

RE-INTRODUCING LAY PARTICIPATION TO JAPANESE CRIMINAL CASES: AN AWKWARD YET NECESSARY STEP

INTRODUCTION

For over two centuries, the right to be judged by a jury of one's peers has endured as one of the fundamental concepts underlying the judicial process in the United States.¹ This entitlement so permeates the legal mindset that American citizens and legal professionals alike are often shocked² to discover that our concept of an independent jury is for the most part an institution unique to common law nations.³ Although several nations have experimented with lay participation in varying forms, the number of countries that maintain a jury system are dwarfed by those that do not.⁴ Nevertheless, the concept of lay participation continues to captivate the attention of many nations, and most recently, Japan.⁵

On June 12, 2001, Japan's Judicial Reform Council⁶ submitted its

1. U.S. CONST. amends. VI & VII.

2. See *U.S. Justice System Best in World, Poll Finds*, CAL. ST. B.J. (Apr. 1999), at <http://www.calbar.ca.gov/calbar/2cbj/99apr/index.htm>. In a survey of 1000 Californians "78 percent believe the jury system is the fairest way to determine guilt or innocence and 69 percent think juries are the most important part of the American justice system." *Id.*

3. The majority of nations, from Western Europe to Latin America and East Asia belong to the civil law tradition. The civil law tradition is the largest of the four traditions (civil law tradition, common law tradition (*i.e.*, England, United States, Australia), socialist tradition (*i.e.*, Cuba and China) and religious tradition (*i.e.*, Vatican and Iran)). Civil law traditions do not have a history of either a civil or criminal jury.

4. See Neil Vidmar, *Forward*, 62 LAW & CONTEMP. PROBS. 1 (Spring 1999). Countries that presently have a jury system include: United States, Canada, Australia, New Zealand, Jamaica, and Trinidad. *Id.* Several countries have recently abandoned their former jury systems, including Singapore, Malaysia, Pakistan, and India. *Id.*

5. See Frank Ching, *Who's to Judge?* FAR EASTERN ECON. REV., Jan. 11, 2001, available at 2001 WL-FEER 6645486 (noting that in addition to Japan, South Korea has also considered implementing some form of lay participation in the judicial process, however, Japan sits at the forefront in East Asia for introducing a jury). See also Takashi Maruta, *The Criminal Jury System in Imperial Japan and the Contemporary Argument for its Reintroduction*, 72 REVUE INTERNATIONALE DE DROIT PÉNAL 219 (2001).

6. Sabrina McKenna has stated:

The Judicial Reform Council was created in mid-1999 and is comprised of law professors, professional attorneys, university presidents, an author and the Secretary-General of the Housewives Association. The mandate of the JRC is: to clarify the appropriate role of the justice system in the twenty-first century, and to investigate and consider fundamental measures necessarily related to the realization of a justice system that is more user-friendly to citizens, allows for participation of citizens in the justice system, considers, improves and strengthens ideals for the legal profession, as well as other related reforms and foundational requirements of the justice system.

recommendations for sweeping transformation of the legal profession and the judicial system to Japanese Prime Minister Junichiro Koizumi.⁷ Among the most controversial of the proposals was the Reform Council's call for the re-introduction of lay participation in certain criminal proceedings.⁸ The proposal is not new; legal scholars have pondered and waged debates over this issue for the past fifty years.⁹ Although Japan previously utilized a jury system, it enjoyed only minimal success and was abandoned twenty years after its inception.¹⁰ The Reform Council's recommendation, modeled after the European lay judge model,¹¹ imports an already established mode of citizen participation. Although termed a recommendation, the Reform Council's report establishes the official path Japan has chosen to take.¹² The Prime Minister and his cabinet have embraced the report and have set 2004 as their target date for implementing the numerous provisions.¹³ It is now up to the Diet¹⁴ to debate and promulgate the details. These details will, no doubt, mandate changes in criminal procedure and necessitate extra-legal

Sabrina Shizue McKenna, *Proposal for Judicial Reform in Japan: An Overview*, 2 ASIAN-PAC. L. & POL'Y J. 20, 132-33 (2001).

7. The recommendations propose reforms in several areas of the judicial system including: lay participation, legal education, trial length, increase of legal population, etc. The Council has proposed several controversial reforms. Besides the re-introduction of the jury, the introduction of American-style law schools has prompted intense debate. See Recommendations of the Justice System Reform Council for a Justice System to Support Japan in the 21st Century, ch. IV, available at <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html> [hereinafter Reform Council Recommendations]. See McKenna, *supra* note 6, at 67 (providing more information about the introduction of American-style law schools to replace the current undergraduate course of legal study).

8. See Reform Council Recommendations, *supra* note 7. "A new system should be introduced in criminal proceedings, enabling the broad general public to cooperate with judges by sharing responsibilities, and to participate autonomously and meaningfully in deciding trials." *Id.*

9. See Maruta, *supra* note 5, at 219-20 (noting that beginning in the 1970s, popular movements for the reintroduction of the jury system arose and have been ongoing up to the present); see also Homepage of National Center for Jury Trial, Japan [hereinafter NCJT], at <http://social.l.chiba-u.ac.jp/Jury.html> (detailing the activities of a grass-roots organization dedicated to the re-introduction of a jury system into the Japanese court system).

10. See THE JAPANESE LEGAL SYSTEM, *infra* note 18.

11. See DAVID T. JOHNSON, THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN 47 n.43 (2002) (describing the incarnation of lay participation present in Germany, Denmark, Sweden, and France as that in which lay judges sit alongside professional judges and together deliberate on guilt and sentence).

12. See The Points at Issue in Judicial Reform, available at <http://www.kantei.go.jp/foreign/judiciary/0620reform.html> (noting that the Judicial Reform Council was established pursuant to "the Law Concerning Establishment of Judicial Reform Council (Law No. 68, promulgated on June 9, 1999)"). See also Miwa Suzuki, *Japan Approves First Postwar Judicial Reform Plan*, Agence France-Presse, June 15, 2001, available at Westlaw, AFP-ENG; Editorial, *Bring on the Lawyers!*, ASIAN WALL ST. J., June 20, 2001, available at 20001 WL-WSJ 2867281.

13. See Suzuki, *supra* note 12.

14. The Diet is the name of the Japanese legislative body.

accommodations. However, even in the absence of such details, the basic lay judge framework Japan intends to utilize, itself, deserves scrutiny.

Japanese mass media and political commentators alike have heralded the Reform Council's recommended reforms as necessary and long overdue.¹⁵ The Reform Council's radical departure from the status quo was motivated, in part, by the perceived deterioration of public support for the Japanese legal system. A cursory review of newspaper articles within the last five years evidences a growing public mistrust and sense of detachment from the judicial system and its participants.¹⁶ The introduction of a recent editorial in the *Mainichi Daily* entitled *Judicial Corruption* sums up an increasingly prevalent attitude towards the legal system:

The rule of law here is threatened by a major scandal. No matter how low standards and morals were to fall, we had always believed that we could continue to place our trust in prosecutors and judges. But officers of the court have betrayed this trust by attempting to cover up the investigation of one of their own.¹⁷

The re-incorporation of the citizenry into the criminal adjudicatory process has clearly become an integral part in addressing the public's demand for improvements within the judicial system. This Note addresses Japan's officially proposed reforms for the re-introduction of lay citizen participation in criminal justice administration—discussing the extent to which the Reform Council's proposals remedy the problems encountered in Japan's past experience. I then compare the proposals to the current, firmly established, German system, from which the Japanese reforms draw significantly and analyze the effectiveness of this chosen form in light of Japan's espoused goals, and anticipate conflicts that may arise.

15. See *Legal Experts Optimistic on Judicial Reforms*, DAILY YOMIURI (JAPAN), June 14, 2001, available at 2001 WL 20476684. See also Editorial, *Asides: Wanted: Japanese Lawyers*, WALL ST. J., June 21, 2001, at A18 (praising the proposed legal reforms as necessary for getting the country moving forward again).

16. See, e.g., Shigeo Masui, *Judicial Reform on Horizon*, DAILY YOMIURI, (TOKYO) Dec. 20, 2001, available at 2001 WL 32441419 (noting that the primary concerns of the Japanese people include: "Trials can drag on for too long; judicial circles are exclusionary; most judges interpret laws too rigidly; the National Bar Examination is so difficult it is often compared to the ancient Chinese examinations in literary classics for selecting mandarins. Finally, there are simply not enough legal professionals."); *Reviewing Japan's Judicial System*, DAILY YOMIURI, Oct. 2, 1993, at 6. ("But the Japanese judicial system also has many problems of its own. Trials in Japan take too much time and money. Trial procedures are so complicated that few people feel they can bring their problems to court.")

17. Editorial, *Judicial Corruption*, MAINICHI DAILY NEWS (JAPAN), Feb. 14, 2001, at <http://www.mainichi.co.jp/english/news/archive/200102/14/opinion.html>.

Part I begins with a brief overview of Japan's history with lay participation, presenting the leading scholars' theories regarding its demise. Part II then proceeds to discuss the present system, elucidating the perceived problems that have prompted the proposed reforms. After presenting the Reform Council's proposals for lay participation, Part III of this Note explores Japan's proposal and the German lay judge system, using Germany as a benchmark for predicting the success of the proposed Japanese system.

I. THE HISTORY

The proposed reintroduction of lay participation necessitates an assessment of Japan's previous experience with the jury system. To understand the issues that arise today, it is important to understand the motivation for the establishment and subsequent abandonment of the first jury system.

The Japanese Diet passed the Jury Act in 1923,¹⁸ during a period known as the Taisho Democracy.¹⁹ This era witnessed an increasing desire on the part of the government to allow public participation in the political process.²⁰ Partly in an effort to solidify confidence and lend stability to the legal system, the Japanese government decided to introduce an American-style, twelve-man jury, independent from the presiding judge.²¹ By introducing lay participation, the government hoped to establish popular

18. Jury Act (Baishin Hō), passed in 1923, did not go into effect until Oct. 1, 1928. The Act established a trial jury for certain criminal cases in which significant penalties were available (e.g. murder). THE JAPANESE LEGAL SYSTEM 482 (Hideo Tanaka ed., 1976).

19. See DAVID J. LU, JAPAN: A DOCUMENTARY HISTORY 375-76 (M.E. Sharpe ed., 1997) (noting that although the Taisho period lasted from only 1912 until 1926 the era witnessed a dramatic shift towards democratic reform). The introduction of party politics, universal manhood suffrage and women's rights movements are representative of the political changes that characterize the era. *Id.* However, in the mid-1930s the political environment shifted towards increasing military fascism. *Id.* This change precipitated the government's withdrawal from several of the changes adopted in the Taisho period. *Id.*

20. See PETER DUUS, PARTY RIVALRY AND POLITICAL CHANGE IN TAISHO JAPAN 110 (1968) (the mass awakening "rested on the notion that the common people of the country, who for years had deferred silently to the demands placed on them by the state and by their social betters, were beginning to experience a newly quickened awareness of their rights as citizens and human beings."); see also Kuniji Shibahara, *Participation of Citizens in Criminal Justice in Japan*, in CRIME PREVENTION AND CONTROL IN THE UNITED STATES AND JAPAN 26 (V. Kusuda-Smick ed., 1990) ("The period of the 1910s and the first part of the 1920s was a time where democratic movements became active in Japan. The expansion of popular involvement in politics was emphasized.")

21. See Reform Council Recommendations, *supra* note 7.

support to legitimize the judiciary, an important element for developing expanding nation.²²

As numerous scholars have pointed out, the jury system implemented in Japan from 1928 through 1943 was rife with procedural problems and improper incentives.²³ While the Jury Act remained in effect, only 484 out of a possible 25,484 persons eligible for trial by jury opted for one.²⁴ The Act did not entrust the jury with the authority to decide a suspect's guilt or innocence; rather, it only allowed jurors to answer questions of fact put before them by the judge.²⁵ Above all, the determinations of the jury were not binding; the judge could convene a new jury if he believed that the "jury's answer [was] unwarranted."²⁶ Upon election of a trial by jury, suspects relinquished their right to appeal on the facts—thereby creating strong incentive to opt out of a jury trial.²⁷ In addition, the jury's inability to access pretrial evidence, often resulted in jurors who were oblivious to key matters in the case.²⁸

Along a different line of reasoning, some scholars assert that the hierarchically oriented Japanese public found the jury, as an institution, unpalatable.²⁹ They argue that culturally, the Japanese were not equipped

22. See *id.* (noting that the Japanese government desired to increase popular participation in the political arena).

23. See Lester W. Kiss, *Reviving the Criminal Jury in Japan*, 62 LAW & CONTEMP. PROBS. 261, 266-70 (Spring 1999) (discussing as factors contributing to the ineffectiveness of the Japanese jury: the fascist political climate in Japan, the cultural preference to be judged by judges as opposed to peers and defects with the Jury Act itself); see also THE JAPANESE LEGAL SYSTEM, *supra* note 18, at 485-88 (illustrating the facts that jury trials cost more, were limited to certain criminal cases and that for the most part, judges did not facilitate the transition to the new system).

24. See Shibahara, *supra* note 20, at 27. Statistically, less than 1.9% of suspects chose to have a jury trial. *Id.* The number of jury trials reached a peak in 1929 when 143 lay jury trials were held. *Id.* From this point on, the numbers fell each year until the Jury Act's suspension. *Id.*

25. See THE JAPANESE LEGAL SYSTEM, *supra* note 18, at 484. Lay jury members did not decide issues of guilt or innocence. *Id.* Rather, the judge put specific factual questions to the jury for resolution. *Id.*

26. *Id.* The judge could not merely disregard the jury's determination. *Id.* In order to get around a jury's decision, the court would have to declare a mistrial and begin the trial anew with a different set of jurors. *Id.* Japanese judges rarely exercised this right. *Id.* Out of a possible 484 jury cases, judges called for a new trial only fourteen times on grounds that the jury's determination was incorrect). *Id.* There is no evidence that the subsequent juries in these cases decided the same or differently than the previous jury. *Id.*

27. See THE JAPANESE LEGAL SYSTEM, *supra* note 18, at 485-88. If a suspect elected to have a trial by jury, he automatically waived his right to appeal *de novo* on the facts. *Id.* The suspect still retained the ability to appeal on matters of law. *Id.* Defense lawyers often waived jury trial so that the suspect retained his right to appeal on the facts. *Id.*

28. *Id.* at 488. Testimony and evidence taken prior to trial at the procurator's office was not provided to jurors. *Id.*

29. See Maruta, *supra* note 5, at 221 (noting that scholars have asserted that the jury system would not fit in Japan given the its vertical social structure).

to handle, nor did they trust a system in which a panel of peers rendered verdicts.³⁰ Judges and prosecutors also disfavored juries because outcomes were unpredictable and contravened underlying social norms.³¹ Though historians debate and accord different relative weight to each theory, it is clear that the combination of these problems made Japan's first attempt at lay participation inefficient and unworkable, ultimately leading to the suspension of the Jury Act in 1943.³²

II. THE CURRENT SYSTEM

Japan's current criminal procedure system, often incorrectly classified as "inquisitorial,"³³ is a hybrid, incorporating influences from both Germany and America.³⁴ In many respects it resembles systems found in a majority of civil law countries.³⁵ The system places the judge in the position of sole arbiter of fact and guilt.³⁶ The public plays no formal role in deciding the fate of accused criminals.³⁷ In part, this lack of public

30. See THE JAPANESE LEGAL SYSTEM, *supra* note 18, at 485-86.

31. See JOHNSON, *supra* note 11, at 43. (citing a survey of jury trials in Sendai, Japan that demonstrated a high acquittal rate in jury trials).

32. SHIGEMITSU DANDO, JAPANESE CRIMINAL PROCEDURE 41 (B.J. George, Jr. trans., 1965). The Jury Act was suspended in 1943. *Id.* However, "the Court Organization Law makes it clear that 'the provisions of this Law shall in no way prevent the establishment of a jury system for criminal cases elsewhere by law.'" *Id.*

33. See JOHN HENRY MERRYMAN ET AL., THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA 1062 (1994) (asserting that the term "inquisitorial" is an anachronism used to classify the criminal procedure in modern nations that follow the civil law tradition). The basic characteristics of the "inquisitorial" system include: discontinuous trials, an extensive dossier from which the judge reviews the prosecutor's evidence, and a lesser emphasis placed on oral testimony. *Id.*

34. See JOHN O. HALEY, AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX 126 (1991) (noting that the American influence appeared in the Japanese Constitution and in Japanese criminal procedure, whereas the German influence appeared more strongly in criminal law and practice).

35. *Id.* The civil law tradition is a category that describes a general disposition towards the law and legal systems. The tradition is based on Roman law (*jus commune* or *corpus juris civilis*) and characterized by a reliance on codes and rejection of common law precedent.

36. See Joachim Herrmann, *Models for the Reform of the Criminal Trial in Eastern Europe: A Comparative Perspective*, 1996 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 137 (explaining that the role of the judge in the Japanese system is more pro-active than in common-law countries). As the finder of fact, the judge has both the right, and the obligation to resolve issues pertinent to the resolution of each case. *Id.* Therefore, if either the prosecution or defense fails to ask a question the judge considers important, the judge will raise it *sua sponte*. *Id.* See also JOHNSON, *supra* note 11, at 14. Depending on the nature of the crime, criminal cases are seen before a single judge or a panel of three judges. See THE JAPANESE LEGAL SYSTEM, *supra* note 18.

37. See Mark D. West, Note, *Prosecution Review Commissions: Japan's Answer to the Problem of Prosecutorial Discretion*, 92 COLUM. L. REV. 684 (1992) (noting that, although citizens participate in prosecutorial review boards, which evaluate prosecutors' decisions on whether to charge individuals with crimes, conclusions are not binding).

participation stems from the overarching goal of achieving consistency and uniformity in judicial decision-making.³⁸ Judges at the trial level compose detailed opinions regarding their findings.³⁹ These opinions are important because in addition to the right to appeal matters of law, an appellant may also appeal matters of fact; in essence, allowing for two opportunities to challenge the trial verdict. Both the defendant and the prosecutor can appeal the trial court's determination.⁴⁰ Prior to charging individuals with crimes, the prosecution compiles evidence into a dossier⁴¹ from which the professional judge relies on heavily through the trial.⁴² Japan has no expedited pleading system—individuals who confess guilt must still be proven guilty.⁴³ In addition, Japanese criminal trials are typically conducted on non-consecutive days, often with several weeks or months intervening between hearings.⁴⁴

In Japan, prosecutors possess broad fact-finding authority, which makes them critically important figures within the Japanese criminal justice system.⁴⁵ In addition to their powers of arrest and interrogation, prosecutors retain the sole power to initiate and suspend prosecutions.⁴⁶ Confessions, which are obtained in ninety percent of all convictions,⁴⁷ play a critical role, not only in the way prosecutors conduct their activities, but also in the operation of the criminal justice system as a whole.⁴⁸ The prosecutor may take many factors into consideration when exercising prosecutorial discretion. Among the most determinative are: the suspect's repentance or remorse, restitution, and the victim's input.⁴⁹ Japan does

38. See HALEY, *supra* note 34, at 115 (asserting that uniformity is a shared goal among civil law nations).

39. See JOHNSON, *supra* note 11, at 46.

40. *Id.* at 41.

41. See Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317, 338-39 (1992).

42. *Id.* In many instances judges merely approve of the results of the prosecutor's investigation contained in the dossier file. *Id.*

43. See HALEY, *supra* note 34, at 132. Japan does not have a guilty plea similar to the one employed in the United States, thus even when suspects confess their guilt, the case is still heard before the criminal court. *Id.*

44. See JOHNSON, *supra* note 11, at 14-15 (noting that "the average trial takes a little more than three months to finish, and 94 percent of trials finish in six months or less.").

45. See JOHNSON, *supra* note 11, at 4.

46. *Id.* at 36-42.

47. See Foote, *supra* note 41, at 336-37.

48. See *id.* at 336-38 (stating, among other things, that confession is an important cultural mechanism that serves many functions, including the minimization of recidivism, the creation of incentives to provide restitution and repentance, the creation of incentives to grant absolution and forgiveness all of which create a more cohesive society).

49. See *id.* at 129. See also JOHNSON, *supra* note 11, at 46.

utilize lay participation in the form of a Prosecution Review Commission. Citizens on the Commission review the propriety of the prosecution's decisions to file charges. However, the Commission's determinations are not binding.⁵⁰ As a result, the power afforded to Japanese prosecutors is unprecedented when compared to other civil law jurisdictions.⁵¹ Prosecutors enjoy an unparalleled conviction rate, which perennially exceeds ninety-nine percent.⁵²

As far back as 1945, members of the legal profession have called for the reinstatement of an improved jury system.⁵³ However, until recently, no movement had been able to garner public support or muster the political clout necessary to effectuate change.⁵⁴ Since the mid-1990s,⁵⁵ the public's ever-growing perception of significant problems with the legal apparatus has prompted concomitant calls for institutional reform.⁵⁶

Judicial corruption and high level improprieties, coupled with incidences of prosecutor or lawyer indiscretions have tarnished the legal system's image.⁵⁷ Criticism of the Japanese criminal justice system extends beyond the behavior of its members, and into the very foundations of the system. Many scholars believe that the present system, in which the prosecutor conducts the primary investigation,⁵⁸ has afforded the

50. See West, *supra* note 37, at 702; see also Reform Council Recommendations, *supra* note 7 (detailing the Reform Commission's proposal to make Prosecution Review Commission determinations binding).

51. See JOHNSON, *supra* note 11, at 37.

52. See George, *infra* note 112, at 538. See also Foote, *supra* note 42, at 318.

53. West, *supra* note 37, at 684. Additionally, "[a] group of prominent Japanese law professors, with some degree of support from the judiciary, are currently engaged in research to convince the Supreme Court and [the] Japan Federation of Bar Associations (JFBA) to support a modified jury system." *Id.* at 715.

54. See Shibahara, *supra* note 20, at 29-30. The re-introduction of the criminal jury back into Japanese criminal proceedings was not a public priority. *Id.* The author cites a 1985 opinion poll showing that only thirty-eight percent of citizens favored jury trials. *Id.*

55. *Id.* at 29. (discussing the post-World War II movement undertaken by several lawyers to reintroduce a jury system). See also THE JAPANESE LEGAL SYSTEM, *supra* note 18, at 428.

56. See Shibahara, *supra* note 20, at 29.

57. See, e.g., *Lawyer Given Prison Term for Corruption*, MAINICHI DAILY NEWS (JAPAN), Nov. 9, 1995, at 12 (discussing an instance where a lawyer defrauded a client out of one hundred million yen and instructed a witness to lie in court). See also *High Court Judge Admits to Child Prostitution Charges*, MAINICHI DAILY NEWS (JAPAN), Sept. 20, 2001 (detailing the public's damaged trust in judges stemming from an instance where a judge was impeached for hiring three underage prostitutes, but avoided jail time). See also *Top Judge's Wife Faces 3-Year Term for Intimidation*, MAINICHI DAILY NEWS (JAPAN), Oct. 24, 2001 (detailing a recent scandal in which a prosecutor tipped off a prominent judge that the judge's wife was under investigation for sexual harassment).

58. See HALEY, *supra* note 34, at 125-33. In Japan, police, prosecutors and judges alike enjoy a wide degree of discretion in pursuing criminal matters. *Id.* This practice stands in marked contrast to the mandatory prosecution provision in Germany. Unlike other civil law nations, Japanese citizens cannot themselves bring criminal charges outside of the procuracy. Japan does have a Prosecutorial

prosecutor too much influence over the court's decision.⁵⁹ They argue that the judicial system has relegated the judge's role in criminal cases to merely that of a rubber stamp,⁶⁰ and has prevented the development of an adequate standard for criminal defense work.⁶¹ Instances of indefensible convictions, coupled with sentences not commensurate with the crimes committed have prompted public backlash.⁶² Academics routinely criticize judges for being too technical and out of touch with the lives and opinions of ordinary people.⁶³

Not all assessments of the Japanese criminal justice system have been critical. Many proponents praise the degree to which the system promotes repentance and forgiveness, which consequently minimizes recidivism.⁶⁴ Scholars attribute the low recidivism rate to incentives created by prosecutorial discretion, along with the certainty of punishment created by the high conviction rate.⁶⁵ The relative certainty of conviction thus plays a critical role in the operation of criminal justice.

Review Board in place, whose purpose is to review decisions of whether or not to prosecute. However, the system is rarely put to use and its decisions are not binding upon the prosecutor. Factors apart from the commission of the crime are often determinative in its resolution. Admission of guilt, an expression of remorse, and compensation to the aggrieved party play a significant role at every stage of the criminal proceeding. These factors determine what crimes police report to the procuracy, whether the prosecutor decides to prosecute, and the leniency of the judge.

59. West, *supra* note 37, at 686. "The procuracy as an institution is quite powerful, and prosecutors have a wide range of statutorily authorized discretion." *Id.* "A prosecutor who loses a case in Japan often also suffers a tremendous loss of face As a loss of face would reflect negatively on the 'dignity of the[ir shared] profession many people think that some judges may tend to favor the cause of the prosecutors." *Id.* at 691.

60. See Foote, *supra* note 41, at 319. Foote provides the following example:

Takeo Ishimatsu, a former High Court judge who handled criminal matters for most of his forty-year career, recently generated shock waves within Japan by flatly asserting that prosecutors and not the courts conducted the real trials of Japanese criminal defendants. A leading criminal procedure scholar and former president of Tokyo University, Ryuichi Hirano, went so far as to label Japan's criminal-justice system "abnormal," "diseased," and even "hopeless."

Id.

61. See Kohei Nakabo & Yohei Suda, *Judicial Reform and the State of Japan's Attorney System: A Discussion of Attorney Reform Issues and the Future of the Judiciary*, PAC. RIM. L. & POL'Y J. 632, 641 (2001) (noting that "some attorneys have left criminal defense, disillusioned by what they consider to be a hopeless state of criminal affairs.")

62. See Editorial, *Bring on the Lawyers*, ASIAN WALL ST. J. June 20, 2001, available at 2001 WL-WSJA 22051407 (stating that "a spate of recent cases has left the public with little faith in the police, prosecutors and judges."). The case the article lays out details a woman who was convicted by a judge despite having a "water-tight" alibi. *Id.*

63. See Suzuki, *supra* note 12 (describing a commonly held belief that judges, as career appointees, do not often represent the perspective of the common man). Although judges are not appointed for life, judgeships are in practice secure positions. *Id.*

64. See HALEY, *supra* note 34, at 138. See also Foote, *supra* note 41, at 351.

65. Foote, *supra* note 41, at 351.

Nonetheless, the system has also been attacked for its gross inefficiency.⁶⁶ In both criminal and civil matters, a significant backlog of cases exists.⁶⁷ Article 37 of the Japanese Constitution guarantees those accused of crimes the right to a speedy trial and an impartial tribunal.⁶⁸ Although the majority of cases that actually go to trial are resolved in less than six months, complex and controversial trials can take an inordinate amount of time.⁶⁹ The highly publicized prosecution of Asahara, the leader of the Aum Shinrikyo cult responsible for the 1995 sarin gas attacks in Tokyo subways, exemplifies the problem. Asahara's trial has been languishing for over six years without resolution.⁷⁰

III. THE NEW SYSTEM

The Japanese government has set forth explicit goals that it hopes to achieve by re-introducing lay participation. Foremost, the Reform Council wants citizens to participate in criminal proceedings in a "meaningful" and "autonomous" manner.⁷¹ Second, it intends to have "the sound social common sense of the public reflected more directly in trial decisions."⁷² The Reform Council believes that lay participation will expand citizens' understanding of Japan's legal system and give ordinary people a feeling of inclusion and confidence in the judicial system.⁷³ Similarly, the Reform

66. See *Koizumi Aims to Set 2-Year Time Limit on Court Rulings*, JAPAN POL'Y & POL. (JAPAN), July 8, 2002. Inefficiency in terms of both the significant backlog of criminal cases (partially due to the small number of judges per capita, which the Council hopes to alleviate by changing Japan's system of legal education) and in terms the duration of criminal trials. *Id.*

67. *Id.* (conveying Prime Minister Koizumi's statement that "[t]he current situation, where there are cases in which five or ten years pass before a ruling at a district court is made, both for criminal and civil suits, is too slow."). See also HALEY, *supra* note 34, at 125. But see JOHNSON, *supra* note 11, at 24-25.

68. KENPŌ, art. 37 ("In all criminal cases the accused shall enjoy the right to a speedy and public trial by an impartial tribunal.").

69. See JOHNSON, *supra* note 11, at 14-15 (noting that 94 percent of all criminal trials take six months or fewer to resolve).

70. See *Justice Gets Bugged Down at Tokyo District Court* JAPAN POL'Y & POL., Aug. 20, 2001, available at 2001 WL 24327393 (noting that as of August 2001, more than five and a half years since the beginning of the trial, the prosecution had still not finished presenting its case). As is typical, only three or four hearings are held each month and many expect the trial to be the longest in Japanese history. *Id.* The article also notes that currently in Japan there are four criminal trials that have been ongoing for over ten years without resolution. *Id.*

71. See Reform Council Recommendations, *supra* note 7.

72. *Id.*

73. *Id.* The Reform Council suggests:

In the same way, the judicial branch must establish a popular base by meeting the demand for accountability to the people, while paying heed to judicial independence. Justice can play its role fully only if its activities are easily seen, understood, and worthy of reliance by the people. For justice to secure a popular base, the legal profession must have won the public trust. The source of

Council believes that greater transparency within the judiciary will create the connection between the citizens of Japan and the legal process that is presently lacking. The Reform Council's report notes that:

[T]hrough having the people participate in the trial process . . . the people's understanding and support of the justice system will deepen and it will be possible for the justice system to achieve a firmer popular base.⁷⁴

The new type of lay participation that Japan plans to implement stands in marked contrast to its short-lived twentieth century jury system. In the new system, lay participants, referred to as *saibanin*,⁷⁵ will work alongside professional judges as equals.⁷⁶ Together, the professional judge and lay judges will deliberate and issue verdicts and decide sentences.⁷⁷ Ostensibly, judges will fulfill the role of the legal specialists who will

this trust lies in the legal profession's consciously, and with an open attitude, constructing a desirable system of justice that responds to public expectations.

Id.

74. *Id.* The Reform Council continues:

In order to establish a stronger popular base for the justice system, measures shall be taken to expand participation of the people in the justice system. As a new system for popular participation in litigation proceedings which constitute the core of the justice system, a new system shall be introduced for a portion of criminal cases. Under this new system, the general public can work in cooperation with judges, sharing responsibility for and becoming involved in deciding the cases autonomously and meaningfully. In the civil procedure, for cases that require specialized knowledge, a system shall be introduced in which experts become involved in all or part of trials and support judges. In addition, the existing participation systems shall be expanded, such as by giving legally binding force to certain resolutions by Inquests of Prosecution and by expanding the court counselor system as a part of reinforcement of the function of the family court accompanying transfer of jurisdiction for actions related to personal status. Furthermore, a system to reflect public views on procedures for appointment of judges and a scheme to further reflect public views on administration of the courts, the public prosecutors' offices and the bar associations shall be introduced. Coordination of conditions to make such participation in the administration of justice effective shall be promoted, such as realization of an easily understandable system of justice including adjustment of the basic laws, reinforcement of legal education and promotion of information disclosure relating to the administration of justice.

Id.

75. THE NEW NELSON JAPANESE-ENGLISH CHARACTER DICTIONARY 979 (New Nelson ed., 1997) (translating *saibanin* to mean judge).

76. Reform Council Recommendations, *supra* note 7. The Reform Council describes the relationship as the following:

From the viewpoint of ensuring the effectiveness of deliberations, the size of the judicial panel should be such that all of the judges and all of the *saibanin* can engage in thorough discussion to reach a conclusion with substantial grounds. The deliberation process and the method of deciding the verdict are also relevant with regard to the appropriate number, so those matters should be considered together.

Id.

77. *Id.*

educate the *saibanin* on matters of law. The *saibanin*, as laypersons, will then share their knowledge of everyday life, providing the perspective that the professional judges, as long-term appointees,⁷⁸ may not have.⁷⁹ Ideally, the judgments in each case will reflect the open exchange of knowledge and experience between professional judges and *saibanin*.⁸⁰

Initially, the Reform Council contemplated implementing an American-style independent jury, however, it ultimately decided against it.⁸¹ Although the Japanese Federation of Bar Associations encouraged, and continues to advocate for an independent jury,⁸² the Japanese Supreme Court strongly cautioned against such a system.⁸³ Supreme Court justices

78. Although Japanese judges are not lifetime appointees it is uncommon for the Ministry of Justice to renew a judge's tenure. See KENPŌ, art. 80 ("All such judges shall hold office for a term of ten years with privilege of reappointment, provided that they shall be retired upon the attainment of the age as fixed by law.")

79. Reform Council Recommendations, *supra* note 7. In describing the role of the *saibanin*, the Reform Council states:

The significance of the involvement of *saibanin* is that, while judges and *saibanin* share responsibilities, the judges who are legal specialists and the *saibanin* who are laypersons will share their respective knowledge and experience through mutual communication and reflect the results thereof in their judgments. This significance applies not only to fact finding and decisions on guilt, but in the same way to decisions on sentencing, as to which the public takes a strong interest. Accordingly, as to all of these matters, the *saibanin* should participate and sound social common sense should be reflected. In addition, there exists significance in the very process of judges and *saibanin* sharing their knowledge and experiences through mutual communication, so judges and *saibanin* should deliberate together and make decisions both on guilt and on the sentence.

Id.

80. *Id.* The Reform Council states:

From the viewpoint of the need to ensure the autonomous and meaningful participation by *saibanin*, it is essential to ensure that the opinions of *saibanin* could influence the results of verdicts. In this connection, the number of *saibanin* is a very important factor, but other matters such as the manner in which trial hearings are conducted and the method of deciding the verdict are also relevant. Accordingly, the autonomous and meaningful participation of *saibanin* should be ensured, taking all these factors into account.

Id.

81. See The Points at Issue in Judicial Reform, *supra* note 12.

82. See <http://www.nichibenren.or.jp/jp/katsudo/shihokai/saibaninseido.html>; see also http://www.nichibenren.or.jp/jp/katsudo/sytyou/iken/02/2002_26.html. Groups such as the Japanese Bar Association and the National Center for Jury Trials have strongly advocated and continue to advocate the adoption of an independent jury modeled on the twelve-man American jury.

83. *Top Court Proposes Use of Jury System*, DAILY YOMIURI (TOKYO), Sept. 13, 2000, available at 2000 WL 25272001.

With the top court's announcement, discussions concerning public participation in the judicial system are expected to make progress, observers said. However, during the meeting, the top court still showed a cautious stance toward the idea of introducing a jury system, as in the United States, where jurors selected from the public determine the verdict, saying such a system may violate the Constitution, the members said.

Id. The Court initially favored an even smaller role for citizens. *Id.* It suggested that citizens might contribute their thoughts, but not have any real power to bind the court. *Id.* See KENPŌ, art. 76 ("All

publicly indicated that they would likely find unconstitutional, legislation that created an independent jury.⁸⁴

In order to assure that the *saibanin* possess authority generally equivalent to that of professional judges, the Reform Council afforded them similar rights and responsibilities, including the authority to question witnesses.⁸⁵ Although the ratio of *saibanin* to professional judges has not yet been determined, the ratio will be such that “a decision adverse to a defendant cannot be made on the basis of a majority of either judges or *saibanin* alone.”⁸⁶

The selection process for *saibanin* will be egalitarian, with participants selected randomly from a pool of eligible voters.⁸⁷ This measure resolves the problem of the previous jury system, which limited potential jurors to males over the age of thirty,⁸⁸ by providing, to the broadest extent possible, a chance for all citizens to get involved in the legal system.

The type of cases for which the new *saibanin* are available will remain virtually the same as in the old jury system. Like before, only serious crimes, which trigger grave statutory penalties fulfill the criteria for lay participation.⁸⁹ According to the Japan Information Network, the total

judges shall be independent in the exercise of their conscience and shall be bound only by this constitution and the laws.”)

84. See *Legal Experts Optimistic on Judicial Reform*, DAILY YOMIURI (TOKYO), June 14, 2001, available at 2001 WL 20476648 (providing a Supreme Court justice’s personal opinion about the reforms). The justice noted, “The Supreme Court made its decision purely from constitutional considerations, not from any reservations about the ability of the public to make decisions. *Id.* Another justice stated that “if a law can be established without impinging on the Constitution, we will cooperate as a matter of course.” *Id.*

85. Reform Council Recommendations, *supra* note 7.

86. *Id.*

87. *Id.* The Reform Council describes the process in the following way:

With regard to the selection of *saibanin*, the selection pool should be made up of persons randomly selected from among eligible voters, and further appropriate mechanisms should be established to ensure a fair trial by an impartial court. *Saibanin* should be selected for each specific case and should serve for the entire case up through the judgment on it.

Id.

88. See THE JAPANESE LEGAL SYSTEM, *supra* note 18, at 484. In the first jury system, only males over the age of thirty who paid taxes in excess of three yen for the prior two consecutive years were eligible to serve on juries. *Id.*

89. Reform Council Recommendations, *supra* note 7. The Reform Council asserts:

In order to introduce the new participation system smoothly, it is appropriate to start with a certain portion of the criminal cases. The scope of the cases covered should be cases of serious crime to which heavy statutory penalties attach, those being cases in which the general public has a strong interest, and that have a strong impact on society. The scope of such “cases of serious crime to which heavy statutory penalties attach” might, for example, be regarded as cases which by law are to be decided by a collegiate panel, or as cases to which either the death penalty or life imprisonment attaches.

Id.

number of felony arrests for crimes involving the possibility of severe punishment numbered 7,320.⁹⁰ This represents roughly 1.4 percent of the total number of suspects arrested each year (542,115).⁹¹ The Reform Council believed that society has a strong interest in handling such matters. Therefore, unlike the old system, the defendant no longer has the right to waive trial in front of a court that utilizes lay participants.⁹² Moreover, because loss of de novo appeal on the facts provided a significant disincentive for defendants under the old system to elect a jury trial, the Reform Council has eliminated a suspect's right to elect and has guaranteed a defendant's right to appeal on grounds of error in fact-finding or an improper sentence.⁹³ Initially, lay judges will only hear serious criminal cases, but the Reform Council has indicated the possibility of expanding jurisdiction to lesser criminal cases and even civil cases.⁹⁴

The Reform Council recognized the need to address challenges in the area of criminal procedure to accommodate necessary changes that arise from the new system.⁹⁵ When lay participants are introduced into the system, significant logistical problems arise.⁹⁶ Unlike civil law systems, common law systems, where the institution of the jury has shaped criminal procedure, operate on what has been termed the "adversarial" system.⁹⁷ The Reform Council has therefore recommended several procedural changes based on the "adversarial" model, including: trials conducted on

90. See http://www.jin-japan.org/stat/category_14.html.

91. *Id.*

92. *Id.* The Reform Council cautions:

Even when *saibanin* participate, the danger exists of a mistaken verdict or a mistaken judgment with regard to the sentence. Accordingly, in the same manner as in the case of judgment by judge(s) only, appeals by the parties should be recognized with respect to the determination on guilt and with respect to the sentence as well. Further studies are necessary with regard to the composition of the court body for the koso appeal, the method of proceedings, etc., taking into consideration the relationship with the composition of the judicial panel in the court of first instance, etc.

Id.

93. *Id.*

94. *Id.*

95. See Nakabo & Suda, *supra* note 61, at 623. They also assert, "Jury trials did not fit in well with Japanese legal professionals trained under the inquisitorial system." *Id.* at 634.

96. Reform Council Recommendations, *supra* note 7 (stating "[t]o that end, while also bearing in mind the possibility of an impact on trials by judge(s) only, various efforts should be made in connection with administration of trial procedures and, as necessary, the relevant laws should be modified.").

97. See MERRYMAN ET AL., *supra* note 30, at 1016. The accusatorial system differs in many respects from the inquisitorial system. *Id.* Trials are held on consecutive days, the judge's role is to maintain fairness, and it is up to the prosecutor and defense attorney to raise all the issues. *Id.*

consecutive days,⁹⁸ hearings focused on the contested issues, and an increased emphasis on direct presentation of evidence to the jury.⁹⁹

IV. DISCUSSION

The controversial reintroduction of lay participation in criminal trials will not attain the lofty goals sought by the Reform Council. Admittedly, the reforms represent a necessary step towards increasing the transparency and popular support for the judicial process. However, the form of lay participation the Reform Council has selected will create just as many problems as it solves. Although the reforms acknowledge the mistakes of the past and attempt to remedy all of them, they do so in the context of the original jury system. By importing a new form of lay participation—one that significantly draws from the German model—Japan opens itself up to new, unforeseen problems. The lay judge model has its own flaws and drawbacks that will delay the achievement of the stated goals for reintroducing lay participation in Japan. Introducing lay participation also raises the question posed by Professor Daniel H. Foote regarding the systemic reform of criminal procedure: “Are there remedies that Japan can administer that would not undermine the benefits of its system?”¹⁰⁰ Although the ineffectiveness of the lay judge system may preserve prosecutorial leverage and continue to encourage repentance and forgiveness, it will fail to generate “meaningful” or “autonomous” participation. Neither the American jury model nor the European lay judge model represents the best way for Japan to engage its citizens. The need to preserve the unique benefits of the Japanese system, in light of popular calls for citizen involvement, necessitates a system that can accommodate both.

98. See JOHNSON, *supra* note 11, at 14-15. Presently trials are conducted on a non-continuous basis. *Id.* Judges conduct roughly three to four hearings per trial per month often with large intervals of up to three months in-between hearings. See B.J. George, Jr., *Rights of the Criminally Accused*, 53 LAW & CONTEMP. PROBS. 94 (Spring 1990). This system has been criticized by human rights groups such as the ACLU for its inefficiency and because it keeps suspects incarcerated for longer than necessary. *Id.*

99. Reform Council Recommendations, *supra* note 7. In order to make sure that lay participants fully understand what is happening during the trial, attorneys must shift from their former reliance on the case documents. *Id.* Oral testimony best achieves direct communication between attorneys, witnesses and lay participants. *Id.*

100. Foote *supra*, note 41, at 322.

A. The German Model

Japan, like other civil law jurisdictions, has borrowed extensively from the German legal model.¹⁰¹ Although civil law countries other than Germany also utilize a lay judge system,¹⁰² Germany has continually maintained some form of lay participation in criminal trials for over seventy years, making it both firmly established and well-documented.¹⁰³ Like Japan, Germany initially employed a jury system similar to the American system—a twelve-man, independent jury.¹⁰⁴ Over time, the German system has evolved into what judicial scholars have termed a “mixed court” system.¹⁰⁵ In its present incarnation, the German version of lay participation resembles one that Japan intends to implement. Therefore, the German model merits analysis and provides a convenient comparison to Japan. The shortcomings, limitations, and inherent problems the Germans have experienced with their system need to be addressed in light of the similarities to the system Japan seeks to introduce.

German lay judges, who are democratically selected from townships,¹⁰⁶ are appointed for four-year terms.¹⁰⁷ They sit alongside the professional

101. The German civil and criminal codes have been exported in part and in whole to other nations. Japan borrowed extensively from Germany during the early part of the twentieth century in its efforts to modernize and catch up with the Western powers that threatened its borders. The Japanese were impressed with the scientific nature and modernity of the German model. Japan’s first civil code was nearly a wholesale adoption of the German code. Japan’s second Criminal Code (1907) drew significantly from the German model. See Volker F. Krey, *Characteristic Features of German Criminal Proceedings—An Alternative to the Criminal Procedure Law of the United States*, 21 LOY. L.A. INT’L & COMP. L. REV. 591 (1999) (stating, “[t]he influence of German criminal law is especially considerable in Southern Europe, Eastern Europe . . . Japan, and South Korea.”).

102. Denmark and Sweden also employ lay judges in criminal proceedings. See Christian Diesen, *Lay Judges in Sweden—A Short Introduction*, 72 REVUE INTERNATIONALE DE DROIT PENAL 313 (2001); Peter Garde, *The Danish Jury*, 72 REVUE INTERNATIONALE DE DROIT PENAL 87 (2001).

103. Krey, *supra* note 101, at 600 (noting that the American-style jury which had been in force in Germany for capital crimes was abolished in 1924 because of its inefficiency).

104. John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 1981 AM. B. FOUND. RES. J. 195 (noting that the independent criminal jury was first introduced in Germany in 1848 and also detailing the evolutionary process by which lay participation gradually shifted to the mixed court system that is now in place).

105. See Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT’L & COMP. L. REV. 317, 322 (1995) (defining mixed courts as the combination of at least one professional judge and one or more lay judges).

106. See Krey, *supra* note 101, at 600 n.23. An election committee consisted of one presiding judge, ten citizens and one civil servant vote on eligible lay jurors whose names are on a list prepared by individual towns. *Id.* There must be a two-thirds majority vote for a lay judge to be approved. *Id.* A lay judge may serve two consecutive terms. *Id.*

107. See Walter Perron, *Lay Participation in Germany*, 72 REVUE INTERNATIONALE DE DROIT

judges and participate in deciding guilt and sentencing.¹⁰⁸ There are two different types of mixed courts. The first type, *Schoffengericht*, consists of one professional judge and two lay judges who hear cases dealing with misdemeanors, serious petty infractions, and non-serious felonies.¹⁰⁹ The other type, *Landgericht*, is comprised of two lay judges and, depending upon the circumstances, two or three professional judges.¹¹⁰ The *Landgericht* hears serious felony cases punishable by significant criminal sanctions.¹¹¹

The German practice of mandatory prosecution sets it distinctly apart from Japan. The concept of *Legalitätsprinzip*¹¹² mandates that where sufficient evidence exists to charge a suspect, the prosecutor must prosecute. Thus, German prosecutors do not retain unlimited discretionary authority. As in Japan, the prosecution compiles a dossier containing evidence relating to the suspect's guilt.¹¹³ The presiding professional judge has the responsibility of drafting the court's opinion, even when he or she disagrees with the verdict.

Like all legal systems, the German system has its problems, including issues relating to lay participation. The German system suffers from the professional judge's predisposition to decide cases prior to the formal presentation of evidence at trial.¹¹⁴ The professional judge, in his dual role as finder of fact and arbiter of fairness, is placed in a unique position.¹¹⁵

PENAL 190, 191 (2001) (noting that lay judges are appointed to the sessions they serve each year in a random manner and that each session lasts a total of twelve days).

108. See Frase & Weigand, *supra* note 105, at 321.

109. See *id.* at 317.

110. *Id.*

111. *Id.*

112. See B.J. George, Jr., *Discretionary Authority of Public Prosecutors in Japan*, 17 *LAW IN JAPAN* 42 (1984), reprinted in KENNETH L. PORT, *COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN* 534, 535.

113. See Herrmann, *supra* note 36, at 139.

114. See Frase & Weigand, *supra* note 105, at 344 ("Yet, the actual impact of German lay judges on the outcome of trials should not be overestimated. Lay judges frequently accept the professional judge's conclusions because of the latter's superior experience and knowledge of the law."); see also Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 *STAN. L. REV.* 547, 565 (1997). Dubber suggests:

Lay judges, as a rule, are so passive that the 5.4 percent of trial court cases that are resolved by a judgment of the lay court without prior plea agreements do not necessarily reflect lay participation of any kind German criminal cases tried before a collaborative lay court may be—and most often are—in fact decided by the professional judge or judges to whose authority the lay judges generally defer both at trial and during deliberations.

Id.

115. *Id.* The judge has the duty to keep the trial running smoothly and preventing prejudice for the lay participants. *Id.* This type of dual role often creates a conflict of interest. *Id.*

The judge must fulfill his primary job—to ascertain credibility¹¹⁶—while at the same time making sure that the non-legally oriented lay judges have enough information to form an opinion. Often, the professional judge will take total control of the proceedings to such an extent that lay judges no longer play a meaningful role.¹¹⁷ Even though they are supposed to participate as equal fact-finders, lay judges defer to the determinations of the professional judge.¹¹⁸ Deference is so great that one scholar has commented that: “[German] lay judges [are], as a rule, so passive that the . . . trial . . . cases that are resolved by a judgment of a lay court without prior plea agreements do not necessarily reflect lay participation of any kind.”¹¹⁹

Part of the reason for lay judge deference stems from the inequality between lay judge and professional judges that is built into the system. The presiding judge conducts the trial, relying primarily on the contents of the dossier.¹²⁰ Until recently, the professional judge alone had access to the dossier prepared by the prosecution.¹²¹ Lay judges were denied access to the contents of this file, therefore, they had to make up their minds solely on the basis of the presentation of evidence at trial.¹²² This procedural tenet was so strict that if a lay judge were to look at the dossier, it would be grounds for a mistrial or reversal upon appeal.¹²³ Furthermore, since German criminal courts do not have defined standards of proof, lay judges are not provided with an explicit set of instructions before the trial, resulting in uncertainty regarding their role during the proceeding.¹²⁴ For

116. *Id.* The judge occupies a dual role, one of which is that of the as ultimate fact-finder. *Id.* As such, the judge has a duty to ascertain the truth and is granted the power to ask questions to suspects and witnesses. *Id.* If the prosecutor or defense attorney does not question the witness to the satisfaction of the judge, the judge is obliged to raise those issues. *Id.*

117. *Id.* See also Stefan Machura, *Interaction Between Lay Assessors and Professional Judges in German Mixed Courts*, 72 *REVUE INTERNATIONALE DE DROIT PENAL* 451, 458 (2001) (stating that “lay assessors emphasized a recurrent problem: They found most of their colleagues to be too reluctant and passive, too much compliant in relation to the presiding judge.”).

118. See Frase & Weigend, *supra* note 105, at 344.

119. See Dubber, *supra* note 114, at 565.

120. See Markus Dirk Dubber, *The German Jury and the Metaphysical Volk, From Romanticism to Idealism to Nazi Ideology*, 43 *AM. J. COMP. L.* 227, 240 (1995).

121. *Id.* (noting that only judges have a legal right to view the prosecution’s dossier which contains (all of the relevant evidence to the case)).

122. *Id.* Such a lack of information puts the lay judge on a less than equal basis with the professional judge. *Id.* There is a fine line between what the judge needs to see to effectively manage the prosecution and what may be withheld from the lay judges for fear of prejudicing them. *Id.* Without access to the identical information, there can be no meaningful collaboration. *Id.*

123. *Id.* at 581 (“the lay judges are prohibited from even glancing at the all-important case file. Should they gain access to even a small part of the dossier, this will be grounds for reversal.”).

124. See Thomas V. Mulrine, *Reasonable Doubt: How In The World is it Defined?*, 12 *AM. U. J. INT’L L. & POL’Y* 195, 220 (1997). Instead, the professional judge engages in dialogue deliberations

example, although lay judges have the right to question witnesses, observers have noted that they rarely exercise this right.¹²⁵

B. Comparison

Several problems inherent in the German system are precisely the same as those Japan is trying to avoid. This suggests that procedure, not just the presence of lay participation plays an important role in criminal cases. In Germany, the problem of a judge deciding the case before trial on the basis of the dossier is not noticeably affected by the presence of lay judges. By importing the lay judge into the criminal trial, the Japanese have not adequately dealt with their problems. Despite all of the safeguards the Reform Council has put in place, the influence of the presiding judge will still overwhelm the lay jurors. This is a frequent occurrence in Germany, where the system is better suited to minimize such influence. In the German system, lay judges are appointed to four-year terms,¹²⁶ which affords them a greater degree of autonomy and confidence, whereas the Japanese *saibanin* are only required to serve once.¹²⁷ A Japanese *saibanin* is more likely to bend to the will of a presiding judge than someone with repeat experience with the legal system and a better understanding of legal rules and procedure.

According to some legal scholars, within German criminal procedure, the role of the lay judge has become “honorary.”¹²⁸

The collaborative court was introduced not to accelerate trials but to diminish “popular distrust in the justice of judgments in police matters. Evidence strongly suggests that lay judges play an insignificant and largely symbolic role in the administration of criminal justice.”¹²⁹

with the lay participants during deliberations. *Id.* The lay jurors are not afforded an independent gauge with which to determine matters of guilt. *Id.*

125. See Dubber *supra* note 120, at 240.

126. See Krey, *supra* note 101, at 600 n.23.

127. See Dubber, *supra* note 114, at 587-88. (noting that the composition of German lay judges tends to be non-representative of the general population). Minorities and working-class people tend to be under-represented in the lists that townships provide. *Id.* The author indicates that this fact further contributes to the passivity of the German lay judges. *Id.*

128. See COMPARATIVE CRIMINAL PROCEDURE 143 (John Hatchard et al. eds., 1996). See also, Perron *supra* note 107, at 184.

129. See Dubber, *supra* note 114, at 587-88.

Others argue that the German lay judge serves as a buffer between the executive and judicial branches.¹³⁰ They posit that because the German judiciary has gained independence from the state, the lay judge merely assumes a symbolic role.¹³¹ Japan, however, appears to desire genuine active public participation. The reform is not merely a symbolic gesture.¹³² The impetus for the reforms and the Reform Council's goal of creating "meaningful" and "autonomous" participation indicates a sincere wish for *saibanin* to impact the outcome of the verdict. Likewise, the judiciary in Japan enjoys a great deal of independence—no threat of executive branch interference in judicial matters exists.¹³³ Adoption of a lay judge-professional judge mixed court system, alone will not suffice to achieve the Reform Council's goals.

Japan will fail in its hope to gain public trust and wider public support for the judicial system if it does not give credit to the participation of the *saibanin*. German lay judges do not participate in the formulation and public announcement of the justification for the court's judgment.¹³⁴ Japan has adopted the very same provision.¹³⁵ This failure to acknowledge the contribution of lay judges minimizes the public's perception that lay judges have an effect on the judicial system. In Germany, ordinary people and legal scholars purportedly forget that lay judges play a role at all in judicial proceedings.¹³⁶

130. See Perron, *supra* note 107, at 194-95. Perron posits:

While very few people call for its abolition, most critics point out that the original reasons for lay participation have become irrelevant and that the disadvantages have increased instead. After the inquisitorial system had been abolished, the legislator originally intended to strengthen judicial independence and to counterbalance the power of professional judges who then were not only employees of the state but also under the influence of executive authorities.

Id.

131. *Id.*

132. Such a radical reform coupled with the effort that the government has expended in the area of judicial reform indicates that the Japanese are serious about totally overhauling their system of criminal justice.

133. See John O. Haley, *Judicial Independence in Japan Revisited*, 25 LAW IN JAPAN 1 (1995); but see Mark Ramseyer & Eric B. Rasmusen, *Skewed Incentives: Paying for Politics as a Japanese Judge*, 83 JUDICATURE 190 (2000).

134. See Dubber, *supra* note 114, at 582.

135. See Reform Council Recommendations, *supra* note 7.

136. See Dubber, *supra* note 114, at (relating the anecdote that the president of one of the most prestigious law faculties forgot that lay participation played a role in criminal matters). The author also notes that the majority of citizens are unaware of the mixed court system. *Id.*

C. Recommendations

In order for a system of lay participation to work in Japan, further changes must be implemented. Placing *saibanin* on an equal footing with professional judges, although an improvement upon the system in Germany, will not prevent professional judges from exercising undue influence over lay jurors in the decision-making process. The Reform Council's solution—to arrange the number of professional judges and lay judges so that “a decision adverse to a defendant . . . cannot be made on the basis of a majority of either judges of the *saibanin* alone.”¹³⁷—will not suffice. Regardless of the jurisdiction, placing an average citizen who is completely unfamiliar with a new system on the bench beside a professional judge, with the expectation that a collaborative outcome will result, is overly optimistic. Although the average Japanese citizen has a good grasp of the law, it is unlikely that one would disagree with a judge, whose education and experience with the law afford a high level of respect within the community.¹³⁸ Given the judiciary's historic resistance towards lay participation—initially opposing attempts to introduce formal citizen participation and later attempting to minimize the degree of formal participation¹³⁹—it is unlikely that judges will want to relinquish control, despite their comments to the contrary.¹⁴⁰ In rare instances where the lay judges influence the outcome of the trial to the presiding judge's protest, the specter of judicial manipulation of the written opinion will exist.

In order for lay citizens to participate in the criminal adjudication process at the trial level, some degree of separation between professional and lay participants is necessary. This is not to suggest the American jury system, which has numerous flaws of its own, is the most viable alternative. A complete reversion to the previous Japanese jury system, even with the strategic modifications as incorporated in the Reform Council's report, would thoroughly undermine the benefits of the current mode of prosecution. The uncertainty of a jury verdict would create a disincentive for the accused to confess, thereby weakening a uniquely beneficial aspect of the Japanese criminal system.

Though the Council has gone to great lengths to remedy procedural

137. Reform Council Recommendations, *supra* note 7.

138. See Kiss, *supra* note 23, at 273-74 (noting that the Japanese culture and notions of Confucian hierarchy would prevent individual citizens from disagreeing with judges).

139. See <http://courtdomino2.courts.go.jp/oshirase.nsf/ef4987e1516a9e7449256b6c00201ce3/7d3107fb67a329c449256b74001952dc?OpenDocument>.

140. See <http://homepage2.nifty.com/saitama-jury/ikentokyo.htm>.

flaws of the past, potential deficiencies with the new system remain unaddressed.¹⁴¹ Looking at the German model, it is evident that the degree of influence that the Reform Council wishes to grant the *saibanin* is unattainable. Accordingly, Japan should mold its lay judge system in a slightly different form than the German standard. In particular, it should consider substantially increasing the number of lay judges that participate and permit them to initially deliberate apart from the professional judge or judges. Both changes would help mitigate lay judge passivity while at the same time preserving input from the professional judge and conforming to the recommendations of the Reform Council. An increased number of lay judges would, if necessary, allow lay judges to present a united front that is less likely to bend in the face of a professional judge's opposition. Likewise, separation of the lay judges from the professional judge in the initial stages of deliberations would allow the lay judges to discuss the merits of the case among themselves. This would allow them the opportunity to assess the case using their "knowledge of everyday life" while still allowing for the judge to educate them on legal issues.

Alternatively, Japan might consider a bifurcated system, one which incorporates both jury and lay judge courts. Under such a system, an independent jury trial would be reserved for only the type of cases the Reform Council contemplates in its report—those where significant penalties, such as the death penalty or life imprisonment, inure. All other criminal cases, aside from summary court cases, would be heard in front of the lay judge-professional judge court as proposed by the Reform Council. Such a bifurcated system uniquely addresses the circumstances in Japan, where criticism of the system has focused primarily on instances of injustice where severe penalties have been wrongly imposed on innocent

141. See Reform Council Recommendations, *supra* note 7. The Reform Council acknowledges that:

From 1928 to 1943, a jury system was adopted for a certain portion of criminal cases in Japan (although the jury's verdict did not legally bind the courts). Looking at the existing systems for popular participation in justice, systems such as conciliation members, judicial commissioners, and Inquests of Prosecution exist, and those systems have been performing their functions quite well. Still, on the whole, opportunities for the people to be involved in the administration of justice are very limited, and the authority provided to the people in those instances in which they do participate is also limited. (See Article 3(3) of the Court Law.) In order to establish a much firmer popular base for the justice system by obtaining the autonomous participation of the people in the justice system, it is necessary to establish appropriate participation mechanisms in a variety of settings, such as trial procedures, the process for selection of judges, and the administration of the courts, the public prosecutors' offices and bar associations, as well as reforms of the existing systems for popular participation systems.

Id.

parties.¹⁴² The uncertainty of jury verdicts in such limited instances would not appreciably diminish the benefits of preventing recidivism and encouraging repentance. Typically, only repeat offenders and the most egregious offenders face capital punishment or life imprisonment.¹⁴³ Given the leniency of sentencing and frequent suspension of sentences for non-violent crime,¹⁴⁴ the risk of judicial domination is lessened. With such change, Japan would then achieve “meaningful” and “autonomous” participation, without compromising the necessary tools that the prosecutors rely on to do their job.

The Reform Council recognized that, concurrent with the re-emergence of citizen participation, reformation of legal institutions, both criminal and non-criminal, is necessary.¹⁴⁵ Although the Reform Council has yet to make any formal recommendations, the Diet should consider particular areas of concern.

First, the Reform Council must realize that the Japanese people have neither the historical mindset nor the sense of being entitled to participate in criminal trials involving their peers. Unlike the United States, Japan’s experience with lay participation in judicial matters has not left an appreciable impact on the citizenry. In a recent poll, Japanese citizens indicated that they would be reluctant to participate in any kind of jury system.¹⁴⁶ To ensure that a meaningful number of citizens participate in the system and begin to develop a sense of entitlement, the courts should rapidly expand *saibanin* jurisdiction to include lesser criminal cases.

Second, although the Reform Council’s recommendations for *saibanin* selection appear egalitarian, several areas of concern remain. While the vast majority of Japan’s population is ethnic Japanese, several minorities such as Koreans, Chinese, and Thai reside in Japan as resident aliens.¹⁴⁷ As the population of non-Japanese grows, they face commensurate, but

142. See *supra* notes 16 & 62 and accompanying text.

143. See JOHNSON, *supra* note 11, at 194.

144. *Id.*

145. See *id.* ch. IV, pt. 1, § 4.

146. *Legal Experts Optimistic on Judicial Reforms*, DAILY YOMIURI, June 14, 2001, available at 2001 WL 20476648 (excerpting from an interview with Kunihiro Matsuo, Administrative Vice Justice Minister, commenting on the potential difficulties of implementing a jury system).

147. Summary of Findings from the 1995 Population Census (Vol. 9 Special Tabulation on Foreigners), available at <http://www.stat.go.jp/data/Kokusei/1995/1518.htm> (noting the population of foreigners in Japan). The population of foreigners who lived in Japan in 1995 was 1,140 thousand persons or 0.91% of the total population, showing an increase of 254 thousands or 28.6% in 1990-95. *Id.* Looking at the number of foreigners by nationality, Korean was the largest, 568 thousand persons, accounting for 49.1% of the total of the foreigners, followed by Chinese 176 thousands or 15.4%, Brazil 134 thousands or 11.7% and Philippines 68 thousands or 6.0%.” *Id.* Other minorities such as the Ainu (a Caucasian race residing in Hokkaido) and the Burakamin also reside in Japan. *Id.*

disproportionate increases in criminal prosecution.¹⁴⁸ Steps must be taken to minimize prejudicial treatment of non-native suspects by lay jurors.

CONCLUSION

Although I only examined one portion of the Judicial Reform Council's comprehensive plan, it is important to recognize that changes in other areas of the legal system will influence the success of the *saibanin* and lay participation as a whole. While the Reform Council's intentions were noble, the means it chose to effectuate change will not achieve the nation's desired ends. Considering the nature of Japanese society, the problems inherent in a German-based, lay judge court will render lay participation impotent. Although this may benefit the Japanese procuracy by preserving incentives for criminal repentance, it does not afford the Japanese citizenry an adequate voice in criminal proceedings.

Wisely, the Reform Council has permitted adjustments for unanticipated problems. The success of this new system will depend on the flexibility of the Reform Council's guidelines.¹⁴⁹ Due to the inevitable adjustments, the system initially proposed will only vaguely resemble the final product. Nonetheless, even if Japan's initial experimentation with increased lay participation proceeds along its current awkward path, the underlying positive reforms and goals will eventually emerge.

*Joseph J. Kodner**

148. Hiroko Ihara, *Court Interpreters Scale Tower of Babel*, MAINICHI DAILY NEWS, Apr. 12, 2000, available at 2000 WL 6945906. Ihara warns:

A sharp rise in crimes committed by foreigners over the past 10 years has created a pressing need for court interpreters. According to the Public Prosecutors' Office, district courts found 8,086 foreigners guilty of crimes in 1998, a four-fold increase from ten years ago Among the defendants were about 2,600 Chinese, 770 Koreans, 700 Filipinos, 630 Iranians, and 500 Thais.

Id.

149. Reform Council Recommendations, *supra* note 7. The Reform Council believes that:

Even after its implementation, the initial system should not be regarded as fixed in stone. Rather, the actual circumstances of the system should be constantly monitored and, bearing in mind the importance of establishing the popular base, the system should be flexibly readjusted from a broad viewpoint, as necessary. The possibility of introducing the participation system for proceedings other than criminal cases should be considered as a future issue, keeping watch on the circumstances of the introduction and operation of the new participation system in criminal proceedings.

Id.

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