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Abstract

The lay judge system has considerable potential both in concept and form. To realize its full potential, the system needs to overcome various structural impediments and cultural challenges. This Article further contributes to the emerging discussion by detailing three related areas that merit attention and reform if the system is going to realize its full potential. Namely, the lay judge system would benefit from 1) increased transparency by eliminating punitive measures against citizen judges desiring to freely speak about the trial proceedings or deliberation process oncle the trial is complete; 2) impoved access to the interrogation of detained suspects and defendants; and 3) limited victim participation in trials until a post-verdicgt phase in the proceedings. Part I establishes a foundation by outlining the movement towards citizen participation, the reasons underlying the new lay judge system, and the ongoing debate about the law judge system. Part II details the development of the Japanese criminal system. Part III explains the need for increased transparency in the deliberation room, improved access to interrogations, and controls necessary to ensure objective deliberations.

JAPAN'S NEW CRIMINAL JURY TRIAL SYSTEM: IN NEED OF MORE TRANSPARENCY, MORE ACCESS, AND MORE TIME

*Matthew J. Wilson**

INTRODUCTION

When the murder trial of seventy-two year-old Katsuyoshi Fujii commenced in the Tokyo District Court in early August 2009, thousands of Japanese lined up for the opportunity to witness the trial.[1] Millions more were showered with seemingly non-stop television coverage of this monumental event.[2] This marked the first time that the Japanese public had paid such close attention to the minute details of the criminal justice process.[3] Interestingly, the fanfare underlying this widespread national interest did not specifically relate to Mr. Fujii or his heinous acts. Rather, the entire nation focused its eyes on the groundbreaking participation of citizen jurors in his criminal trial.[4]

For over sixty years, meaningful public participation in criminal or civil trials was an abstract concept in Japan. This

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1. *See Home Issues Top Lay Judge Trials/Focus Shifting to Sentences as 1st Cases go to Court in Early August*, DAILY YOMIURI (Japan), June 23, 2009 [hereinafter *Home Issues Top Lay Judge Trials*], *available at* 2009 WLNR 11928120; David T. Johnson, *Early Returns from Japan's New Criminal Trials*, ASIA-PAC. J., Sept. 7, 2009, http://www.japanfocus.org/-david_t_-johnson/3212; Leo Lewis, *Juries Return to Japanese Justice in Katsuyoshi Fujii Trial*, TIMES (London), Aug. 4, 2009, http://www.timesonline.co.uk/tol/news/world/asia/article6737305.ece; Posting of Isabel Reynolds to Raw Japan, http://blogs.reuters.com/japan/ (Jun 18, 2009, 05:13 EDT). Katsuyoshi Fujii was accused of stabbing an elderly neighbor in Tokyo. He confessed to the murder and was sentenced to fifteen years in prison. *Trial by Jury in Japan: Hanging in the Balance*, ECONOMIST, Aug. 8, 2009, at 38 [hereinafter *Hanging in the Balance*].

2. While living in Tokyo, the author witnessed the comprehensive television and print media coverage given to the relatively simple trial of Mr. Fujii. Notably, Mr. Fujii did not contest his guilt in the matter. Lewis, *supra* note 1. Instead, he challenged the sentence that was recommended by the prosecution. *Id.*

3. *See* Setsuko Kamiya, *Citizens Stepped up, Fulfilled New Court Duty*, JAPAN TIMES, Aug. 7, 2009, http://search.japantimes.co.jp/cgi-bin/nn20090807a4.html (quoting Professor Akira Goto of Hitotsubashi University Graduate School of Law).

4. Lewis, *supra* note 1.

drastically changed with Mr. Fujii's trial. Japan recently initiated revolutionary changes to its legal system as part of a sweeping reform effort aimed at addressing its mid-1990s economic slump and its desire to play a greater role in global affairs. One of the most significant and well-publicized legal reforms was the adoption of a "*saiban-in seido*," which translates as "lay assessor system" or "lay judge system,"[5] in which registered voters are conscripted to serve on a mixed quasi-jury tribunal together with professional judges. [6] This monumental change and other significant reforms have not only affected the judicial process itself, but have also impacted Japanese society.

On May 21, 2009, Japan revived citizen participation in serious criminal trials pursuant to the "*Saiban-in Ho*," or Act Concerning Participation of Lay Assessors in Criminal Trials ("Lay Judge Act").[7] Although citizen involvement in the judicial process is standard in most developed nations,[8] Japan was until now the only Group of Eight nation without a system that allows citizens to participate in criminal trials. [9] For nearly seven decades, the Japanese judicial system has been the exclusive domain of legal professionals. Since 1943, professional judges presided over all criminal trials at the district court and appellate

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5. For the purpose of consistency, this Article will generally refer to the new system as "lay judge system."

6. *See* Chana R. Schoenberger, *Challenges Abound For Japan's New Lay Judges*, FORBES, June 16, 2009, http://www.forbes.com/2009/06/16/japan-lay-judges-markets-equities-asia.html. The term "*saiban-in seido*" has been subject to a variety of translations including: lay assessor system, lay judge system, citizen judge system, quasi-jury system, or even jury system. *See id.*

7. *See* Saiban'in no sanka suru keiji saiban ni kansuru hōritsu [Act Concerning Participation of Lay Assessors in Criminal Trials], Law No. 63 of 2004 [hereinafter Lay Judge Act], *translated in* Kent Anderson & Emma Saint, *Japan's Quasi Jury (Saiban-in) Law: An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials*, 6 ASIAN-PAC. L. & POL'Y J. 9, 9 (2005); *see also* Johnson, *supra* note 1 (outlining the Lay Judge Act and discussing the effect on the Japanese public, judges, prosecutors, defense attorneys and others).

8. Jury service is well established internationally. Over seventy jurisdictions, such as Australia, Canada, Hong Kong, Russia, Spain, the United Kingdom, and the United States have jury systems. *See, e.g.*, Kang Ji-Sun, *Civil Participation System: A Major Judicial Reform Allowing Public Participation in Court*, YONSEI ANNALS (Japan), July 12, 2009, http://annals.yonsei.ac.kr/news/articleView.html?idxno=595. On January 1, 2008, the Republic of Korea also introduced citizen participation in criminal trials. *Id.* February 12, 2008, marked the first jury trial in Korea in the Daegu District Court. *Id.* The Korean government hopes to perfect the system by 2012. *Id.*

9. *Lay Judge System Starts in Japan amid Lingering Concerns*, THAI PRESS REPS., May 25, 2009, *available at* 2009 WLNR 9772569.

levels.[10] During this period, the Japanese judiciary has been generally regarded as intelligent, competent, consistent, and hard working.[11] Notwithstanding, there were some serious criticisms regarding poor fact-finding and an over reliance on prosecutors.[12] During this period, citizen participation in the judicial process was extremely limited and only manifest in largely unknown prosecutorial review commissions.[13] With Mr. Fujii's trial officially kicking off the new lay judge system, Japan opened a new chapter in criminal jurisprudence and civic participation. Japan's new lay judge system will not only be closely scrutinized on a domestic scale, but it may also offer valuable lessons on an international scale to established and emerging democracies, both in its initial form and in subsequent iterations.

Much excitement and fanfare have accompanied the lay judge system. Japan's investment of time, energy, and financial resources in preparing for citizen participation in the lay judge

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10. *See* JAPAN FED'N OF BAR ASS'NS, JFBA AND JAPANESE JUDICIAL SYSTEM 4 (2008), *available at* http://www.nichibenren.or.jp/en/about/data/JFBA_Brochure_2008.pdf. Japan did, however, utilize jury trials in its past. Under the Meiji Constitution of Japan, jury trials were held in criminal cases between 1928 and 1943. *See* Matthew Wilson, *The Dawn of Criminal Trials in Japan: Success on the Horizon?*, 24 WIS. INT'L L.J. 835, 840 (2007). Japan held fewer than five hundred jury trials during this period, though, primarily because the risks to a defendant were quite high—including the inability to appeal a jury verdict. *See* Kanako Ida, *Introducing Citizen Participation in Japanese Courts: Interaction with Society and Democracy from the Perspective of the American Jury System* 7 (USJP Occasional Paper 06-03, 2006), *available at* http://www.wcfia.harvard.edu/us-japan/research/pdf/06-03.Ida.pdf.

11. Wilson, *supra* note 10, at 836–37.

12. *See, e.g.*, Ingram Weber, *The New Japanese Jury System: Empowering the Public, Preserving Continental Justice*, 4 E. ASIA L. REV. 125, 149 (2009); *see also* John O. Haley, *Litigation in Japan: A New Look at Old Problems*, 10 WILLAMETTE J. INT'L L. & DISP. RESOL. 121, 139 (2002).

13. Albeit unknown to most, Japanese citizens have participated in the criminal justice system for over sixty years in the context of *Kensatsu Shinsakai*, or Prosecutorial Review Commissions ("PRC"). *See* Hiroshi Fukurai, *The Re-birth of Japan's Petit Lay Judge 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, 323–28 (2007). The PRC reviewed the propriety of a prosecutor's decision not to prosecute certain suspects upon request from a victim or party of interest. *Id.* at 323–24. If the PRC disagreed with the prosecutor's inaction, then the PRC issued a recommendation to reconsider its decision not to prosecute. *Id.* at 324. Because these recommendations were not binding, prosecutors only modified their initial decision less than ten percent of the time. *Id.* at 325. On May 28, 2004, the Diet enacted legislation that makes these recommendations binding. *Id.*

system has been phenomenal.[14] As the implementation date for the lay judge system approached, debate and speculation about the merits of this epic change to Japanese justice and society increased considerably.[15] Optimists see the new system as a vehicle for fostering positive societal change and bringing transparency to Japan's sheltered and oft-criticized criminal justice system.[16] Conversely, others strongly believe that the system was never broken, and should not be touched by common citizens who are inexperienced and generally uneducated in the complexities of the law.[17] Some even advocated that the lay judge system should be postponed, or even completely scrapped.[18]

The lay judge system has considerable potential both in concept and form. To realize its full potential, the system needs to overcome various structural impediments and cultural challenges. Interested parties and observers in Japan and abroad, including this author, have expressed concerns about the obstacles facing the lay judge system and have suggested methods of reform.[19] This Article further contributes to the emerging discussion by detailing three related areas that merit attention and reform if the system is going to realize its full potential.

If the new lay judge system is going to achieve the pronounced objectives of transparency, public education, enhanced credibility of the criminal justice system, and reliability

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14. *See infra* notes 32–43 and accompanying text.

15. *See infra* notes 46–50 and accompanying text.

16. *See infra* notes 61–63 and accompanying text.

17. *See infra* notes 46, 56–59 and accompanying text.

18. *See, e.g.*, Masami Ito, *Lawmakers Question 'Saibanin' System*, JAPAN TIMES, May 22, 2009, http://search.japantimes.co.jp/cgi-bin/nn20090522a9.html.

19. Wilson, *supra* note 10; *see, e.g.*, Kent Anderson & Mark Nolan, *Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (Saiban-in Seido) from Domestic Historical and International Psychological Perspective*, 37 VAND. J. TRANSNAT'L. L. 935 (2004); Robert M. Bloom, *Jury Trials in Japan*, 28 LOY. L.A. INT'L & COMP. L. REV. 35, 62–64 (2006); Fukurai, *supra* note 13 at 341–44; Ida, *supra* note 10 at 36–43; Lester W. Kiss, *Reviving the Criminal Jury in Japan*, 62 LAW & CONTEMP. PROBS. 261 (1999); Stephan Landsman & Jing Zhang, *A Tale of Two Juries: Lay Participation Comes to Japanese and Chinese Courts*, 25 UCLA PAC. BASIN L.J. 179, 190–97 (2008); Douglas G. Levin, *Saiban-in-seido: Lost in Translation? How the Source of Power Underlying Japan's Proposed Lay Assessor System May Determine Its Fate*, 10 ASIAN-PAC. L. & POL'Y J. 199 (2008); Arne Soldwedel, *Testing Japan's Convictions: The Lay Judge System and Rights of Criminal Defendants*, 41 VAND. J. TRANSNAT'L L. 1417, 1454–55 (2008); Stephen C. Thaman, *Japan's New System of Mixed Courts: Some Suggestions Regarding Their Future Form and Procedures*, 2001–2002 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 89 (2003); Weber, *supra* note 12.

with respect to the preservation of rights, then Japan needs to turn its attention to several additional reforms. Namely, the lay judge system would benefit from (1) increased transparency by eliminating punitive measures against citizen judges desiring to freely speak about the trial proceedings or deliberation process once the trial is complete; (2) improved access to the interrogation of detained suspects and defendants; and (3) limited victim participation in trials until a post-verdict phase in the proceedings.

This Article analyzes how these three important issues impact the lay judge system and explores potential solutions to them. More specifically, Part I establishes a foundation by outlining the movement towards citizen participation, the reasons underlying the lay judge system, and the ongoing debate about the new lay judge system. Part II details the development of the Japanese criminal justice system. It also describes the recent systemic reforms and benefits of increased citizen participation. Finally, Part III explains the need for increased transparency in the deliberation room, improved access to interrogations, and controls necessary to ensure objective deliberations. Unless these steps are taken, not only will the lay judge system fail to attain its full potential, but Japanese criminal justice will remain shrouded in secretive doubt and the rights of the accused will continue to be endangered. Japan should take these specific measures in tandem with its scheduled review of the lay judge system in 2012, if not before.

I. *THE FOUNDATION AND THE DEBATE*

Criminal justice involves very high stakes. Concerns related to community safety, victims' rights, criminal deterrence, and individual punishment directly compete with the rights, lives, and reputations of suspected criminals. Even though Japanese courts have traditionally been the exclusive province of professional judges and attorneys, various forces have long sought a system that would permit common citizens to constructively participate in the judicial process, thereby infusing societal expectations and norms into the judicial process.[20] For instance, the Japan

20. *See* Ida, *supra* note 10, at 4–5.

Federation of Bar Associations ("JFBA") [21] has actively campaigned for jury trials since the 1980s, when four men who confessed under duress were released from death row after confirmation of their innocence.[22] Despite these efforts, the government and general public largely ignored calls for jury trials until the Justice System Reform Council ("JSRC") [23] recommended the integration of citizen participation into the criminal trial process at the turn of the century.[24] With little attention or much public debate, the National Diet, Japan's bicameral legislature, accepted the JSRC's recommendation and quickly enacted a law providing for lay judge trials.[25]

The introduction of lay judge trials is one of many revolutionary legal reforms[26] intended to transform Japan from a society with excessive regulatory control to a global model based

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21. It should be noted that membership in the Japan Federation of Bar Associations ("JFBA") consists of attorneys, legal professional corporations, and registered foreign lawyers. *See* JAPAN FED'N OF BAR ASS'NS, *supra* note 10, at 1–2. The JFBA does not include prosecutors and judges. *See id.* The pronounced mission of the JFBA and Japanese attorneys is the protection of fundamental human rights and the realization of social justice. *See id.* at 1.

22. *See* JAPAN FED'N OF BAR ASS'NS, JAPAN'S 'SUBSTITUTE PRISON' SYSTEM SHOCKS THE WORLD 3 (2d ed. 2008), *available at* http://www.nichibenren.or.jp/en/activities/statements/data/daiyo_kangoku.pdf; Landsman & Zhang, *supra* note 19, at 185–87.

23. Prime Minister Keizo Obuchi established the *Shihō Seido Kaikaku Shingikai*, or Justice System Reform Council ("JSRC"), in 1999 to create official guidelines for the judicial reforms taking place in Japan. Fukurai, *supra* note 13, at 321; *see also* Shihō seido kaikaku shingikai secchihō [Justice System Reform Council Establishment Act], Law No. 68 of 1999, art. 2. The JSRC consisted of thirteen elite members from various political and economic sectors, including 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 (*Keizai Doyukai*), the former President of the JFBA, 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*). Fukurai, *supra* note 13, at 321.

24. *See* Ida, *supra* note 10, at 4.

25. *See id.* at 4, 11. For a copy of this report, see Shihō Seido Kaikaku Shingikai [Justice System Reform Council], Shihō seido kaikaku shingikai ikensho—21 seki no Nihon o sasaeru shihō seido—[Recommendations of the Justice System Reform Council—A Justice System to Support Japan in the 21st Century] (2001), *translated in* The Justice System Reform Council, *Recommendations of the Justice System Reform Council—A Justice System to Support Japan in the 21st Century*, 2001–2002 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 119. An electronic copy of the English translation is available at http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html.

26. *See* Wilson, *supra* note 10, at 842–43. Among other things, Japan instituted legislation reforming its codes, commercial laws, tort law, administrative procedure, criminal and civil trial procedure, as well as its legal education system. *Id.*

on transparency and ex post review.[27] The current wave of reform seeks to "reposition the public as actors, not bystanders, in governance,"[28] so that the Japanese public is transformed from "governed objects" to "governing subjects."[29] Within this context, citizen participation in criminal trials is geared to incorporate sound common sense into the deliberative process, increase public understanding of Japan's judicial system, promote civic responsibility, and enhance the tools of democracy available to the citizenry.[30] Reformists also hope citizen participation will help attain justice in all cases, increase investigative and prosecutorial accountability, and eliminate wrongful convictions and other injustices.[31] Kunio Hamada, a former Japanese Supreme Court Justice, posits that citizen participation will foster independent thinking and that this "great social experience" will result in "more Japanese citizens [being] capable of formulating their opinion in international scenes."[32]

Since 2004, Japan has expended immense time, effort, and financial resources in preparing for the lay judge system. The government and JFBA spent massive sums promoting the system to citizens through billboards, print advertisements, television programs, digital video discs (DVDs), Japanese *manga* (cartoons), Japanese *anime* (animation), a mascot, mock trials, symposiums, advertisement on the website You Tube, and other means.[33] As of

27. JUSTICE SYSTEM REFORM COUNCIL, *supra* note 25, ch. I, pt. 1, ch. 4, pt. 1.

28. JAPAN FED'N OF BAR ASS'NS, *supra* note 10.

29. *See* JUSTICE SYSTEM REFORM COUNCIL, *supra* note 25, ch. I, pt. 1. The JSRC recommended that Japan embark on a transformation in which its citizens shed the view of government as the ruler and take a greater responsibility in governing themselves. *Id.* The government needs to respond to the people. *Id.* In a society facing domestic and international challenges, the JSRC noted that the citizenry must be creative and develop their social economic living relationships more autonomously and actively. *Id.*

30. *Id.* ch. IV, pt. 1; *see* Akiko Fujita, *Japan Gets Ready for New Jury System*, VOICE OF AMERICA, July 1, 2009, http://www.voanews.com/english/archive/2009-07/2009-07-01-voa27.cfm.

31. *See* Fujita, *supra* note 30; *see also* JAPAN FED'N OF BAR ASS'NS, *supra* note 10; JUSTICE SYSTEM REFORM COUNCIL, *supra* note 25, ch. I, pt. 2 (noting that the judiciary is expected to serve as the ultimate guardian of the rights and freedoms of the people and to maintain the legal order with the constitution, but that a substantial number of evaluations suggest that the judiciary has not necessarily met these expectations sufficiently).

32. *See* Fujita, *supra* note 30 (quoting Kunio Hamada).

33. *See, e.g.*, Norimitsu Onishi, *Japan Learns Dreaded Task of Jury Duty*, N.Y. TIMES, July 16, 2007, at A1 (reporting on widespread efforts to familiarize public with lay judge system); Saikō Saibansho [Supreme Court of Japan], Saibanin Seido Heisei 21 nen 5

the end of 2007, the Supreme Court of Japan had expended approximately JP¥3.6 billion (US$36 million) on advertising the lay judge system.[34] The Ministry of Justice spent an additional JP¥970 million (US$9.7 million) on advertising activities during this same period.[35] These governmental organs and the JFBA also continued to expend significant sums leading up to the official start date of the lay judge system in May 2009.[36]

In addition, Japan has spent significant amounts on initial logistical preparations. [37] For example, courtrooms were remodeled to create sufficient space for three professional judges and six citizen judges sitting on the bench.[38] Deliberation rooms were specially constructed with sensitivity given to the tribunal's comfort.[39] As of the end of 2008, facility costs related to the lay judge system alone totaled approximately JP¥23.1 billion (US$231 million), and additional preparatory expenditures exceeded JP¥5.5 billion (US$55 million).[40]

Expenditures on the lay judge system have reached into the hundreds of millions of dollars, and will continue to accrue going forward as Japan operates its new lay judge system. Based on current estimates, the Supreme Court of Japan estimates yearly expenditures of JP¥2 billion (US$20 million) for lay judge compensation and JP¥1.2 billion (US$12 million) for lay judge

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gatsu 21 nichi Sutaato [Lay Judge System Starts on May 21, 2009], http://www.saibanin.courts.go.jp/ (last visited Jan. 24, 2010); Hōmushō [Ministry of Justice of Japan], Saibanin Seido Koonaa [Lay Judge System Corner], http://www.moj.go.jp/SAIBANIN/koho/pamph_dvd.html (last visited Jan. 24, 2010) (posting brochures and digital video discs); Japan Federation of Bar Associations, Saibanin Seido [Lay Judge System], http://www.nichibenren.or.jp/ja/citizen_judge/ (last visited Jan. 24, 2010) (interactive website designed to assist public through lay judge system); Leussink, *supra* note 21.

34. *See* Prime Minister of Japan Taro Aso, Saibanin Seido ni tsuite Kokumin ga idaiteiru gimon ni taisuru seifu no ninshiki ni kansuru shitsumon shuisho [Opinion About Questions Concerning the Government's Recognition of Doubts Harbored About Citizens in the Lay Judge System], Question No. 53 of 2009, *available at* http://www.shugiin.go.jp/itdb_shitsumon.nsf/html/shitsumon/b171053.htm.

35. *Id.*

36. *Id.*

37. *See generally Saiban-insei Sutaato made Ikagetsu* [*One Month to the Start of the Lay Judge System*], YOMIURI SHIMBUN (Japan), Apr. 21, 2009, http://www.yomiuri.co.jp/photonews/photo.htm?ge=1&id=12002 (pointing out the various preparations, including logistical details such as the chair quality and magazine selection in the jury room, that have been made in sixty trial courts around Japan).

38. Aso, *supra* note 34.

39. *Id.*

40. *Id.*

travel related expenses.[41] Lay judges and alternate lay judges will be paid JP¥10,000 (US$100) per day for their service during trial, while citizens participating in the selection process will receive a maximum of JAP¥8,000 (US$80).[42] Total expenditures could increase substantially depending upon the number of serious criminal cases actually brought to trial.[43] In addition, valuable resources will be invested in mitigating burdens on the citizenry. For example, lay judges will have free access to psychological counseling if they are traumatized by the criminal proceedings.[44]

All of these resources have been expended on the government's presumption that the system must change, and that citizen understanding and trust in the legal system must be enhanced.[45] Despite Japan's sizeable investment in the new lay judge system and its interest in bringing the justice system closer to the public, opinion polls have consistently shown strong opposition to participation in the criminal justice process.[46] Even

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41. *See* Kiyotaka Iwata, *Saiban-in no Nittou/Ryohi, Nenkan 32 Okuen Saikosai Yosan Yokyu e,* [*Supreme Court Seeks Budget of 3.2 Billion Yen for Lay Judge's Daily Allowance and Travel Expenses*], ASAHI SHIMBUN (Japan), Aug. 26, 2008, http://www.asahi.com/special/080201/TKY200808250332.html (foreign exchange calculation was made at JP¥100/US$1). Between 2003 and 2006, Japan saw an average of 3600 cases that would qualify for lay judge adjudication. *Id.* The budget contemplates this average. In 2007, this number dropped to 2643 applicable cases. *Id.*

42. *See* Mariko Kato, *Those off Lay Judge Hook Feel Relieved: Preparing for Trial Duty Exacted Emotional Toll,* JAPAN TIMES, Aug. 4, 2009, at 4, *available at* http://search.japantimes.co.jp/cgi-bin/nn20090804a2.html.

43. Iwata, *supra* note 41.

44. The Japanese Supreme Court plans to establish a system to provide psychological counseling to lay judges traumatized after serving in trials involving serious crimes at no cost. *See Traumatized Lay Judges to Get Free Counseling,* DAILY YOMIURI (Japan), June 19, 2009, *available at* 2009 WLNR 11660238. The Supreme Court will establish a free twenty-four hour counseling hotline and pay for a maximum of five counseling sessions with clinical psychologists. *Id.*

45. *See* Aso, *supra* note 34.

46. *See, e.g., Start of Lay Judge System: Candidates Anxious Over Dispensing Justice,* DAILY YOMIURI (Japan), May 21, 2009, at 1, *available at* 2009 WLNR 9610521 (citing a nationwide survey in which "79 percent of respondents said they did not want to be involved in trials as lay judges, [which is] up from 75 percent in the previous survey in December 2006."); Leussink, *supra* note 22 (referencing the *Yomiuri* survey indicating seventy-nine percent disapproval rating); Iwata, *supra* note 41 (disclosing the results of a poll in which nearly eighty percent of respondents did not want to serve as lay judges); *See* Haruka Katakawa, *Major Change in Japan's Criminal Trials: Lay Judge System Starts in May,* IIST WORLD FORUM, Feb. 16, 2009, http://www.iist.or.jp/wf/magazine/0674/0674_E.html (citing a poll conducted by the Supreme Court of Japan in April 2008 which showed that nearly forty percent of the 10,500 respondents were unwilling to participate even if participation was mandatory and forty-five percent were reluctant to

some attorneys are unconvinced of the merit of changing the system.[47] The top-down approach in adopting and implementing the lay judge system was largely instituted without any substantive public input. Citizens do not feel qualified to judge suspects, dread the time commitment required by service, fear retaliation by dangerous defendants, and generally do not want to be involved in the criminal justice process.[48] Some citizens even argue that compulsory service violates the constitutionally guaranteed right of freedom of thought and conscience because they would be required to pass judgment.[49] Although Japan has attempted to convince the public about the value of participation through advertising and other means, winning them over may be a difficult task.[50]

Some skeptics of the new lay judge system also see this as an expensive experiment in futility.[51] Japan does not have a tradition of public participation in the criminal justice system.[52] Many believe that citizen judges will refrain from expressing their

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participate, but would do so if participation was mandatory). *But see Over 70% Willing to Take Part in Lay Judge Trials*, KYODO NEWS (Japan), July 25, 2009, *available at* 7/25/09 JWIRE 08:07:22 (Westlaw) (reporting the results of a survey conducted after the initiation of the new system in which over 70 percent of respondents declared they are ready to take serve lay judges because it is their civic obligation but nearly 25 percent of respondents indicated a desire to refuse participation even if legally obligated to do so). Kunio Hamada, former Supreme Court Justice, says that it is not surprising that public opinion polls show a negative opinion of the new lay judge trial because Japanese society does not promote independence. Fujita, *supra* note 30. In his view, the Japanese traditionally do not like to separate from the pack. *Id.*

47. There are lawyers that fundamentally oppose the system on a variety of grounds. For example, several local bar associations believed that the citizen judge system should not be introduced, or at least delayed, due to potential concerns about a rush to judgment or tougher penalties. *Lay Judge Plan Fraught with Guilty Verdict Dangers, Bar Groups Say*, JAPAN TIMES, Nov. 4, 2008, http://search.japantimes.co.jp/cgi-bin/nn20081104a2.html.

48. *See* Iwata, *supra* note 41.

49. *See 1st Lay Judge Trial Starts in Tokyo, Reluctance to Participate High*, KYODO NEWS (Japan), Aug. 3, 2009, *available at* 8/3/09 JWIRE 11:58:30 (Westlaw) (noting that three hundred demonstrators picketed outside the trial expressing their objections on these constitutional grounds).

50. In one display of opposition, many Japanese picketed outside of the first lay judge proceeding held in August 2009. *See* Lewis, *supra* note 1. In another, a woman screamed out "[p]lease refuse to become lay judges" after a hearing on the first day of Fujii's trial. *1st Lay Judge Trial Starts in Tokyo, supra* note 49.

51. *See, e.g.*, Anna Dobrovolskaia, *An All-American Jury System Instead of the Lay Assessor (Saiban-in) System for Japan? Anglo-American Style Jury Trials in Okinawa Under the U.S. Occupation*, 24 J. JAPANESE L. 57, 60–65 (2007).

52. *See* Reynolds, *supra* note 1.

opinions or interjecting their insights into the process due to the cultural tradition of harmony in Japan.[53] There is also doubt that lay judges can overcome the tradition of leaving criminal matters to the professionals,[54] or that they will rise above cultural inclinations against making an independent decision in the face of trained professionals.[55] As such, many have argued that Japan will need to adopt an all-citizen jury for the system to succeed and function as intended.[56]

Initially, the Supreme Court vehemently opposed the concept of a jury system.[57] In striving to protect society and administer justice, the court did not see any reason to include amateurs in the process.[58] The court relented on the general premise that professional judges would maintain their role, and that any changes primarily function to educate the citizenry.[59] According to the judiciary, the system was not revised because it was ailing or broken.[60] As such, still other skeptics believe that professional judges will never allow a verdict if they disagree with the outcome. They contend that the new system is merely a façade, and that the mixed professional-citizen judge composition, combined with structural impediments in the system, will result in little, if any, substantive change in conviction rates.[61] Consequently, citizen participation will actually legitimize

53. *See* Onishi, *supra* note 33; *Hanging in the Balance*, *supra* note 1; Richard Lloyd Parry, *Trial by Jury Returns to Japan and the Lawyers Aren't Happy*, TIMES (London), Feb. 28, 2009, http://www.timesonline.co.uk/tol/news/world/asia/article5818123.ece (asserting that the conformist nature of Japanese citizens and the tendency to follow authority may make citizens unsuitable to sit on juries).

54. *See* Reynolds, *supra* note 1.

55. *See* Dobrovolskaia, *supra* note 51, at 64–65.

56. *See generally id.* (noting calls for the implementation of all-lay person juries consistent with the Anglo-American style jury systems).

57. *See* Weber, *supra* note 12, at 133–34 (observing that the Supreme Court of Japan resisted almost every argument in favor of jury participation presented by the reformists). Not only did the court raise fierce opposition to jury trial proposals in any form, but it also proactively lobbied to ensure that the Diet did not adopt legislation implementing a pure citizen jury. *See* TAKASHI MARUTA, SAIBAN'IN SEIDO [THE LAY JUDGE SYSTEM] 84 (2004), *reviewed in* Colin P.A. Jones, *Prospects for Citizen Participation in Criminal Trials in Japan*, 15 PAC. RIM L. & POL'Y J. 363, 367 (2006) (book review).

58. *See* Wilson, *supra* note 10, at 847–48 (describing how Japan's high court balked at the ability of ordinary citizens to arrive at verdicts more just or consistently than professional judges).

59. *See id.*

60. *See id.*

61. *See* Leussink, *supra* note 22.

the judiciary's current imperfections, instead of improving the delivery of justice.[62]

Proponents of the lay judge system are correct in their assessment that the system has vast potential to change the criminal justice system and increase the public's awareness of important social issues. As Japanese society changes and the need for individual participation in government increases, the citizenry needs to be more informed and better educated about the judicial system and criminal process. By promoting citizen participation in government, the lay judge system stands as a powerful vehicle for potentially achieving the stated goals and solidifying the democratic processes promoted by citizen participation in government.[63] It can also be used to instill greater trust in the truth-finding process, preserve the rights of the accused, and help ensure the due process of law.[64] Public participation is vital to overseeing the criminal justice system and attaining true justice against criminals.

Critics correctly assert that the new lay judge system, at least in its current form, may fall short of its goals.[65] The system has many imperfections and faces various obstacles. To overcome these challenges, the lay judge system and several laws affecting the system need to be revised. Japan has the opportunity to make legislative revisions and adjustments to the lay judge system. The Lay Judge Act was amended to contain an express provision enabling the government to review the effectiveness of the lay judge system in 2012, if necessary, and permitting corrective measures.[66] As such, Japan should utilize this opportunity to lift the overly strict duty of lifetime secrecy imposed upon citizen

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62. *Id.*

63. *See* Levin, *supra* note 19, at 201–02. Criminal defendants are not entitled to a trial by jury under the Japanese Constitution. *See generally* KENPÔ [Constitution]. Citizen participation in the judicial process as a lay judge is a legislative creation. *See* Lay Judge Act, *supra* note 7, art. 2. As such, the Lay Judge Act could be easily repealed by the Diet.

64. *See* JUSTICE SYSTEM REFORM COUNCIL, *supra* note 25, ch. I, pt. 3(2); *see also* KENPÔ [Constitution], art. 31.

65. *See* Joseph J. Kodner, *Re-introducing Lay Participation to Japanese Criminal Cases: An Awkward Yet Necessary Step*, 2 WASH. U. GLOBAL STUD. L. REV. 231, 245 (2003).

66. *See* Lay Judge Act, *supra* note 7, supp. art. 8; *see also* Press Release, Japan Fed'n of Bar Ass'ns, Bill on Lay Judge System and Criminal Procedure Reform Clears Lower House (Apr. 23, 2004), *available at* http://www.nichibenren.or.jp/en/activities/meetings/20040423.html (reporting on the transition of a bill amending the Lay Judge Act to be reviewed three years after its entry into force through the Diet).

judges, open the doors to the interrogative process, and limit victim participation to proceedings following the verdict.

II. *THE CRIMINAL JUSTICE SYSTEM IN JAPAN*

At the age of forty-five, Toshikazu Sugaya lost his freedom.[67] On the frosty morning of December 1, 1991, the Tochigi prefectural police force barged into the kindergarten bus driver's home and accused him of kidnapping and murdering Mami Matsuda, a local four-year-old child.[68] Showing him the girl's photograph, the police demanded an apology from Sugaya for Mami's murder and quickly escorted him to the detention center. [69] In detention, Sugaya was incessantly accused, interrogated, and shown test results allegedly matching his DNA with bodily fluid found on Matsuda's clothing.[70] He was denied food, water, and a lawyer during thirteen hours of intense interrogation.[71] Investigators allegedly kicked him, pulled his hair, and shouted in his face.[72] Sugaya was exasperated by the investigators' unwillingness to listen and their persistent belief that he committed the crime.[73] Feeling "desolate" from the abuse and verbal sparring, Sugaya resigned himself to the conclusion that if he did not confess then he would not be able to go home. [74] Sugaya broke down in tears of desperation, [75] and proceeded to fabricate a confession based on media reports that he had heard.[76] Sugaya never revealed any details of the crime that only a perpetrator could know, nor could a single witness corroborate his claim that he took the victim to the crime scene by bicycle.[77]

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67. *See* Setsuko Kamiya, *High Court OKs Sugaya Retrial: Challenge to Wrongful Conviction Not Allowed*, JAPAN TIMES, June 24, 2009, *available at* 2009 WLNR 12058384.

68. *See id.*; *Sugaya: 'I Confessed out of Despair*, DAILY YOMIURI (Japan), June 9, 2009, *available at* 2009 WLNR 10964663.

69. *See Sugaya: 'I Confessed out of Despair', supra* note 68.

70. *Id.*

71. *See Miscarriage of Justice Could Be Turning Point for Japan's Justice System*, IRISH TIMES, July 28, 2009, at 11.

72. *Id.*

73. *Id.*

74. *See Sugaya: 'I Confessed out of Despair', supra* note 68.

75. *Id.*

76. *Id.*

77. *See Editorial, Sugaya's Retrial Ordered*, ASAHI SHIMBUN (Japan), June 25, 2009, http://www.asahi.com/english/Herald-asahi/TKY200906250061.html.

After gaining access to legal counsel, Sugaya recanted his confession claiming that it was made under duress.[78] He also challenged the reliability of unproven DNA testing methods and tainted evidence.[79] Notwithstanding, Sugaya was sentenced to life in prison based on his confession and DNA evidence.[80] Subsequent appeals and petitions for retrials were rejected.[81]

On June 4, 2009, Sugaya was freed from prison more than seventeen years after his arrest.[82] Improved DNA testing confirmed that Sugaya had not committed the crime.[83] In an extremely rare move, the Japanese police apologized to Sugaya for his wrongful conviction and unjust imprisonment.[84] Expressing deep regret and remorse, the Tochigi police chief offered "sincere apologies for having subject[ed] [Sugaya] to a long and distressing ordeal."[85] Having lost nearly two decades of his life, however, the apology rang hollow for Sugaya. He insists on an investigation into his wrongful conviction and apologies

78. *See Tokyo High Court Orders Retrial for Sugaya,* ASAHI SHIMBUN (Japan), June 23, 2009, http://www.asahi.com/english/Herald-asahi/TKY200906230292.html.

79. *Id.*

80. *See Police Chief Sorry for Sugaya's Pain,* ASAHI SHIMBUN (Japan), June 18, 2009, http://www.asahi.com/english/Herald-asahi/TKY200906180101.html; *Ashikaga Jiken, Saishin Kaishi o Kettei Tokyo Kosai [Ashikaga Incident, Start of Retrial Decided, Tokyo High Court]*, ASAHI SHIMBUN, June 23, 2009, http://www.asahi.com/national/update/0623/TKY200906230044.html.

81. *See Tokyo High Court Orders Retrial for Sugaya, supra* note 78. Sugaya's appeal to the Tokyo High Court was dismissed in 1996. *Id.* In 2000, the Supreme Court of Japan confirmed that the original DNA test could be used as evidence, but also noted that technological advances in DNA testing should be taken into consideration and carefully weighed. *Id.* Sugaya filed for a retrial with the Utsunomiya District Court in 2002, but this request was rejected six years later in 2008. *Id.*

82. *Id.* Although Sugaya can claim up to JP¥12,500 (about US$125) for every day spent in confinement from the Japanese government pursuant to the Criminal Compensation Law, money cannot adequately compensate the time lost in spending over seventeen years in jail. *See* Yuichiro Nakamura et al., *Confession, 1st DNA Test Likely Focus of Probe,* DAILY YOMIURI (Japan), June 25, 2009, *available at* 2009 WLNR 12067118.

83. *See Tokyo High Court Orders Retrial for Sugaya, supra* note 78.

84. *See Tochigi Police Chief Apologizes to Sugaya,* DAILY YOMIURI (Japan), June 18, 2009, *available at* 2009 WLNR 11588689 (describing the official apology issued to Mr. Sugaya in person by Chief Shoichiro Ishikawa on behalf of the Tochigi Prefecture Police). This was the first time that Mr. Sugaya received a direct apology from any investigative organization. *Id.* In the Sugaya case, the Supreme Public Prosecutors Office concluded that the prosecutors relied on the authenticity of the confession too much, and that the investigators should have examined the confession and evidence more closely. Nakamura et al., *supra* note 82.

85. *See Tochigi Police Chief Apologizes to Sugaya, supra* note 84.

from the investigators, scientists who conducted the DNA tests, and judges who contributed to wrongly convicting him.[86]

Sugaya is not alone in falling victim to the overly-aggressive criminal investigation system of Japan. For example, there was considerable public outcry when police detained twelve suspects in 2007 in connection with an alleged vote-buying scheme in the small town of Shibushi, Japan.[87] After intense questioning and coercive tactics, six of the suspects admitted to buying votes in a local election using liquor, cash, and catered parties.[88] Not only were all defendants acquitted, but the district court found that the confessions were made "in despair" due to "marathon questioning."[89] Other widely publicized recent cases involved the involuntary confession of a man who confessed to killing three women after 170 hours of interrogation over the course of seventeen days;[90] a taxi driver in Toyoma Prefecture who served a three year prison term for a rape that he did not commit based upon an involuntary confession obtained when he was "browbeaten" into ratifying a written confession drafted by the police;[91] and the wrongful conviction of a Russian citizen accused of robbery who was pressured to confess.[92] The case of Iwao

86. *See id.*

87. *See* JAPAN FED'N OF BAR ASS'NS, REPORT OF THE JAPAN FEDERATION OF BAR ASSOCIATIONS IN RESPONSE TO COMMENTS BY THE GOVERNMENT OF JAPAN CONCERNING THE CONCLUSIONS AND RECOMMENDATIONS OF THE COMMITTEE AGAINST TORTURE 10 (2008), *available at* http://www.nichibenren.or.jp/ja/kokusai/humanrights_library/treaty/data/AltRep_CAT_C_JP_CO_1_en.pdf; *see also* Norimitsu Onishi, *Pressed by Police, Even Innocent Confess in Japan*, N.Y. TIMES, May 11, 2007, at A1.

88. *See* Onishi, *supra* note 87. One suspect, Sachio Kawabata, was forced to stomp on the names of his loved ones. *Id.* This practice is similar to the *fumi-e* tactic used by the Tokugawa shoguns in which Japanese leaders forced suspected Christians to step on a sacred image of Jesus Christ. *See* STEPHEN R. TURNBULL, THE SAMURAI AND THE SACRED 120 (2006). Citizens refusing to step on the image and denounce their faith were subsequently killed. *Id.* Other tactics included threatening suspects' children. *See* Onishi, *supra* note 87. Kawabata subsequently prevailed in a civil lawsuit against the government for mental anguish resulting from improper interrogation tactics. *Id.* One suspect was under so much duress that he attempted to commit suicide during the ordeal. *Id.*

89. *See* Onishi, *supra* note 87.

90. *Id.* No evidence other than the confession existed against the defendant in this Saga Prefecture case. *Id.* In March 2007, the high court upheld the acquittal of this man and prosecutors appealed. *Id.*

91. *Id.*; *accord* Kamiya, *supra* note 358; *Sugaya: 'I Confessed out of Despair'*, *supra* note 68. The taxi driver was exonerated only after the actual culprit was caught by the police three years into the taxi driver's sentence. Onishi, *supra* note 87.

92. Vladimir Shilov was cleared of a robbery conviction after finding that his confession to robbery charges was coerced. *See Cop Who Forced 'Fumiji' Confession Avoids*

Hakamada is yet another example. Despite the fact that the clothing that prosecutors claimed that Hakamada wore on the night of the quadruple murder did not fit him and the alleged murder weapon was too small to make the wounds, the prosecutors obtained a confession based on twenty-two days of extended interrogations in a small police detention cell.[93] This confession led to a conviction even though Hakamada almost immediately retracted his confession and testified that he had been threatened and beaten during interrogations.[94] In 2007, Norimichi Kumamoto, one of the three judges who tried Hakamada, went public with his belief that Hakamada's confession was coerced and that the judgment was erroneous.[95]

In 2006, the problems were further highlighted when a computer file entitled "Guidelines for the Interrogation of Suspects" was leaked from a police computer.[96] The guidelines encouraged weakening suspects through long interrogations and maximal use of the twenty-four-hour period of control over a suspect.[97]

A. *General Characteristics of the System*

When a crime occurs in Japan, the police typically investigate the crime, arrest the alleged perpetrator, and then promptly refer the accused to the Public Prosecutors Office.[98] The Public Prosecutors Office takes statements from the victim and witnesses, interrogates the suspect, and decides whether to prosecute.[99] Japanese prosecutors have extensive powers. A "suspect" may be detained for up to twenty-three days before an

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Prison, JAPAN TIMES, Mar. 19, 2008, http://search.japantimes.co.jp/cgi-bin/nn20080319a2.html.

93. *See Fukuoka Woman Cleared in '04 Slaying of Brother*, JAPAN TIMES, Mar. 6, 2008, http://search.japantimes.co.jp/cgi-bin/nn20080201f2.html.

94. *See id.*

95. *See id.*

96. *See* JAPAN FED'N OF BAR ASS'NS, *supra* note 22, at 5.

97. *Id.* at 2.

98. *See* PUBLIC PROSECUTORS OFFICE, FOR THE VICTIMS OF CRIME: ABOUT THE PROTECTION AND SUPPORT SYSTEM FOR VICTIMS 3 (2007), *available at* http://www.moj.go.jp/ENGLISH/CRAB/crab-02.pdf.

99. *See id.*; *see also* DAVID T. JOHNSON, THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN 13–14 (2002).

indictment is required.[100] During this time, prosecutors have substantial latitude in their investigative techniques, particularly with respect to "suspects" who do not have the same rights as charged "defendants."[101] This includes the right to counsel during interrogations.[102] In the past, numerous suspects have claimed that they were abused, tortured, and forced to confess during the extended twenty-three-day detention period.[103]

1. Crime Investigation and the Role of Confessions in Japanese Criminal Jurisprudence and Practice

The investigation of criminal behavior stands as the first important process within a criminal justice system, and the interrogation of suspects plays an integral role in the investigative process.[104] In Japan, the interrogation process is vital to ascertaining the truth.[105] Interrogations are intended to obtain "relevant evidence that may be admissible in court proceedings for the prosecution of an alleged offender."[106]Evidence extracted from an interrogation can include a confession or an admission against interest.[107]

The evidence obtained through interrogation is subject to several very important limitations however. The Japanese Constitution and public international law entitle a suspect to the presumption of innocence, the right to silence, and the right to legal advice. 108 In addition, all confessions proffered into

100. *See* JOHNSON, *supra* note. 99, at 13–14; *see also infra* notes 113–17 (outlining legal framework for holding a suspect in custody).

101. *See* Fujita, *supra* note 30; *see also* David A. Suess, *Paternalism Versus Pugnacity: The Right to Counsel in Japan and the United States*, 72 IND. L.J. 291, 300–06 (1996) (stating that several factors practically limit defendants' right to counsel, despite the language of the constitution).

102. *See* Suess, *supra* note 101, at 303.

103. *See* Jeff Vize, *Torture, Forced Confessions, and Inhuman Punishments: Human Rights Abuses in the Japanese Penal System*, 20 UCLA PAC. BASIN L.J. 329, 360–63 (2003).

104. *See* Int'l Bar Ass'n, *Interrogation of Criminal Suspects in Japan—The Introduction of Electronic Recording* 5 (2003), *available at* http://www.ibanet.org/Document/Default.aspx?DocumentUid=340486E4-A77A-4205-A73C-F422C3714CBB.

105. *See* Comm. Against Torture, *Comments from the Government of Japan to the Conclusions and Recommendations of the Committee Against Torture*, ¶ 22, U.N. DOC. CAT/C/JPN/CO/1 (Nov. 5, 2008).

106. *Id.*

107. *See id.*

108. *See* Kenpō [Constitution], arts. 31–38; International Covenant on Civil and Political Rights, art. 14, Dec. 16, 1966, 999 U.N.T.S. 171; *see also* Int'l Bar Ass'n, *supra* note 104.

evidence must be voluntary, reliable, and consistent with constitutional guarantees. Article 38 of the constitution of Japan governs interrogations and the use of confessions at trial. This article stipulates that "[n]o person shall be compelled to testify against himself..." and that any confessions made under compulsion, torture, threat, or prolonged detention "shall not be admitted in evidence." 109 Moreover, no person "shall be convicted or punished in cases where the only proof against him is his own confession."110

Under the current system, Japanese police and prosecutors[111] have a considerable amount of time to hold, question, and obtain a confession from a suspect in detention.[112] When the police make an arrest, they will first interrogate the suspect. Within forty-eight hours, they will then hand the suspect over to prosecutors.[113] Prosecutors then have twenty-four hours to obtain permission to continue holding the suspect in custody.[114] With court approval, prosecutors can hold and question a suspect in captivity for two additional consecutive ten-day periods before formal charges must be filed.[115] When a suspect does not immediately confess, a prosecutor almost always seeks approval to continue detaining a suspect for the additional twenty-day period.[116] Such requests are approved over 99.8% of the time.[117] During this twenty-three day initial detention period, Japanese investigators exert considerable effort towards obtaining a

109. Kenpō [Constitution], art. 38, *translated in* 1 EHS LAW BULL. SER. no. 1000 (1947).

110. *Id.*

111. As of March 2008, Japan had 1680 public prosecutors and 900 assistant prosecutors. *See* Kamiya, *supra* note 149.

112. *See supra* note 100. The system of holding suspects in police custody is known in Japanese as *daiyo kangoku* (substitute prison). *Id.*; *see also* Vize, *supra* note 103, at 332–34.

113. KEISOHŌ [Code of Criminal Procedure], art. 203; *see also* Supreme Court of Japan, Outline of Criminal Justice in Japan, http://www.courts.go.jp/english/proceedings/criminal_justice.html (last visited Jan. 24, 2010).

114. KEISOHŌ [Code of Criminal Procedure], art. 205.

115. *Id.* art. 208.

116. *See* Daijiro Yasuda, Speech at the University of Melbourne Law School: One Aspect of Criminal Justice in Japan: Confessions (2005), *available at* http://www.law.usyd.edu.au/anjel/documents/23Feb2005Conf/Yasuda2005_OneAspectOfCriminalJusticeInJapan.pdf. It should be noted that the twenty-three day period can be extended if a suspect is being investigated for multiple crimes. Vize, *supra* note 103, at 333.

117. *See* Vize, *supra* note 103, at 333; Yasuda, *supra* note 117.

confession. Often the quest to obtain a confession takes priority over serious factual and forensic investigation.[118]

Investigators utilize this initial detention period to interrogate and focus on securing a confession.[119] There is no express legal limitation regarding the amount of time that can be spent on interrogations. During detention, a detainee's life revolves around lengthy interrogation sessions that exceed ten hours per day, constant surveillance, and strict rules of conduct.[120] Interrogators take full advantage of the lack of restrictions.[121] In Japan, interrogation records handwritten by investigators have been the status quo for decades.[122]

Additionally, confessions are easier to obtain during preliminary detention given that "suspects" have fewer rights than "defendants" during the twenty-three day period. Although a suspect may immediately hire legal counsel upon detention, there are limitations to the role of counsel. For indigent suspects, state-appointed counsel has traditionally not been available unless and until prosecutors handed down an indictment.[123] Only a charged defendant has traditionally possessed the right to state-appointed counsel.[124]

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118. *See* Landsman & Zhang, *supra* note 19, at 184.

119. *See* Vize, *supra* note 103, at 333.

120. *Id.* at 333–34. *See generally* Comm. Against Torture, *supra* note 105 (recommending that Japan take "immediate and effective measures to bring pre-trial detention into conformity with international minimum standards.").

121. *See* Landsman & Zhang, *supra* note 19, at 184.

122. *See* YUJI IWASAWA, INTERNATIONAL LAW, HUMAN RIGHTS, AND JAPANESE LAW: THE IMPACT OF INTERNATIONAL LAW ON JAPANESE LAW 271 (1998) (stating that only about twenty percent of suspects actually hire counsel during the detention phase).

123. *See generally* David T. Johnson, *The Organization of Prosecution and the Possibility of Order*, 32 LAW & SOC'Y REV. 247 (1998) (describing the typical interrogation procedures used by prosecutors in Japan).

124. *See* IWASAWA, *supra* note 122, at 271 (explaining that although article 34 of the constitution states that "no person shall be arrested or detained . . . without the privilege of counsel," that this relates to the ability to independently hire counsel and that the clause in article 37(3) of the constitution noting that at all times a "criminal defendant" shall have the assistance of counsel at the state's expense if the defendant is unable to secure the same by his or her own efforts).

2. Criminal Trial of the Accused

Before the lay judge system, trial sessions convened at the average rate of one session per month.[125] Cases were generally decided by a tribunal, comprised of one or three professional judges, which relied heavily on written materials including an investigation dossier compiled by the prosecutor.[126] Professional judges in Japan served concurrently as the finder of fact and the arbiter of law.[127] Judges also determined the sentences of the accused. [128] As such, trials were one-phase, intermittent proceedings in which professional judges simultaneously considered guilt and sentencing matters. [129] Trial sessions convened at the average rate of one session per month.[130]

The prosecution's dossier was particularly well developed and structured to ensure a conviction. [131] Notwithstanding objections from defense counsel, judges generally accepted the prosecutor's file into evidence with little, if any, reservation.[132] Moreover, Japanese prosecutors only needed to disclose to the defense statements that they intend to introduce into evidence at trial, so contradictory statements from the same or different sources never emerged from the prosecutor's office.[133] Within this environment, Japan's criminal conviction rate was 99.8%.[134] In the event of an unlikely setback at trial, prosecutors could find some solace in the right to appeal. Either side in a criminal

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125. See JOHNSON, supra note 99, at 14–15; see also Posting of Isabel Reynolds to Raw Japan, supra note 1.

126. *See* JOHNSON, *supra* note 99, at 14; *see also* Kodner, *supra* note 65, at 237; Leussink, *supra* note 22.

127. CARL F. GOODMAN, THE RULE OF LAW IN JAPAN: A COMPARATIVE ANALYSIS 298–99 (2003).

128. *Id.; see also* SHIGEMITSU DANDŌ, THE CRIMINAL LAW OF JAPAN: THE GENERAL PART 327 (B.J. George trans., 1997).

129. *See generally* PUBLIC PROSECUTORS OFFICE, *supra* note 98 (explaining that after concluding the examination of evidence, the prosecutor recommends an appropriate punishment after which the court will render a sentence).

130. *See* JOHNSON, *supra* note 99, at 14–15; *see also* Reynolds, *supra* note 1.

131. *See* Rajendra Ramlogan, *The Human Rights Revolution in Japan: A Story of New Wine in Old Wine Skins?*, 8 EMORY INT'L L. REV. 127, 207 (1994).

132. *See Lateline: Japan's Tough Justice* (Australian Broadcasting Company television broadcast May 31, 2001), *transcript at* http://www.abc.net.au/lateline/stories/s306103.htm) (interviewing Satoru Shinomiya, law professor and criminal defense lawyer).

133. *See* JOHNSON, *supra* note 99, at 40–41.

134. *See* Onishi, *supra* note 87; *see also* Landsman & Zhang, *supra* note 19, at 184.

matter can appeal as of right based on matters of fact, matters of law, or issues involving sentencing.[135]

Some theories suggest that Japan's near-absolute conviction rate results from skillful prosecutors who are "exceptionally adept at reaching just dispositions."[136] Others explain that conservative case selection and low prosecutorial budgets mean that the government does not prosecute absent the prospect of certain outcomes.[137] Some observers even suggest that the extreme conviction rate stems from the tendency to avoid adversarial relations with other system actors,[138] defendants' proclivity not to contest guilt,[139] or the significant procedural advantages available to prosecutors.[140] Nevertheless, it is difficult to adequately explain a conviction rate that nears perfection in any criminal system.[141] In fact, it begs the question of whether such perfection can be justified, or whether due process and defendants' rights are being sacrificed in the name of perfection.

Observers note that Japanese prosecutors derive extraordinary power from their ability to prejudge suspects within a rigidly bureaucratic and hierarchical structure.[142] Prosecutors operate in an opaque environment of nondisclosure and largely without the interference of defense counsel.[143] They can be reluctant to admit mistakes, and subject to demotion or

135. *See* PUBLIC PROSECUTORS OFFICE, *supra* note 98.

136. *See* JOHNSON, *supra* note 99, at 5–6.

137. *See* J. Mark Ramseyer & Eric B. Rasmusen, *Why is the Japanese Conviction Rate So High?*, 30 J. LEGAL STUD. 53, 53–54 (2001).

138. *See* David T. Johnson, *Plea Bargaining in Japan*, *in* THE JAPANESE ADVERSARY SYSTEM IN CONTEXT: CONTROVERSIES AND COMPARISONS 140, 156 (Malcolm M. Feeley & Setsuo Miyazawa eds., 2002); Ramseyer & Rasmusen, 137, at 53–54. Professor Johnson advocates that the rate is so high based on the concept of consensus and Japanese defense attorneys' tendency to go along in an effort to get along with the police and prosecutors, particularly in comparison with defense attorneys in the United States. *Id.*

139. *See* CURTIS J. MILHAUPT ET AL., THE JAPANESE LEGAL SYSTEM: CASES, CODES, AND COMMENTARY 445 (2006); *see also* Levin, *supra* note 19, at 227.

140. *See* Levin, *supra* note 19, at 227.

141. In contrast, the Japanese rate compares with a ninety percent conviction rate in U.S. federal courts in 2005. *See* MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS 2005 (2008), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fjs05.pdf.

142. *See* JOHNSON, *supra* note 99, at 6.

143. *See* Hiroshi Matsubara, *Trial by Prosecutor*, LEGAL AFF., Mar.–Apr. 2003, at 11 (contrasting expansive search, seizure, and interrogation powers Japanese prosecutors have with that of U.S. prosecutors).

termination for even a single acquittal.[144] Prosecutors also tend to defer to bureaucratic interests or public pressure.[145] As a result, Japanese courts have been characterized as venues that "confirm whether someone is guilty" based on the prosecutors' pretrial investigation, as opposed to U.S. and European criminal courts, in which trials focus on determining the defendant's innocence or guilt.[146] A former Japanese high court judge asserts that prosecutorial dominance is so complete in Japan that "real criminal trials" are conducted in the prosecutor's office, not in open court.[147]

3. Confessions as the "King of Evidence"

Japan's conviction rate hovers around 99.9%.[148] This nearly perfect conviction rate has been attributed to high confession rates, conservative prosecutors who indict suspects only when a conviction is highly likely, the absence of juries, external and internal pressures on judges, limited resources for suspects and defendants, and other structural features of the criminal justice system that favor prosecutors.[149] In comparing the varying explanations, it is apparent that the high confession rate plays an instrumental role in the nearly perfect conviction rate.

Confessions play a vital role in Japanese law enforcement, crime control, and criminal jurisprudence as well.[150] A confession is often referred to as the "king of evidence" in Japanese courtrooms.[151] Despite the constitutionally guaranteed right to remain silent,[152] prosecutors typically rely upon signed confessions at trial.[153] In fact, confessions form the foundation of

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144. *Id.*

145. *See* JOHNSON, *supra* note 66, at 6.

146. *Lateline: Japan's Tough Justice*, *supra* note 132 (quoting former Japanese prosecutor, Takeshi Tsuchimoto).

147. JOHNSON, *supra* note 66, at 6–7 (quoting Judge Takeo Ishimatsu, who handled criminal cases for thirty years, and observed that court hearings are empty shells that validate the egregious trampling of human rights through the prosecutorial process).

148. *See supra* note 134.

149. *See supra* notes 136–140 and accompanying text.

150. *See* Saul M. Kassin, *Internalized False Confessions*, *in* 1 HANDBOOK OF EYEWITNESS PSYCHOLOGY 169, 170 (Michael P. Togilia et al. eds., 2006).

151. Onishi, *supra* note 87 (quoting Kenzo Akiyama, a Japanese attorney who served as a judge for nearly twenty-five years).

152. KENPÔ [Constitution], art. 38.

153. *See* Landsman & Zhang, *supra* note 19, at 184; Yasuda, *supra* note 117, at 2 (citing article 322(1) of the Japanese Code of Criminal Procedure which states: "A

over 90% of all criminal convictions in Japan.[154] Accordingly, efforts to acquire a confession assume the central role in criminal prosecutions, and the methods used to question and interrogate suspects assume a particularly important role in the prosecutorial process.[155] Due to the heavy reliance placed on confessions, Japanese police and prosecutors employ a variety of tactics including extended, daily questioning during the initial twenty-three day detention period.[156] In difficult cases in which a suspect fails to confess, interrogations may include undue pressure, threats, inappropriate actions, and even psychological torture.[157]

Given that a confession serves as a prosecutor's "most potent weapon,"[158] other aspects of the trial become superfluous once the government introduces a confession into evidence.[159] As such, Japanese prosecutors are often guilty of building their cases on confessions instead of solid evidence.[160] Investigators justify their reliance on confessions on the lack of prosecutorial powers routinely available in other countries, such as the authority to plea bargain, offer testimonial immunity, or conduct undercover stings.[161] Additionally, prosecutors and judges treat confessions as

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written declaration made by the accused or the deposition of the accused which is signed or sealed thereby may be made as evidence.").

154. *See* Landsman & Zhang, *supra* note 19, at 184.

155. *See Upper House Passes Bill to Fully Record, Film Interrogations*, KYODO NEWS, Apr. 24, 2009, *available at* 4/24/09 JWIRE 09:27:10 (Westlaw).

156. *See* JAPAN FED'N OF BAR ASS'NS, *supra* note 87, at 10.

157. *See* Arne Soldwedel, *Testing Japan's Convictions: The Lay Judge System and Rights of Criminal Defendants*, 41 VAND. J. TRANSNAT'L L. 1417, 1433 (2008) (reporting methods used to extract confessions include slapping, punching, kicking, sleep deprivation, promises of timely release, threatening more stringent punishments, isolation, lack of privacy, nonstop questioning, binding fingers, standing for long periods, shouting, and offers of freedom in return for a confession); *see also* Onishi, *supra* note 87 (quoting Kenzo Akiyama as stating that authorities use "psychological torture"); Vize, *supra* note 103, at 334 (noting a JFBA survey of former detainees that revealed interrogation tactics such as threatening to ruin the suspect's or a family member's reputation, beating or assaulting, binding fingers, forced standing in a fixed position for prolonged periods, making promises in exchange for a confession, and waking the suspect up in the middle of the night for questioning).

158. CHRISTINE BOYLE ET AL., THE LAW OF EVIDENCE—FACT FINDING, FAIRNESS, AND ADVOCACY 781 (Edmond Montgomery Publications Ltd. 1999) (1949).

159. *See* Kassin, *supra* note 150, at 170–80 (citing supportive works from Kassin & Kiechel, Horselenberg et al., as well as Redlich and Goodman).

160. *See* Onishi, *supra* note 87.

161. *See* DANIEL H. FOOTE, LAW IN JAPAN: TURNING POINT 349 (2008). However, observers have analogized that confessions play the functional equivalent of a plea bargain, in that the accused confesses in exchange for the government's implicit agreement to seek a lighter sentence. Ramseyer & Rasmusen, *supra* note 137, at 57.

the first important step on the road to rehabilitation.[162] Offenders who readily confess and exhibit remorse will enhance their position before the court, and likely receive a lighter sentence.[163] External observers, however, explain that other factors fuel the incessant prosecutorial quest for a confession including, among others, the need to prevail,[164] fear of professional demotion or career failure,[165] media pressure,[166] and the public's desire to quickly solves crimes.[167]

B. *Removing the Doors: Increasing the Visibility to Justice*

1. Justice System Reform Council

In 1999, Japan formed the Justice System Reform Council to consider legal reforms that would help revive its stumbling economy and lead it into the twenty-first century.[168] After two years of deliberation and debate, the JSRC submitted its recommendations to the Japanese Cabinet.[169] The JSRC advanced three pillars of fundamental reform: (1) a justice system that "shall be made easier to use, easier to understand, and more reliable;" (2) a legal profession "rich both in quality

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162. *See* JUSTICE SYS. REFORM COUNCIL, *supra* note 27, ch. II, pts. 2, 4(2)b; *see also* Onishi, *supra* note 87; Yasuda, *supra* note 117, at 2.

163. *See* Yasuda, *supra* note 117, at 2.

164. *See* Ramseyer & Rasmusen, *supra* note 137, at 61 (quoting one Tokyo prosecutor who stated that prosecutors regard acquittal as a very serious problem and that if there is any doubt about the strength of a case, then he will not indict).

165. *See id.*

166. *See* Yasuda, *supra* note 117, at 1. *But see* JOHNSON, *supra* note 99, at 30–31 (pointing out that Japanese prosecutors are not subject to election, and therefore, isolated from the public fury and scrutiny faced in other systems such as the United States).

167. *See id.*

168. The Diet enacted the Act for Establishment of the Justice System Reform Council, and formed the Justice System Reform Council pursuant to this Act in July 1999. *See* Shihō seido kaikaku shingikai secchihō [Justice System Reform Council Establishment Act], Law No. 68 of 1999, art. 2; Ministry of Justice, Ensuring that the Results of the Justice System Reform Take Root, http://www.moj.go.jp/ENGLISH/issues/issues01.html (last visited Jan. 24, 2010) (outlining history of reform legislation); *see also* Justice Sys. Reform Council, The Points at Issue in the Justice Reform (Dec. 21, 1999), http://www.kantei.go.jp/foreign/policy/sihou/singikai/991221_e.html (noting that Japan entered a new century with enormous financial deficits, economic difficulties, and various social issues).

169. *See* Justice Sys. Reform Council, *supra* note 168. For a copy of the report, see JUSTICE SYSTEM REFORM COUNCIL, *supra* note 25.

and quantity;" and (3) a "popular base" in which citizens' trust in the legal system is enhanced through their participation in legal proceedings.[170] As an integral part of these reforms, the JSRC envisioned that the judicial system would assume an enhanced role in society as Japan shifts away from centralized control and heavy regulation.[171] The JSRC also envisioned a trustworthy criminal justice system capable of discovering the truth consistently with the due process of law.[172]

As a result of the JSRC Recommendations, the Diet passed the Act on the Promotion of the Judiciary Reform System.[173] Pursuant to this Act, the Office for Promotion of Justice System Reform ("OPJSR") was established within the Japanese cabinet[174] in December 2001 to facilitate justice system reform and take the lead in drafting related legislation.[175] In its first three years of its existence, the OPJSR was involved in the promulgation and passage of twenty-four major legal reforms.[176] These reforms included, among others, various civil litigation reforms in 2003 designed to accelerate the adjudication of civil cases,[177] expand the subject matter jurisdiction of summary courts,[178] improve the Code of Civil Procedure,[179] and update the Arbitration Act.[180] In

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170. *See* JUSTICE SYSTEM REFORM COUNCIL, *supra* note 25, ch. 1 pt. 3(1).

171. *See* Justice Sys. Reform Council, *supra* note 168; *see also* Weber, *supra* note 12, at 150–51.

172. *See* JUSTICE SYSTEM REFORM COUNCIL, *supra* note 25.

173. *See* Shihō seido kaikaku suishin hō [Justice System Reform Promotion Act], Law No. 119 of 2001; *see also* Justice Sys. Reform Council, *supra* note 168.

174. The cabinet is the executive branch of government in Japan. It consists of the Prime Minister and ministers of state. *See generally* The Prime Minister of Japan and his Cabinet, The Cabinet, http://www.kantei.go.jp/foreign/hatoyama/meibo/index_e.html (last visited Jan. 24, 2010). The Cabinet Office was established in 2001 to strengthen the functions of the cabinet, enable the Prime Minister to better assert leadership over nationally important issues, and cope effectively with Japan's rapidly changing economy and society. Cabinet Office, Government of Japan, *Naikakufu no Panfuretto* [*Cabinet Office Government of Japan Pamphlet*], http://www.cao.go.jp/about/pmf2009/hyo2_p1.pdf (last visited Jan. 24, 2010).

175. Justice Sys. Reform Council, *supra* note 168. The Office for Promotion of Justice System Reform consisted of the Prime Minister and other cabinet leaders. *Id.*

176. *See* JAPAN FED'N OF BAR ASS'NS, *supra* note 10.

177. *See* Saiban no jinsokuka ni kansuru hōritsu [Act on the Expediting of Trials], Law No. 107 of 2003, *translated at* http://www.japaneselawtranslation.go.jp/law/detail/?id=133&vm=02&re=02.

178. *See* Shihō seido kaikaku no tame no saibansho-hō nado no ichibu o kaisei suru hōritsu [Act for Partial Amendment to the Court], Law No. 128 of 2003.

179. *See* Minji soshōhō tō no ichibu o kaisei suru hōritsu [Act for Partial Revision of to the Code of Civil Procedure], Law No. 108 of 2003.

2004, the Diet adopted various criminal justice reforms, including the lay judge system;[181] a new pretrial arrangement proceeding system designed to improve, accelerate, and streamline criminal trials;[182] and a court-appointed defense counsel system for suspects and criminal defendants.[183] Japan also made significant reforms to the dispute resolution system in 2004, including the establishment of the Intellectual Property High Court,[184] implementation of an amended labor dispute system in which labor affairs specialists handle adjudication,[185] amendments to the administrative litigation system,[186] and addition of alternative dispute resolution mechanisms.[187]

To realize the full potential of this revolutionary wave of reform, Japan implemented legislation in 2002 to establish U.S.-style professional law schools with an eye to increase the number and quality of legal professionals.[188] Previously, Japan relied upon

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180. *See* Chūsaihō [Arbitration Law], Law No. 138 of 2003. An English translation of this law is electronically available at http://www.kantei.go.jp/foreign/policy/sihou/arbitrationlaw.pdf.

181. *See supra* note 7.

182. *See* Keiji soshōhō tō no ichibu o kaisei suru hōritsu [Act for Partial Revision of the Code of Criminal Procedure], Law No. 62 of 2004.

183. Sōgō hōritsu shien hō [Comprehensive Legal Support Law], Law No. 74 of 2004, *translated at* http://eiyaku.hounavi.jp/eigo/h16aa000740201.php (establishing a nationwide legal support center to provide information and services that facilitate the settlement of legal disputes); *see also* Justice Sys. Reform Council, *supra* note 168. The system of assigning court-appointed defense lawyers prior to indictments at national expense began in October 2006. The appointment system initially only covered the most serious crimes. *Id.; see also Home Issues Top Lay Judge Trials*, *supra* note 1. On May 21, 2009, however, the system was expanded to cover crimes that carry prison terms that can exceed three years with or without forced labor. Justice Sys. Reform Council, *supra* note 168.

184. *See* Chiteki zaisan kōtō saibansho sechihō [Act for Establishment of the Intellectual Property High Court], Law No. 119 of 2004. An English translation of this law is electronically available at http://www.cas.go.jp/jp/seisaku/hourei/data/IPHC.pdf.

185. *See* Rōdō shinpanhō [Labor Tribunal Act], Law No. 45 of 2004.

186. *See* Gyōsei jiken soshōhō no ichibu o kaisei suru hōritsu [Act for Partial Revision of the Administrative Case Litigation Act], Law No. 84 of 2004.

187. *See* Saibaingai funsō kaiketsu tetsuzuki no riyō ni sokushin ni kansuru hōritsu [Act on Promotion of Use of Alternative Dispute Resolution], Law No. 151 of 2004; *see also* Sōgō hōritsu shienhō [Comprehensive Legal Support Act], Law No. 74 of 2004. An English translation of the alternative dispute resolustion law is electronically available at http://www.cas.go.jp/jp/seisaku/hourei/data/AOP.pdf.

188. *See* Monbu-kagakushō [Ministry of Education, Culture, Sports, Science, and Technology], Senmonshoku Daigakuin (Hokadaigakuin/Kyoushoku Daigakuin) [Professional Graduate Schools (Law and Teaching Graduate Schools)],

undergraduate law faculties and a specialized legal and training institute to provide legal education.[189] With a goal to increase the number of attorneys, Japan established seventy-four new professional law schools and raised its annual bar pass rate from three percent to over forty percent.[190] Essentially, Japan plans on increasing the number of new attorneys from 1200 to 3000 per year by early next decade, however the bar exam passage rate over the past three years has been much lower than the planned target. [191] In 2006, Japan had approximately 27,000 legal professionals. [192] With the planned increases, this number is expected to rise to 50,000 by 2018.[193]

2. Lay Judge System

The lay judge system is the product of considerable preparation.[194] Typical of other aspects of Japanese law, the lay judge system borrows and mixes concepts from various countries. The system resembles typical common law jury systems in that lay judges are randomly selected from voter lists and participation is

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http://www.mext.go.jp/a_menu/koutou/houka/houka.htm (last visited Jan. 24, 2010) [hereinafter *Professional Law Schools*]; *see also* Ministry of Justice, *supra* note 168.

189. *See* Waseda University Law School, *Transformation of Japan's System of Justice*, http://www.waseda.jp/law-school/eng/system.html (last visited Jan. 24, 2010). The previous system was hampered not only by the 1200 person cap on the number of lawyers licensed each year, but also because many lawyers were ill equipped to deal with diverse and sophisticated legal issues that require broader intellectual backgrounds in fields such as science and economics because they did not have academic background in subjects other than law. *Id.*

190. *See* Colin P.A. Jones, *Japan's Push to Add Lawyers Fraught with Troubles*, NAT'L L.J., Sept. 8, 2008, at S3; *10 Law Schools Mulling Cutting Student Quotas*, DAILY YOMIURI (Japan), May 22, 2008, at 2, *available at* 2008 WLNR 9593249 (citing problems with law schools filling their target enrollment numbers); Dai Adachi, *Legal Sector Split on Raising Lawyer Numbers*, DAILY YOMIURI (Japan), Feb. 6, 2008, at 3, *available at* 2008 WLNR 2173326.

191. *See Success Rate at Bar Exam Lowest at 27%*, ASAHI SHIMBUN (Japan), Sept. 12–13, 2009, at 1 (citing a bar passage rate of only 27.6% and the number of successful examinees as 2043, well short of the target mark of 2500 to 2900 successful test takers.); *see also* Adachi, *supra* note 190. As of June 23, 2009, the number of cases in which Japanese courts appointed lawyers to suspects increased tenfold over the same time during the previous year. *Home Issues Top Lay Judge Trials*, *supra* note 1. In the one month following the implementation of the lay judge system, Japanese courts appointed defenses attorneys in 6730 cases. *Id.*

192. *See* JAPAN FED'N OF BAR ASS'NS, *supra* note 10.

193. *See id.*

194. *See* Kamiya, *supra* note 3.

limited to a single case.[195] Unless excused by the court or excluded by peremptory challenge, participation is compulsory.[196] At the same time, the system also mirrors civil law systems, such as the *schöffe* lay judge system in Germany[197] or the *échevin* system in France,[198] in which citizens participate in trials as "lay judges" alongside professional judges. This contrasts with the all-citizen petit jury found in the United States and other common law countries.[199] Under the new Japanese system, tribunals will consist of six lay judges selected to serve alongside three professional judges in contested serious criminal cases.[200] At trial, the lay judges will determine facts, reach verdicts, and decide sentences with authority theoretically equivalent to that of the professional judges.[201] In uncontested serious criminal cases, four lay judges and one professional judge will handle the sentencing.[202]

Pursuant to the Lay Judge Act, the Japanese public will serve as lay judges in criminal trials involving serious crimes, such as 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, as well as certain rape, drug, and counterfeiting offenses.[203] One might reasonably question why public participation has been directed to criminal trials involving serious crimes. In fact, the public might be more comfortable deciding civil matters in which they would not be subject to gruesome images, pressures associated with sentencing (including the death penalty), and fear stemming from trying organized mafia or *yakuza* members.[204]

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195. *See* JAPAN FED'N OF BAR ASS'NS, *supra* note 10.

196. *See* Lay Judge Act, *supra* note 7, arts. 13–18.

197. *See generally* JOHN PHILIP DAWSON, A HISTORY OF LAY JUDGES 94–115 (1999) (outlining history of *schöffen* in the German judicial system).

198. *See generally id.* at 39–83 (1999) (outlining history of the *échevin* system in France).

199. *See* Wilson, supra note 10, at 847–48.

200. *See* Lay Judge Act, *supra* note 7, art. 2(2).

201. *See* JAPAN FED'N OF BAR ASS'NS, *supra* note 10.

202. *See* Lay Judge Act, *supra* note 7, art. 2(3).

203. *Id.*; *see* SUPREME COURT OF JAPAN ET AL., START OF THE SAIBAN-IN SYSTEM 4 (2005), *available at* http://www.japaneselawtranslation.go.jp/rel_info/download?re=02&info_id=28.

204. For example, even prosecutors recognize the potential fear and harm associated with such cases as they debated whether to ask the Saitama District Court for

In response, the Ministry of Justice has maintained that citizen involvement with violent crimes is vital because "the more heinous the crime, the more meaning there is in the restoration of social justice by citizens, in whom sovereignty rests."[205] The government further believes that criminal cases are straightforward and easier to understand than civil matters, so evidentiary disputes can be narrowed down before trial and in-court examinations will be comparatively shorter.[206]

a. Procedural Differences

The procedural aspects of the new lay judge system will differ substantially from past practice. Trials will be held on consecutive days, as opposed to the system of the past that held criminal proceedings sporadically over the course of months, if not years.[207] The first trial handled by lay judges was historic in that it was held over the course of four consecutive days.[208] This systemic change will substantially enhance speed and efficiency within the criminal justice system. It will also deliver on the constitutional promise of the right to a speedy trial.[209]

Contrary to past practice, the new system will also reduce the focus on written dossiers and place more value on trial advocacy, in-court questioning of witnesses, and the use of simple-to-understand terminology.[210] Live questioning of witnesses has been a historic rarity.[211] With the adoption of the lay judge

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an exemption to the lay judge requirement. *See Lay Judges May Not Try Mob Hit*, JAPAN TIMES, July 18, 2009, http://search.japantimes.co.jp/mail/nn20090718a2.html; *see also* Peter Harris, *Judging Thy Neighbor: An Exploration of How the Lay Judge System to be Implemented in 2009 Will Affect Japanese Society*, J@PAN INC, Sept.–Oct. 2007, at 22, 25. In fact, the public has consistently cited fear of the defendant as one of the top reasons for not wanting to serve as a lay judge. *Id.*

205. *See Citizen Judge System*, ASAHI SHIMBUN (Japan), May 20, 2009, at 1, *available at* 5/21/09 JWIRE 01:41:24 (Westlaw).

206. *See* Setsuko Kamiya, *Preparation for Quicker Criminal Trials Enhances Focus*, JAPAN TIMES, May 14, 2009 (quoting Shozo Fujita, Director of the Saibanin Trial Department of the Supreme Public Prosecutor's Office).

207. *See* JOHNSON, *supra* note 99, at 14–15; *see also* KEISOHŌ [Code of Criminal Procedure], arts. 281–86.

208. *See* Reynolds, *supra* note 1.

209. KENPŌ [Constitution] art. 37 ("In all criminal cases, the accused shall enjoy the right to a speedy and public trial by an impartial tribunal"), *translated in* 1 EHS LAW BULL. SER. no. 1000 (1947).

210. *See* Kamiya, *supra* note 3; *see also* Weber, *supra* note 12, at 162; Wilson, *supra* note 10, at 868–870.

211. *See* JAPAN FED'N OF BAR ASS'NS, *supra* note 10.

system, prosecutors and defense attorneys will need to advocate, question witnesses in an easily understandable manner, and incorporate more visual materials into the trial process.[212] Lay judges will have limited, if any, legal training or prior exposure to the criminal justice system. As such, prosecutors will need to validate cases through both live testimony and written evidence.

The empowerment of citizen judges constitutes another significant procedural change. Professional judges will now need to collaborate with ordinary citizens in determining innocence or guilt, and also in assessing a convicted defendant's sentence.[213] During the trial itself, citizen judges will have the ability to question witnesses, victims, and defendants. [214] Moreover, defendants will appear before the court in a more dignified manner. In stark contrast from past practice, the defendant's handcuffs and ropes will be removed before the professional and citizen judges enter the courtroom each day.[215] The defendant will also wear normal clothing and slippers, unlike the prison garb always worn to trial in the past.[216]

b. Duty of Confidentiality for Lay Judges

Lay judges are entrusted with the power of government, and act on behalf of the state. Citizens empanelled as lay judges will encounter some of the most sensitive issues. Accordingly, Japan decided to bind lay judges with a strict duty of lifetime confidentiality in the final version of the Lay Judge Act.[217]

As for penalties, a bill was originally submitted whereby a lay judge would face a fine of up to JP¥500,000 (approximately US$5000), imprisonment for up to one year, or both, for leaking confidential information, either during or after the trial, learned

212. *See* Weber, *supra* note 12.

213. *See* Lay Judge Act, *supra* note 7, arts. 6, 9.

214. *See id.* arts. 56, 58–59.

215. *See* Fumio Tanaka & Dai Adachi, *Lay Judges Appreciate Help During Trial*, DAILY YOMIURI (Japan), Aug. 8, 2009, *available at* 2009 WLNR 15305283.

216. *Accused to be Allowed to Wear Tie in Court*, DAILY YOMIURI (Japan), Mar. 22, 2008, *available at* 2008 WLNR 5528568; *see also 1st Lay Judge Trial Starts in Tokyo, Reluctance to Participate High*, *supra* note 49 (reporting how Mr. Fujii was permitted to wear leather shoes and free from handcuffs "so as not to give the lay judges the impression the defendant is guilty simply from his appearance").

217. *See* Lay Judge Act, arts. 9(2) ("Lay assessors shall not disclose secrets from deliberation . . . or other secrets learned in the exercise of their duties.").

during the course of jury duty.[218] The bar association and others voiced their opposition to extreme restriction on a lay judge's ability to openly communicate about their trial experience.[219] They also lobbied to eliminate imprisonment as a penalty.[220]

After vigorous debate, the Diet passed a compromise bill subjecting lay judges to a maximum fine of up to JP¥500,000 (approximately US$5000), six months imprisonment, or both, for leaking: (1) confidential information learned during jury service, (2) jury deliberations contents, (3) the opinions or identities of other lay judge members, or (4) personal opinions about the panel's findings or weight that should have been attributed to the evidence.[221] The duty of confidentiality applies both during and after trial.[222]

The confidentiality restriction does not impact the ability of citizen judges to discuss their personal feelings about their overall experience as lay judges. For example, citizen judges participating in Japan's first lay judge trial talked to the media about their experience in very general terms, mostly focusing on how they dealt with the pressure and how they slept the night before rendering a verdict.[223] One juror also shared his thoughts about the sentences sought by the prosecution and defense.[224] Even in its current form, however, the confidentiality duty imposed upon citizen judges is too strict and should be revised.[225] Although not expressly stated in the law, it is generally believed that imprisonment will be limited to cases in which a lay judge seeks monetary or other personal gain by disclosing information.[226] However, there are no guarantees that the government will refrain from strict enforcement.

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218. *See* Press Release, Japan Fed'n of Bar Ass'ns, *supra* note 66.

219. *See* Editorial, *Reinstating a Jury System*, JAPAN TIMES, May 29, 2004, *available at* 5/28/04 JWIRE 23:58:28 (Westlaw); Press Release, Japan Fed'n of Bar Ass'ns, *supra* note 66.

220. *See* Press Release, Japan Fed'n of Bar Ass'ns, *supra* note 66.

221. *See* Lay Judge Act, *supra* note 7, arts. 70, 79; Press Release, Japan Fed'n of Bar Ass'ns, *supra* note 66.

222. *See* Lay Judge Act, art. 79.

223. *See* David Johnson, *Early Returns from Japan's New Criminal Trials*, ASIA-PAC. J., Sept. 7, 2009, http://www.japanfocus.org/-David_T_-Johnson/3212.

224. *See Trial Shows Change in Defense Strategy*, DAILY YOMIURI (Japan), Aug. 14, 2009 *available at* 2009 WLNR 15757511.

225. *Cf. 1st Lay Judge Trial Starts in Tokyo, Reluctance to Participate High*, *supra* note 49 (quoting experts as criticizing the lifetime secrecy obligations as "too strict").

226. *See* Press Release, Japan Fed'n of Bar Ass'ns, *supra* note 66.

The confidentiality restriction imposed upon lay judges reflects serious concerns about the need to protect both the sanctity of trials and the personal information of individuals involved in the criminal justice process. The JSRC summarily stated that it was "natural" that lay judges should have the same duty of confidentiality as judges in relation to deliberations and secrets learned during jury service.[227]

Japan gives considerable deference to the concept of privacy in both judicial and private settings. In general, professional judges are precluded from disclosing information obtained during their judicial service.[228] Judges generally do not challenge judicial outcomes in public. In fact, the dissenting opinions of district court and high court judges are not revealed.[229] Only the Supreme Court publishes dissenting opinions.[230] Moreover, aside from the Supreme Court the voting breakdown of cases heard by multiple justices is not revealed.[231] In private contexts, Japan also affords a significant amount of deference to privacy rights and has become increasingly sensitive to protecting personal information. This sensitivity is exemplified by the Personal Information Protection Law enacted on April 1, 2005,[232] which prohibits the release of collected personal information to third parties absent express consent.[233]

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227. *See* JUSTICE SYSTEM REFORM COUNCIL, *supra* note 25, ch. IV, pt. 1(2)(b); *see also* Tani Nobuyuki, *Saiban-in Seido in Kansuru Ikkosatsu: Shihouken no Dokuritsu to Hyougi no Himitsu no Shiten Kara* [*A Study on the Saiban'in System: Independence of Judiciary and Confidentiality of Deliberations*], 10 SEIWA HOUGAKU KENKYUU DAI 155 (2003) (Japan).

228. Saibanshōhō [Court Act], No. 59 of 1947, art. 75, *translated in* 2 EHS LAW BULL. SER. no. 2010 (2005) (providing that "[d]eliberations of decisions in a panel shall not be disclosed; provided, however, that the presence of legal apprentices may be permitted" and that "strict secrecy must be observed with respect to the proceedings of deliberations, the opinions of each judge and the number of opinions constituting majority and minority."). An English translation of the Court Act is electronically available at http://www.cas.go.jp/jp/seisaku/hourei/data/CACT.pdf.

229. *Cf. id.*

230. *See id.* art. 11.

231. *See* Nobuyuki, *supra* note 227, at 156.

232. *See* Kōjin jōhō no hogo ni kansuru hōritsu [Act on the Protection of Personal Information], Law No. 57 of 2003.

233. *See* Paul Kallender, *Japan Tightens Personal Data Protection*, PC WORLD (U.S.), Mar. 29, 2005, http://www.pcworld.com/article/120219/japan_tightens_personal_data_protection.html. Companies must specify the purpose of collecting information, obtain consent if the data will be used for any purpose other than they originally stated purpose, and take measures to prevent theft or leakage. *Id.*

The strict confidentiality requirements contained in the Lay Judge Act reflect the concern that public disclosure of information related to the deliberations might impede open discussions among lay judges.[234] This is consistent with worries expressed when Japan last experimented with juries prior to World War II.[235] Theoretically, secrecy is intended to foster the free exchange of ideas during the deliberative process.[236] Open deliberation and discourse might be stifled if lay judges are aware that discussions or actions in the deliberation room are subject to external publication. [237] Additional worries about disclosure include the potential for challenges to final verdicts, harassment of lay judges, unreliable disclosures, and potential profiting from book, television, or movie deals.[238] Apart from these traditional reasons for secrecy, new concerns have been expressed about the need to protect certain information such as the identity of the victims of sex crimes.[239]

c. Benefits of Citizen Participation

Japan's substantial investment of time, effort, and money in the lay judge system exemplifies the expectation that greater citizen involvement in the criminal justice process will stimulate

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234. *See Citizen Judges in Court, supra* note 46. *See* Mark Levin & Virginia Tice, *Japan's New Citizen Judges: How Secrecy Imperils Judicial Reform*, ASIA-PAC. J., May 9, 2009, http://www.japanfocus.org/-Mark_D_-Levine/3141.

235. *See* Nobuyuki, *supra* note 227, at 156. Before World War II, Japan implemented a jury system for certain criminal cases pursuant to the Jury Act. Baishinhō [Jury Act], Law No. 50 of 1923. However, with the rise of militarism in Japan and the government's need to control criminal justice, the Jury Act was suspended in 1943. Baishinhō no teishi ni kansuru hōritsu [Act Concerning the Suspension of the Jury Act], Law No. 88 of 1943 (Japan). For a very interesting translation of a jury guide book distributed shortly after the first jury system was implemented, see Anna Dobrovolskaia, *The Jury Trial System in Pre-War Japan: An Annotated Translation of "The Jury Guidebook" (Baishin Teibiki)*, 9 ASIAN-PAC. L. & POL'Y J. 231, 271 (2008).

236. *See* Diane E. Courselle, *Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform*, 57 S.C. L. REV. 203, 211 218–19 (2005).

237. *See id.*

238. *See id.*

239. If confidentiality is not respected, victims may be less inclined to step forward and report instances of abuse. *See generally Privacy Sought for Victim in Rape Trial*, JAPAN TIMES, July 10, 2009, http://search.japantimes.co.jp/cgi-bin/nn20090710a3.html (citing the lack of protection for the privacy of rape victims because potential jurors not selected for jury duty are not bound by confidentiality obligations); *Alleged Sex Crime Victims Might Be Named During Jury Selection*, JAPAN TIMES, June 5, 2009, http://search.japantimes.co.jp/cgi-bin/nn20090605a9.html.

many benefits. Although the political and social benefits of public participation in the Japanese criminal justice system are still speculative and face many obstacles at this early juncture, some hope does arise from this monumental change.

Theoretically, direct public participation in the criminal justice process will reduce the possibility of injustice. Dr. Martin Luther King Jr. once espoused, "injustice anywhere is a threat to justice everywhere."[240] Because "we are caught in an inescapable network of mutuality, tied in a single garment of destiny ... whatever affects one directly, affects all indirectly."[241] The involvement of a representative group of citizens sitting on a jury or jury-like tribunal contributes to sound decision-making and positively affects society in general.[242] Although juries in other countries are sometimes criticized, studies have shown that jury verdicts are well-grounded.[243] More specifically, different viewpoints and the opportunity to debate and discuss trial evidence among a diverse group increase the likelihood that the tribunal will thoroughly evaluate and examine all disputed matters.[244] This collaborative process leads to accurate results that are grounded in the evidence,[245] and just findings that are less susceptible to internal influences and established preconceptions.

If taken seriously, meaningful citizen involvement in the judicial process is likely to enhance the legal system's legitimacy and make it more responsive to community values.[246] A criminal justice system gains credibility when citizens have the opportunity to engage in the debate, enforcement, and preservation of societal norms as part of a jury or jury-like body.[247] Similar to

240. Martin Luther King, Jr., Letter from Birmingham Jail (Apr. 16, 1963), *in* THE YALE BOOK OF QUOTATIONS, 427 (Fred R. Shapiro ed., 2006).

241. *Id.*

242. *See* Valerie Hans, *Citizens as Legal Decision Makers: An International Perspective*, 40 CORNELL INT'L L.J. 303, 307–308 (2007).

243. *Id.* at 308.

244. *Id.* at 307–08.

245. *See id.* at 308 (citing to scholarly research that confirms that most U.S. jury verdicts are soundly based on trial evidence and legal experts (such as the presiding judge) typically concur with the jury verdicts); *see also* Phoebe C. Ellsworth, *Are Twelve Heads Better than One?*, 52 LAW & CONTEMP. PROBS. 205, 206 (1989).

246. *See* Hans, *supra* note 242, at 308.

247. *See* Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2347 (2008) (arguing that measures should be taken to ensure transparency and prevent criminal justice from being "run behind closed doors by insiders (judges, prosecutors,

citizen juries, the integration of lay members into mixed tribunals can also offer a fresh perspective on the matters addressed at trial.[248] As the first lay judge trials in Japan have just started, the citizenry has approached the process and new system very seriously and with high regard for their new civic duty.[249]

Furthermore, jury service functions as an educational vehicle that binds citizens to the state.[250] The U.S. experience indicates that jury service increases public support for the courts and promotes civic engagement.[251] Jury service stands as an attribute of citizenship because it offers individuals the opportunity to better comprehend the law and the judicial system.[252] Other than voting, jury service is one of the few activities in which citizens come into direct contact with the fundamentals of democracy. Moreover, lay judges stand to personally benefit from a sense of accomplishment, civic pride, or democratic empowerment.

3. Role of Defense Counsel

In response to external and internal criticism about violating international human rights law in this regard, Japan established a system in October 2006 whereby indigent suspects charged with certain serious crimes could petition for court-appointed legal counsel during their preliminary detention.[253] Crimes covered by this reform included those punishable by

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defense attorneys, and law enforcement officials) to the exclusion of outsiders (ordinary citizens and victims) who are left ill informed about criminal justice").

248. *See* Hans, *supra* note 242, at 307–08.

249. *See* Kamiya, *supra* note 3.

250. *See* Hans, *supra* note 242, at 306.

251. *See id.* at 306–07 (citing surveys that have "routinely [found] that jurors are more positive about the courts and the jury system after their service than before. For example, a national survey of over 8000 jurors who served in sixteen federal and state courts found that the majority (63%) said that their impression of jury duty was more favorable after serving.").

252. *See* Note, *Beyond Batson: Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920, 1927–28 (1992).

253. *See* Japan Ministry of Justice, Implementation of Comprehensive Legal Support by the Japan Legal Support Center, http://www.moj.go.jp/ENGLISH/issues/issues02.html (last visited Jan. 24, 2010). Pursuant to this policy change, the Japan Legal Support Center was established to nominate court-appointed defense attorneys and secure enough attorneys across the country. *Id.*; *see also* David Tharp, *Human Rights and Access to Justice: Japan's Legal Aid Reform as a Model*, NIPPON FOUNDATION, Mar. 7, 2008, http://www.nippon-foundation.or.jp/eng/current/20080307LegalAid2.html.

death, life imprisonment, or a minimum one-year prison sentence.[254] In conjunction with the implementation of the lay judge system, Japan expanded this system in May 2009 to include serious cases in which a suspect could be subject to the death penalty, life imprisonment, or a maximum sentence of imprisonment exceeding three years.[255] This second wave of expanded rights newly covers crimes involving theft, assault, professional negligence, fraud, blackmail, and other similar crimes.[256]

Although progress has been made, this system still fails to provide access to counsel from the moment of arrest, and does not cover all defendants. Even more significantly, the ability of suspects to consult with legal counsel remains limited. To the extent that hired or appointed defense counsel wish to visit with a suspect, officials typically limit the meeting time.[257] Pursuant to Japanese law, an investigating authority may designate the time, date, and place of any meeting between suspect and counsel "when it is necessary for investigation," provided that it does not "unduly restrict the rights of the suspect to prepare for defense."[258] Japanese investigators liberally apply this provision to restrict contact between suspect and counsel.[259] Furthermore, counsel is not given the opportunity or right to be present during interrogations.[260]

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254. *See* UNHRC, *supra* note 123, at 8.

255. *See id.* (remarking that statistics from 2006 indicate that approximately eighty percent of all suspects were detained for crimes falling within the revised category).

256. *See* JAPAN FED'N BAR ASS'NS, JAPAN FEDERATION OF BAR ASSOCIATIONS UPDATE REPORT IN RESPONSE TO THE LIST OF ISSUES TO BE TAKEN UP IN CONNECTION WITH THE CONSIDERATION OF THE FIFTH PERIODIC REPORT OF JAPAN 11 (2008), *available at* http://www2.ohchr.org/english/bodies/hrc/docs/ngos/JFBA_Japan94.pdf.

257. *See* KEISOHŌ [Code of Criminal Procedure], art. 34(3); Kamiya, *supra* note 149. Even for those who can afford to retain counsel, the Japanese system does not allow attorneys to be present at interrogations. Soldwedel, *supra* note 19, at 1435; *see also* IWASAWA, *supra* note 122, at 271–72.

258. KEISOHŌ [Code of Criminal Procedure], art. 34(3), *translated in* 2 EHS LAW BULL. SER. no. 2600 (2009). An English translation of the Code of Criminal Procedure is electronically available at http://www.fernuni-hagen.de/imperia/md/content/rewi/japanrecht/StPO.pdf.

259. *See* Vize, *supra* note 103, at 334.

260. *See* Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317, 338 (1992); Landsman & Zhang, *supra* note 19, at 184.

4. Judicial Reform in Other Areas Affecting the Trial Process

In deference to the citizenry, Japan has attempted to design its new lay judge trial system in the least burdensome and time-consuming way possible. Reformers have been particularly concerned about the negative impact that extended jury service might impose on work, family, and other responsibilities.[261] Japan has also implemented new procedures that allow for greater victim access to criminal trials.

a. Measures Intended to Expedite Criminal Trials

The introduction of citizen judges into the adjudication process has altered the process in many ways. One aspect of the trial that remained the same is that the verdict and sentencing are still integrated within a single proceeding. However, to minimize the time commitment for citizen jurors and limit costs related to the use of citizen jurors, Japan has made several significant procedural modifications to its criminal procedure.

First, lay judge trials will be conducted on consecutive days, instead of following the past practice in which criminal trials were discontinuous and conducted over the course of multiple months, if not years.[262] Legal professionals benefited from the past trial process because preparations could be spread over time.[263] However, the episodic hearing process tended to only benefit legal professionals and not the accused. Japan also instituted a new pretrial "arrangement" procedure to save time by narrowing the issues presented at trial and facilitating a productive and systematic trial.[264] Finally, in rolling out the lay judge trial system, the courts have continuously talked about limiting the length of trials,[265] so much so that the government seems more concerned with shortening the trial process than the defendant's right to a fair and complete trial.

Finally, to expedite lay judge trials and reduce the anticipated scheduling challenges involving citizen jurors, Japan amended its Code of Criminal Procedure to include new

261. *See* Kamiya, *supra* note 206.
262. *See supra* note 207.
263. *See* Landsman & Zhang, *supra* note 19, at 190.
264. KEISOHŌ [Code of Criminal Procedure], arts. 316–1 to 316–24.
265. *See Citizen Judge System*, *supra* note 205.

"pretrial arrangement proceedings."[266] The mandatory pretrial arrangement procedures require counsel to cooperate and confer in advance of trial.[267] Among other things, the pretrial arrangement proceedings are intended to clarify the charges and applicable law, define the allegations and contested issues, disclose disputed facts and evidence, establish objections related to evidence, address the use of experts, and establish hearing and trial dates.[268]

b. Movement to Increase and Protect Victim's Rights

In the mid-1990s, calls started in Japan for victim participation in criminal trials. [269] In response, Japanese legislators passed the Basic Act on Crime Victims ("Crime Victim Act") on December 8, 2004.[270] The Act sought to respect the individual dignity of crime victims and foster the development of policies that protect crime victims' rights and interests. [271] Pursuant to the Act, Japan implemented subsequent measures enabling victims to recover damages as part of the criminal process, [272] interject their opinions and information about

266. Keiji soshōhō to no ichibu o kaisei suru hōritsu [Act Partially Amending the Code of Criminal Procedure], Law No. 62 of 2004; *see also* Lay Judge Act, *supra* note 7, arts. 49–50.

267. KEISOHŌ [Code of Criminal Procedure], arts. 316–2to 316–12 .

268. *Id.* art. 316–5.

269. *See Victims Participation in Criminal Trials May Begin Dec. 1*, JAPAN TIMES, Aug. 21, 2008, http://search.japantimes.co.jp/cgi-bin/nn20080821a2.html (stating that calls for reform started growing after the Aum Shinrikyo sarin gas attack on the Tokyo subway in 2005 that killed twelve and injured more than 5,500 people); *see also* Toshihiro Kawaide, Victim's Participation in the Criminal Trial in Japan (2008) (unpublished manuscript), *available at* http://www.j.u-tokyo.ac.jp/~sota/info/Papers/kawaide.pdf (noting that the concern for increasing crime and the social environment were additional factors).

270. Hanzai higaishatō kihonhō [Basic Act on Crime Victims], Law No. 161 of 2004. An English translation of this law is electronically available at http://www.j.u-tokyo.ac.jp/~sota/info/Papers/Basic%20Law%20on%20Crime%20 Victims%20in%202004.pdf.

271. *See id.* arts. 3, 9; *see also* KEISOHŌ [Code of Criminal Procedure], arts. 316–33 to 316–39; UNHRC, *supra* note 123, at 17; Ministry of Justice, Support for Crime Victims, etc., http://www.moj.go.jp/ENGLISH/issues/issues09.html (last visited Jan. 24, 2010).

272. *See* Hanzai higai zaisantō niyoru higai kaifukukyufukin no shikyu ni kansuru hōritsu [Act on the Payment of Damages Recovery Based on the Property of Crime Victims], Law No. 87 of 2006 (allowing victims to recover their property or value equivalent to such property); *see also* Ministry of Justice, *supra* note 271 (discussing options such as confiscating stolen property or collecting an equivalent sum of money from offenders).

conditions into the parole hearing process,[273] as well as acquire counseling, support, and updated information from the Public Prosecutors Office and other public agencies.[274]

Most relevant to the criminal trial process, the Diet amended the Code of Criminal Procedure in June 2007 to provide victims with the opportunity to actively participate in criminal trials.[275]This revolutionary change became a reality when it was applied to indictments on December 1, 2008.[276] Pursuant to the amendments, a victim or the victim's bereaved spouse, lineal relative, brother, or sister (hereinafter collectively "victim") may actively participate in serious criminal trials by directly stating opinions, expressing sentiments, or submitting a written opinion for reading by the presiding judge upon request to the prosecutor and permission from the court.[277] In addition, the court has the discretion to permit the victim to sit nearby the prosecution at trial, question witnesses to challenge the credibility of statements related to mitigating circumstances, question the defendant, and state opinions about matters of fact or law after the prosecutor's closing statement.[278] In essence, the victim's participation does not relate to fact-finding or evidence, but rather it relates to personal opinions and mitigating

273. *See* Kōsei hogohō [Offenders Rehabilitation Act], Law No. 88 of 2007 (allowing victims to give opinions regarding parole and damages); *see also* Ministry of Justice, *supra* note 271 (discussing measures taken to consider victims' opinions during the parole hearing process). An English translation of the law is electronically available at http://www.cas.go.jp/jp/seisaku/hourei/data/ORA.pdf.

274. *See* Ministry of Justice, *supra* note 271 (noting efforts of the Ministry of Justice to give victims support and counseling).

275. *See* Keiji soshōhō tō no ichibu o kaisei suru hōritsu [Act Partially Amending Part of the Code of Criminal Procedure], Law No. 62 of 2004; *see also* Ministry of Justice, *supra* note 271 (discussing the use outcomes in criminal proceedings for claiming damages).

276. *See* Editorial, *Crime Victims Get Their Say*, JAPAN TIMES, Jan. 10, 2009, *available at* 2009 WLNR 525559.

277. KEISOHŌ [Code of Criminal Procedure], art. 292–2; *see also* Kawaide, *supra* note 269, at 3 (noting that victim participation is limited to trials for murder, injury leading to death, rape, sexual assaults, negligence resulting in injury or death, illegal arrest, and kidnapping); Masami Ito, *Crime Victims Bill Enacted*, JAPAN TIMES, June 21, 2007, http://search.japantimes.co.jp/cgi-bin/nn20070621a4.html (noting judge must give victims permission to participate during trial).

278. KEISOHŌ [Code of Criminal Procedure], arts. 316–33 to 316–38; *see also* Editorial, *supra* note 276 (noting family members of deceased victims may also participate); Kawaide, *supra* note 269, at 3–4.

circumstances.[279] Notably, this active participation occurs before the tribunal reaches its determination of guilt or innocence.[280]

III. *THE LAY JUDGE SYSTEM: REALIZING ITS FULL POTENTIAL*

To acquire a full return on the taxpayer dollars and time invested in the lay judge system, Japan needs to continuously assess the system's efficiencies and shortcomings. In principle, Japan needs to achieve justice while simultaneously honoring the due process rights of all suspects. Japan must also obtain the understanding, interest, and feeling of its citizenry that participation in the judicial process is meaningful.[281] Where necessary, further reform should be taken expediently. Otherwise, the lay judge system might not live up to its potential and Japan's substantial investment could go to waste.

Monitoring and reassessment are consistent with the JSRC recommendations, which advise that the initial system should not be "fixed in stone," but rather should be "flexibly readjusted" to ensure the establishment of a popular base.[282] Even at this early stage, it is evident that Japanese policymakers need to reexamine and revise several laws and practices that directly affect lay judge trials. More specifically, Japan needs to reassess the present: (1) strict confidentiality restrictions on lay judges, (2) secretive interrogation process, and (3) crime victim participation system. If adjustments are not made in these areas, Japan runs the risk of undercutting many of the primary intended benefits of the lay judge system.

A. *More Transparency: The Need to Release the Shackles of Secrecy From the Deliberation Room*

To construct a solid foundation for the lay judge system and engender democratic participation in the judicial process, the "doors of the courtroom" must be propped open further. This

279. *See* Kawaide, *supra* note 269, at 4.

280. *See* Editorial, *supra* note 276 (noting that victims can question the defendant after the prosecutors' closing argument and sentencing recommendation).

281. *Cf.* Hans, *supra* note 242, at 308 ("All the work on mixed tribunals thus far confirms that lay citizens are highly likely to agree with the legal expert judges who decide cases with them.").

282. *See* JUSTICE SYSTEM REFORM COUNCIL, *supra* note 25, ch IV, pt. 1.

will enable Japanese society to truly see how the law and judicial process function. Real transparency and complete justice cannot be sufficiently achieved unless Japan is willing to modify or repeal the lifetime restriction on citizen judges' freedom to speak about certain trial-related matters. The lay judge system needs to shed its shackles of secrecy and allow a greater degree of post-verdict disclosure by citizen judges.

1. The Need to Open the Door: Increased Ability to Disclose

Secrecy during trials protects the sanctity of the proceedings. [283] During a trial, public participation and confidence in the system are encouraged if jury deliberations remain secret.[284] Closed-door deliberations, moreover, encourage open and frank discussion in the jury room and safeguard against external influence.[285] After the trial, continuing confidentiality may serve to protect lay judges from harassment, encourage the finality of judgments, eliminate fishing expeditions to impeach verdicts, diminish the reluctance of jury service, and stimulate open discussions in the jury deliberation room. [286] Notwithstanding, the need for strict post-trial secrecy is questionable except in extraordinary cases. For the reasons detailed below, Japan should distinguish between the role of secrecy during trial versus the imposition of a lifetime ban on post-trial disclosure regarding deliberations and the trial experience.

The goals underlying the establishment of the lay judge system include the promotion of transparency, access to the legal system, and free flow of information. The JSRC advanced reforms that would make the justice system easier to use, easier to understand, and more reliable for the general public.[287] On its

283. *See generally* Courselle, *supra* note 236.

284. Alison Markovitz, *Jury Secrecy During Deliberations*, 110 YALE L.J. 1493, 1508 (2001).

285. *See generally* Courselle, *supra* note 236.

286. *See* David N. Averyt, *Paying Former Jurors for Consultation on a Retrial: Suspect Tactic or Good Lawyering?*, 57 ALA. L. REV. 853, 858–59 (2006) (citations omitted); Nicole B. Cásarez, *Examining the Evidence: Post-Verdict Interviews and the Jury System*, 25 HASTINGS COMM. & ENT. L.J. 499, 507–600 (2003); Susan Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principal of Rule 606(b) Justified?*, 66 N.C. L. REV. 509, 512 (1988); Holly M. Stone, *Post-Trial Contact with Court Members: A Critical Analysis*, 38 A.F. L. REV. 179, 181–82 (1994).

287. *See* JUSTICE SYSTEM REFORM COUNCIL, *supra* note 25, ch. IV, pt. 2.

face, however, the permanent duty of post-trial confidentiality is inconsistent with these goals. Even more significantly, constitutional considerations dictate a relaxation of the strict secrecy standards imposed by the Lay Judge Act.

By constitutional mandate, trials in Japan are open to the public.[288] Further, the new lay judge system is expressly intended to educate.[289] Although it is a challenge to decide how to best strike a balance between the competing interests of confidentiality versus transparency, access to information, education, and freedom of expression, it is evident that the doors to the courtroom should not be sealed once deliberations are finished. Moreover, precious judicial resources should not be diverted to monitoring or prosecuting citizen judges desiring to discuss, justify, or opine about the tribunal's decisions.

Systemic transparency and open post-trial disclosure are essential. At minimum, lay judges should have the post-trial option to state their opinions and impressions about the tribunal's deliberations, findings, and voting breakdown. In a Japanese context, the importance of open disclosure is amplified by the fact that the lay judge system is still in its infancy. The general public and legal professionals alike will benefit from greater access to information. Legal reformers and scholars can also gain greater insight into potential improvements as well as the system's strengths and weaknesses. Accordingly, the strict confidentiality restrictions should be relaxed or eliminated. Post-trial disclosure by willing citizen judges will increase transparency, further public education about the criminal justice system, enhance learning opportunities for legal counsel, and guard against corruption.

a. Current Restrictions Are Constitutionally Unjustified

The current strict lifetime confidentiality restrictions infringe the citizen judges' right to free expression and speech. Article 21 of the constitution of Japan specifies that freedom of speech and all other forms of expression be guaranteed.[290] Lay

288. KENPŌ [Constitution], arts. 37, 82.

289. *See* Levin & Tice, *supra* note 234.

290. KENPŌ [Constitution], art. 21, *translated in* 1 EHS LAW BULL. SER. no. 1000 (1947) ("Freedom of assembly and association as well as speech, press, and all other forms of expression are guaranteed.").

judge expression should be free from governmental limitation after the conclusion of a trial. An individual's right of expression stands as the bedrock of any democracy,[291] and should be respected to the fullest extent possible. The Supreme Court of Japan has acknowledged that the freedom of expression "must be respected as an especially important right in democratic society."[292] By prohibiting lay judges from speaking about the trial itself,[293] the Diet has restricted free speech. Although lay judges certainly should not be forced to speak about their experience, they should be free to exercise their constitutionally guaranteed rights and speak about their experience if they so choose.

The criminal justice system and related activities are core governmental functions and should not be shrouded in secrecy.[294] Openness is the key to responsible government and justice. Based on this premise, the Japanese constitution specifies that criminal trials and verdicts are open to the public, except in extraordinary cases. [295] There should be nothing to hide, particularly after the conclusion of a trial.

The most tenable justification for impeding post-trial free speech stems from the general public welfare exception in the Constitution. Specifically, article 13 stipulates that an individual's right to life, liberty, and the pursuit of happiness shall be the supreme consideration in governmental affairs "to the extent [that such rights do] not interfere with the public welfare."[296] The Japanese Supreme Court has stated that article 21 "does not

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291. *See* Jean-François Flauss, *The European Court of Human Rights and the Freedom of Expression*, 84 IND. L.J. 809, 814 (2009).

292. *See* Kuriyama Reiko et al., 62 KEISHŪ 5 (Sup. Ct. Apr. 11, 2008).

293. *See, e.g.*, Setsuko Kamiya, *Lay Judges Relieved Case Over But Enthusiastic About Experience*, JAPAN TIMES, Aug. 7, 2009, *available at* 2009 WLNR 15296161 (reporting on press conference involving first set of lay judges and restrictions placed on what they could discuss).

294. *See* Eugene R. Sullivan, *The Great Debate V: A Debate on Judicial Reform, England v. United States*, 38 AM. CRIM. L. REV. 321, 338–39 (2001).

295. KENPŌ [Constitution], arts. 37, 82. Article 82 sets forth the exception for private trials. More specifically, private trials might be possible where a court unanimously determines publicity to be dangerous to public order or morals. *Id.* However, trials of political offenses, offenses involving the press, or cases wherein the rights of people as guaranteed in Chapter III of the Constitutions must always be conducted publicly. *Id.*

296. KENPŌ [Constitution], art. 13, *translated in* 1 EHS LAW BULL. SER. no. 1000 (1947).

guarantee freedom of expression unconditionally, but rather it allows necessary and reasonable restrictions for public welfare."[297] Therefore, the public welfare may trump individual rights in certain limited circumstances.

Even though individual rights are not absolute, the public is well served by transparency and free expression.[298] Applying the above standard, the restriction on post-trial lay judge speech is unnecessary and unreasonable in light of public welfare considerations. Post-trial access to information better serves the public interest as it promotes responsible deliberations, curbs the possibility of undue influence from professional judges, and enables public education about the new lay judge system. Because criminal trials are open to the public, sensitive information related to particular individuals will be publicly disclosed through the evidence presented at trial. As such, a citizen juror's expression is unlikely to "unduly infringe" upon another person's right to privacy. Further, the proceedings will not be undermined through post-trial disclosure. Rather, the professional and citizen judges are more apt to issue quality verdicts and sentences given the prospect of subsequent public scrutiny.

Accordingly, the strict duty of confidentiality currently imposed on lay judges should be removed or relaxed. To assess criminal penalties to lay judges commandeered into public service is an unreasonable restriction on the guarantee of free speech,[299] and does not serve the public welfare. To the extent that Japanese policymakers want to retain a post-trial duty of confidentiality in some form, it should be drafted on a more narrowly tailored basis and subject to stricter scrutiny. Japan could limit restricted speech to "extraordinary cases" determined

297. *See* Kuriyama Reiko et al., 62 KEISHŪ 5 (Sup. Ct. Apr. 11, 2008).

298. *See generally* AM. BAR ASS'N, PRINCIPLES FOR JURIES AND JURY TRIALS (2005), http://www.abanet.org/juryprojectstandards/principles.pdf (concluding that the public welfare is supported by transparency and a juror's freedom to speak). The American Jury Project, was established by the American Bar Association in recognition of the need to constantly refine and improve jury practice. *Id.* It further concluded that a juror should ordinarily have the right to discuss a case with anyone, including legal counsel or the media, once the terms of jury service have expired. *Id.*

299. The Supreme Court of Japan has never used strict scrutiny to strike a statute restricting free speech. *See* Naoki Kanaboshi, *Competent Persons' Constitutional Right to Refuse Medical Treatment in the U.S. and Japan: Application to Japanese Law*, 25 PENN ST. INT'L L. REV. 5, 61 (2006).

by the presiding judge on a case-by-case basis. For example, narrowly tailored restrictions might be placed on disclosures related to the identity of sex crime victims.

a. Fines and Imprisonment Are Too Severe

The penalties related to the lay judges' duty of confidentiality[300] are too severe and should be removed or reduced, regardless of whether enforcement is pursued. If lay judges face the specter of jail time or monetary fines, it significantly increases the likelihood that the judicial process will remain mired in silence. If lay judges are unable to freely discuss their experiences after sitting behind the bench, the system will remain shrouded in secrecy[301] and the incentive to serve as a lay judge will decrease.[302] Although the government has provided verbal assurances that citizen judges may discuss their feelings and impressions about serving as a lay judges,[303] citizen judges are less likely to freely and openly discuss information that might be helpful to understanding the verdict, the system, and the judicial process in general. Moreover, abnormalities and indiscretions are more likely to be concealed.

The imposition of criminal penalties against citizens unjustifiably exceeds the burdens placed on professional judges. Professional judges are life-long civil servants who willingly chose to serve as judges. They have professional training and experience to guide them through the various challenges associated with criminal trials and deliberations.[304] In contrast, a

300. *See supra* notes 218–22.

301. Not only does the resolution of criminal trials generally remain outside of the public eye, but the implementation of the death penalty is hidden from sight. *See* David T. Johnson, *Japan's Secretive Death Penalty Policy: Contours, Origins, Justifications, and Meanings*, 7 ASIAN-PAC. L. & POL'Y J. 62, 70–71 (2006).

302. *See* Eiji Yamamura, *What Discourages Participation in the Lay Judge System (saiban'in seido) of Japan? An Interaction Effect Between the Secrecy Requirement and Social Network*, (MPRA Paper No. 15920, June 26, 2009), *available at* http://mpra.ub.uni-muenchen.de/15920/1/MPRA_paper_15920.pdf; *see also supra* note 46 (indicating low public willingness to participate as a lay judge).

303. Editorial, *Lay Judge's Duty of Confidentiality, Mental Anguish Need Further Consideration*, MAINICHI JAPAN (Japan), Nov. 25, 2009, *available at http://mdn.mainichi.jp/perspectives/editorial/news/20091125p2a00m0na010000c.html* (describing the ability of lay judges to discuss their feelings during post-trial press conferences, and noting the frequent interruptions by the clerk courts instructing lay judges not to answer based on confidentiality restrictions).

304. *See* Levin & Tice, *supra* note 234.

citizen is compelled to serve as a lay judge, and does not have the training or experience to deal with the exposure to the graphic nature of a serious criminal trial in an isolated bubble.[305] At a minimum, citizens should be provided with the freedom to seek comfort and share their experiences with family members and close friends. It is inequitable to threaten lay judges serving in a mandatory capacity with criminal penalties, particularly when professional judges do not face imprisonment or fine.[306] Civic service should be rewarded. It should not be greeted with the threat of jail time, the loss of constitutional rights, or even significant fines.

One of the keys to a successful lay judge system is public support. Threats and uncertainty achieve the opposite result. As such, Japan needs to remove or reduce the severe penalties associated with post-trial disclosure. As a middle ground, the Lay Judge Act might be amended to penalize citizen jurors only in the event that they leak information during trial or disclose sensitive information obtained through the deliberation process after trial to a third party in exchange for money or something of comparable value.

b. Health of Citizen Jurors Merits Consideration

Although the new reforms are sensitive to the employment commitments, transportation requirements, childcare issues, and various other needs of lay judges,[307] the health and well-being of these civic servants merits further consideration. If citizen judges cannot share their experiences with third parties after the trial, their mental well-being may be jeopardized. Carrying the mental yoke associated with gruesome information revealed in serious felony cases and the potential stress posed by jury service can be detrimental. More specifically, lay judges exposed to graphic

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305. *Id.*

306. *Id.* (emphasizing that Japanese career judges are constrained only by the confidentiality provisions in the Court Act of 1947 and only face internal sanctioning based on their employment status as judges).

307. *See* Lay Judge Act, *supra* note 7, art. 16(vii) (listing various exclusions from service); *see also First Lay Judges Sent Summons/6 lay judges, 3 Reserves to Be Chosen for Trial over Tokyo Murder*, DAILY YOMIURI (Japan), June 18, 2009, *available at* 2009 WLNR 11588684 (describing how the Matsuyama District Court may excuse citizen judges if their civic service interferes with work connected with local specialties including pearls, yellowtails, mandarin oranges, and rice harvesting).

evidence, distressing testimony, and contentious proceedings could suffer disturbing reactions such as "vicarious traumatization" and other adverse reactions.[308] In fact, studies of jury and lay judge systems in other countries have found that prohibiting jurors from communicating their trial experience with others can be detrimental to their health.[309]

In recognition of this potential problem, the Supreme Court of Japan has announced a program to provide traumatized lay judges with subsidized psychological counseling and a twenty-four-hour counseling hotline.[310] By implication, the government does not intend to prosecute lay judges seeking counseling services and communicate about their experience. However, these measures do not go far enough. The Lay Judge Act should be modified to expressly recognize the unrestricted right for lay judges to consult with psychologists, counselors, and other medical specialists. For their mental well-being, lay judges should be expressly allowed to freely speak about their concerns or traumatic experiences with any mental health professional member of their choice. Lay judges should be able to seek comfort from their family members and friends also.

c. Silence Undermines the Express Goals and Public Value of Judicial Reform

To promote citizen participation in the Japanese justice system, it is essential that participants can freely convey their first-

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308. *See* Levin & Tice, *supra* note 234 (explaining phenomenon of "vicarious traumatization" (citing Theodore B. Feldman & Roger A. Bell, *Crisis Debriefing of a Jury After a Murder Trial*, 42 Hosp. & Community Psychiatry 79 (1991))); *see* Editorial, *Lay Judge System Should Be Monitored, Improved*, DAILY YOMIURI (Japan), Aug. 7, 2009, *available at* 2009 WLNR 15195481 (describing the psychological effect on first panel of lay judges). A lay judge could suffer from trauma for a few days, months, or years depending on the circumstances and utilization of professional mental health services. Levin & Tice, *supra* note 234. The possible symptoms of victim traumatization are emotional distress, fatigue, irritability, sleep disturbance, eating problems, intrusive thoughts, and some lay judges could even lose interest in sex or experience physical ailments such as hives, chest pains, and ulcers. *Id.*

309. *See* Levin & Tice, *supra* note 234.

310. *See Traumatized Lay Judges to Get Free Counseling*, DAILY YOMIURI (Japan), June 19, 2009, *available at* 2009 WLNR 11660238 (describing how the Supreme Court of Japan will establish a system to provide psychological counseling to lay judges traumatized after serving in trials at no cost). The Supreme Court will also establish a free twenty-four-hour counseling hotline for lay judges and pay for a maximum of five counseling sessions with clinical psychologists. *Id.*

time experience to future generations of lay judges. Citizens not only need to understand how the participants felt during the process, but also how the criminal justice and deliberative process played out.[311] As suggested earlier,[312] strict secrecy is counterproductive to the judicial reform effort given that the pronounced goals underlying judicial reform are transparency and education.[313]

In certain cases, it may be important to preserve the privacy of victims, witnesses, and even the accused. Such importance is diminished in criminal trials, however, because the constitution mandates open trials.[314] Therefore, the dangers associated with disclosing the content of the trial and deliberative process are significantly diminished.

As with a complex mathematical equation, there is merit to everyone having access to the question, the solution, as well as the methodology and process used to reach the solution. If the Japanese public has access to information about the methodology and process used to reach a verdict, this increases the likelihood of understanding. Having access to only the question (trial) and answer (verdict) does not necessarily further the educational process. If the lay judges' tongues are tied, the public will be unable to see the process used to carefully resolve each case. The benefits associated with readily available information about how and why a tribunal reached a conclusion will be diluted or lost.

Drawing upon the U.S. experience, the U.S. Supreme Court has emphasized that access to criminal trials is important, in part because "results alone" cannot satisfy the public's need to understand the criminal justice system.[315] If a trial is concealed from public view, "an unexpected outcome can cause a reaction that the system at best has failed, and at worst has been corrupted."[316] Pursuant to the Lay Judge Act, a citizen judge desiring or willing to speak about certain subjects after the trial is prohibited from doing so.[317] As such, the system is unnecessarily

311. *See* Iwata, *supra* note 41; Levin & Tice, *supra* note 234.
312. *See supra* Part III A.3.a.
313. *See supra* note 2727.
314. *See supra* note 295.
315. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571 (1980).
316. *Id.*
317. *See* Lay Judge Act, *supra* note 7, arts. 9, 70.

exposed to negative reaction and detrimental repercussions. To guard against failure or corruption and facilitate understanding, the deliberation process should be open and subject to post-trial analysis. Without sufficient access to information, opposition may result over a controversial verdict or sentence. Left to speculation, the public may not understand valid reasoning for a particular result. In contrast, if lay judges can freely explain the reasoning behind a verdict or sentence after the conclusion of a trial, it will lessen the frequency or intensity of public doubt about the judicial process.[318] As such, Japan should explore ways to increase the amount of information that lay judges can openly disclose, as opposed to adhering to the entrenched practice of keeping information secluded behind closed doors.

Accordingly, access to information will likely help reduce current opposition to the lay judge system. Public opinion polls leading up to the implementation of the lay judge system leaned heavily against participation.[319] By allowing broad post-trial dissemination of information, the citizenry can observe the process, become familiar with the system, and comprehend the value of citizen participation.[320] Increased access to information about the process will both alleviate potential anxiety and improve chances that the populous will embrace the new system.[321]

Another reason for relaxing the life-long restriction on the freedom to speak about trial deliberations relates to interpersonal social networks that play an important role within the Japanese societal structure.[322] In its current form, the Lay Judge Act discounts the importance and support provided by social networks in Japan. Lay judges belonging to personal social networks face the moral dilemma of deviating from traditional norms due to the inability to openly discuss feelings and experiences with other members of their social networks.[323] Unless the current restrictions are modified or repealed, lay judges face the risk of alienation from their social networks

318. *See* Cásarez, *supra* note 286, at 592.

319. *See supra* note 46.

320. *See* Minoru Matsutani, *Media Fret Risk of Biasing Lay Judges*, JAPAN TIMES, May 15, 2009, http://search.japantimes.co.jp/cgi-bin/nn20090515a3.html 300.

321. *Id.*

322. *See* Yamamura, *supra* note 302, at 7–8.

323. *See id.*

during potentially trying times. To avoid statutory penalties, citizen judges will need to subordinate their social networks.[324] Not only can this be uncomfortable for the citizen judges, but it can also undermine invaluable support for the new system. Social networks and personal interaction enhance grass-roots support for civic participation.[325] In theory, social networks should encourage citizens to serve as lay judges because interactive discussion among family and friends increases learning and promotes efficiencies.[326] If citizen judges have reservations about or restrictions on their ability to communicate with their social network, public support and group understanding may be hindered. As such, the relaxation of current confidentiality restrictions would be consistent with Japanese culture and society.

Allowing the lay judges to speak in detail after trial will not have the negative consequences envisioned by advocates of the strict confidentiality restrictions.[327] By way of comparison, U.S. jurors may freely speak about the deliberative process in most cases once a verdict has been rendered.[328] If extraordinary considerations exist, courts possess the discretion to impose a gag order or narrowly restrict juror speech.[329] Research shows that U.S. jurors are generally willing to voluntarily speak with the press.[330] When U.S. jurors have spoken with the press, they typically endeavor to explain the rationale underlying the verdict.[331] Additionally, they commented on the deliberative process used to reach a verdict, their emotions in serving as a juror, the ease or difficulty of decision-making, their impressions of the system, instances of misconduct, and their evaluation of

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324. *See id.*

325. *See id.*

326. *See id.* at 14–15.

327. *See* Levin & Tice, *supra* note 234, at 5 (explaining the arguments and concerns of authorities who advocate strict confidentiality restrictions).

328. *See* Sullivan, *supra* note 294, at 336–38 (quoting an excerpt from Judge Kenneth Starr on his belief for the disclosure of jury deliberations in the United States); *see also* Cásarez, *supra* note 286, at 505 (detailing the extent of First Amendment rights).

329. *See* Cásarez, *supra* note 286, at 505 (explaining the proof needed to restrict jurors' free speech).

330. *See id.* at 553 (analyzing 761 articles from the Houston Chronicle between 1985 to 2002, in which jurors were approached or independently contacted by the press).

331. *See id.*

the lawyers and judges.[332] Personal, private, or inappropriate disclosures about fellow jurors have been extremely rare.[333]

Access to juror experiences and observations has generally been a positive experience in the United States,[334] and a valid argument can be made that Japan would have a similarly positive experience as well. Opponents of broader disclosure also contend that fair trials are attainable only if judges can deliberate without fear of subsequent exposure of their identity or opinions.[335] The argument follows that sensitive or shy lay judges will prefer to hide their opinions and feelings rather than risk subsequent public disclosure.[336] The argument further proposes that if discussions were chilled by the prospect of disclosure, then incomplete deliberations would result in injustice.[337] The U.S. experience shows otherwise.[338] In a Japanese context, the likelihood of chilled opinions is also remote given that public attacks against fellow lay judges would be unlikely.[339] Culturally, citizen judges are more likely to focus on personal opinions and group dynamic rather than singling out other members serving on the tribunal. The benefits of disclosure outweigh the minimal risk of chilled deliberations. To reduce the likelihood of any chilling effect, Japan might consider lifting the restriction against disclosing the content of jury deliberations and vote tallies, while retaining restrictions on the identification of other judges or individual conduct. This would mask attribution to specific individuals, while providing society with useful information. It would also preserve the implicit good faith obligation that the citizen judges and professional judges have to each other.

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332. *See id. at* 514–46.

333. *See id. at* 545.

334. *See* Sullivan, *supra* note 294, at 336.

335. *See* Cásarez, *supra* note 286, at 553; Levin & Tice, *supra* note 234.

336. *See* Cásarez, *supra* note 286, at 553.

337. *Id.*

338. *See* Sullivan, *supra* note 294, at 338–39 (citing to a two-year study conducted by the Connecticut Supreme Court involving a fifteen-member panel that concluded that post-verdict juror interviewing did not chill discussions in the deliberation room or negatively influence the jury deliberation process (citing Lauren A. Borsa, *Task Force: Post-Verdict Interviews Not a Problem*, NEWS-TIMES (Danbury, Conn.), July 11, 1996)).

339. *Cf.* Cásarez, *supra* note 286, at 553 (explaining that chilling in the jury room debate would only occur if interviewed jurors identified other jurors by name and exposed highly personal or unflattering comments made by them, or revealed statements that would subject the juror to discomfort, ridicule, or derision).

d. Value of Disclosure to Attorneys and Defendant

In any legal system, an attorney serves as an advocate for his or her clients. Japan is no exception to this fundamental concept. For a trial lawyer, the reaction of the judges and jury to case theories and substantive arguments is important. Both prosecutors and defense attorneys have a legitimate interest in speaking with willing lay judges after a trial for evaluation purposes.[340] In relation to a specific case, both sides may wish to consult with willing lay judges to assess the possible merits and demerits of pursuing an appeal. They may also desire to confirm whether any improprieties occurred in the deliberation process. Additionally, a convicted defendant has an interest in confirming these matters and obtaining a better understanding about the reasoning underlying any conviction.

On a personal level, counsel may also seek information related to improving their trial advocacy skills. Research affirms that a fact-finder not only considers attorney presentation and style when deciding a case, but also places a level of importance on the presentation.[341] Although this research was conducted based on the U.S. framework, it is reasonable to conclude that the lay judges will also similarly have positive or negative reactions to the presentation methods and styles of Japanese attorneys. In fact, the JFBA and Ministry of Justice have reached similar conclusions and expended significant sums on training attorneys about the art of trial advocacy.[342] Early comments from citizen judges in Japan further confirm the importance of presentation methods.[343]

An attorney possesses a great interest in understanding how his or her case theory, evidence, arguments, presentation, and style are received.[344] Although training sessions, mock trials, or

340. *See* Averyt, *supra* note 286, at 858 (noting that post-verdict interviews can be very useful where the lay judge system is still developing despite the fact that lay judges could have difficulties recalling their experience, perceive events incorrectly, or even lie about their experience).

341. *See id.*

342. *See* Setsuko Kamiya, *Day of Public Reckoning in Criminal Trial Process Looms*, JAPAN TIMES, May 12, 2009, http://search.japantimes.co.jp/cgi-bin/nn20090512a3.html; *see also* JAPAN FED'N OF BAR ASS'NS, *supra* note 10.

343. *See* Tanaka & Adachi, *supra* note 215 (commenting that graphics and other visual displays made the presentations more understandable).

344. *See* Averyt, *supra* note 286, at 858.

study are helpful for attorneys, it cannot substitute for direct feedback about actual performance in the intense environment presented by a live courtroom.[345] By acquiring feedback from lay judges who are willing to discuss their experience, the entire system can benefit from improvements in evidence presentation, trial advocacy methods, and attorney understanding.[346]

e. Opening the Doors Fosters Accountability and Prevents Injustice

Secrecy increases the risk of misconduct or masked bias. Facilitating transparency will thus foster accountability and avoid potential injustices among all courtroom actors. Because lay judges exercise governmental power, "their ability to speak promotes a reasonable and responsible exercise of power."[347] When citizen judges carry out such an important governmental function, there is merit in the citizens knowing this function will not remain a mystery.[348] If a tribunal's actions are subject to public commentary and opinion, it reasons that the tribunal will apply significant thought, substantial care, and diligent efforts in reaching a verdict. Social science explains that the prospect of having to explain the rationale behind a conviction or acquittal encourages quality and thoughtful deliberations.[349] Increased transparency will encourage the professional and citizen judges to make thoughtful decisions and reach a defensible verdict.[350] Public scrutiny will also decrease the likelihood that a verdict will be influenced by prejudice or bias.

There is also a significant concern that professional judges will utilize their positions of esteem and respect to exert undue influence over lay judges during the deliberations.[351] Although

345. *See id.*

346. *See id.*

347. *See* Sullivan, *supra* note 294, at 338 (excerpting Judge Kenneth Starr).

348. *See id.*

349. *See* Cásarez, *supra* note 286, at 567.

350. *See id.*

351. *See* Wilson, *supra* note 10, at 852; David Allen & Chiyoda Sumida, *A New Order in Japan's Courts*, STARS & STRIPES (Pacific ed., Wash., D.C.), June 2, 2009, *available at* http://www.stripes.com/article.asp?section=104&article=63030; *see also* Anderson & Nolan, *supra* note 19, at 990 (expressing hope that judges allow for meaningful participation by lay citizens); Bloom, *supra* note 19, at 62–63 (same); Parry, *supra* note 53 (paraphrasing judges as describing the system as "destructive tinkering"). This concern is specifically recognized in the Lay Judge Act in that professional and lay judges are

the system contains several checks and controls such as the involvement of multiple professional judges [352] and the requirement to delineate the reasoning underlying all verdicts,[353] the potential for impropriety exists. One cannot discount the possibility of implicit or express coercion by professional judges, particularly where junior judges tend to give considerable deference to senior judges.[354] To the extent that such tendencies exist, secrecy will facilitate such coercion. To minimize potential misconduct and avoid injustice to the accused, the accuracy of a verdict should outweigh the secrecy of the tribunal's deliberations. Any suspicion that an internal or external force has interfered with the administration of justice should not be tolerated.[355]

In its current form, the Lay Judge Act does not expressly exempt lay judges from punishment if they report suspected irregularities or improper conduct encountered during the trial or deliberation process.[356] It is conceivable that a lay judge could witness another tribunal member violate court rules, or experience undue pressure from a professional judge. Distorted deliberations, erroneous guidance, and impropriety should be subject to public scrutiny. The threat of serious penalty could inhibit the disclosure of such abuses. Absent the express right to report suspected misconduct or abuses, lay judges will be less inclined to divulge or share information about undue influence or a potential miscarriage of justice.[357]

Even if serious misconduct is the exception in Japanese court proceedings, impropriety cannot be tolerated under any condition. Accordingly, measures should be implemented to

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entrusted to decide freely based on the strength of the evidence. Lay Judge Act, *supra* note 7, art. 62. The Act further requires that professional judges take measures to ensure that lay assessors voice their opinions. *Id.* art. 67.

352. *See* Levin & Tice, *supra* note 234, at 8.

353. *Id.*

354. *See* Levin & Tice, *supra* note 234. *See generally* Bruce Wallace, *Japan Urged to Come Clean on Confessions*, L.A. TIMES, May 12, 2007, http://articles.latimes.com/2007/may/12/world/fg-confessions12 (reciting account of one junior judge's difficulties in dealing with a senior judge in a murder case involving a coerced confession).

355. *See* Mattox v. United States, 146 U.S. 140, 148 (1892) (holding that communications between jurors and third persons, witnesses, or the courtroom officer invalidate a verdict).

356. *See generally* Lay Judge Act, *supra* note 7.

357. *See* Levin & Tice, *supra* note 234.

enable lay judges to freely discuss possible instances of misconduct or impropriety. In sum, policymakers should amend the Lay Judge Act to include a mechanism to enable whistle blowing and provisions that protect lay judges who seek to raise or correct an impropriety. Lay judges must be able to speak about the deliberations with the assurance that the government will not punish them for blowing the whistle on an esteemed governmental official or fellow lay judge.[358]

f. Concerns Should Not Be Overblown

By publicly expressing opinions or explaining the rationale underlying a verdict or sentence, lay judge disclosures will not destabilize the legal system or undermine final judgments.[359] This has been demonstrated by the U.S. experience with juror disclosures.[360] In the United States, while entities external to the tribunal such as attorneys, family, friends, or the media may inquire about the nature or content of jury deliberations, the law prohibits any formal inquiry into the deliberation.[361] This process has enhanced the judicial system's credibility.[362] Also, the voluntary nature of jury secrecy has been a key component to building public respect for the jury system.[363] The ability to not comment also empowers jurors to resist external pressures to decide the case based on the strength of the evidence.[364]

Dissenting opinions should not subvert the process either. The Japanese Supreme Court publishes majority and dissent opinions.[365] When the highest judicial power in the land

358. *See* Setsuko Kamiya, *Legal Pros Expecting A Lot From Lay Judges,* JAPAN TIMES, June 17, 2009, http://search.japantimes.co.jp/cgi-bin/nn20090617a3.html.

359. *See supra* note 234–238.

360. *See* Sullivan, *supra* note 294, at 338–39 (quoting Judge Kenneth Starr); *see also* Nancy J. King, *Ethics for the Ex-Juror: Guiding Former Jurors After the Trials, in* JURY ETHICS: JUROR CONDUCT AND JURY DYNAMICS 222 (John Kleinig & James P. Levine eds., 2005).

361. *See* RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM 273 (2003) (stating the well-established principle under U.S. Federal Rule of Evidence 606 that jurors may not be impeached on their verdicts following the conclusion of a trial).

362. *See* King, *supra* note 360, at 220–21.

363. *See id.* at 222. *But see* Paul Marcus & Vicki Waye, *Australia and the United States: Two Common Criminal Justice Systems Uncommonly at Odds,* 12 TUL. J. INT'L & COMP. LAW 27, 116 (2004).

364. *See* King, *supra* note 360, at 221; *see also* Marcus & Waye, *supra* note 363, at 115 (explaining that juror secrecy is designed to keep jurors anonymous and free from corruption).

365. *See supra* note 230.

disagrees, an inherent danger exists that the stability of law might be undermined.[366] Notwithstanding, debate and discussion does not destabilize, but rather stimulates democratic debate and fosters potential improvements in the system. The existence of multiple opinions reflects that the tribunal reached a decision only after giving due thought and consideration to the issues.[367] Based on the Japanese Supreme Court's living example, it reasons that open discussion and debate among the lay judges and professional judges would not harm the finality of judgments. Conversely, it would reflect due consideration and care to all serious criminal cases, and further the goals of transparency and public education.

Advocates of a strict confidentiality standard might discount the U.S. experience, in favor of the positions taken by the United Kingdom ("U.K.") or Australia. In the U.K., jury deliberations transpire in a black box. Jurors are held in contempt of court for revealing information about "any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations or after the case is over."[368] Unlike Japan, however, U.K. law expressly allows a juror to reveal information about impropriety within the jury room.[369] The U.K. and Australian contempt penalties are also based, at least in part, on concerns about public scrutiny of compromise verdicts in a system where unanimous consent is necessary.[370] If jurors publicly discuss the deliberation process,

366. *See* Nobuyuki, *supra* note 227, at 156.

367. *Id.* at 156–57.

368. Contempt of Court Act, 1981, c.49, § 8(1) (U.K.) (stating that "it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceeding."); *see also* Oliver Luft, *The Times Convicted of Contempt of Court for Report on Jury's Disagreement: The Times and Jury Foreman Revealed 'Secrets of Jury Room,'* GUARDIAN, May 13, 2009, http://www.guardian.co.uk/media/2009/may/13/the-times-jury-foreman-contempt-court.

369. Contempt of Court Act, 1981, c.49, § 8(2) (U.K.) (permitting disclosures "in the proceedings in question for the purpose of enabling the jury to arrive at their verdict, or in connection with the delivery of that verdict, or in evidence in any subsequent proceedings for an offence alleged to have been committed in relation to the jury in the first mentioned proceedings"). Criminal trial verdicts must be unanimous in the United Kingdom and Australia, and commentators have expressed concern that openness would reveal compromise as opposed to unanimity among jurors in reaching a verdict. *See* Marcus & Waye, *supra* note 363, at 95.

370. *See* Marcus & Waye, *supra* note 363, at 95 (observing that commentators have expressed concern that openness would reveal compromise as opposed to unanimity

worries exist that the public might negatively conclude that unanimous findings actually constitute negotiated compromises.[371] In a Japanese context, however, the lay judge system provides for a verdict by majority vote,[372] so the prospect of negative societal reaction to a "compromise verdict" is inapposite in Japan.

Moreover, the U.K. laws regarding juror secrecy have recently come under attack. Concerns exist about the lack of juror accountability and jurors are often second-guessed about their decisions.[373] Also, there is an increasing recognition that post-trial openness about jury deliberations a healthier option for the long-term success of the judicial process.[374] Not only does secrecy reflect systemic weakness, but the ability to access information helps to identify strengths and weaknesses, as well as to facilitate a system that meets the needs of all stakeholders.[375]

2. Resolving Concerns: Increased Ability to Disclose

The public welfare is well-served by transparency and open access to information. In recognition of individual constitutional rights, citizen judges deserve the freedom to express their thoughts and opinions. Accordingly, Japan should revise article 79 of the Lay Judge Act and permit citizen judges to openly discuss a case with anyone, including legal counsel or the media, once the terms of jury service have expired.

To alleviate privacy-related concerns, restrictions against the identification of citizen judges or attribution of particular statements or opinions to specific members of the tribunal may be left in place. This should diminish concerns about "chilling" frank deliberations or post-trial harassment. At the conclusion of a trial, the courts can easily instruct lay judges about the appropriate boundaries of discussing the case and verdict with third parties, if they decide to exercise their free speech rights and speak with family, friends, lawyers, the community, or even

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among jurors in unanimous verdict jurisdictions such as the United Kingdom and Australia).

371. *See id.* at 95–96.

372. *See* Weber, *supra* note 12, at 160–61; Wilson, *supra* note 9, at 846–847.

373. *See* King, *supra* note 360, at 221; Marcus & Waye, *supra* note 363, at 115.

374. *See* John D. Jackson et al., *The Jury System in Contemporary Ireland: In the Shadow of a Troubled Past*, 62 LAW & CONTEMP. PROBS. 203, 231–32 (1999).

375. *See* Jackson et al., *supra* note 374, at 231–32.

the media. Such instruction can guard against excessive or inappropriate disclosures. If special considerations warranting continued secrecy exist in a certain case, Japanese courts can be afforded the discretion to judiciously employ a gag order. This can be done on a case-by-case basis.

Further, to protect citizen judges against harassment, policymakers can develop mechanisms whereby lay judges have the ability to easily approach the courts for assistance if third parties over-zealously pursue information and ignore lay judge objections. In extreme cases, a court could employ contempt of court measures, restraining orders, or some other form of injunctive relief against insistent third parties.

Despite the various reasons supporting a complete retraction of the lifetime post-trial confidentiality requirements imposed on citizen judges, Japanese policymakers may feel more comfortable with more conservative amendments. At a minimum, however, Japan needs to incorporate a provision into the Lay Judge Act that enables citizen judges to report suspected abuses and seek psychological treatment without fear of reprisal. Japan also must show more respect to citizen judges by repealing the six-month imprisonment penalty facing citizen judges for unauthorized disclosures.

Although less than ideal, there are other alternatives that would do a better job of recognizing individual rights, furthering the objectives of the lay judge system, and supporting the public welfare than the current confidentiality scheme. For example, Japan might explore the concept of holding supervised post-trial interviews of willing lay judges, allowing open discussion after a certain "cooling-off period," or permitting individuals or organizations to petition for permission to pool citizen judges about their experiences for research purposes. Additionally, post-trial voluntary disclosure by citizen judges might be restricted to instances in which there is no exchange of financial consideration or other tangible benefit associated with or attached to the disclosure.

B. *More Access: The Need to Open the Doors to the Interrogation Process in Japan*

Recent events highlight the problems associated with involuntary confessions and lack of access to interrogations.[376] These events and others call Japan's interrogation tactics and abuse prevention mechanisms into serious question. To stop the flow of further involuntary confession cases in Japan, the interrogation room must be opened to greater scrutiny. The lengthy imprisonment of Sugaya, an innocent man, based on a coerced confession was tragic. Equally unfortunate is the reality that Mami Matsuda's murderer remains free nearly two decades after her heinous murder. Coerced confessions are a reality in Japan, [377] and the discovery of cases involving involuntary confessions continues to grow.

1. Confessions as a Source of Controversy and the Need to Refine the Interrogation Process

Confessions are a recurring source of controversy in Japan. Due to the injustices and dangers associated with convicting an innocent person and wrongfully depriving even one person of their right to freedom, a criminal justice system must be adept at identifying confessions susceptible to coercion and preserving due process rights. An interrogator needs to carefully proceed when soliciting a confession. Forced or involuntary confessions are unacceptable. Such confessions "carry the unacceptable risk of unreliability" and increase the chances of injustice.[378]

Domestic and international critics have accused Japanese police and prosecutors of conducting "hostage trials" in which suspects are held in detention until they confess, regardless of whether they committed the crime.[379] Even the United Nations has criticized the Japanese criminal justice system, observing that Japan relies too heavily on confessions obtained during extended

376. *See supra* notes 67–97.

377. *See generally* Saul M. Kassin, *The Psychology of Confessions*, 4 ANN. REV. LAW & SOC. SCI. 193 (2008) (explaining the types and processes responsible for false confessions).

378. *See* Int'l Bar Ass'n, *supra* note 104, at 5–6.

379. *See* Stuart Biggs, *Japan's Bar Demands Taped Interrogations to Prevent Injustice*, BLOOMBERG, June 17, 2009, http://www.bloomberg.com/apps/news?pid=20601101&sid=ad0BE0gZ0bmM (quoting Makoto Miyazaki, President of the Japan Federation of Bar Associations).

interrogations and unjustifiably maintains a presumption of guilt against criminal suspects.[380] Unfortunately, Sugaya's case is only the most recent example involving a coerced confession, and it is expected that cases will continue to emerge unless corrective measures are taken.[381]

Although some observers have subjectively estimated that ten to fifty percent of confessions may be involuntary,[382] many observers of the Japanese criminal system will probably agree that most confessions are accurate. [383] Illegal or improper interrogation tactics are likely not the norm in Japan. Japanese police, prosecutors, and governmental officials seeking to preserve safety and punish genuine offenders deserve due respect. Nevertheless, there is genuine concern that coerced confessions like those solicited from Sugaya may be more than isolated events based on recent events in Japan.[384] In any event, convictions of the innocent based on involuntary confessions cannot be tolerated.

a. Inappropriate Interrogation Techniques Must Be Deterred

To avoid weakening the judicial system's credibility or convicting the innocent, inappropriate tactics must be avoided when questioning or interrogating suspects and defendants.

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380. *See* Comm. Against Torture, *Summary Record of the 767th* Meeting, ¶ 18, U.N. Doc CAT/C/SR/767 (May 9, 2007).

381. Due to the high number of actual or suspected coerced confessions in Japan, a quarterly magazine called the *Enzai File* (the Falsely Accused File) started publications on February 1, 2008. *See* Masami Ito, *New Magazine Takes Aim at Wrongful Convictions*, JAPAN TIMES, Feb. 1, 2008, http://search.japantimes.co.jp/cgi-bin/nn20080201f2.html. The founder of this new magazine maintains that recent coerced confessions that have surfaced are only the tip of the iceberg. *Id.*; *see also* Keiji Hirano, *Sayama Case Taken to UN Panel*, JAPAN TIMES, Oct. 31, 2008, http://search.japantimes.co.jp/cgi-bin/nn20081031f1.html.

382. *See* Ramlogan, *supra* note 131, at 200; Interview by Matthew Wilson with several experienced criminal defense lawyers, in Japan (June 2009) (the names of attorneys are kept anonymous in order to prevent any impact on their professional dealings).

383. *See* THOMAS P. SULLIVAN, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS 2 (2004). *See generally* FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 412 (4th ed., Jones & Bartlett Pub. 2004) (2001) (observing that most criminal confessions outside of Japan tend to be accurate as well.)

384. *See* Ramlogan, *supra* note 131, at 200–201.

Japan's Constitution sets out the basic limits that govern interrogations.[385]

In strictly interpreting article 38, Japanese investigators must adapt their questioning techniques and present evidence that corroborates all confessions. [386] In reality, interrogation techniques have been questionable and the Japanese courts have often required little corroborative evidence.[387] Observers note that Japanese courts often presume guilt, until the accused can prove his or her innocence.[388] By loosely applying article 38 and discounting the "proof beyond a reasonable doubt" standard, the risk of injustice and wrongful convictions increases considerably. This is one of the primary reasons why Sugaya and other recent wrongful conviction cases have again called the judicial decisions and interrogatory tactics of Japanese investigators into question.

b. The Quasi-Jury Tribunal Requires More Access to Interrogations

In various quarters, genuine hope exists that the new lay judge system will cultivate greater transparency. By increasing access to the governmental interrogation of suspects and defendants, Japan can achieve greater transparency while simultaneously ensuring the conviction of guilty criminals and reducing the chance of extreme injustice for the innocently accused.

Lay judge involvement in seeking the truth about charges of contested interrogations and involuntary confessions will both enable increased scrutiny and provide a new perspective. One may question whether the new lay judge system would have made any difference in the Sugaya case. Looking two decades into the distant past, the answer is speculative at best. However, citizen judges would most certainly provide varying viewpoints and a fresh perspective. They would also be less likely to presume guilt, and more likely to have closely scrutinized his allegations of a

385. *See supra* notes 108–10 (highlighting fundamental bounds within which confessions must take place).

386. Ramlogan, *supra* note 131, at 200; Soldwedel, *supra* note 19, at 1434.

387. *See* Onishi, *supra* note 87.

388. *See supra* notes 146–47.

coerced confession. Professor Satoru Shinomiya[389] postulates that the verdict may have differed because citizen judges would have actually listened to Sugaya's involuntary confession and spoliation of evidence claims.[390] The recent words of former Judge Norimichi Kumamoto confirm the same. Kumamoto notes that the media and social pressures have unduly influenced judges in the past, and that the Japanese believe that the prosecutor's office and government would never do anything intentionally wrong.[391] As such, the courts give minimal credence to a defendant's claims about a coerced confession.

Additionally, empirical research over the past several decades about the psychology of police interrogation and likelihood of false confessions has revealed a better understanding of the causes and consequences of involuntary confessions.[392] For any fact-finder, it may be difficult to comprehend the reason for an innocent person to confess to a crime. Within the context of the new lay judge system, this may be particularly difficult for an inexperienced citizen judge. An innocent person in detention may rationalize that a false admission is the quickest, or only, way out of a difficult situation. Such rationalization may occur due to a combination of overzealous interrogation techniques, lengthy questioning sessions, police deception, threats, or manipulative promises.

With an eye towards justice and due process rights, every nation should ideally scrutinize and revise its criminal justice

389. Satoru Shinomiya is a renowned attorney and law professor in Japan. He is currently a law professor at Kokugakuin University Law School, and served as a member of the Judicial Reform Council responsible for recommending the revolutionary change. Kokugakuin University, *Kyouin Shousai, Shinomiya Satoru [Faculty Biography: Satoru Shinomiya]*, http://www.kokugakuin.ac.jp/lawschool/houka02_00097.html. Professor Shinomiya has played an integral role in preparations for Lay judge System in Japan, including serving on various JFBA committees such as the Trial Advocacy Project Team designed to train Japanese defense attorneys in the art and skill of trial advocacy.

390. *See* Kunio Hamada, Makoto Miyazaki & Satoru Shinomiya, Speech at The Foreign Correspondents Club: The New Jury System, in Tokyo, Japan (June 16, 2009); *see also* Kamiya, *supra* note 358.

391. *See* Wallace, *supra* note 354 (Judge Kumamoto questioning prosecutor tactics in Hakamada murder case).

392. *See* Richard A. Leo & Kimberly D. Richman, *Mandate the Electronic Recording of Police Interrogations*, 6 CRIME & POL'Y 791 (2007); *see also* Walter F. Bugden, Jr. & Tara L. Isaacon, *Crimes, Truth and Videotape: Mandatory Recording of Interrogations at the Police Station*, UTAH BAR J., Sept.–Oct. 2006, at 28; Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998).

system where necessary. Japan is no exception, particularly where innocent citizens are being sent to prison. In issuing its recommendations, the JSRC advocated consideration of reforms to the custodial and questioning process of suspects and defendants.[393] Due to confirmed and alleged problems associated with past and present interrogation procedures and involuntary confessions, Japan needs to revisit its interrogation process.

2. Necessary Changes to the Lay Judge System: Electronic Recording of Interrogations and Presence of Defense Counsel

Prior to the judical reforms in Japan, handwritten interrogation records by investigators were commonplace.[394] One-sided written records constitute inadequate recordkeeping, and therefore can give rise to unreliable fact finding.[395] Also, such records weaken the concept of transparency and magnify the possibility of abuse. Given the growing number of confirmed wrongful convictions, Japan should employ reform measures without delay. By opening the doors on the interrogation process to public scrutiny, most wrongful convictions derived from involuntary confessions could be prevented.[396]

In assessing the validity of a contested confession, inexperienced lay judges and the criminal tribunal as a whole would further benefit from the adoption of two additional tools. First, the comprehensive electronic recording of the entire interrogation process would significantly aid a tribunal's inquiry about improper interrogation tactics. If officials had supplied electronic recordings of Sugaya's interrogation to the tribunal, the fact finder would have had an uninhibited view of the circumstances, thereby reducing the likelihood of a wrongful conviction.[397] Citizen access to electronic recordings of the entire questioning process would decrease the possibility of involuntary confessions. Instead of facing conflicting stories about unseen

393. *See* JUSTICE SYSTEM REFORM COUNCIL, *supra* note 2527, ch. II, pts. 2, 4(2).

394. *See supra* note 122.

395. *See* Leo & Richman, *supra* note 392, at 792.

396. *See id.*

397. *See* Nakamura et al., *supra* note 82 (quoting Tatsuya Kawasaki, Vice-President of the Japan Federation of Bar Associations, who stated "if sound and video recording of the whole investigation process had been introduced at that time, the false charges could have been avoided"); *see also* Kamiya, *supra* note 358 (quoting Makoto Miyazaki, President of the Japan Federation of Bar Associations).

conduct in the interrogation room, electronic recording provides an unrestricted view of interrogative techniques and the defendant's answers. Electronic recording open to scrutiny also serves as a check on improper questioning techniques. Second, another possible tool to aid lay judges and criminal tribunals in their assessment of claims of involuntary confessions is the presence of counsel during interrogations. The presence of counsel would provide the tribunal with another resource. It would also constitute an important check on questioning practices and techniques. By making these additional tools available, all participants in the lay judge system stand to benefit.

In principle, Japan needs to implement specific legislation that (1) requires electronic recording of criminal interrogations in their entirety, and (2) allows defense counsel to attend the interrogations. These reforms are consistent with the mission of the Japanese criminal justice system, which strives to obtain the "truth of the cases under the guarantee of due process of law."[398] These reforms are simple, inexpensive, and benefit all parties involved in the criminal justice system. They also promote accurate fact finding by the mixed quasi-jury tribunal and facilitate the conviction of guilty defendants.[399]

a. Electronic Recording of Criminal Interrogations

Requiring the comprehensive electronic recording of all interrogations will aid the lay judge system and facilitate justice. At present, Japanese law does not mandate the recording of interrogations, and investigators do not electronically record interrogations in full.[400] In assessing the criminal justice system, the JSRC submitted that "a system should be introduced that imposes the duty of making a written record for every occasion of questioning."[401] Although the JSRC acknowledged arguments in favor of electronic recording as well as the attendance of defense counsel during the interrogation process, they reserved making any recommendation and encouraged future consideration of these matters.[402]

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398. *See* JUSTICE SYSTEM REFORM COUNCIL, *supra* note 25, ch. II, pts. 2, 4(2).
399. *See id.*
400. *See* Biggs, *supra* note 379.
401. *See* JUSTICE SYSTEM REFORM COUNCIL, *supra* note 25, ch. II, pts. 2, 4(2)b.
402. *Id.*

Since the JSRC recommendations were issued in 2001, there have been increasing calls for more access to the interrogation room.[403] The JFBA, interest groups, political parties, and even the United Nations have exerted pressure on the Japanese government to electronically record interrogations in full.[404] Notwithstanding, the Japanese government has opposed this idea. The National Police Agency, Japanese prosecutors, the Ministry of Justice, the Supreme Court of Japan, and Cabinet ministers have objected to the full and comprehensive recording of the interrogation of suspects.[405] The Diet has refused to mandate full electronic recording as well.[406] The government's willingness to record has been limited to the confession portion of the interrogation.[407] Limited electronic recording does not capture the entire interrogative process, and has been primarily intended to serve the prosecutors' own purposes.[408]

In light of the inclusion of citizen judges into the deliberative process, Japan should require the submission of unedited and complete electronic recordings of interrogations as a precondition of introducing confession evidence at trial. Now that the lay judge system is operative, the mixed-tribunal needs to

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403. *See, e.g.*, Biggs, *supra* note 379; Press Release, Japan Fed'n of Bar Ass'ns, UN Torture Committee: Japan's Substitute Prison System Must be Reconsidered Immediately Following the Committee's Recommendations, Says Japan Federation of Bar Associations (May 22, 2007), *available at* http://www.nichibenren.or.jp/en/activities/meetings/070530.html; *see also* Keiji Hirano, *Full Recording of Interrogations is Key to Fairness*, KYODO NEWS (Japan), May 27, 2009, http://home.kyodo.co.jp/modules/fstStory/index.php?storyid=441176.

404. *See, e.g.*, Comm. Against Torture, *supra* note 105; Press Release, Japan Fed'n of Bar Ass'ns, *supra* note 403; Kamiya, *supra* note 88; *Mori Cool to Taped Grillings*, JAPAN TIMES, June 6, 2009, http://search.japantimes.co.jp/cgi-bin/nn20090606a2.html.

405. *See, e.g.*, *Mori Cool to Taped Grillings*, *supra* note 404 (State Minister and chairman of the National Public Safety Commission); *see also* Kamiya, *supra* note 88 (Prosecutor's Office and National Police Agency); *Upper House Passes Bill to Fully Record, Film Interrogations*, KYODO NEWS (Japan), Apr. 24, 2009, *available at* 4/24/09 JWIRE 02:35:08 (Westlaw) (Minister of Justice, Eisuke Mori); Bruce Wallace, *Court Case May Shine Light on Japan's Interrogations*, L.A. TIMES, May 26, 2007, at A10 (prosecutors and police, generally).

406. *See* Kamiya, *supra* note 88; Editorial, *Reform for the Citizens*, ASAHI SHIMBUN (Japan), Jan. 30, 2004, *available at* 2004 WLNR 21854909.

407. *See* Biggs, *supra* note 379; *see also Killer's Video Confession Rejected as Not Credible*, JAPAN TIMES, July 9, 2008, http://search.japantimes.co.jp/cgi-bin/nn20080709b7.html (rejecting limited twenty-five minute video recording of the defendant's confession. The presiding judge stated that the limited footage does not support the credibility of the remarks).

408. *See* Biggs, *supra* note 379.

have a transparent view and clear understanding of how each confession was obtained. Electronic recording will enable a more accurate and exact determination of whether a confession was coerced. Recording technology will help facilitate discovery of the truth, and enable the government to obtain the strongest evidence possible to assist in convicting the guilty.[409]

The Japanese criminal justice system will realize significant benefits if Japan adopts legislation mandating the electronic recording of all questioning of any suspect, detainee, or defendant allegedly involved in a crime. There are many benefits to utilizing recording technology on either an overt or covert basis. Technology is not an impediment to these benefits. As a world leader, Japan has the technological means and ability to electronically record all interrogations. Technology costs are minimal,[410] particularly in comparison to the expense associated with adjudicating extended disputes as well as the unquantifiable costs associated with involuntary confessions. Additionally, the concerns cited by opponents and the Japanese government are largely unfounded or capable of resolution.

i. Recording Reduces Conflict and Saves Judicial Resources

Mandatory recording of interrogations will reduce potential conflict between the government and defense, thereby saving precious time and judicial resources for the mixed judge tribunal. In Japanese criminal trials, the defense commonly argues that investigators coerced the defendant's confession through leading questions, forceful interrogations, and illicit tactics.[411] Claims of involuntary confession provoke contentious debate between the prosecution and defense. A defendant may attack a prior confession by demonstrating that interrogations used inappropriate tactics, a crime never occurred, the confessor could not have committed the crime, or the confessor did not commit the crime.[412]

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409 . *See* THE JUSTICE PROJECT, ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS: A POLICY REVIEW 2 (2007), *available at* http://www.thejusticeproject.org/wp-content/uploads/polpack_recording-fin2.pdf.

410. *See* Leo & Richman, *supra* note 392.

411. *See* Kamiya, *supra* note 88; *Reform for the Citizens*, *supra* note 406.

412. *See, e.g.*, Taisuke Kanayama, *Transparency of Criminal Investigations in the United States and Japan* 6–7 (USJP Occasional Paper 06-06, 2006), *available at* http://www.wcfia.harvard.edu/us-japan/research/pdf/06-06.kanayama.pdf. For

Access to unadulterated footage of questioning will eliminate the need to rely on one-sided written records designed to detail the results of specific interrogations, and should also reduce the number of disputes about alleged prosecutorial misconduct in general.[413] The camera will capture a suspect's words, actions, and attitudes. As such, the record will speak for itself so nothing will be left to the imagination. This will make it much easier for citizen judges, district court judges, and even appellate court judges to assess the interrogation and confession process.[414] Also, to the extent that recording reduces the number of disputes over confessions, the time necessary for citizen service can be minimized.

Debate about inappropriate interrogations can significantly prolong a trial as the fact-finder must explore the veracity of the defendant's assertions and credibility of the investigators' responses.[415] The debate not only affects the trial in the first instance, but it can also extend to subsequent appellate review.[416] By granting unabated access to the interrogation room through electronic recording, the debate between the parties can be streamlined.[417] The frequency of related appeals should be less likely as well. This streamlining measure is consistent with the overall goal of mitigating the burdens placed on citizen judges,[418] and should be adopted to help prevent trials from being unnecessarily prolonged due to disputes over the credibility of confessions.

At present, Japan's interrogation rooms are particularly secretive and closed.[419] This exacerbates any dispute about a confession's validity. By opening interrogations to scrutiny and

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example, in Mr. Sugaya's case, scientific evidence affirmatively established his innocence. Of note, ongoing research in the United States shows that fifteen to twenty percent of DNA exoneration cases involved false confessions. Kassin, *supra* note 150.

413. *See* SULLIVAN, *supra* note 383, at 24.

414. *See id.* at 13–14.

415. *See Reform for the Citizens*, *supra* note 406.

416. *See* Leo & Richman, *supra* note 392, at 793–94; *see also* Yasuda, *supra* note 116 (noting that it is very time-consuming to determine whether the confession was honest or coerced, when the defendant challenges the credibility of his own confession).

417. See *Reform for the Citizens*, *supra* note 407.

418. *See* JUSTICE SYSTEM REFORM COUNCIL, *supra* note 25, ch. IV, pt. 1(1) (advocating that the government should give due consideration to mitigating the burdens of the system on the public).

419. *See* Press Release, Japan Fed'n of Bar Ass'ns, *supra* note 403; Biggs, *supra* note 379; Hirano, *supra* note 403.

making the process more transparent, the risk of controversy and time necessary to resolve disputes related to confessions should be diminished considerably. Although a suspect's dishonesty might explain contradictory accounts of a retracted confession, handwritten reports of interrogations can be attacked on the grounds of faulty recording, equivocal interpretations, disparate perceptions, preconceived notions, misunderstandings, and imprecision.[420] Without full electronic recordings, the waters are unnecessarily muddied and the fact-finder's ability to clear up the vagaries associated a particular interrogation is hindered.

To date, Japanese judges have been forced to imagine investigations behind closed doors to determine which side has the most credibility.[421] Going forward, inexperienced citizen judges will face claims of involuntary confessions. By adopting mandatory and complete electronic recording of all interrogations, the process will become more transparent. Not only will all members of the tribunal be able to observe first-hand the important interplay that occurs between the investigators and suspects during the interrogation process, but they also will be able to make thorough and more accurate determinations related to the confessions. Again, this should reduce the judicial time and effort necessary to resolve controversies related to confessions. It should further ensure the rights of the accused, and facilitate the conviction of actual perpetrators. As such, Japan should quickly implement legislation making the electronic recording of the interrogation process mandatory.

ii. Opening the Doors to the Interrogation Room Has Public Support

The Japanese public supports electronic recording of the entire interrogation process. Over the past several years, public calls for Japan to open the doors and make the interrogation process transparent have increased. With the recent implementation of the lay judge system, these calls have intensified even more. In May 2009, the Japan Federation of Bar

420. *See* Brian Parsi Boetig et. al, *Revealing Incommunicado: Electronic Recording of Police Interrogations*, FBI L. ENFORCEMENT BULL., Dec. 2006, at 1.

421. In light of the abnormally high conviction rate, it is evident that professional judges are very likely to side with their prosecutor colleagues when doubt arises concerning what transpires behind closed doors.

Associations presented twenty-nine cardboard boxes filled with petitions signed by over 1.1 million Japanese citizens to the Japanese Diet.[422] These petitions called for legislation requiring investigative authorities to fully videotape criminal suspect questioning, as opposed to simply recording the confession itself.[423]

There have also been multiple, albeit unsuccessful, attempts in the Diet recently to pass legislation to this effect. In December 2007, the Democratic Party of Japan ("DPJ") submitted a bill that would have required investigative authorities to fully record and film interrogations of criminal suspects.[424] Majority opposition in the more powerful House of Representatives killed the bill.[425] The DPJ did not give up, though. Again, in April 2009, the DPJ attempted to enact similar legislation in advance of the lay judge system's implementation. Although the DPJ-controlled House of Councillors passed the measure,[426] it was unable to muster sufficient support in the House of Representatives for passage. With the parliamentary elections on August 30, 2009, resulting in an outright majority for the DPJ in both houses of the Diet,[427] the DPJ now has the ability to pass legislation mandating electronic recording. Going forward, it is expected that the DPJ will pass legislation requiring the recording of interrogation sessions.[428] Japan would benefit most from legislation that mandates comprehensive recording of the interrogations of all criminal suspects and defendants.

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422. *See Citizen Judge System*, *supra* note 205. Japan's population is estimated at about 127 million people. *Id.*

423. *See 1 Million Signatures Seek Mandatory Videotaping of Police Questioning*, KYODO NEWS (Japan), May 14, 2009, *available at* 5/14/09 JWIRE 07:57:08 (Westlaw).

424. *See Upper House Passes Bill to Fully Record, Film Interrogations*, *supra* note 405.

425. *See id.* (noting that the House of Representatives was controlled by the majority coalition of the Liberal Democratic Party ("LDP") and the New Komeito Party at the time, both of which oppose opening the doors to the interrogation room)

426. *See id.*

427. *See DPJ Prepares for Government; Top Brass Discusses Cabinet Makeup; Hatoyama Woos SDP, PNP*, DAILY YOMIURI (Japan), Sept. 1, 2009, *available at* 2009 WLNR 16994513.

428. *See* DEMOCRATIC PARTY OF JAPAN, THE DEMOCRATIC PARTY OF JAPAN'S PLATFORM FOR GOVERNMENT 27 (2009), *available at* http://www.dpj.or.jp/english/manifesto/manifesto2009.pdf.

iii. Electronic Recording Removes the Presumption of Guilt

Electronic recording will equip mixed tribunals with the tools necessary to seriously scrutinize any confession in doubt. In Japan, professional judges have been in the "habit of handing down guilty verdicts," and media reports painting the accused as guilty even before the commencement of trial have "pressured judges to find [defendants] guilty."[429] In essence, criminal proceedings have merely become a formality.[430] With access to an unabridged and complete electronic recording, both professional and citizen judges will not only be able to determine whether a confession is voluntary, but can also obtain other useful information relevant to the trial. When a fact-finder can access unadulterated electronic recordings, the likelihood of correct and just verdicts can only increase.

iv. Electronic Recording Enhances Professionalism

Electronic recording will renew focus on professional responsibility in the interrogation process, and reduce the risk that the tribunal will ratify false confessions. If governmental officials record interrogations in their entirety, interrogators will interview suspects in a professional manner. Interrogators are less likely to use questionable techniques, including psychologically coercive tactics, if they know that there will be a record of their interrogation reviewable by professional and citizen judges at trial.[431] The quality of the interrogations will increase, and investigative work in Japan may regain its credibility.[432] Moreover, the increased visibility in the interrogation room will reduce the likelihood of involuntary confessions, safeguard the rights of suspects and defendants, as well as enhance public confidence in law enforcement and the justice system as a whole.

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429. *See* Kenji Hirano, *Ex-Judge Now Doubts Convictions' Credibility*, JAPAN TIMES, Mar. 12, 2004, http://search.japantimes.co.jp/cgi-bin/nn20040312b6.html; *see also* Wallace, *supra* note 405.

430. *See* Landsman & Zhang, *supra* note 19, at 185–86.

431. *See* SULLIVAN, *supra* note 383, at 16.

432. *See* Leo & Richman, *supra* note 392, at 795.

v. All Parties Will Benefit from a Complete and Accurate Record

All stakeholders in the criminal justice process can benefit from mandatory recording. First, the government will realize benefits from the unedited electronic recording of suspect interviews.[433] With a permanent and complete record of the interrogations, prosecutors can put forward the most accurate case possible. [434] Electronic recording will help Japanese prosecutors "secure convictions of those who are actually guilty, avoiding additional victimization and threats to public safety."[435] Actual perpetrators clogging up the courts with unfounded claims of coercion will be discouraged from pursuing such claims. In addition, prosecutors can use the permanent questioning record to prepare for trial. Because prosecutors can go back and review the electronic recording, they can focus on responses rendered during questioning, as opposed to concentrating on note taking during the interrogations. [436] Prosecutors can also more accurately refresh their recollection of the questions asked and answers rendered well after the conclusion of interrogations.

With the introduction of electronic recording, governmental officials will gain a valuable tool for investigating and studying the causes of involuntary confessions,[437] and can use the recordings for training purposes and for the development and institution of further safeguards against questionable interrogation techniques.[438]

Defense counsel will benefit as well. They can use the electronic recordings to assess the case and prepare for trial. With access to the interrogation room, defense counsel would have access to information unlike ever before. This would help streamline the proceedings as defense counsel could obtain valuable information to better prepare for trial, narrow down the issues in dispute, and make an accurate assessment of whether to challenge an allegedly coerced confession. Because defense

433. *See* SULLIVAN, *supra* note 383, at 6; Leo & Richman, *supra* note 392, at 793–95.
434. *See* SULLIVAN, *supra* note 383, at 6.
435. Leo & Richman, *supra* note 392, at 796.
436. SULLIVAN, *supra* note 383, at 10; Leo & Richman, *supra* note 392, at 795.
437. *See* Leo & Richman, *supra* note 392 at 796.
438. *See* SULLIVAN, *supra* note 383, at 18; Leo & Richman, *supra* note 392, at 795.

attorneys have been kept out of the interrogation room to date, they have been left only to speculate as to the accuracy of renditions about what transpired behind closed doors. This has hindered preparations and assessments.[439] With the introduction of the lay judge system and trial hearings held on consecutive days, it is even more important that defense counsel be afforded the tools and information necessary to prepare for trial.

Most importantly, electronic recording will help ensure that interrogators do not mistreat suspects or defendants and that they do not use tactics likely to elicit involuntary confessions. Absent the use of audio or video recording, the danger of involuntary confessions looms large.[440] Appropriate questioning techniques should be used with all suspects. Also, particular care should be given to the questioning of mentally challenged or intellectually deficient suspects. Electronic recording would provide an additional level of protection against manipulation and coercion for challenged suspects and others.

vi. Partial Recording Is Inadequate and Potentially Misleading

Partial recording of the interrogation process is inadequate for purposes of the quasi-jury tribunal and the accused. Recording a suspect's final confession, but not the preceding interrogation, is far inferior to acquiring a complete record of the questioning.[441] To eliminate the uncertainties related to confessions, professional and citizen judges should have the ability to consider: (1) the conditions under which a suspect confessed; (2) the degree to which interrogators used pressuring techniques; and (3) whether the confession contains details that have been independently verified in relation to the crime at issue.[442] A confession can only prove guilt beyond a reasonable

439. *See* Hirano, *supra* note 403.

440. *See id.* Hiroshi Yanagihara was detained in 2002 in connection with several rape cases. *Id.* Intimidated by prosecutors and their refusal to allow him to say no or not true, Yanagihara involuntarily confessed to something that he neither did nor even knew anything about. *Id.* He was convicted and his attorney discouraged him from appealing. *Id.* Yanagihara was detained for 1005 days before he was released. *Id.* In 2007, the police caught the real culprit. *Id.* Yanagihara firmly believes that he would not have been convicted or coerced to confess if video or audio recordings were used during the interrogation process. *Id.*

441. *See* SULLIVAN, *supra* note 383, at 17.

442. *See* Kassin, *supra* note 150.

doubt if it consists of information known only to the suspect.[443] It cannot consist of information solely derivable from the media, photographs, leading questions, or other secondary sources that are hidden from the view of the fact-finder.[444]

To identify a false confession, a fact-finder naturally tends to look at the confession in isolation. However, for both legal and psychological reasons, a fact-finder must not separate a confession from the interrogation used to garner it.[445] Electronic recording of all aspects of the interrogation process provide a fact-finder with access to both the confession and interrogation, enabling an evaluation of the entire process. Interrogation tactics, allegedly used to coerce confessions, warrant scrutiny. The practice of lying to suspects and presenting false evidence during interrogation increases the risk that an innocent person, particularly someone vulnerable to manipulation, will confess to acts they did not commit.[446] These practices can cause suspects to internalize blame for acts committed by others.[447] Accordingly, the tribunal should have the opportunity to observe these tactics with a realization that deception increases the possibility of false confessions.

If the Japanese government continues to rely on selective taping, the problems associated with involuntary confessions and claims thereof will persist. These problems include lingering charges of improper prosecutorial conduct, negative inferences drawn against the government based on its refusal to acquiesce to comprehensive taping, and forfeited educational opportunities for all courtroom actors. In addition, the absence of electronic recording may result in the misstatement or omission of important evidence.[448] Accordingly, the tribunal needs to have access to unadulterated footage of interrogations to the extent that a confession is going to be introduced at trial.

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443. *See supra* note 110.
444. *See* Kassin, *supra* note 150.
445. *See* INBAU ET AL., *supra* note 383, at 412.
446. *See* Kassin, *supra* note 150.
447. *See id.*
448. *See* SULLIVAN, *supra* note 383 at 17–18.

vii. Opposition by Current Governmental Officials Is Unfounded or Concerns Can Be Resolved

Mandatory electronic recording of the entire interrogation process is intended to facilitate the accurate collection and preservation of confession evidence in the most unbiased and efficient manner possible.[449] Unless there is something to hide, investigators and prosecutors have no credible basis to withhold the substance of interrogations as recordings stand to benefit investigators and prosecutors. Even so, Japanese police, prosecutors, and the government still do not support the concept of recording the entire interrogation process. The recent emergence of involuntary confession cases has not changed the standard policy or practice.

The government argues that comprehensive recording will diminish the willingness of suspects to cooperate with investigators, and that suspects will not respond to questioning if investigators record their statements.[450] Eisuke Mori, former Minister of Justice, explains that the full recording of questioning and interrogation of suspects "would make questioning harder."[451] According to governmental officials, interrogators need to develop a relationship of trust to elicit confessions, and recording will make it difficult, if not impossible, to develop such a relationship.[452] Because recording will impede the ability to acquire the truth and reduce the chance of suspect cooperation, the government contends that comprehensive recording would be detrimental.[453]

The Japanese government is not totally opposed to all electronic recording of interrogations, however. In anticipation of lay judge involvement in the criminal justice process, the government decided that recording the confession portion of the interrogation process would give credibility to the interrogation process.[454] Accordingly, prosecutors started to partially record interrogations in July 2006, and police started recording in

449. *See* Boetig et al., *supra* note 420.
450. *See* Nakamura et al., *supra* note 82.
451. *Upper House Passes Bill to Fully Record, Film Interrogations*, *supra* note 405.
452. *See* Yasuda, *supra* note 116.
453. *See* Nakamura et al., *supra* note 82.
454. *See Upper House Passes Bill to Fully Record, Film Interrogations*, *supra* note 405.

September 2008 on an "experimental" basis.[455] In conjunction with the lay judge system, governmental officials are creating DVD recordings of suspect interrogations.[456] To demonstrate that a confession was voluntary, the DVD recordings show suspects checking the content of their written confessions, signing the confessions, and explaining the background underlying their confessions.[457] This practice recognizes the reality that citizen judges will demand stricter and more accurate proofs with respect to the credibility of interrogation records and confessions.[458]

Contrary to the concerns voiced by the government, past experience outside of Japan indicates that electronic recording does not cause suspects to shy away from talking or openly responding to questions.[459] Research demonstrates that even when suspects are cognizant of overt recording, they generally shift their attention to the questioning and provide complete responses.[460] It also shows that electronic recording allows prosecutors to obtain favorable information and useful materials during the taped interrogations.[461]

To the extent that overt recording might hinder the questioning of a particular suspect, then Japan has the ability to employ other tools to assist the tribunal. For instance, the presence of defense counsel in the interrogation room would provide a useful check on interrogation techniques. Covert recording of interrogations could also alleviate any chilling effect on the suspect. In a worst case scenario, if the cooperation of a suspect is impossible, then the interrogator might stop the recording and proceed to take handwritten notes in the traditional sense.[462] In such cases, however, Japan would need to establish a standard whereby prosecutors are required to prove

455. *See* Katakawa, *supra* note 319.

456. *See id.*

457. *See id.*

458. *See Upper House Passes Bill to Fully Record, Film Interrogations*, *supra* note 405.

459. *See* Leo & Richman, *supra* note 392, at 792–93 (citing various studies that specifically refute the unsupported assertion that recording inhibits questions and incriminating statements); *see also* SULLIVAN, *supra* note 383, at 19–22.

460. *See* SULLIVAN, *supra* note 383, at 20.

461. *See* Leo & Richman, *supra* note 392, at 793.

462. *See id.*

that recording was not feasible under the circumstances.[463] These tools would avert systemic abuses and help preserve justice.

Finally, as prosecutors continue to express concerns about the availability of interrogative techniques, Japan might consider reforms that provide prosecutors with the authority to plea-bargain, offer testimonial immunity, or conduct undercover stings. If Japanese prosecutors generally limit their prosecution to suspects or defendants who confess, it follows that prosecutors are setting guilty perpetrators free. This demonstrates a systemic flaw that policymakers might address by increasing the tools available to prosecutors, while simultaneously mandating the electronic recording of interrogations. Such reforms would empower prosecutors to spend more time focusing on corporate crime, crimes of corruption, and organized crime.[464]

By opposing growing demands to electronically record the entire interrogation process, the government's motives are questionable. The police and prosecutors may not want to allow the judges, the media, or the general public to see how unprofessional or inappropriate their typical interrogation tactics can be. Alternatively, if a tribunal does not have access to the "real data" or the words and actions actually leading up to a confession, the government can control the spin and cloud the tribunal's ability to determine whether errors have been made.[465] In either case, greater transparency will remove doubts about the government's intentions and actions.

viii. Other Countries Have Seen Success with Full Electronic Recording

Many countries record the interrogation process using audio, video, or other digital technology with much success. The list of countries includes, among others, Australia, France, Germany, Italy, South Korea, Taiwan, the United Kingdom, and the United States.[466] In contrast, Japan stands alone in its

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463. *See id.* at 794.

464. *See* FOOTE, *supra* note 149, at 349 (discussing the current system's struggles with adequately controlling these areas).

465. *See* Dennis Wagner, *FBI's Policy Drawing Fire; Interrogations Not Taped,* ARIZ. REPUBLIC (Phoenix), Dec. 6, 2005, at 1A.

466. *See* David T. Johnson, *You Don't Need a Weather Man to Know Which Way the Wind Blows: Lessons from the United States and South Korea for Recording Interrogations in Japan,* 24 RITSUMEIKAN L. REV. 141, 142 (2008).

resistance to engage in complete, unedited electronic recording.[467]

In these countries, electronic recording has proven to be an effective tool in documenting crime scenes, traffic stops, accidents, and conducting undercover surveillance and other monitoring operations.[468] Electronic recording also has been effective in the investigative process. In fact, a survey of over 450 law enforcement agencies in the United States demonstrated that the electronic recording of custodial interviews of felony suspects has been "uniformly positive."[469]

Many U.S. jurisdictions permit covert recording, thereby alleviating any concerns about recorded questioning.[470] Even when overt recording has been conducted, however, the reaction has been positive.[471] Research has shown no conclusive evidence that a suspect's reluctance to cooperate and confess increases when authorities conduct overt recording.[472] Consequently, electronic recording continues to gain popularity in the United States with both the prosecution and defense.[473] At present, Illinois, Maine, Minnesota, New Mexico, Washington, and the District of Columbia, have adopted statutes that require electronic recording of entire interrogations in at least some, if not all, types of criminal cases.[474] Also, the supreme courts of Alaska, Massachusetts, Minnesota, New Hampshire, and New Jersey have ordered police to record suspect interrogations in certain circumstances.[475]

Other U.S. states and localities also voluntarily engage in the electronic recording of interrogations, and general support for electronic recording exists in other sectors as well. For example, in 2004, the American Bar Association adopted a resolution

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467. *Id.*

468. Boetig et al., *supra* note 420.

469. *See* THE JUSTICE PROJECT, *supra* note 409; SULLIVAN, *supra* note 383, at 1–28 (asserting that the Sullivan study is not an exhaustive study of all U.S. prosecutors and police departments, and that there are many more governmental arms that engage in recording either on a mandatory or voluntary basis).

470. *See* Boetig et al., *supra* note 420.

471. *See id.*

472. *See id.*

473. *See* Johnson, *supra* note 466, at 144.

474. *See* Leo & Richman, *supra* note 392, at 792; *see also* Johnson, *supra* note 466, at 144; Wagner, *supra* note 465.

475. *See* Wagner, *supra* note 465.

urging law enforcement organizations to implement electronic recording of interrogations.[476] U.S. calls for increased recording have been targeted at: (1) reducing the possibility of false confessions and abusive police interrogation practices; (2) making it easier for fact-finders to determine the voluntariness and trustworthiness of confession evidence; and (3) strengthening the relationship between police and community.[477] Over the past several decades, the number of law enforcement agencies utilizing electronic recording of the interrogation process has increased significantly.[478] This trend is expected to continue as calls for mandatory, verbatim recording continue.

b. Presence of Defense Counsel During Interrogations Merits Serious Consideration

To further reduce the likelihood of injustice, defense lawyers should have the ability to attend the interrogations as well. At present, Japanese police criminal investigation guidelines specify that "an attorney or a person deemed appropriate" may be present during suspect interrogations in certain cases.[479] In reality, however, suspects are not afforded the opportunity to have legal counsel present during interrogation.[480] To guard against questionable interrogation techniques and psychological pressures applied during pretrial detention, electronic recording of interrogations or the presence of defense counsel is essential. In addition, the adoption of these tools will aid the mixed tribunals in reaching the truth.

The Japanese government opposes access to the interrogation room on the grounds that the presence of defense counsel may inhibit the "essential functions of interrogations" in which investigators "build relations of trust with the suspect through directly facing, hearing, and persuading the suspect" and then "clarify the true facts of the case by obtaining

476. *See* AMERICAN BAR ASSOCIATION, POLICY AND PROCEDURES HANDBOOK 239 (2009).

477. *See* Johnson, *supra* note 466, at 143.

478. *See* Leo & Richman, *supra* note 392, at 792 (noting growing support, but also pointing out that many police departments in the U.S. continue to resist the idea of recoding interrogations in their entirety); *see also* Johnson, *supra* note 466, at 15.

479. *See* Hanzai Sōsa Kihan [Crime Investigation Regulations], art. 180(2) (2003); JAPAN FED'N OF BAR ASS'NS, *supra* note 87, at 10.

480. JAPAN FED'N OF BAR ASS'NS, *supra* note 87, at 10.

statements of truth from the suspects." [481] Further, the government is concerned that investigating officer may refrain from posing certain questions out of fear that investigation methods and information sources will be revealed to defense counsel, or that coordinating schedules with defense counsel will leave insufficient time for questioning suspects.[482]

The government's arguments are inadequate grounds for denial of the right to counsel during interrogations, however. Without legal representation, a suspect is left to withstand the intense powers of government in literal isolation while facing the prospective long-term loss of freedom, assets, or life. Fundamentally, a suspect to should be granted access to counsel at all times, unless such access is waived. Moreover, there is no credible reason to deny the presence of defense counsel. To the extent that investigators need to build a relationship of trust with a suspect, they can do so in the presence of defense counsel.

By opening the interrogation room doors to defense counsel, the likelihood of using questionable interrogation methods and interview techniques will decrease.[483] In turn, this will aid the mixed tribunal and citizen judges in making objective determinations related to confessions. Also, increased transparency will preserve the rights of the accused and conflicts involving confessions will decline. In a recent examination of the Japanese criminal justice system, the United Nations Committee Against Torture expressed deep concern about the lack of procedural guarantees available to detainees, including the absence of defense counsel during interrogations, and even recommended that suspects in Japan must be "guaranteed access to the presence of defense counsel during interrogation."[484] With the inception of the lay judge system, now is the perfect time for Japan to take the next step and provide suspects with unrestricted access to counsel.

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481. Comm. Against Torture, *supra* note 105, at 6.

482. *See id.*

483. *See* Soldwedel, *supra* note 19, at 1434–40.

484. Comm. Against Torture, *Conclusions and Recommendations of the Committee Against Torture: Japan*, ¶ 16, U.N. Doc. CAT/C/JPN/CO/1 (Aug. 3, 2007).

C. *More Time: The Need to Bifurcate Proceedings and Focus More on Objective Evidence and Less on Time*

In deference to the citizenry, Japan has attempted to design its new lay judge trial system in the least burdensome and time-consuming way possible. These recent innovations have achieved greater efficiency, however, only at the cost of the accused. As such, further tweaking is necessary to be compatible with the goals of judicial reform in Japan.

1. Bifurcate Trials Proceedings: Determine Guilt and Sentence Separately

In the new lay judge system, professional and citizen judges will collaborate to reach a verdict, and if necessary, concomitantly determine the sentence of a guilty defendant.[485] Within this quasi-jury system, the presumption of innocence and deliberation process may be negatively impacted by recent victim rights legislation unless the timing of victim participation during trial is altered. The ability of victims or their families to actively participate in the trial proceedings before the determination of guilt or innocence potentially conflicts with the concept of presumptive innocence and unfairly tips the scale of justice against the accused. By restructuring the flow of criminal trials through bifurcation, Japan can enable meaningful victim participation at trial, while also avoiding potential prejudice to the accused.

A crime victim should receive access to the courtroom and information regarding the resolution of the crime at issue, particularly within a transparent judicial system. Access is consistent with important victim's rights. Participation in the process may enable victims and their families to obtain closure, or obtain an in-court apology. In a Japanese cultural context, these elements have much significance. Prosecutors may benefit from a victim's in-court presence as well. Not only will the prosecutor's case appear real and sympathetic, but the victim can possibly clarify facts or shed light on testimony, written evidence, or other in-court statements.

At the same time, however, there are many dangers associated with allowing victims to actively participate in the trial

485. *See supra* notes 200–02.

proceedings before a verdict has been rendered, unless the victim offers testimony directly related to the facts of the case. With the inception of lay judge trials, it is necessary to further explore the effect that active victim participation has on lay judges, and also to establish proper controls that simultaneously permit victim participation while avoiding undue prejudice to the accused.

a. Preserving the Rights and Interests of the Accused and Crime Victim Through Bifurcation

In the current system, victims may share feelings, opinions, and other subjective thoughts during the one-phase trial proceedings with court permission.[486] Allowing active victim participation before the issuance of a verdict runs the risk of unjustly influencing the mixed tribunal and unfairly tipping the scales of justice against the accused. Such subjective contributions do not constitute objective evidence.[487] A tribunal cannot rest a conviction or sentence on "subjective whims or prejudices," rather it must determine matters on an "objective, rational basis."[488] The courtroom serves as a place to determine truth based on facts and objective evidence.[489] Victim participation as currently contemplated under the revised Code of Criminal Procedure[490] does not advance the presentation of objective evidence or impartial determination of facts. Rather, it unnecessarily opens the door to additional emotion and subjective opinions before the tribunal reaches a verdict.[491] The courts must exclude possible prejudices or preconceptions against the accused.

A neutral criminal justice system should not allow statements of opinion, excessive emotion, and subjective elements to

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486. *See supra* note 277 and accompanying text.

487. *See* KEISOHŌ [Code of Criminal Procedure], art. 292–2; Kawaide, *supra* note 269, at 4.

488. *See* DANDŌ, *supra* note 128, at 327–28.

489. *See* Masami Ito, *Victim Participation in Trials Risky, Experts Say*, JAPAN TIMES, Mar. 30, 2007, http://search.japantimes.co.jp/cgi-bin/nn20070330a3.html ("The court is [a place] to acknowledge facts based on appropriate evidence").

490. *See supra* notes 275–80.

491. *Cf.* Editorial, *supra* note 276 (noting that emotions should not rule in criminal trials); Ito, *supra* note 489 ("The criminal court should not be a place ruled by emotion.").

prejudice the defendant or even influence the determination of innocence or guilt. Moreover, even express instructions from the presiding judge to the lay judges not to consider such statements when reaching a verdict do not mitigate the potential dangers and possible prejudice.[492] Through the introduction of opinions, possible vengeful statements, or even emotional questioning from a victim into the preverdict phase of a trial, there is a real risk that inexperienced citizen judges will discount factual evidence and overlook the presumption of innocence against the accused. Based on subjective materials, citizen judges may over-emphasize emotion when attempting to reach a verdict in a way that professional judges are trained to disregard.

Further, questioning by victims as part of the guilt determination process does not facilitate the objective or rational determination of innocence or guilt. Conversely, it may have the opposite effect. Faced with the prospect of emotional or inflammatory questions in front of the tribunal, a defendant faces the prospect of extreme prejudice. Citizen judges unfamiliar with such intense emotional questioning may be unjustly swayed, and subsequently place less emphasis on objective evidence or facts.[493] In addition, even if the accused is innocent, he or she may be reluctant to frankly respond to questions out of respect to the victim or fear that a response may offend the victim. The tribunal may incorrectly perceive the reluctance to respond as a sign of guilt. Further, questions posed by the victim may contradict or even undermine the strategy or case theory advanced by the prosecutor. In any event, trained prosecutors can better handle questions aimed at the defendant. If the victim wishes to pose questions during the presentencing stage of a trial, such questions should be filtered through the prosecutors.

To guard against the subjective distortion caused by emotional statements and questioning, victims should not be

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492. *See* Philip Brasor, *New Law May Backfire on Victims*, JAPAN TIMES, Feb. 8, 2009, http://search.japantimes.co.jp/cgi-bin/fd20090208pb.html (noting those who oppose the current system believe victim participation "will prejudice judges and undermine the fundamental principal of a criminal trial, which is that the defendant is deemed innocent until proven guilty").

493. *See* Reynolds, *supra* note 1 (citing the fear of Professor Setsuo Miyazawa, a law professor at Aoyama Gakuin University, that victims and their families may hold too much emotional sway over the lay judges for the new system to be successful).

allowed to actively participate in a trial before guilt is established. The government must show that the accused is guilty beyond reasonable belief using relevant facts and objective evidence.[494] Naturally, active participation through direct factual testimony would be exempted from this rule. Unless a victim can offer objective and direct testimony as a witness regarding the alleged crime, a victim's subjective statements and opinions should be reserved for a separate time and place once the tribunal has concretely determined guilt. A verdict must be objectively reached first, before the subjective input from the crime victim becomes relevant. For this to be possible, Japan should seriously consider bifurcating its current one-phase trial process so that there are two separate and distinct stages: a verdict stage, in which the tribunal objectively determines guilt or innocence, and, if necessary, a sentencing stage. With bifurcated trials, the system can preserve objective proceedings and afford a presumption of innocence to the accused until guilt has been established beyond a reasonable doubt.[495]

Bifurcation need not harm victims' rights or interests in participating in the process. Victims can participate in the guilt phase by observing the proceedings and using the prosecutor as a proxy to pose questions to witnesses. Also, before the sentencing phase, prosecutors can make a concerted effort to constantly communicate with victims and incorporate their input into the trial proceedings. To promote victim satisfaction and impact, Japan might also consider other ways to assimilate victim feedback into the pretrial process, including soliciting feedback on the charges and recommended sentences. Moreover, victims can actively participate during the sentencing phase of trial in the form of questioning or subjective statements of opinion.

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494. *See* Landsman & Zhang, *supra* note 19, at 189.

495. Alternatively, to maximize the effectiveness of the new lay judge system and alleviate the chance of undue prejudice to the accused, Japan could scale back recent victims' right legislation. However, it is unnecessary to retreat to past times in which victims had fewer rights. Japan instituted its Crime Victim Act in recognition that victims deserve greater access to the courtroom, the judicial process requires more transparency, and victims should have the ability to play a greater role in the trial proceedings if they so desire. *See* UNHRC, *supra* note 123, ¶ 76–77. Before the Crime Victim Act, victims were infrequently advised about the trial or investigation process. *See* Kawaide, *supra* note 269, at 1. Some victims were not apprised about hearing schedules nor invited to hearings unless they were scheduled to testify. *See id.*

Victims should still have the right to observe the trial, talk with prosecutors, and receive information related to the prosecution in a timely manner. Additionally, victims should maintain the ability to ask questions or express opinions *if* these activities are directed at convicted defendants, and not the accused, during the postverdict phase of the trial. It is important that subjective statements by victims do not interfere with the objective determination of innocence or guilt. The presumption of innocence and rights afforded to the accused should not be sacrificed. Rather, victim participation should focus on a convicted defendant, and not on the accused.

Fairness considerations should trump any concerns about the time that bifurcation might potentially add to the trial proceedings. Notwithstanding, there might actually be time savings involved with bifurcation. If the mixed tribunal acquits a defendant, it will be relieved from expending time and energy debating and determining the appropriate sentence. Additionally, the infusion of the victim's emotions into the presentencing phase of the trial may constitute an additional ground for appeal. By limiting active victim participation to the sentencing stage of trial, bifurcation might provide the added benefit of streamlined appellate challenges. Even if the bifurcation process takes more time, however, it will protect the interests and rights of the accused while still allowing the victims to materially participate in the proceedings.

2. New Pretrial Arrangement Process Should Not Unnecessarily Limit the Trial Proceedings

When Japanese policymakers evaluate the progress of the lay judge system in 2012, they also need to closely monitor and analyze the effects of the mandatory "pretrial arrangement procedures" recently implemented in advance of the lay judge system.[496]

Although it is too early to tell whether immediate change to these pretrial procedures is necessary, Japan should look closely at whether these procedures unnecessarily usurp relevant issues and objective evidence from the mixed tribunal. Without question, expeditious and efficient adjudication benefits all

496. *See supra* notes 266–68.

parties involved in the criminal justice process. However, by over-emphasizing speed and efficiency, defendants' rights might be unreasonably endangered.

In theory, serious criminal cases tried by quasi-juries are fairly straightforward and simple in comparison with complex civil cases, particularly if guilt is uncontested and the primary issue focuses on sentencing. In such cases, with the consent of both sides, it may be possible to reasonably narrow down the number of issues and streamline the evidence necessary for presentation at trial. In contested cases, however, this may not be the case. The issues might be more complex, and significant conflicting evidence might exist.[497] In these complex cases, the courts must refrain from unnecessarily eliminating issues and evidence. The quasi-jury panel should be afforded the opportunity to hear the evidence, observe witnesses, and make a determination.

Worries about time should not trump a defendant's right to a full and fair trial. Article 37(2) of the constitution of Japan guarantees the full opportunity to examine all witnesses.[498] This is a very important right for the defendant, and should not be discounted in the name of speed.[499] Moreover, the evidentiary process should not be unfairly truncated out of a desire to avoid inconveniencing the citizenry. Ample time should be provided to both sides to fully present evidence. If the evidence is unnecessarily limited, it can deprive the citizen judges' of their opportunity to assess witness credibility, despite the fact that this is potentially one of their most important contributions to the trial process.[500]

CONCLUSION

Although the new lay judge system faces many obstacles, Japan has created a vehicle capable of advancing society and constructively improving its criminal justice. While many doubt the new system, it does provide Japan with an opportunity to restore credibility in the legal system through transparency, civic

497. *See, e.g.*, Kamiya, *supra* note 293 (citizen judge in the first lay judge trial expressed opinion that complicated cases with more witnesses will take longer).

498. KENPŌ [Constitution], art. 37.

499. *See* DANDŌ, *supra* note 128, at 281.

500. *See* Landsman & Zhang, *supra* note 19, at 191.

participation, and education. It also provides an opportunity to revise its interrogation process and implement measures guaranteeing the fundamental rights of suspects and defendants. Going forward, the operative question is whether Japan will utilize the lay judge system as a vehicle of change or merely use it as a showpiece. By adopting the suggestions contained in this article, Japan can move in the right direction and bring the system closer to realizing its potential.