–38 (Edward T. Imparato ed., 2000).

²⁵ See Renata Lawson Mack, *Reestablishing Jury Trials in Japan: Foundational Lesson from the Russian Experience*, 2 CREIGHTON INT’L & COMP. L.J. 101, 130–31 (2012).

²⁶ Elliott J. Hahn, *Overview of the Japanese Legal System*, 5 NW. J. INT’L L. & BUS. 517, 522 (1983).

²⁷ *Id.*

a guaranteed parliamentary system of government.²⁸ The Constitution outlined a governmental structure based on the Western concept of separation of powers that provides for check and balances among the legislative, executive, and judicial branches of government.²⁹ The Japanese judiciary system resembles the structure of United States court systems, with trial courts, appellate courts, and a supreme court.³⁰

Japan was not an absolute stranger to democratic institutions and tendencies before the Second World War. In fact, after the restoration of the Emperor Meiji to the Japanese throne in 1868, Japan embarked on a mission to “modernize” its political institutions based on Western examples.³¹ Significant steps taken during the Meiji Restoration period include the adoption of the Constitution of the Empire of Japan in 1889, the creation of a national legislature known as the Imperial Diet in 1890, and the implementation of statutory codes based on Western European models.³² Political parties also emerged during this period, challenging the established Japanese political order.³³ Lawyers and formal legal education did not exist—at least in the forms known in the West—until the Meiji Era.³⁴ During that era, with the adoption of a new Western-based system, lawyers quickly came on the scene.³⁵ As the legal system evolved, Japan experimented with citizen participation and jury trials for a short period between 1928 and 1943 pursuant to the pre-war Jury Act.³⁶ The terms of the Japanese surrender in World War II promulgated in the Potsdam Declaration reflect the existence of these institutions as it refers to the removal of obstacles to “the revival and strengthening of democratic tendencies among the Japanese people.”³⁷

During Japan’s post-war transformation, government and public officials benefitted from an increasing public trust that resulted from the country’s overall success. This extended to the judiciary given that Japanese judges were generally regarded as intelligent, honest, politically independent,

²⁸ Murai Ryōta, *The Rise and Fall of Taishō Democracy: Party Politics in Early-Twentieth Century Japan*, NIPPON COMM. FOUND. (Sept. 29, 2014), <http://www.nippon.com/en/in-depth/a03302/>.

²⁹ *Court System of Japan*, SUPREME COURT OF JAPAN, http://www.courts.go.jp/english/judicial_sys/Court_System_of_Japan/index.html (last visited July 2, 2017).

³⁰ *Id.*

³¹ Murai Ryōta, *supra* note 28; *see also* Hahn, *supra* note 26, at 521.

³² Murai Ryōta, *supra* note 28.

³³ *Id.*

³⁴ Hahn, *supra* note 26, at 518.

³⁵ *Id.* at 521.

³⁶ WILSON ET AL., *supra* note 5, at 14–15.

³⁷ Proclamation Defining Terms for Japanese Surrender (Potsdam Declaration) (July 26, 1945).

and professionally competent.³⁸ In short, the Japanese judiciary comprised a “small, largely self-regulating cadre of elite legal professionals who enjoy with reason an extraordinarily high level of public trust.”³⁹

III. PROCESS OF PLANNED CHANGE—DIAGNOSIS AND CONCEPTION PHASES

Despite the country’s impressive recovery and substantial achievements in the post-war era, Japan’s economic momentum deteriorated considerably shortly before the turn of the twenty-first century due to a prolonged period of economic uncertainty, a swelling national debt, and political stagnation.⁴⁰ In the 1980s, Japan’s economy experienced a rapid escalation in real estate and stock prices. Japan’s Nikkei average eventually hit its all-time high in 1989. Japan’s economy collapsed shortly thereafter in spectacular fashion as asset values plummeted, economic growth stalled, banking problems ensued, and Japan’s Nikkei stock average crashed.⁴¹ The economy had over-expanded during years of exorbitant growth. As a result, the stock market dropped more than sixty percent and real estate values plummeted by nearly eighty percent in some cases.⁴² This phenomenon came to be known as Japan’s “bubble economy.”⁴³

Unable to immediately return to continuously sustained growth after the economic bubble popped, the country’s confidence was shaken. Moreover, Japan’s dominance in manufacturing and innovation was challenged by other Asian nations that were able to produce goods at much lower costs.⁴⁴ The subsequent economic stagnation in Japan in the post-1989 era came to be known as the “Lost Decade.”⁴⁵ During this time, Japan began to work to address its problems and challenges.

³⁸ John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust*, in *LAW IN JAPAN: A TURNING POINT* 99 (Daniel H. Foote ed., 2007).

³⁹ *Id.*

⁴⁰ WILSON ET. AL, *supra* note 5, at 5.

⁴¹ *Id.*

⁴² Brink Lindsey & Aaron Lukas, *Revisiting the “Revisionists”: The Rise and Fall of the Japanese Economic Model*, CATO INST. (July 31, 1998), <https://www.cato.org/publications/trade-policy-analysis/revisiting-revisionists-rise-fall-japanese-economic-model>.

⁴³ MAURICE OBSTFELD, *TIMES OF TROUBLES: THE YEN AND JAPAN’S ECONOMY 1985–2008*, at 1 (Koichi Hamada, et al. eds., 2011).

⁴⁴ Dan Rosen, *Japan’s Law School System: The Sorrow and the Pity*, 66 J. LEGAL ED. 267, 271 (2017).

⁴⁵ Eric Johnston, *Lessons from When the Bubble Burst*, JAPAN TIMES, Jan. 6, 2009, <https://www.japantimes.co.jp/news/2009/01/06/reference/lessons-from-when-the-bubble-burst/#.WgVFrIZrzdQ>.

A. *Genesis for Court and Legal Reforms*

Professor Feeley characterizes the first stage of court reform as *diagnosis*. “Diagnosis is the process of identifying problems and considering solutions.”⁴⁶ *Diagnosis* provides a foundation for applying the Feeley formula to analyze the potential success of a court reform. Recounting the historical events underlying the movement for a specific legal and court reform can help in understanding the genesis for the reforms and likelihood of success.

In the case of Japan, the diagnosis related primarily to sustained economic malaise as opposed to glaring problems with the criminal court system or popular agitation. Japan’s criminal justice system had been generally praised by many for its stability, efficiency, and leniency.⁴⁷ Japanese society was comparatively safe and largely devoid of major criminal activity.⁴⁸ Notwithstanding, the praise does not mean that Japan’s criminal justice system was perfect, or even that it lacked the need to change in the eyes of reformers. In fact, some critics and reform-minded individuals had long sought constructive change to the criminal justice system.⁴⁹ More than anything though, reformers and policymakers set out to find economic and societal solutions that would propel society forward.⁵⁰ In the eyes of reformers, the country was carrying “enormous financial deficits and economic difficulties or a sense of some kind of social blockade.”⁵¹ This needed to be remedied, and legal reform was seen as a potential catalyst for change.

Starting in the 1990s, after the economic “bubble” popped and appreciable economic growth did not appear imminent, Japanese policymakers and others diagnosed the source of its economic problems and considered possible solutions to spur economic growth.⁵² Although the official unemployment rate remained low, the Japanese economy appeared to

⁴⁶ FEELEY, *supra* note 12, at 35–36.

⁴⁷ Dan Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317, 317–18 (1992).

⁴⁸ *As Crime Dries up, Japan’s Police Hunt for Things to Do*, ECONOMIST, May 18, 2017, <https://www.economist.com/news/asia/21722216-there-was-just-one-fatal-shooting-whole-2015-crime-dries-up-japans-police-hunt>.

⁴⁹ WILSON ET AL., *supra* note 5, at 36–37.

⁵⁰ *Id.* at 12–13.

⁵¹ JUD. REFORM COUNCIL, THE POINTS AT ISSUE IN THE JUDICIAL REFORM II.2 (Dec. 21, 1999), <http://www.kantei.go.jp/foreign/judiciary/0620reform.html> [hereinafter THE POINTS AT ISSUE].

⁵² WILSON ET AL., *supra* note 5, at 6–7.

be running out of miracles.⁵³ It would grow a little, stop, and then contract a little.⁵⁴ To stimulate its economy, Japan slashed interest rates and invested massive sums on infrastructure and other public works.⁵⁵ These attempts to lift Japan out of the lingering economic doldrums failed to gain the sustained traction desired by policymakers.⁵⁶

Calls for deregulation and administrative reform to combat the economic slowdown grew progressively louder.⁵⁷ Previously, the government had endeavored to prevent excessive competition and corporate failure by heavily controlling market entry.⁵⁸ This approach was now backfiring, while global competitive forces were putting pressure on Japan's dominance.⁵⁹ Domestically, a response to the massive number of non-performing loans and high bankruptcy rates was necessary.⁶⁰ Unlike the past several decades, many felt that Japan could no longer rely heavily upon concentrated bureaucratic oversight and regular governmental intervention to achieve economic solutions.⁶¹ Instead, government bureaucrats were criticized for practicing a "unique form of state-directed insider capitalism" pursuant to which the government favored certain industries, controlled the allocation of capital, regardless of market signals, and helped prop up real estate and stock values.⁶² Unlike the praise that observers had offered when the Japanese economy was firing on all cylinders, bureaucratic interference and control quickly became broadly criticized.⁶³

B. *Conceiving Solutions from a Legal Perspective*

The *diagnosis* stage outlined by Professor Feeley starts with identification of the problem and progresses to the exploration of potential solutions.⁶⁴ Understanding that the country needed to address its enormous financial deficits, lingering economic difficulties, and challenging social issues, Japanese policymakers felt compelled to explore solutions from

⁵³ Jim Impoco, *Life after the Bubble: How Japan Lost a Decade*, N.Y. TIMES, Oct. 18, 2008, <http://www.nytimes.com/2008/10/19/weekinreview/19impoco.html>.

⁵⁴ *Id.*

⁵⁵ Lindsey & Lukas, *supra* note 42.

⁵⁶ Impoco, *supra* note 53.

⁵⁷ WILSON ET AL., *supra* note 5, at 7.

⁵⁸ *Id.* at 6.

⁵⁹ *Id.* at 7.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Lindsey & Lukas, *supra* note 42.

⁶³ *Id.*

⁶⁴ FEELEY, *supra* note 12, at 36.

diverse perspectives.⁶⁵ The deregulation conversation initially focused on economic issue, but subsequently morphed into a deeper discussion, not only about scaling back governmental intervention in the private sector, but also about reevaluating Japan's economic, administrative, political, and legal structures.⁶⁶

The judicial system was seen as “a social infrastructure indispensable for national life,” particularly in terms of its role to “support the free and fair activities of people by making rules and providing resolution of disputes.”⁶⁷ Thus, the observation that “economic circumstances are drastically and rapidly changing” in Japan led the government to conclude that the judicial system as then-constituted was incapable of adequately supporting economic activities.⁶⁸ To enable the Japanese economy to stabilize and grow in the twenty-first century, the judicial system required drastic reform.⁶⁹ Although talks of judicial reform initially focused on the civil justice system, these rapidly spread to a comprehensive analysis of both the civil and criminal justice systems.⁷⁰

In essence, reformers rationalized that Japan should expand the role of law to stimulate the economy and enhance participatory democracy.⁷¹ The justice system would benefit from greater access, user-friendliness, and increased citizen involvement and understanding.⁷² Reformers believed greater citizen involvement could help improve governmental transparency, increase public and private accountability, and inspire the private sector.⁷³

Through legal reform, the hope was that society would strengthen, the economy would grow, and the country could adequately prepare for domestic challenges.⁷⁴ Becoming more responsive to complex and dynamic matters

⁶⁵ THE POINTS AT ISSUE, *supra* note 51, II.2.

⁶⁶ *Id.*

⁶⁷ MINISTRY OF ECONOMY, TRADE, AND INDUSTRY OF JAPAN, REPORT OF CORPORATE LEGAL SYSTEM STUDY GROUP FOR RESEARCH ON ECONOMIC ACTIVITY AND THE JUDICIAL SYSTEM (May 9, 2000), <http://www.meti.go.jp/english/report/data/gCorpMaine.html> [hereinafter METI REPORT].

⁶⁸ *Id.* (noting that “enterprises involved in economic activities are required to dynamically and rapidly cope with such change in such areas as the (i) implementation of corporate alliances, etc. for the purpose of revitalization of competitiveness in the international market, (ii) intensifying the corporate governance system, and (iii) modification of business models in response to globalization. . .”).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ THE POINTS AT ISSUE, *supra* note 51, I.1.

⁷² *See generally* METI REPORT, *supra* note 67.

⁷³ THE POINTS AT ISSUE, *supra* note 51, III.1.

⁷⁴ *Id.* I.1.

was also key.⁷⁵ From a global perspective, reforms to the legal system could position Japan for an even greater role in the global community and enable it to respond to global issues more quickly and efficiently.⁷⁶ Legal reform was increasingly viewed as a pathway to recovery.⁷⁷ Accordingly, policymakers started paying attention to reforming laws, policies, legal institutions, and the courts.

In time, Japan's dominant political party, the Liberal Democratic Party (LDP), together with big business, adopted the notion that the "rule of law" should displace the concept of "rule by law."⁷⁸ These groups agreed that the arsenal of solutions needed to be expanded beyond a deregulatory approach aimed only at economic revitalization.⁷⁹ It also needed to include social, political, and legal reforms.⁸⁰ An expanded arsenal of solutions was crucial in getting a larger package of judicial reforms, including the new *saiban'in* system, passed into legislation.⁸¹ The *saiban'in* system was consistent with the spirit of deregulation and empowerment of the individual given that the new system limits government involvement in criminal trials by shifting some of the legal responsibility to ordinary citizens.⁸²

IV. PROCESS OF PLANNED CHANGE—INITIATION PHASE

With some of its problem seemingly diagnosed and potential solutions under consideration, Japan moved into the second phase of planned change with respect to its court system—*initiation*—as defined in Professor Feeley's book. During *initiation*, "new functions are added or practices are significantly altered," and, as observed in Japan, policymakers must decide which alternatives will be adopted, how programs will be financed, and who will oversee the changes.⁸³

⁷⁵ See generally METI REPORT, *supra* note 67.

⁷⁶ THE POINTS AT ISSUE, *supra* note 51, II.3.

⁷⁷ *Id.* II.2.

⁷⁸ METI REPORT, *supra* note 67.

⁷⁹ THE POINTS AT ISSUE, *supra* note 51, II.1.

⁸⁰ Zachary Corey & Valerie P. Hans, *Japan's New Lay Judge System: Deliberative Democracy in Action?*, 12 ASIAN-PAC. L. & POL'Y J. 72, 90 (2010).

⁸¹ ANNA DOBROVOLSKAIA, *THE DEVELOPMENT OF JURY SERVICE IN JAPAN: A SQUARE BLOCK IN A ROUND HOLE?* 209 (2016).

⁸² Corey & Hans, *supra* note 80, at 90 (citing Dan W. Puchniak, *Perverse Main Bank Rescue in the Lost Decade: Proof that Unique Institutional Incentives Drive Corporate Governance*, 16 PAC. RIM L. & POL'Y J. 13, 13 (2007)).

⁸³ *Id.*

For Japan to successfully transition to a deregulated economy that relied on free-market mechanisms, citizens needed to trust the law and move forward without extensive governmental interference. To better serve the private sector, courts needed better accessibility, greater transparency, and increased efficiency. They also needed to be more responsive to global influences, which, in turn, could help Japanese competitiveness on an international scale. In the past, Japan's court system was slow in its case review and private attorneys were scarce.⁸⁴ The legal system and the courts needed to adapt, and the size, quality, and breadth of the attorney pool needed to grow.⁸⁵

A. *Creation of the Justice System Reform Council (“JSRC”)*

Against this backdrop, the Justice System Reform Council was tasked with considering the future of law in Japan from the “people’s viewpoint.”⁸⁶ The JSRC was specifically designed to explore and propose tangible measures to reform the legal and justice system.⁸⁷ To achieve this purpose, the Japanese government invited thirteen distinguished individuals from various political and economic sectors to join the JSRC to engage in detailed, high-level discussions about potential civic, legal, and judicial reforms.⁸⁸ The invitees included a former chief justice of the Hiroshima High Court, a former chief prosecutor of the Nagoya Public Prosecutor’s Office, two members from the Federation of Economic Organizations (*Keidanren*) and the Japanese Association of Corporative Executives (the *Keizai Doyukai*), the former president of the Japan Federation of Bar Associations, the president of the Federation of Private Universities, a business professor from a private university, a popular writer, a vice president of the *Rengo* labor organization, and the president of the Federation of Homemakers (*Shufuren*).⁸⁹ Diversity was one of the objectives of forming this particular group since different perspectives allow people to identify a wide range of problems and develop a variety of remedies.

⁸⁴ METI REPORT, *supra* note 67.

⁸⁵ *Id.*

⁸⁶ THE POINTS AT ISSUE, *supra* note 51, I.1.

⁸⁷ *Id.*

⁸⁸ See Hiroshi Fukurai, *The Rebirth of Japan’s Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT’L L.J. 315, 349–53 (2007).

⁸⁹ Hiroshi Fukurai, *People’s Panels vs. Imperial Hegemony: Japan’s Twin Lay Justice Systems and the Future of American Military Bases in Japan*, 12 ASIAN-PAC. L. & POL’Y J. 95, 103–04 (2010).

Recognizing the potential for a major economic crisis, the JSRC noted that Japan had embarked on a course of structural reform including “political reform, administrative reform, [and the] promotion of decentralization and deregulation to enable Japan to recover its “creativity and vitality.”⁹⁰ In its own words, these reforms were intended to further economic development and ensure that every person would “participate in making a free and fair society” as a governing subject instead of a governed object.⁹¹ Culturally, however, this concept could be uncomfortable due to the involvement of, and reliance upon, a government deeply embedded in society through regulation along with other factors that deterred private citizens from pursuing justice. For example, consumers were hesitant to expend the time and money necessary to navigate the obstacles inherent in the judicial process in order to sue big business.⁹²

1. Goals of the JSRC

In moving forward, the JSRC, in part, focused on “clarifying the role to be played by justice in Japanese society in the twenty-first century and examining and deliberating fundamental measures necessary for” realizing a justice system that is “easy for the people to utilize,” fosters “participation by the people in the justice system,” and achieves a strengthened and improved legal profession and justice system.⁹³ The JSRC firmly believed that one of its fundamental tasks should be to distinctly define what must be done to “transform both the spirit of the law and the rule of law into the flesh and blood of this country, so that they become the shape of [the] country.”⁹⁴ This reflects the transformational goal of reducing the role of government while empowering the individual. Correspondingly, the group recognized the importance of a justice system that reinforces popular sovereignty, democracy, and respect for individuals as recognized in the Constitution of Japan.⁹⁵

⁹⁰ THE POINTS AT ISSUE, *supra* note 51, II.2.

⁹¹ *Id.*

⁹² JEFF KINGSTON, JAPAN’S QUIET TRANSFORMATION: SOCIAL CHANGE AND CIVIL SOCIETY IN THE 21ST CENTURY 86 (2004).

⁹³ JUSTICE SYS. REFORM COUNCIL, RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL FOR A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE 21ST CENTURY, Introduction (June 12, 2001), <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html> [hereinafter JSRC RECOMMENDATIONS].

⁹⁴ *Id.*

⁹⁵ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], arts. 1, 13 (Japan).

During its early stages, the JSRC identified a multitude of potential improvements for Japan's justice system. Chief criticisms of the justice system included the length of both criminal and civil proceedings; the lack of transparency in the justice system—particularly the closed nature of the criminal justice system; the inadequacy of legal counsel in terms of quantity and sophistication; the inability of the courts to adapt to the needs of society as it becomes more complex; the reality gap between the courts and the citizenry; as well as the perceived separation between the population and participants in the court system including judges, attorneys, and court staff.⁹⁶ Over time, complaints also emerged about the difficulties in using the justice system.⁹⁷ Similarly, complaints materialized about the passivity of the judiciary and an overall inability to serve as a check on administrative agencies and other branches of government.

In assessing the justice system, the JSRC quickly recognized the need to reinforce the function of justice in an “increasingly complex and diversified Japanese society” as well as the necessity of instituting changes to facilitate a more accessible and user-friendly justice system that “can respond to the expectations of the people and meet their trust.”⁹⁸ In terms of access, there was a push for a legal aid system in a criminal context and a drive to make civil litigation more affordable.⁹⁹ Similarly, there was a push to expand alternative dispute resolution mechanisms.¹⁰⁰ Public exposure to the system was considered vital—not only for the justice system, but also for stimulation of the private sector.¹⁰¹ Based on the JSRC's enumerated goals and needed improvements for the existing system, reformers and JSRC members approached justice system reform with the mindset that this would be the “final linchpin” in a series of reforms that would restructure the shape of Japan—economically and otherwise—and empower it for the future.¹⁰²

The JSRC's investigations revealed that improvements to the legal and court systems could alleviate the business world's increasing frustration with inefficiencies and limited legal resources.¹⁰³ Improvements could also help address the perceived inefficiencies, slowness, and high costs associated with

⁹⁶ THE POINTS AT ISSUE, *supra* note 51, III.2.

⁹⁷ WILSON ET AL., *supra* note 5, at 41–42.

⁹⁸ *Id.* at 44.

⁹⁹ THE POINTS AT ISSUE, *supra* note 51, III.2.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² WILSON ET AL., *supra* note 5, at 9.

¹⁰³ See THE POINTS AT ISSUE, *supra* note 51, III.3.

the judicial process.¹⁰⁴ Lawsuits were slowed by hearings held sporadically over the course of months, if not years. Filing fees for litigation were traditionally high and the number of lawyers with specialization was comparatively low. Industry had long advocated higher quality legal assistance in the form of more well-rounded legal professionals. It had also yearned for a more efficient, reliable, and credible dispute resolution system as part of facilitating commerce and economic development. Much of the frustration of the private companies stemmed from cross-border comparisons with the legal and court systems of Japan's Western counterparts.

2. Recommendations of the JSRC and Legislative Change

After sixty meetings and two years of substantive deliberations, the JSRC released its final report on June 21, 2001, which advocated for wide-ranging recommendations for reform.¹⁰⁵ The suggestions detailed in the report went far deeper into the legal and court system than even the reformers had imagined.

The JSRC based its recommendations upon three pillars of fundamental reform. First, the JSRC felt Japan needed a justice system that is "easier to use, easier to understand, and more reliable."¹⁰⁶ Second, to achieve these objectives, Japan should ensure that it has a legal profession "rich both in quality and quantity." Third, the country needed to develop a popular base in which citizens' trust in the legal system is enhanced through their participation in legal proceedings and through other measures.¹⁰⁷

To effectuate these pillars of reform, the JSRC advocated expanded public access to the civil litigation system for purposes of achieving civil justice.¹⁰⁸ The civil justice system needed to resolve disputes in a fairer, more proper, and more prompt manner.¹⁰⁹ With respect to criminal justice, the JSRC believed that the system needed to be equipped to acquire the truth,

¹⁰⁴ *Id.* III.2.

¹⁰⁵ WILSON ET AL., *supra* note 5, at 10 (citing JSRC RECOMMENDATIONS, *supra* note 93; *see also* MINISTRY OF JUSTICE OF JAPAN, ENSURING THAT THE RESULTS OF THE JUSTICE SYSTEM REFORM TAKE ROOT, <http://www.moj.go.jp/ENGLISH/issues/issues01.html>).

¹⁰⁶ JSRC RECOMMENDATIONS, *supra* note 93, Ch. I, pt. 3.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* Ch. II.

¹⁰⁹ *Id.* Ch. II, pt. 3.

ensure the due process of law, and penalize promptly and properly when appropriate, while “obtaining the trust of the people.”¹¹⁰

In essence, the reformers saw the judicial system as an engine for propelling fundamental societal change. It was believed that citizen participation in the judicial system could, in turn, function as one of the pistons in the engine of individual empowerment. The JSRC envisioned that the judicial system and citizen involvement through the lay judge system would assume an enhanced role in helping shift Japan away from its traditional model of centralized control and bureaucratic regulation.¹¹¹ The suggested reforms were consistent with the perceived need for Japanese citizens to not only break away from excessive dependency on the government, but also to develop greater civic consciousness and become more actively involved in public affairs. Moreover, the JSRC felt that jury service would be an effective means of introducing community values and more common sense into the justice system.¹¹²

As a result of the JSRC’s recommendations, the Diet of Japan passed the *Shiho seido kaikaku suishin ho* or “Justice System Reform Promotion Act,”¹¹³ facilitating the establishment of the Office for Promotion of Justice System Reform (“OPJSR”), which would take charge in enacting legislative reforms along the lines suggested by the JSRC. Over the course of the next three years, the OPJSR assisted with the passage of twenty-four significant legal reforms.¹¹⁴

The legal reforms adopted by Japanese legislators extended far beyond facilitating economic recovery through legal reform. These recommendations included various civil litigation reforms starting in 2003. These reforms were designed to accelerate the adjudication of civil cases,¹¹⁵ expand the jurisdiction of summary courts,¹¹⁶ improve the Code of Civil Procedure,¹¹⁷

¹¹⁰ *Id.* Ch. I, pt. 3.

¹¹¹ *Id.* Ch. IV, pt. 2.

¹¹² *Id.* Ch. I, pt. 2.

¹¹³ *Shiho seido kaikaku ho* [Judicial System Reform Promotion Act], Law No. 119 of 2001.

¹¹⁴ See generally Hiroshi Fukurai, *Japan’s Quasi-Jury and Grand Jury Systems as Deliberative Agents of Social Change: De-Colonial Strategies and Deliberative Participatory Democracy*, 86 CHI.-KENT. L. REV. 789 (2011).

¹¹⁵ *Saiban no jinsokuka ni kansuru houritsu* [Act Concerning Speeding Up of Trials], Law No. 107 of 2003.

¹¹⁶ *Shiho Seido Kaikaku no tame no Saibansho-hou nado no Ichibu o Kaisei suru Houritsu* [Act for Partial Amendment to the Court Organization Act for Justice System Reform], Law No. 128 of 2003.

¹¹⁷ *Minji soshouhou to no Ichibu o Kaisei Suru Houritsu* [Act for Partial Amendment to the Code of Civil Procedure], Law No. 108 of 2003.

and update the Arbitration Act.¹¹⁸ Reforms to the civil dispute resolution system also involved the establishment of a new Intellectual Property High Court, implementation of an amended labor dispute system in which labor affairs specialists handle adjudication together with the amendments to the administrative litigation system, and the addition of alternative dispute resolution mechanisms.¹¹⁹

In 2004, as is common in the *initiation* phase of planned change, legislators dove into the criminal justice system, adding new functions and significantly altering practices. For instance, Japanese policymakers created a lay judge system requiring citizen participation in serious criminal trials, enhanced its court-appointed defense counsel system, and implemented a new pretrial conference system designed to expand discovery as well as improve, accelerate, and streamline criminal trials.¹²⁰ All of these reforms to the system would significantly impact the trial process. In fact, these reforms essentially required a shift from a fairly docile trial process based on affidavits, prosecutor dossiers, and other written documentation into a more active trial proceeding involving more live, in-court testimony by witnesses.

To achieve other parts of its three pillars of reform advocated by the JSRC, Japan significantly altered the legal system by passing legislation “aimed at increasing the number of legal professionals and improving the quality of the attorney pool through the establishment of . . . professional law schools.”¹²¹ Traditionally, the bar passage rate had ranged between two and three percent.¹²² An undergraduate or graduate degree in law was not a prerequisite to sit for the national bar examination, but those who wished to pass the bar exam focused their attention almost exclusively on the law.¹²³ For someone seeking to become a lawyer, judge, or prosecutor, private “cram” schools had been the primary avenue for assistance.¹²⁴ Again, a major reform changed the landscape of legal education as seventy-four institutions stepped

¹¹⁸ Chusaiho [Arbitration Act], Law No. 138 of 2003.

¹¹⁹ LEON WOLFF, LUKE NOTTAGE, & KENT ANDERSON, WHO RULES JAPAN? POPULAR PARTICIPATION IN THE JAPANESE LEGAL PROCESS 10 (2015).

¹²⁰ See generally JSRC RECOMMENDATIONS, *supra* note 93; see also WILSON ET AL., *supra* note 5.

¹²¹ WILSON ET AL., *supra* note 5, at 12 (citing Ministry of Education, Culture, Sports, Science, and Technology, *Senmonshoku Daigakuin (Hokadaigakuin/Kyoushoku Daigakuin)* [Professional Graduate Schools], http://www.mext.go.jp/a_menu/koutou/houka/houka.htm.)

¹²² Matthew J. Wilson, *Legal Clinical Education in Japan: A Work in Progress*, in CLINICAL LEGAL EDUCATION IN ASIA: ACCESSING JUSTICE FOR THE UNDERPRIVILEGED 195, 197 (Shuvro Prosun Sarker ed., 2015).

¹²³ *Id.*

¹²⁴ *Id.*

up to create “American-style” professional law schools that were separate and distinct from the nearly one hundred undergraduate and graduate faculties of law traditionally operated by various Japanese universities.¹²⁵ Graduates from these law schools were promised a significantly higher chance to pass the bar examination in exchange for spending an additional two to three years studying law at these institutions. The JSRC recommended these new schools not only to increase the number of bar passers, but also to diversify the legal profession.¹²⁶ As a result, professional law schools sought to admit applicants from varying backgrounds, different geographic regions, and a range of academic areas.¹²⁷

3. History of Citizen Participation in the Court System

One of the most significant recommendations for reform, if not the most significant, was the addition of a new function in major crime cases—namely, so-called jury trials. With the post-war United States occupation of Japan and American involvement in drafting the Constitution of Japan, many expected a jury system to return to Japan at the end of the Second World War. Not only is the right to a jury trial constitutionally guaranteed in the United States federal and state court systems, but Japan had experimented with jury trials in certain criminal cases before the war.¹²⁸ Between 1928 and 1943, Japan conducted 480 criminal jury trials in major crime cases.¹²⁹ The original system failed to reach its full potential due to procedural and practical imperfections. In 1943, the government officially suspended the Jury Act,¹³⁰ due to in large part to the rise of militarism and the government’s need to control criminal justice leading up to World War II.¹³¹

Japan’s original venture into the realm of jury trials ultimately failed due to lack of trust. Juror selection that was limited to wealthy and educated males undercut trust in the verdicts. Moreover, the juries themselves had only

¹²⁵ One of the issues Japan struggled with when designing its system was whether to allow universities to retain their undergraduate law programs. Rosen, *supra* note 44, at 268–74.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Baishin ho [Jury Act], Law No. 50 of 1923.

¹²⁹ Saikō Saibansho [Supreme Court] Nov. 16, 2011, Case No. 2010 (A) No. 1196, 65 Keishu 8, Nov. 16, 2011; see Takuya Katsuta, *Japan’s Rejection of the American Criminal Jury*, 58 AMER. J. COMP. L. 497, 503–06 (2010); Dimitri Vanoverbeke, *The Taisho Jury System: A Didactic Experience*, 43 SOC. SCI. JAPAN 23, 23 (2010).

¹³⁰ Baishin no Teishi ni Kansuru Horistu [Act Concerning the Suspension of the Jury Act], Law No. 88 of 1943.

¹³¹ Matthew J. Wilson, *The Dawn of Criminal Trials in Japan: Success on the Horizon?*, 24 WIS. INT’L L.J. 835, 840 (2007) [hereinafter Wilson, *The Dawn of Criminal Trials in Japan*].

limited power. The all-citizen jury of twelve male voters was asked only to answer questions regarding points of fact, which were ultimately adjudicated on a majority basis.¹³² Also, judges were not bound to accept the answers, and juries were not asked to render a verdict.¹³³ Similarly, the judge could dismiss the jury at almost any time. There was no right of appeal and defendants had to bear the jury's expenses, therefore, the accused were not inclined to trust juries.¹³⁴ At the end of the day, almost all criminal defendants waived their right to a jury trial.¹³⁵

The continuous suspension of meaningful citizen participation in the justice system for more than seven decades meant that the Japanese judicial system was essentially the exclusive domain of legal professionals with professional judges presiding over all trials at the district court and appellate levels. The two exceptions to professional dominance included a brief period of jury trials in Okinawa,¹³⁶ and largely unknown *Kensatsu Shinsakai*, or Prosecutorial Review Commissions ("PRC").¹³⁷

During the period of United States administrative control of the Island of Okinawa, a number of American-style jury trials occurred in both civil and criminal cases between 1963 and 1972.¹³⁸ Grand jury proceedings were held in Okinawa, and at least four civil jury trials were instigated by individuals without significant monetary resources or support against powerful domestic and foreign interests.¹³⁹ This was noteworthy given that the American drafters neither guaranteed nor referenced trial-by-jury in the post-war Constitution of Japan.

The impact of the PRC had been extremely limited. Consisting of ordinary citizens, the PRC reviewed the propriety of a prosecutor's decision not to prosecute a suspect if a victim or party of interest asked for such a review.¹⁴⁰ If the PRC disagreed with the prosecutor's decision not to proceed, it would then issue a recommendation to reconsider its decision not to

¹³² *Id.*; DOBROVOLSKAIA, *supra* note 81, at 74.

¹³³ Wilson, *The Dawn of Criminal Trials in Japan*, *supra* note 131, at 840.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ WILSON ET AL., *supra* note 5, at 134.

¹³⁷ *Id.* at 17; Fukurai, *supra* note 88, at 323–28. While Japan adopted the use of lay people rather than juries during reformation, the scope of the PRC's influence was expended upon the recommendation of the JSRC.

¹³⁸ WILSON ET AL., *supra* note 5, at 134.

¹³⁹ *Id.*

¹⁴⁰ Fukurai, *supra* note 88, at 323–28.

prosecute.¹⁴¹ Before the JSRC's suggested reforms, these recommendations were not binding, so prosecutors only rarely changed their initial decision about prosecution.¹⁴² However, the adoption of the Lay Judge Act ushered in a modification to the PRC system.

On a practical level, the *saiban'in* system was part of a comprehensive plan to revamp Japan's justice system. It was essentially the glue that bound together other criminal justice reforms proposed by the JSRC, including the expanded power of the PRC. Pursuant to legislation enacted on May 28, 2004, the PRC recommendations newly became binding on prosecutors.¹⁴³ Together with the adoption of the new *saiban'in* system "for certain serious cases, under which the general public will participate in deciding cases together with judges,"¹⁴⁴ these monumental changes ushered in a new era in criminal justice in Japan. While these two reforms in isolation might not directly impact an individual defendant, they were significant to the expansion of democratic ideals within Japanese society.

B. Reception of the Lay Judge System and Related Changes

The initiation of the lay judge system was complicated. Professor Feeley notes that during the *initiation* phase because "many changes in the criminal courts are initiated by outsiders, such as appellate court judges, legislators, and agency heads," the original intent of planned changes can be "neglected or deflected" by institutions close to the courts which must implement the initiatives.¹⁴⁵ Avoidance, evasion, and delay can often result.¹⁴⁶

Lay judge trials were proposed and initiated by outsiders to the criminal justice system. Moreover, the JSRC combined with Japanese policymakers imposed the adoption of lay judge trials without significant public discussion or debate.¹⁴⁷ There was no widespread popular movement or consensus to adopt jury trials, or even to include the citizenry in the judicial process on a greater scale. At the same time, on a symbolic level, the introduction of lay judge trials further legitimized democratic engagement. Practically, the

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ JSRC RECOMMENDATIONS, *supra* note 93, Ch. I, pt. 3.

¹⁴⁵ FEELEY, *supra* note 12, at 36.

¹⁴⁶ *Id.*

¹⁴⁷ WILSON ET AL., *supra* note 5, at 10.

adoption of the lay judge system represented a democratic solution to a largely opaque criminal justice system and investment of trust in the citizenry. This raised the question about whether the new *saiban'in* system would take root, or if it would simply end as an expensive experiment.

Japanese society has had considerable time to digest and react to the formal reintroduction of meaningful citizen participation into justice system after the five-year preparatory period leading up to the first *saiban'in* trial. The resulting reactions were mixed. Political reformers, bureaucrats, criminal attorneys, the Japan Federation of Bar Associations, and many scholars were noticeably excited and optimistic about the prospects underlying increased citizen participation and its potential impact on the criminal justice system.¹⁴⁸ On the other hand, the majority of Japanese citizens, the courts, the media, and others were much more critical. In fact, before the first lay judge trial, the media became notorious for bashing the concept of lay participation in the criminal justice system.¹⁴⁹

Originally, the *saiban'in* system was viewed, most significantly, with suspicion by the populous and judiciary, the primary participants in the new system. Opinion polls consistently confirmed the public's distrust of the new system, lack of desire to participate, as well as its angst and fear.¹⁵⁰ Skeptics of the new system contended that Japan's reforms and sizeable investment in citizen participation would be futile due to cultural traditions and institutional impediments.¹⁵¹ Skeptics also predicted that the lay judges would fall short of expectations due to their lack of legal training, insufficient knowledge, and susceptibility to emotion and bias.¹⁵²

The judiciary adamantly maintained that the lay judge system was not created due to problems or discontent with the system. It contended that the jurisprudential approach had been certain and consistent. To a large degree, this approach had fostered societal stability and engendered trust in the Japanese judiciary over time. At the same time, the press and critics had increasingly taken issue with the judiciary and justice system. Although comparatively low, crime was increasing. In Japan, the government has the ability to interrogate suspects for extended periods prior to formal arrest with

¹⁴⁸ *Id.* at 28.

¹⁴⁹ Daniel H. Foote, *Citizen Participation: Appraising the Saiban'in System*, 22 MICH. ST. INT'L L. REV. 755, 760 (2013).

¹⁵⁰ *Id.* at 761.

¹⁵¹ WILSON ET AL., *supra* note 5, at 36–37.

¹⁵² Foote, *supra* note 149, at 760.

the intent of eliciting a confession that will facilitate an easier conviction.¹⁵³ A string of high-profile wrongful convictions resulting from forced confessions had raised troubling questions.¹⁵⁴

Concerns about the relative isolation and uniform background of most professional judges started resonating with the reformers.¹⁵⁵ Lawyers, scholars, and even some former judges, raised additional concerns about the justice system.¹⁵⁶ In the post-war era, Japan's justice system became known for the symbiotic power relationship among the courts, the public prosecutor offices, and the police. Some argued that this resulted in prosecutorial abuses and Japan's incredible 99.9% conviction rate.¹⁵⁷ Increased scrutiny highlighted previous criticisms that judges engaged in inadequate fact-finding, relied on prosecutors, and failed to operate in a transparent manner. By shifting to a new system, some of these concerns could be addressed at least in the cases subject to the new lay judge system.

V. PROCESS OF PLANNED CHANGE—IMPLEMENTATION PHASE

Japan expended significant energy and resources during the *initiation* phase due to the magnitude of the shift to lay judge trials. Similarly, the *implementation* stage of this experiment with lay participation was intense as the country translated the abstract goals delineated by the JSRC into concrete policies.

¹⁵³ See David T. Johnson, *Japan's Prosecution System*, 41 CRIME & JUST. 35, 52 (2012).

¹⁵⁴ WILSON ET AL., *supra* note 5, at 32.

¹⁵⁵ See Arne F. Soldwedel, *Testing Japan's Convictions: The Lay Judge System and the Rights of Criminal Defendants*, 41 VAND. J. TRANS. L. 1417, 1419–20 (2008); Wilson, *The Dawn of Criminal Trials in Japan*, *supra* note 131, at 851; Robert M. Bloom, *Jury Trials in Japan*, 28 LOY. L.A. INT'L & COMP. L. REV. 35, 41 (2006). Ideally, Japanese judges have a strong sense of societal values when evaluating evidence and making determinations. However, concerns have been raised that judges tend to be elitist, sheltered, and ascend from mirror educational and socio-economic backgrounds. Judges spend so much time studying law and cramming for the national bar examination that meaningful work experience is unusual. After passing the bar, a judge is nearly always fast tracked into the judiciary. Based on practice and procedure, Japanese judges are generally isolated from other aspects of society based on traditions, regular job transfers, and other factors. Judges tend to interact predominantly with other judges. According to critics, this has traditionally caused a gap and significant disconnect between judges and society as a whole.

¹⁵⁶ See generally Hiroshi Fukurai, *A Step in the Right Direction for Japan's Judicial Reform: Impact of the Justice System Reform Council Recommendations on Criminal Justice and Citizen Participation in Criminal, Civil, and Administrative Litigation*, 36 HASTINGS INT'L COMP. L. REV. 517 (2013).

¹⁵⁷ David Johnson, *Retention and Reform in Japanese Capital Punishment*, 49 U. MICH. J.L. REFORM 853, 865 (2016).

Implementation necessarily “involves staffing, clarifying goals, and adapting to a new environment.”¹⁵⁸ In his book, Professor Feeley notes that this stage entails the task of translating goals into practical policies.¹⁵⁹ Justice systems are built on certainty, stability, and predictability. If change is significant, substantial challenges will arise given the disruption of common routines, interference with established authority, and emergence of uncertainties.¹⁶⁰ Coordination and cooperation are key to achieving success. In the case of the lay judge system, the change was significant, leaving open questions about the prospects of coordination, cooperation, and ultimately success.

A. *Contours of the New Lay Judge System in Japan: Five-Year Development Period*

As Japan decided to significantly alter its court system during its *initiation* phase, policymakers needed to decide which alternatives to adopt, how to finance the programs, and who would oversee the implementation and operation of the lay judge system during the *implementation* phase.¹⁶¹ After some debate about whether to adopt an all-citizen jury model typical in Anglo-American jurisdictions, such as the United States, or to embrace a mixed tribunal modeled after Continental-European jurisdictions, Japan embraced aspects of both models.¹⁶² Accordingly, Japan’s *saiban’in* system is a unique hybrid, which integrates elements of the common law jury and civil law mixed jury systems.¹⁶³ Like common law jury systems including the petite jury in the United States, lay judges in Japan are randomly selected from voter lists and participation is limited to a single case.¹⁶⁴ Unless excused by the court or excluded by peremptory challenge, participation is compulsory.¹⁶⁵ Likewise, lay participants stand between the accused and the state rendering a verdict that can strip away life or liberty from the accused. In other respects, though, the lay judge system mirrors civil law systems, such as the *schoffe* lay judge system in Germany or the *echevin* system in France, in which citizens participate in trials as lay judges alongside professional judges.¹⁶⁶

¹⁵⁸ FEELEY, *supra* note 12, at 36.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² THE POINTS AT ISSUE, *supra* note 51, III.2.

¹⁶³ Wilson, *Japan’s New Criminal Jury Trial System*, *supra* note 3, at 513–14.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

The Lay Judge Act sets forth the parameters of the lay judge system including the serious crimes subject to this legislation. Under this Act, a defendant charged with a crime prescribed in the Lay Judge Act cannot waive or avoid trial by a lay judge panel.¹⁶⁷ In contested cases when the defendant enters a not guilty plea, the Act requires that six *saiban'in* or lay judges, chosen from among eligible voters, join three professional judges for a single “qualifying” criminal trial to adjudicate guilt or innocence.¹⁶⁸ The nine-person lay judge tribunals also collaborate to determine the sentence of a convicted defendant.¹⁶⁹ By design, the lay judge system limits citizen participation to involvement in adjudicating certain serious criminal cases.¹⁷⁰ The reasoning underlying this decision largely lies in concerns about the citizenry’s ability to effectively participate in complex matters and the importance associated with adjudications involving a person’s liberty.¹⁷¹

In uncontested serious criminal cases, four lay judges and one professional judge handle the matter.¹⁷² Through mutual communication and the exchange of ideas among the citizen judges and professional judges, the mixed tribunal is charged with determining guilt and sentencing.¹⁷³ Pursuant to the Lay Judge Act, a guilty verdict requires a majority vote with the qualification that at least one professional judge and one lay judge must concur in the majority’s conclusion.¹⁷⁴ For an acquittal, five votes are sufficient even if all of these votes come from the *saiban'in* or lay judges.¹⁷⁵ Procedurally, the prosecutor or defendant may appeal the verdict.¹⁷⁶

The selection of the citizen judges begins with each court generating a prospective lay judge list and summoning lay judges for service from the list.¹⁷⁷ Exemptions from service may be granted based on a personal relationship with the case or related actor, lay judge service within the past five years, age over seventy, select occupations in government or law (in particular, Diet, ministers of state, city council members, lawyers, judges,

¹⁶⁷ Lay Judge Act, art. 2(3).

¹⁶⁸ *Id.* art 2.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* art. 2(3).

¹⁷¹ See THE POINTS AT ISSUE, *supra* note 51, III.2.

¹⁷² Lay Judge Act, art 2(3).

¹⁷³ *Id.*

¹⁷⁴ *Id.* art 67.

¹⁷⁵ Akira Goto, *Citizen Participation in Criminal Trials in Japan*, 42 INT’L J.L., CRIME, & JUST. 117, 117 (2014).

¹⁷⁶ *Id.*

¹⁷⁷ Lay Judge Act, arts. 21–23.

prosecutors, police officers, self-defense officers, and certain other government employees), status as a current student, appointment onto a prosecutorial review committee, and other individuals who are injured, sick, or who have unavoidable family or business obligations.¹⁷⁸ Citizens are also exempt if they have not completed compulsory education in Japan, have committed a crime, or have mental or physical incapacities that would preclude them from serving.¹⁷⁹

The system is limited in several respects. Although there is certainly room for expansion, lay judge trials in Japan have been applied only to certain major crime cases. The lay judges are limited in what they can disclose about the proceedings. Pursuant to the Lay Judge Act, the *saiban'in* have a strict duty of confidentiality, and face severe penalties for disclosing information about the trial and deliberations both during and after the trial.¹⁸⁰

B. *Preparations for the System*

Needing the new system to succeed, Japan infused significant thought, preparation, and expense into the lay judge system's implementation. This preparation included both the actual physical facilities (courtroom expansion, construction of jury deliberation rooms, etc.) and other necessary preparations (e.g. development of systems, training, education, etc.). Much consideration was given to the relationship among the professional and citizen judges. The *saiban'in* system aimed to achieve fair and just results through professional judges contributing their legal expertise and the lay judges sharing their respective societal understanding, personal knowledge, and common sense experiences. Theoretically, citizen judges would possess the same authority as the professional judges—both groups would determine facts and engage in sentencing.¹⁸¹ Through the chief judge, lay judges would even have the ability to question witnesses.¹⁸² However, legal and procedural matters are reserved for professionals due to their specialized training.¹⁸³

To effectively implement this new system, education was key. Professional judges required training on how to officiate over the trials while affording sufficient deference to the citizen participants. Prosecutors and

¹⁷⁸ *Id.* art. 15.

¹⁷⁹ *Id.* art. 14.

¹⁸⁰ *Id.* art. 2(3).

¹⁸¹ *Id.* art. 6, 9.

¹⁸² *Id.* arts. 56, 58–59.

¹⁸³ *Id.* art. 51.

criminal defense attorneys had never before addressed any type of jury. Due to the significant differences between a traditional Japanese court proceeding and *saiban'in* trials, training was necessary for all lawyers participating in the *saiban'in* proceedings. Both the Prosecutors Office and Japan Federation of Bar Associations (“JFBA”) constructed training programs, hosted mock trials, and held educational events. Drawing from my own experiences as a trial attorney and law professor, I personally had the opportunity of assisting the JFBA with its training programs and even spearheaded several training events both before and after the first *saiban'in* trial. In essence, this training was intended to help defense counsel and prosecutors make trials quicker and easier to understand for the lay judges.

In addition to training lawyers and judges, it was necessary to educate the general public about the new system. Before the first lay judge trial, the Japanese government (including the courts and prosecutors), together with the JFBA and other organizations, “spent well over USD \$50 million promoting the new jury-like system to the public through billboards, print advertisements, television programs, Japanese *manga* (cartoons), Japanese *anime* (animations), a mascot, mock trials, symposiums, internet videos, and other means.”¹⁸⁴ Mass media coverage of mock trials, symposiums, and any other developments related to the new system were unparalleled.¹⁸⁵ Leading up to the first *saiban'in* trial in 2009, it seemed that there was information regarding the new system wherever one turned.

Once the system had officially kicked off, media coverage about the *saiban'in* system started shifting from critical to quite positive.¹⁸⁶ With a noticeable shift in the tone of press coverage, the opportunity for education and positive reinforcement through the mass media expanded. Also, public education efforts have persisted. The Supreme Court, Prosecutors Office, and JFBA have produced educational materials and hold related events.¹⁸⁷ Books, television shows, *manga*, and even video games centering on the *saiban'in* system have emerged.¹⁸⁸ One prime example of efforts to bring the justice

¹⁸⁴ WILSON ET AL., *supra* note 5, at 22. See also SUPREME COURT OF JAPAN, *Saibanin Seido Heisei 21 nen 5 gatsu 21 nichi Sutaato!!~* [Lay Judge System Starts on May 21, 2009], <http://www.saibanin.courts.go.jp/> (last visited Oct. 16, 2017); MINISTRY OF JUSTICE OF JAPAN, *Saibanin Seido Koonaa* [Lay Judge System Corner], http://www.moj.go.jp/SAIBANIN/koho/pamph_dvd.html (last visited Oct. 16, 2017); JAPAN FED’N OF BAR ASS’NS, *Saibanin Seido* [Lay Judge System], http://www.nichibenren.or.jp/ja/citizen_judge/ (last visited Oct. 16, 2017).

¹⁸⁵ WILSON ET AL., *supra* note 5, at 22.

¹⁸⁶ *Id.* at 39.

¹⁸⁷ *Id.* at 42.

¹⁸⁸ *Id.*

system to the citizenry is the computer game developed by the Osaka Bar Association that gives players a “taste of what they may experience as a citizen judge.”¹⁸⁹ Efforts like this are helpful given that candidates for lay judge service likely benefit from a greater awareness of legal procedures.

VI. PROCESS OF PLANNED CHANGE—ROUTINIZATION & EVALUATION PHASES

An expansive body of theoretical literature has addressed the key components that determine the likelihood of success of a certain legal initiative.¹⁹⁰ In the Feeley formula, the fourth phase of planned change relates to the *routinization* of a new program and the commitment by an institution to the program both financially and logistically.¹⁹¹ The fifth and final phase of the formula is related to the fourth phase, and therefore it is appropriate to address these together. The fifth phase involves an evaluation or assessment of the prospects of success for a legal reform, and more specifically whether the reform will work on a long-term basis once it is routine. In the words of Professor Feeley, “new programs are usually assessed during their experimental (the first three) stages rather than their routine periods (the fourth stage) . . . it tells us next to nothing about whether it will work.”¹⁹²

Whether an innovation is successful depends on “how it performs under this routine rather than under its initial conditions.”¹⁹³ What possibly succeeds during the “exciting new experiment” period, may struggle once the innovative change has become the norm and the “halo” has worn off.¹⁹⁴ If, for instance, the process of policy making and implementation is so strongly controlled by the players in the status quo from the very beginning, such that only those reforms which are acceptable to the players is likely to be introduced or succeed, and if the implementation is tightly and carefully managed by the status quo, then the introduced reform will likely become routinized with results that the status quo can be regarded as a success. If the status quo does not agree with the changes, however, then the success of the reform as originally intended may be endangered.

¹⁸⁹ Shusuke Murai, *Computer Role-Playing Game Helps Potential Lay Judges Prepare for Trial*, JAPAN TIMES, Oct. 27, 2014, <https://www.japantimes.co.jp/news/2014/10/27/national/computer-role-playing-game-helps-potential-lay-judges-prepare-for-trial/#.WgVNT0ZrzdQ>.

¹⁹⁰ FEELEY, *supra* note 12, at 37.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

A prime illustration of the status quo disagreeing fundamentally with one of the Japan's recent transformative changes is the experiment with new professional law schools in Japan. This major reform was enthusiastically embraced by many (including over seventy universities that created new law schools) and initially experienced success in drawing a wide-array of students and attracting legal talent into the classroom. However, the new law schools have quickly backslid due to governmental interference, lower than advertised bar pass rates, reduced governmental funding, and opposition from within the legal profession to increased attorney numbers and perceived lower quality law graduates.¹⁹⁵ Unfortunately, the existence of many of these new law schools will likely be short lived due to failed government promises and other countervailing forces.¹⁹⁶ In terms of *routinization*, the question is whether the *saiban'in* system will follow the path of Japan's ongoing experiment with law schools, or if the routinization of the system will follow a different path.

A. *Performance and Impact of the Lay Judge System*

Although the *saiban'in* system is not perfect and could benefit from some tweaking, it has succeeded on many levels since its inception in 2009. Fundamentally, the government has consistently endorsed the lay judge system. Administratively, court planners have been sensitive to minimizing inconveniences to the citizenry.¹⁹⁷ Legally, the Supreme Court of Japan rebuked constitutional challenges to citizen participation in the justice system and validated the new system.¹⁹⁸ Operationally, professional judges on the trial court level have been cooperative and engaged. Though not absolute, the appellate courts have typically been careful to protect lay judge verdicts despite a "prosecutor's inclination to appeal unsuccessful cases."¹⁹⁹ In addition, many have been encouraged by the new system's accomplishments.²⁰⁰

In terms of satisfying the JSRC's original goals and recommendations, the lay judge system has demonstrated substantial promise in its formative

¹⁹⁵ See generally Rosen, *supra* note 44.

¹⁹⁶ See *id.* (describing the failure of the government to honor its promises and fulfill its plans as well as the efforts of the practicing bar to inhibit the success of the system, and how this negatively impacts both the universities and society as a whole).

¹⁹⁷ WILSON ET AL., *supra* note 5, at 48.

¹⁹⁸ *Id.* at 48.

¹⁹⁹ *Id.* at 49.

²⁰⁰ See Fukurai, *supra* note 156, at 563–64; *Top Court Says Lay Judge System Working Well at Five-Year Mark*, JAPAN TIMES, May 21, 2014, <http://www.japantimes.co.jp/news/2014/05/21/national/top-court-says-lay-judge-system-working-well-five-year-mark/#.WWAI1sflk-0>;

years of its existence. The goal of bringing the justice system closer to the citizenry has been accomplished. Many of the fears and doubts expressed previously by critics have not materialized. Many individuals have “greater confidence in the concept of public governance.”²⁰¹ Participatory governance has demonstrated that the law and justice system can be accessible to ordinary citizens. It showed that the citizenry is adequately educated to comprehend the law as it governs society. The public has been able to explore and experience the legal system firsthand, thereby increasing transparency. In turn, this transparency has focused the eyes of society on some of the perceived weaknesses of the justice system.

In terms of serious crime trials, the lay judge system has functioned quite well in terms of direct benefits. At the same time, the biggest successes can be attributed to the indirect benefits that have flowed from this monumental change to the criminal justice system. In essence, the adoption of the *saiban'in* system was as the vehicle to effectuate a plethora of other reforms related to the justice system.

1. Success During the Initial Years—the “Halo” Period

The most impactful direct benefit of the lay judge system during its first five years or the “halo” period is likely educational. The citizenry has a greater understanding of the justice system based on media coverage of, or actual participation in, the criminal trial process. Media coverage of the criminal justice system since the adoption of lay judge trials has reached an unprecedented level. Press and public interest in lay judge trials was rampant during the first five years of the new system, and the interest remains to this day.

Individuals who have had a chance to participate first-hand have gained a greater understanding of the criminal justice system. “Between May 2009 and February 2014, the names of 1,737,106 citizens appeared on the lay judge rolls. Of these, a total 48,345 citizens served either as lay judges (36,027

²⁰¹ WILSON ET AL., *supra* note 5, at 71.

people) or alternate lay judges (12,318 people).”²⁰² By the end of 2016, 54,964 citizens had served as lay judges.²⁰³

Although the system is still in its infancy, this direct exposure has generated an increasing amount of data facilitating governmental reports about cases and official surveys of lay judges. Scholarly analysis is widespread, and the news media has developed a pattern of diligently tracking and reporting the progress of the system. Lay judges have also assisted, albeit in a limited capacity, in getting the word out. Despite a strict confidentiality requirement mandating that lay judges remain silent with respect to their deliberations or otherwise face a fine and/or imprisonment, a practice has arisen for lay judges to give press conferences about their experiences.²⁰⁴ At the press conferences, lay judges voluntarily discuss their reactions to what they heard and discuss their general experiences. Despite the limitations on what a lay judge can say, the press continues to cover their reactions, thereby helping to educate the populace.²⁰⁵ Collectively, the flow of information has increased substantially thereby enriching the public’s awareness of the justice system and promoting an in-depth discussion about critical social issues related to the criminal justice system. This has solidified the democratic processes promoted by citizen participation in government and instilled a heightened trust in the truth-finding process and due process of law.

The swift acceptance of public involvement in the justice system has been encouraging. Japan made a major commitment to the lay judge system by providing funding and a solid base of operations from the start.²⁰⁶ This commitment did not change during the first five years of the *saiban’in* system. Accordingly, without any noticeable major hiccups, citizen participation in serious crime trials quickly became integrated into the Japanese criminal justice system. Lay judges willingly deliberated alongside professional judges making collective decisions, reaching verdicts, and issuing sentences.

²⁰² *Id.* at 40 (citing *Saiban’in Seido, 21 nichi de shikou kara 5nen, 4 man 8000 nin, shihou sanko* [Lay Judge System: 48,000 Participants in the Legal System, Five Years since Implementation as of May 21], SANKEI NEWS, May 5, 2014, <http://sankei.jp.msn.com/affairs/news/140505/tr14050522000002-n1.htm>; *Improving the Lay Judge System*, JAPAN TIMES, May 5, 2014, <https://www.japantimes.co.jp/opinion/2014/05/05/editorials/improving-the-lay-judgesystem-2/#.WgU2p4ZrzdQ>).

²⁰³ SAIBAN’IN SEIHAN NO JISSHI JOTAI [IMPLEMENTATION STATUS OF THE LAY JUDGE SYSTEM], SUPREME COURT OF JAPAN (2017) [hereinafter 2017 STATUS REPORT].

²⁰⁴ Mardar & Hans, *supra* note 5, at 819.

²⁰⁵ *Id.*

²⁰⁶ WILSON ET AL., *supra* note 5, at 21–22.

Through February 2014, [lay] judges had been involved in 7,868 serious criminal cases and rendered verdicts in 6,392 of them. The most common type of cases [were] robbery resulting in bodily injury (1,883 cases) and murder (1,644 cases). Among the verdicts rendered, lay judge tribunals found a total of 6,222 defendants guilty (among which 21 people were sentenced to death)[,] . . . found 33 defendants not guilty, [and] the remainder of the cases were transferred to family court, otherwise resolved[,], or dismissed. Approximately 35[%] of the verdicts [were] appealed.²⁰⁷

The system itself has benefited from citizen involvement. Lay judges have approached their task with much seriousness. They have confronted each trial with diligence and sincerity.²⁰⁸ This honest approach has led to “clear signs [that] careful attention” is being applied to deliberations, “the presumption of innocence, and reasonable doubt standards.”²⁰⁹ Achieving the presumption of innocence in the Japanese criminal system is a giant leap forward.

There are also concrete indications that citizen service in the courtroom enhances trust in the criminal justice system. Almost uniformly, Japanese citizens have spurned the idea of lay judge service when questioned by pollsters.²¹⁰ Almost always, this sentiment disappears once a citizen has served alongside professional judges in a *saiban'in* trial. In fact, citizens serving as lay judges have uniformly praised their experience. In surveys regularly conducted by the Supreme Court every year, over ninety percent of lay judges characterize their actual courtroom experience as positive or extremely positive during the first five years of the new system.²¹¹ This outcome has continued. In fact, the Supreme Court survey conducted in 2016 showed that among those citizens who did not want to participate in a lay judge trial before serving, their post-trial sentiment had shifted

²⁰⁷ WILSON ET AL., *supra* note 5, at 40 (citing *Saiban'in Seido no Jisshi Joukyou ni tsuite (Seido Jikou-Heisei 26 2gatsumatsu – Sokuhou [Bulletin on State of the Lay Judge System – From Inception to February 28, 2014]*, SUPREME COURT OF JAPAN (2014), http://www.saiban'in.courts.go.jp/topics/pdf/09_12_05-10jissi_joukyou/h26_02_sokuhou.pdf).

²⁰⁸ SAIKOU SAIBANSHO JIMSOUKYOKU [GENERAL SECRETARIAT, THE SUPREME COURT OF JAPAN], SAIBAN'IN SAIBAN JISSHI JOUKYOU NO KENSHOU HOUKOKUSHO [REPORT ON EVALUATION OF CIRCUMSTANCES OF IMPLEMENTATION OF SAIBAN'IN TRIALS] (2012), http://www.saibanin.courts.go.jp/vcms_lf/hyousi_honbun.pdf [hereinafter 2012 EVALUATION REPORT].

²⁰⁹ Foote, *supra* note 149, at 764.

²¹⁰ WILSON ET AL., *supra* note 5, at 41–42.

²¹¹ 2017 STATUS REPORT, *supra* note 203.

considerably.²¹² Among this group, 56.8% of the lay judges felt that it was an “extremely good” experience, 38.5% felt it was a “good” experience, 2.1% felt that it wasn’t the best experience, 0.8% felt that it was a bad experience, 0.5% didn’t have any feelings about the experience, and 0.8% did not respond to the question.²¹³

Citizen judges have remarked that their civic service enabled them to learn much, seriously reflect on important issues facing Japanese society, and even educate others.²¹⁴ Consistent with the objectives underlying the new system, the educational value of lay judge participation has been clear. Some of the feedback has included how the lay judge experience has led to a greater understanding of the court system and its participants.²¹⁵ Others have appreciated the opportunity to engage with other members of the community for a common purpose.²¹⁶ Overall, all stakeholders in the process have benefitted from the integration of common sense and differing perspectives into the trial process.

2. Beyond the First Five Years—Direct Impact on Citizenry and Outcomes

Notwithstanding the positive hype, press coverage, and circumstances underlying this exciting new experiment, the *saiban’in* system’s direct impact is hindered by its limited scope. Only three percent of all criminal cases are heard by lay judges.²¹⁷ *Saiban’in* do not participate in civil or administrative litigation. This limited scope hinders more citizens from directly interacting with the justice system. Japan has a unique opportunity to advance participatory democracy through expansion of its lay judge system and with its initial successes has demonstrated how this is possible.

Given the momentum of its new lay judge system, now is a prime time for Japan to consider expanding citizen participation into the civil justice realm.²¹⁸ Expanding the scope of citizen involvement in the justice system

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ Tomohiro Osaki, *Diet Passes Legislation to Revamp Japan’s Criminal Justice System*, JAPAN TIMES, May 24, 2016, https://www.japantimes.co.jp/news/2016/05/24/national/diet-passes-legislation-revamp-japans-secretive-judicial-system/#.WgVO_oZrzdQ.

²¹⁸ WILSON ET AL., *supra* note 5, at 72; Mardar & Hans, *supra* note 5, at 820–21.

would be consistent with the goals set forth by the JSRC.²¹⁹ In terms of an expanded scope, Japan could target lawsuits that have a major societal impact. The citizenry would likely welcome the opportunity to participate in administrative litigation or impactful cases involving environmental disasters, mass torts, nuisance, breach of privacy, the unauthorized disclosure of personally identifiable data, professional negligence resulting in injury or death, and other similar claims.

Japan is ready for expanded citizen engagement. The lay judge system has been admittedly successful in its implementation. From an educational standpoint, the public has been inundated with information about jury service over the past decade so they should be primed for further participation. Logistically, the country has made preparations to accommodate juries in its courtroom facilities. Through expansion, Japan can obtain many of the same benefits on the civil side that have been experienced in a criminal context. Not only will more citizens be directly exposed to the justice system, but they can also infuse common sense and societal values into the system. Moreover, if citizen participation was introduced into the civil justice system, even on a limited basis, it could bring society even closer to self-governance while simultaneously strengthening the democratic foundations of society, promoting justice, and helping ensure equitable results in individual cases even further. It could also help quell increasing public frustration with governmental inaction. Accountability in the public and private sectors could increase thereby diminishing problematic conduct. This is the next logical step for Japan in continuing to advance the goals underlying its legal reforms.

In terms of direct impact on the criminal justice system, the trial outcomes have essentially remained the same. In *saiban'in* cases, the conviction rate has continued to hover around Japan's notoriously high conviction rate of 99.9% during the first eight years of its existence.²²⁰ To the chagrin of criminal defense attorneys and certain observers, this outcome has been disappointing. However, it might be argued that the circumstances have changed because prosecutors have become even more cautious and selective in the number of cases brought to trial.

²¹⁹ JSRC RECOMMENDATIONS, *supra* note 93, Ch. I, pt. 3.

²²⁰ DIMITRI VANOVERBEKE, JURIES IN THE JAPANESE LEGAL SYSTEM: THE CONTINUING STRUGGLE FOR CITIZEN PARTICIPATION AND DEMOCRACY, 157, 157 (2015); Johnson, *supra* note 157, at 865.

Sentences by the *saiban'in* tribunals have been largely equivalent to previous cases tried exclusively by professional judges.²²¹ Sentences in serious sex crimes have, however, been harsher.²²² The consistency in sentencing has resulted from fairly strict controls by the status quo. More specifically, the courts have insisted on the use of a national sentencing database, and the Supreme Court has given specific directions.²²³ Also, the first lay judge case overturned by the Supreme Court involved the conviction of parents for child abuse causing bodily injury resulting in death.²²⁴ In this case, the lay judge panel imposed a term of imprisonment longer than that requested by the prosecutor.²²⁵ The panel justified its sentence based on the history of child abuse, attitude of the defendants in shifting the blame, and the lack of similar cases in the national sentencing database.²²⁶ Social attitudes further justified the harsher sentence.²²⁷ The Supreme Court acknowledged that the lay judge system was introduced to better reflect the views of “common people” with respect to the commission of crimes such that different sentences might be fully expected, and that the panel must fully examine and consider the sentencing standards of prior cases.²²⁸ In this case, the Supreme Court concluded that the panel failed to show the basis for more severe sentencing.²²⁹

Although there is relative uniformity in sentencing, different perspectives have been incorporated into the trial process. Judges have appreciated citizen input and worked together with the lay judges without substantial objections or alarm.²³⁰ In fact, citizen participation in the lay judge system has legitimized governmental action and verdicts. The use of lay judge trials has resulted in a renewed emphasis on central tenets of justice including fairness, accuracy, and the presumption of justness. With the outside spotlight on the professional judges both in the courtroom and deliberation room, in-depth analysis and extra judicial care are natural consequences. The inclusion

²²¹ Johnson, *supra* note 157, at 865.

²²² *Id.*

²²³ *Court Compiling Sentence Database for Lay Judges*, JAPAN TIMES, Aug. 5, 2007, <https://www.japantimes.co.jp/news/2007/08/05/national/court-compiling-sentencing-database-for-lay-judges/#.WcZ-jNOGNPN>.

²²⁴ WILSON ET AL., *supra* note 5, at 49–50; Sayuri Umeda, *Japan: Supreme Court Strikes Down Sentence by Lay Judges*, GLOBAL LEGAL MONITOR, Sept. 4, 2014, <http://www.loc.gov/law/foreign-news/article/japan-supreme-court-strikes-down-sentence-by-lay-judges/>.

²²⁵ WILSON ET AL., *supra* note 5, at 49.

²²⁶ Sayuri Umeda, *supra* note 224.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ WILSON ET AL., *supra* note 5, at 38–50.

of individuals from varied backgrounds into lay judge tribunals better reflects the composition of society and goes beyond the diversity of the elite who tend to make up the legislative, executive, and judicial branches.

3. Beyond the First Five Years—Indirect Impact of Change

Although the lay judge system's direct impact on the outcomes of a comparatively few number of individual criminal trials has been relatively minimal, the real value of this major court reform has been indirect, or at least, specifically designed to complement a transformed criminal justice system. These "indirect" benefits include improvements to court procedures, transparency, better efficiency, and attention by the courts to evidence, facts, and justice.

The *saiban'in* system stimulated reforms in various aspects of the criminal pretrial process.²³¹ Reform was necessary for the system to succeed. These reforms included the adoption of pretrial coordination procedures, the increased use of recordings during interrogations, expanded discovery rights for defendants, and relaxed bail reform.²³² It also led to the creation of a legal aid program to provide counsel for indigent suspects.²³³

The impact of procedural changes associated with the lay judge system have been striking. Before inception of the lay judge system in 2009, all criminal trials were discontinuous proceedings held on random days over the course of months (if not years) in which professional judges simultaneously considered the facts, guilt, and sentencing. Now, lay judge trials are concentrated and occur on consecutive days.²³⁴ After the consolidation of the trial process, the *saiban'in* trial hearings took an average of 5.6 consecutive days in 2016.²³⁵ The deliberations took an average 10.4 hours in 2016.²³⁶

To increase efficiency and facilitate a speedy trial on consecutive days, "[t]he Lay Judge Act stipulates that all cases subject to lay judge trials shall be subject to a mandatory pretrial process, known as *kouhanmae seiri tetsuzuki* or pretrial conference procedures, that must occur before the start of

²³¹ *Id.* at 51.

²³² *Id.* at 51–60.

²³³ *Id.* at 59–60.

²³⁴ DOBROVOLSKAIA, *supra* note 81, at 209.

²³⁵ 2017 STATUS REPORT, *supra* note 203.

²³⁶ *Id.*

trial.”²³⁷ Courts now hold pretrial meetings to identify contested issues, outline a concrete plan for trial, and facilitate greater exchange of evidentiary material in advance of trial.²³⁸ In the pre-*saiban ’in* trial era, prosecutors only needed to disclose materials that they planned on introducing at trial.²³⁹ Contradictory statements or harmful materials often never came forth. At least to some degree, this has changed. To a large degree, the pretrial proceedings have helped increase transparency and satisfy the constitutional promise of the right to a speedy trial. These proceedings have helped increase efficiency and minimize the duration of lay judge trials.²⁴⁰ Although not compulsory in criminal cases that do not qualify for *saiban ’in* treatment, the courts’ use of this procedure has also expanded to non-*saiban ’in* cases in which the accused pleads not guilty and the parties disagree regarding the evidence to be introduced at trial.²⁴¹

Another procedural point of impact has been an emphasis on orality and directness, as seen in an increased importance placed on live witnesses and oral testimony.²⁴² Under the previous system, the professional judge panels “relied heavily on written materials [and evidence], including the prosecutor’s investigation dossier.”²⁴³ The prosecution would meticulously develop its dossier and structure it to best realize a conviction.²⁴⁴ Over defense counsel’s vigorous objections, “judges generally accepted the dossier into evidence with little [or no] reservation.”²⁴⁵ With the adoption of lay judge trials, the tribunals rely comparatively less on prosecutorial dossiers, and much more on live witness testimony. Hearings on consecutive days now enable the professional and lay judges to analyze live testimony and written evidence in a cohesive fashion. Notwithstanding the notable improvements, professional judges have sometimes reverted to their old habits of allowing prosecutors to read investigative materials and confessionary statements aloud in court instead of requiring the direct questioning of witnesses, investigators, and other relevant individuals.

²³⁷ WILSON ET AL., *supra* note 5, at 51; *see also* Lay Judge Act, art. 49.

²³⁸ WILSON ET AL., *supra* note 5, at 51.

²³⁹ *Id.* at 52.

²⁴⁰ VANOVERBEKE, *supra* note 220, at 139.

²⁴¹ *Id.*

²⁴² WILSON ET AL., *supra* note 5, at 55.

²⁴³ *Id.* at 19.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

Another procedural benefit realized through citizen participation has been the increased emphasis on communication. Because ordinary citizens are now involved in the adjudication process, the attorneys and professional judges have strived to communicate with citizen jurors in understandable terms by using plain language throughout the proceedings. This has been an ongoing emphasis associated with the *saiban'in* system. In fact, special training sessions on lay judge communication continue to be held for criminal defense attorneys, prosecutors, and judges.

The newfound transparency in the criminal justice system has opened the door to both scrutinizing the flaws in the judicial process and seeking solutions for such flaws. With increased attention, society has become aware of important issues such as forced confessions and capital punishment. This has already resulted in changes in practice, procedure, and the law.

Since the inception of lay judge trials, intense scrutiny has been placed on forced confessions and flaws in the interrogation process. In 2016, the Diet finally passed a law requiring the government to take measures within three years to record, in its entirety, the interrogation process of any defendant who is subject to a *saiban'in* trial or any case being investigated by a special prosecutor squad.²⁴⁶ To date, investigators record interrogations at their own discretion or not at all.²⁴⁷ In response to calls for reform in preparation for lay judge trials, Japanese police only started recording interrogations in 2008.²⁴⁸ By 2015, the police still recorded less than fifty percent of interrogations in lay judge cases, and recording was often selective.²⁴⁹ This will change pursuant to this new legislation. Now, police must record all interrogations conducted during investigations of alleged crimes to qualify for a lay judge trial.²⁵⁰ This requirement will only apply to crime cases subject to the Lay Judge Act, illustrating how the lay judge system has indirectly impacted the greater legal system.²⁵¹

Since the inception of lay judge trials, all murder defendants have been tried by mixed tribunals. This is a major difference from past practice in

²⁴⁶ *Japanese Police to Tape All Interrogations of Suspects Facing Lay Judge Trials*, JAPAN TIMES, Sept. 16, 2016, <http://www.japantimes.co.jp/news/2016/09/16/national/crime-legal/japanese-police-tape-interrogations-suspects-facing-lay-judge-trials/#.WGMEObYrKL8>; Tomohiro Osaki, *supra* note 217.

²⁴⁷ Tomohiro Osaki, *supra* note 217.

²⁴⁸ Wilson, *supra* note 3, at 560–61.

²⁴⁹ *Japanese Police to Tape All Interrogations of Suspects Facing Lay Judge Trials*, *supra* note 251.

²⁵⁰ Tomohiro Osaki, *supra* note 217.

²⁵¹ *Id.*

which three professional judges tried everyone accused of murder.²⁵² Along these lines, there has been a renewed discussion about capital punishment in Japan.²⁵³ Often shrouded in secrecy, public involvement in adjudicating crimes that qualify for the death penalty has added another dimension to public scrutiny and discourse.²⁵⁴ As lay judge trials have resulted in death sentences, there have been renewed calls from the Japan Federation of Bar Associations, certain segments, and even former lay judges to reconsider and even abolish the death penalty.²⁵⁵

4. Working on the Imperfections and Challenges

Notwithstanding the “excitement and fanfare” of this new experiment, there is still room for improvement.²⁵⁶ During the initial phases of the routine period, Japan continuously evaluated the *saiban'in* system. The enabling legislation of the new system called for a comprehensive evaluation in 2012—only three years into the new system’s existence. Accordingly, the General Secretariat of the Supreme Court issued its fifty-page three-year evaluation in December 2012.²⁵⁷ Additionally, Japan continues to evaluate of the *saiban'in* system. The Supreme Court’s efforts constantly monitor the challenges and successes of the system through research, polling of citizen judges, and other initiatives.²⁵⁸

In its evaluative report, the Supreme Court concluded that the new system was functioning comparatively well.²⁵⁹ The rollout had been successful, the new system was stable, and the outcomes of the new system were consistent with the outcomes of the previous criminal justice system.²⁶⁰ There was no suggestion that the new system needed to be subject to a major reconstruction or even scaled back. The tone of the report was positive, and in fact seemed to conclude that many of the concerns that existed before the roll-out of the system were not as serious as originally feared. The reasons

²⁵² WILSON ET AL., *supra* note 5, at 5–27.

²⁵³ *Id.* at 64–69.

²⁵⁴ *Id.*

²⁵⁵ *Id.*; *Double Murderer Executed; 2nd Under Citizen Judge System*, ASAHI SHIMBUN, Nov. 11, 2016, <http://www.asahi.com/ajw/articles/AJ201611110025.html>; Maki Okubo, *After Hanging, Ex-Citizen Judge Calls Death Penalty ‘Murder,’* ASAHI SHIMBUN, May 17, 2016, <http://www.asahi.com/ajw/articles/AJ201605170007.html>.

²⁵⁶ Wilson, *supra* note 3, at 489.

²⁵⁷ 2012 EVALUATION REPORT, *supra* note 208.

²⁵⁸ WILSON ET AL., *supra* note 5, at 42.

²⁵⁹ *Id.* at 43.

²⁶⁰ *Id.* at 42–43.

underlying the initial success stemmed largely from the value provided to the system by citizen participation. The lay judges engaged enthusiastically during the trial process in terms of their desire to understand, willingness to work hard, and eagerness to speak up during the deliberations.²⁶¹ In fact, the Supreme Court noted that more than ninety-five percent of the lay judges felt that participation on a mixed jury was a valuable experience.²⁶²

At the same time, the Supreme Court's three-year evaluation noted a broad array of concerns and issues that needed to be addressed.²⁶³ There were growing concerns about an increasing number of lay judges either seeking exemption or excusal from jury service, or rather simply more citizens who were failing to show up for service despite receiving a summons.²⁶⁴ As detailed below, this challenge has progressively grown over the past eight years. During the first few years of the system, the populous was comparatively diligent in their responsiveness to calls to serve as a *saiban'in*. Subsequently though, citizen participation has trended in a downward fashion. In 2016, according to the Supreme Court of Japan, the proportion of those who refused to serve rose to nearly sixty-five percent.²⁶⁵ This is a twelve percent decrease in participation compared to when the lay judge system officially started in 2009.²⁶⁶

One of the main reasons cited for refusing to serve is a proliferation of non-traditional employment in Japan.²⁶⁷ Such employment arrangements make it difficult to take time off of work. Another reason is the increasing length of trials.²⁶⁸ Although most lay judge trials finish within a week, this can feel like an inordinate amount of time away from work in light of the country's work culture.²⁶⁹ Even more significantly, longer and more complex trials can provide individual challenges and also draw negative press. In 2017, the highly publicized and complex trial of Chisako Kakehi was scheduled to be lengthy. Ms. Kakehi was charged with the murder or attempted murder of four men with whom she had engaged in a relationship—marital or others. Her trial was scheduled to span 135 days and include fifty hearings and more

²⁶¹ *Id.*

²⁶² *Id.* at 41.

²⁶³ *Id.* at 43.

²⁶⁴ *Id.* at 61–71.

²⁶⁵ *Facilitate Environment to Enable More People to Participate in Lay Judge Trials*, YOMIURI SHIMBUN, June 29, 2017, <http://the-japan-news.com/news/article/0003789012>.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ WILSON ET AL., *supra* note 5, at 62.

²⁶⁹ *See id.*

than fifty witnesses.²⁷⁰ To fill the citizen lay judge spots, the district court summoned 920 individuals for prospective service.²⁷¹ More than eighty percent of those summoned refused to serve.²⁷²

At the same time, courts have likely compounded the problem of *saiban'in* service by permitting prospective lay judges to decline.²⁷³ While such leniency may be the result of courts fearing the consequences of a citizenry that feels it is forced to serve, the unwillingness to insist on participation could lead to long-term problems with the system. This is particularly likely given that opinion polls demonstrate acceptance of the system increases significantly when a person serves as a lay judge.²⁷⁴

Other topics addressed in the Supreme Court's evaluative report in 2012 focused largely upon the burdens on lay judges, such as concerns about increasingly longer trials, the strict confidentiality obligation, the mental toll exacted by jury service, and accommodations.²⁷⁵ It also noted potential procedural issues involving opening arguments, investigation of evidence, handling of deliberations, structure of judgments, cases involving the death penalty, appeals, and other matters.²⁷⁶ As the system becomes even more routine, the government's mission is tackling these challenges and improving the system.

Aside from the Supreme Court's report, observers have focused on a host of areas for potential improvement. To further enhance participatory democracy and the educational benefits of citizen engagement, Japan might consider relaxing the strict lifetime confidentiality obligations imposed on the lay judges to facilitate transparency and greater accessibility. *Saiban'in* are subject to significant fines or imprisonment for leaking any confidential information learned during jury service, any part of the lay judge panel's deliberations, opinions or identities of other lay judge members, or personal opinions about the panel's findings or weight that should have been attributed to the evidence.²⁷⁷ Prohibiting citizen jurors from communicating their trial experience with others can be harmful to their health, particularly in serious

²⁷⁰ *Facilitate Environment to Enable More People to Participate in Lay Judge Trials*, *supra* note 265.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ WILSON ET AL., *supra* note 5, Ch. 41–42.

²⁷⁵ 2012 EVALUATION REPORT, *supra* note 208.

²⁷⁶ *Id.*; *see also* Foote, *supra* note 149, at 762.

²⁷⁷ Lay Judge Act, arts. 70, 79.

criminal trials. Japan has attempted to combat this by offering free counseling, a hotline, and other means of enhancing psychological assistance.²⁷⁸ Just as significantly, for the *saiban'in* system to have the maximum impact, former lay judges need to talk about their experiences freely.²⁷⁹ Strict confidentiality standards reduce the multiplier effect that might be expected from conversations with family members, friends, workplace colleagues and others. Absent relaxed standards, the flow of information and positive effects of transparent civic service are hindered.²⁸⁰

With respect to evidentiary matters, the availability of materials to the defense has increased significantly, particularly in comparison with the pre-*saiban'in* system era.²⁸¹ Despite improved transparency, prosecutors can still refrain from producing potentially harmful evidence. The pretrial proceedings tend to inhibit lay judges from seeing and considering all relevant materials because professional judges can exclude materials in an effort to streamline actual trial hearings.²⁸² For purposes of obtaining justice and providing the lay judges with all relevant information, greater disclosure is desirable. Although expediency can decrease the burden on the lay judges, there should be no substitute for a defendant's right to a fair and complete trial in the name of expediency.

Another concern is whether procedural defects or obstacles caused by compromises reached in the creation of the system will inhibit systematic success. Professor Feeley emphasized such a concern in his work.²⁸³ In essence, the development of the lay judge system was a compromise in terms of its structure due in large part to objections from the status quo. Although some would have preferred an all-citizen jury, Japan opted for a mixed tribunal system whereby three professional judges have the opportunity to oversee and work directly with six citizen judges. Naturally, these experienced adjudicators have the unfettered ability to control interpretations of evidence behind closed doors. Holding firm to the viewpoint that the existing system was sufficient, there was little impetus for change beyond acknowledging that educating people through participation would have benefits. In the eyes of the judiciary, meaningful public input into the verdict

²⁷⁸ Lay Judge System: 48,000 Participants in the Legal System, Five Years since Implementation as of May 21, *supra* note 202.

²⁷⁹ See also Foote, *supra* note 149, at 762.

²⁸⁰ See generally *id.*

²⁸¹ See Makoto Ibusuki, *supra* note 11, at 30.

²⁸² WILSON ET AL., *supra* note 5, at 69–70.

²⁸³ FEELEY, *supra* note 12, at 35–38.

and sentencing was not necessarily the desired goal. Along these same lines, it is noteworthy that certain verdicts are not possible without at least one professional judge joining the lay judges.

Since the first lay judge trial in 2009, observers have expressed concerns related to lay judges including the length of the trials, financial losses due to missed work, and psychological harms from being exposed to gruesome evidence.²⁸⁴ Without question, it is important to reduce the burden on the citizenry in order to generate support and buy-in for the new system. However, lay judge service should not be discounted such that procedure overtakes substance. For citizens adjudicating the guilt or innocence of a fellow citizen, the main priority should be obtaining justice efficiently. When dealing with the life and liberty of the accused, the system must provide every opportunity for due process. Additionally, participatory democracy requires active engagement and sacrifice. A few days of lay judge service for the betterment of society should be viewed as a privilege and civic duty. Again, lay judge surveys demonstrate citizens share this view once they have served.

Finally, in considering the search for truth and due process, the structure of the current system can be viewed as a weakness. Some have voiced significant worries about the potential for tainting a verdict by not bifurcating the trial process so that sentencing is done only after a guilty verdict has been reached.²⁸⁵ Splitting the verdict stage from the sentencing stage avoids potential prejudice to the determination of guilt especially where evidence relevant only to sentencing is inflammatory. Evidence inapplicable to a determination of guilt includes evidence of prior crimes or victim impact statements. It also includes trial participation by victims or victim representatives, which is now allowed in *saiban'in* trials pursuant to the wave of court system reforms undertaken by Japan.²⁸⁶ Although bifurcation is often discussed in the context of concern about citizen jurors' inability to mentally separate the prejudicial impact of previous crimes or impassionate pleas from victims, the lack of separation potentially impacts professional judges as well.

²⁸⁴ See Wilson, *Japan's New Criminal Jury Trial System*, *supra* note 3, at 514.

²⁸⁵ Foote, *supra* note 149, at 762–63; see also Wilson, *supra* note 3, at 566–70.

²⁸⁶ Foote, *supra* note 149, at 762–63.

VII. CONCLUSION

The *saiban'in* system has taken a firm hold in Japanese society and has benefitted both individuals and society alike. Going forward, the system holds great promise of future success as well. Judicial reform and citizen involvement in government have been viewed as a means of spurring private sector economic activity by reducing governmental influence and power. Whether these goals will be fully realized remains to be seen.

In the context of the Feeley formula, it is necessary to continue evaluating the sustained prospects for success and monitor the potential pitfalls that might stand in the way of the *saiban'in* system. Centralized control of the new system and well-defined duties of actors could hinder the continuing development of this major reform if its purposes are neglected or forgotten.²⁸⁷ Moreover, because the government has continued to emphasize efficiency, another concern is whether all of the intended effects and benefits of the new system will be realized.²⁸⁸

At the same time, the likelihood of success has been bolstered by the large and sustained investment made in the new system. This includes structural facilities, operating budgets, and commitment. The *saiban'in* system also benefits from the efforts of highly trained professionals within the court system who oversee the system and perform complex tasks. The rollout and operation of the system has been surprisingly smooth. Although the opportunity exists for expansion of the system, the comparatively small number of *saiban'in* trials to date has also likely contributed to the sustained success of the system given that these professionals have been able focus on any issues or challenges that might arise.

Building on the momentum of the lay judge system, Japan should seriously consider expanding citizen participation into the legal decision-making process in civil trials. Through expansion, Japan can obtain many of the same benefits on the civil side that have been experienced in a criminal context. Also, not only can more citizens be directly exposed to the court system, but they can also infuse common sense and societal values into the system. This is the next logical step for Japan in continuing to advance the goals underlying its legal reforms.

²⁸⁷ FEELEY, *supra* note 12, at 37–39.

²⁸⁸ *Id.*