1. Welcoming citizen participation into Japan’s justice system

To best understand the need for citizen participation in Japan’s civil dispute resolution system, it is useful to first look at the historical background surrounding citizen participation in the judicial branch of government, and then explore recent developments impacting the country’s legal system.

A. MONUMENTAL LEGAL REFORMS DESIGNED TO ADVANCE JAPAN

As an established world leader, Japan has long enjoyed acclaim and prominence for its advancement, societal stability and overall quality of life. Japan’s recovery from the devastation sustained during the Second World War is a remarkable tale. This East Asian country rose from the ashes of ward such that it now excels in per capita income, technological advancement, convenience, safety, literacy and life expectancy among other things. Today, Japan also stands as the most democratic country in Asia. Its government and public officials have traditionally benefitted from a high level of trust. Judges and bureaucrats involved in the judicial process have typically commanded the respect of the masses. As a result of its remarkable achievements, advanced and emerging countries alike have often studied, and even attempted to emulate, certain aspects of Japan’s successful economic and societal model.

Despite its substantial accomplishments, Japan’s momentum significantly weakened before the turn of the century due to an extended period of economic uncertainty, mounting national debt and political stagnation. In the late 1980s, Japan entered into an infamous ‘bubble economy’ caused by rampant speculation, soaring stock prices and unsustainable real estate values. In 1989, Japan’s Nikkei stock average hit an all-time high only to crash shortly thereafter in spectacular fashion. This crash caused the bubble economy to burst, real estate values to plummet, and
economic growth to stall for a long period. The economic correction was so far-reaching that many refer to the post-1989 era as the ‘Lost Decades.’

Based on the country’s economic challenges, Japanese political discourse became dominated by calls for deregulation and administrative reform to combat the economic slowdown. The politics of deregulation quickly expanded beyond a debate about simply reducing governmental intervention in the private sector into a wholesale reevaluation of Japan’s economic, administrative and political structure. Reformers reasoned that fundamental change was necessary for Japan to recover from its economic doldrums and adequately meet the challenges of the modern globalized era from social, economic and legal perspectives. They felt that administrative transparency, governmental accountability, and improvement in policy assessment and application were imperative. Moreover, the country needed to fulfill its constitutional mandate that it occupy an honored place in international society and be equipped to respond to international issues with creativity and vitality.

Up until this time, Japan had thrived economically based upon a long-established formula for growth and advancement. In the aftermath of the Second World War, the United States provided significant aid to Japan so that it could rebuild its economy and the two countries could improve their relationship. With improving relations, Japanese industry could then export manufactured products to an affluent United States. As Japan looked to rebuild and expand its industrial capacity, interlocking industrial conglomerates, known as keiretsu, sprung forth. These conglomerates consisted of industrial corporations organized around a Japanese bank that would provide vital capital. The Japanese government became directly and integrally involved with these keiretsu and other facets of the country’s economy to assure the nation’s prosperity by creating a sound economic infrastructure, cushioning the effect of economic depression, and protecting the citizenry’s living standards.1

For decades, Japan considered bureaucratic intervention and administrative regulation to be fundamental components of its successful economic model. The Japanese government helped initiate and foster new industries. In turn, these industries would often collaborate with governmental agencies on research, development and sales particularly in key sectors. Bureaucratic discretion was controlling, and conformance with informal administrative guidance was expected for success in the private

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sector. In fact, foreign observers coined the phrase ‘Japan, Inc.’ in an
effort to adequately explain the Japanese government’s pervasive influ-
ence on the economy and describe the alliance between business and
government. As a result of this dynamic, private entities typically
engaged in informal discussions with governmental agencies that
demanded compliance as a prerequisite of engaging in any substantial
economic activity instead of relying upon the law or legal professionals
for guidance. In effect, this phenomenon kept the number of licensed
lawyers and legal professionals in check.

Japan’s long-standing formula for economic and societal success
started falling out of favor though when the country failed to swiftly
rebound from its burst economic bubble. Some individuals and organ-
izations openly criticized Japan’s tradition of bureaucratic involvement as
outdated and stifling. The administrative system had become bloated and
the quality of governance was called into doubt. Many openly expressed
concern about the country’s direction and questioned whether Japan
could effectively compete on the global stage in the twenty-first century.
These critics progressively demanded substantial change. Rather than
relying on temporary or minor fixes though, Japanese political discourse
shifted toward extensive deregulation and administrative and political
reform. As part of this dialogue, policymakers and business leaders
eventually came to the conclusion that substantial legal reform and
increased citizen engagement were also necessary. Their hope was based
on the idea that fundamental legal reforms could spur the economy,
strengthen society, and prepare the country for future challenges. As
such, policymakers shifted their focus to enhancing laws, policies and
legal institutions.

To combat economic ills and societal concerns, Japan actually started
passing a variety of legislative measures in piecemeal fashion starting in
the 1980s under Prime Minister Yasuhiro Nakasone. Initial legislative
efforts were intended to cut public deficits and shrink government.
Between 1993 and 2002, Japan accelerated legal reforms in hopes of
jumpstarting its economy and positioning the country for the future.
Among other reforms, it moved to strengthen shareholder rights; imple-
mented an Administrative Procedure Act to require transparency in
government and reduce the effect of administrative guidance; mandated
greater corporate social responsibility through the Products Liability Act
of 1995; revamped its Commercial Code in 2002 in an effort to fortify
the corporate governance system; and instituted many other significant
legal reforms. In fact, these reforms were just the tip of the iceberg.
1. Justice System Reform Council Constituted in Pursuit of Legal Reforms

Bolstered by the winds of reform, Prime Minister Keizo Obuchi directed the creation of a special governmental committee in July 1999, known as the Shiho Seido Kaikaku Shingikai or Justice System Reform Council (JSRC), to consider concrete measures to reform the justice system and define the role of the administration of justice in the twenty-first century. The JSRC consisted of 13 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 Corporate Executives (the Keizai Doyukai), the former President of the Japan Federation of Bar Associations, the President of the Federation of Private Universities, a business professor from a private university, a popular writer, a vice president of the Rengo labor organization, and the President of the Federation of Homemakers (Shufuren).

The JSRC was established for the purpose of ‘clarifying the role to be played by justice in Japanese society in the twenty-first century and examining and deliberating fundamental measures necessary for the realization of a justice system that is easy for the people to utilize, participation by the people in the justice system, achievement of a legal profession as it should be and strengthening the functions thereof, and other reforms of the justice system, as well as improvements in the infrastructure of that system.’

Equally as important, the JSRC strongly felt that one of its fundamental tasks was clearly defining what must be done to ‘transform both the spirit of the law and the rule of law into the flesh and blood of this country, so that they become the shape of [the] country.’ In essence, there was strong recognition that Japan requires a justice system that reinforces popular sovereignty and respect for individuals as recognized in Article 1 and Article 13 of the Constitution of Japan respectively.

In its initial investigations and hearings, the JSRC focused on a wide range of criticisms regarding the existing justice system. Among other things, the alleged shortcomings included: the absence of transparency.

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3. Id.
and openness; inability of the courts to meet the private needs of a developing society; substantial divide between the courts and the public; lack of warmth of court personnel, judges and attorneys; difficulties in understanding and using the justice system; and the passivity of the judiciary including the overall inability of the courts to serve as a check on administrative agencies and other branches of government. The JSRC quickly recognized the need to reinforce the function of justice in an ‘increasingly complex and diversified Japanese society’ as well as the necessity of instituting changes to facilitate a more accessible and user-friendly justice system that ‘can respond to the expectations of the people and meet their trust.’ Based on the enumerated goals of the JSRC and weaknesses of the existing system, the members of the Council approached substantial changes to the legal system with the mindset that reforming the justice system would be the ‘final linchpin’ in a series of reforms that would restructure the shape of Japan and empower it for the future.

Historically, the long-time dominant political party, the Liberal Democratic Party (LDP), and big business both benefitted from passive courts. The courts were reluctant to review the constitutionality of legislative measures, and consumers were hesitant to expend the time and money necessary to navigate the obstacles inherent in the judicial process in order to sue big business. Due to the country’s economic slowdown though, the LDP and big business eventually adopted the position that the ‘rule of law’ should displace the concept of ‘rule by law.’ Rather than relying on extensive and expensive government intervention, policymakers started thinking that the private sector should take the lead in jump-starting a stagnant economy. More than ever, citizens would need to understand and trust the law if Japan were to successfully transition to a deregulated economy that places greater reliance on free-market mechanisms. The legal system and the courts would need to adapt as well. To better serve the private sector, courts would need more accessibility, greater transparency and increased efficiency. They would also need to be more responsive to global influences, which in turn, could potentially help Japanese competitiveness on an international scale.

4 Id.
6 Id.
2. Landmark Recommendations Proposed by the Justice System Reform Council Widely Adopted by Japan

After 60 meetings and two years of significant deliberations, the JSRC released its final report advocating wide-sweeping recommendations for reform on 21 June 2001.\(^7\) With respect to the justice system, the Council advocated institutional enhancements including the advancement of participatory democracy, improvements to human resources, and other positive changes. It concluded that Japan must endeavor to increase civic engagement, enhance governmental transparency, improve access and facilitate responsiveness. More specifically, it pressed forward three key pillars: (i) a justice system that is ‘easier to use, easier to understand, and more reliable’; (ii) a legal profession ‘rich both in quality and quantity;’ and (iii) a popular base in which citizens’ trust in the legal system is enhanced through their participation in legal proceedings.

Public exposure to the system was deemed to be key to success. In addition, the JSRC’s investigations found that substantial legal reforms could help in alleviating the business world’s increasing frustration with limited legal resources. They could also help address the perceived inefficiencies, slowness and high costs associated with the judicial process. Industry proponents had long advocated higher quality legal assistance. They also yearned for a more efficient, reliable and credible court system as part of facilitating commerce and economic development.

Building on the pillars of reform, the JSRC felt that the judicial system could function as an engine capable of propelling societal change and bolstering the economy. It concluded that greater citizen participation in government, specifically in the judicial system, could function as a piston in this engine as it could help Japan shift away from centralized control and heavy bureaucratic regulation. In fact, one of the five major sections of the JSRC’s final report was completely devoted to a participatory justice system. In Chapter IV of its final report entitled *Establishment of the Popular Base of the Justice System*, the JSRC described the fundamental features of the proposed quasi-jury system including its structure, scope, and the relationship and responsibilities of citizen judges and professional judges.\(^8\)

As a result of the JSRC’s recommendations, the Diet of Japan passed the *Shiho seido kaikaku suishin ho* (Law No. 119 of 2001) or Justice

\(^7\) JSRC Recommendations, *supra* note 2; see also Ministry of Justice of Japan, *Ensuring that the Results of the Justice System Reform Take Root*, available at http://www.moj.go.jp/ENGLISH/ issues/issues01.html.

\(^8\) *Id.*
System Reform Promotion Act. Based on this Act, the Office for Promotion of Justice System Reform (OPJSR) was established in December 2001 within the Japanese Cabinet to facilitate justice system reform and take the lead in enacting related legislation. In its first three years of existence, the OPJSR helped promulgate and pass 24 major legal reforms based on the JSRC’s recommendations. The actual reforms extended far beyond the original intent of the legal reformers. These reforms included, among others, various civil litigation reforms in 2003 designed to accelerate the adjudication of civil cases; expand the jurisdiction of summary courts; improve the Code of Civil Procedure; and update the Arbitration Act. In 2004, the Diet adopted monumental reforms to the criminal justice system including citizen participation in trials of serious consequence; a new pretrial conference system designed to expand the discovery system as well as improve, accelerate and streamline criminal trials; and a court-appointed defense counsel system for suspects and criminal defendants. Reforms to the criminal justice system also impacted the trial process itself by shifting a relatively passive trial process based on affidavits, prosecutor dossiers and other written documentation to a more active trial proceeding involving live in-court testimony by witnesses. In addition, Japan made significant reforms to the civil dispute resolution system that same year, including the establishment of the Intellectual Property High Court; the implementation of an amended labor dispute system in which labor affairs specialists handle

9 Saiban no jinsokuka ni kansuru houritsu [Act Concerning Speeding Up of Trials], Law No. 107 of 2003.
10 Shiho Seido Kaikaku no tame no Saibansho-hou nado no Ichibu o Kaisei suru Houritsu [Act for Partial Amendment to the Court Organization Act et al. for Justice System Reform], Law No. 128 of 2003.
adjudication; amendments to the administrative litigation system; and the addition of alternative dispute resolution mechanisms.

As part of the revolutionary wave of reform, the JSRC also advocated quantitative enhancements and qualitative improvement in the legal services arena. Consequently, Japan adopted legislation aimed at increasing the number of legal professionals and improving the quality of the attorney pool through the establishment of American-style professional law schools. Previously, Japan relied upon undergraduate law faculties, independent ‘cram’ schools and a specialized legal and training institute to provide legal education. With a new charge, Japan permitted the establishment of 74 new professional law schools. To increase the size of the legal community and ensure the success of the new law schools, the reformers strongly believed that the national bar examination pass rate needed to be raised to levels comparable to the United States – around 70 or 80 percent. An initial target of 3,000 law school graduates passing the bar exam each year would result in the lawyer population more than doubling to 50,000 by 2018. By raising the bar exam pass rate, universities could theoretically eliminate any undue emphasis on the national bar examination. This would enable universities to comfortably expand the curriculum beyond core bar-exam focused courses and integrate specialized materials and experiential activities such as legal aid clinics into the curriculum. Of note, the government decided to deviate from the roadmap outlined by the JSRC. Ten years after the creation of new law schools, the bar examination pass rate hovered around only 20 percent and an increasing number of the professional law schools started taking measures to close their doors. Notwithstanding, the number of lawyers has increased in Japan and the bar pass rate is considerably higher than the pre-reform era.

16 Gyousei Jiken Soshouhou no Ichibu o Kaisei Suru Houritsu [Act Partially Amending the Administrative Cases Litigation Act], Law No. 84 of 2004.
17 Saibaingai Funsou Kaiketsu Tetsuzuki no Riyou ni Sokushin ni Kansuru Houritsu [Act on Promotion of Use of Alternative Dispute Resolution], Act No. 151 of December 1, 2004; Sougou Houritsu Shienhou [Comprehensive Legal Support Act], Act No. 74 of June 2, 2004.
Aside from increasing the number of legal professionals available to service society, the reformers strongly considered greater participation in government to be vital to the success of Japan’s reforms to its legal system. As a result, Japan formally reintroduced citizen participation into the trial process after a six-decade hiatus through its saiban-in seido, commonly translated as ‘lay judge system’ or ‘quasi-jury system.’ Japan focused citizen participation and its lay judge system exclusively on a subset of criminal cases that it felt would be prime grounds for experimentation.

B. CITIZEN PARTICIPATION IN THE JUDICIAL PROCESS IN JAPAN

Before Japan implemented its lay judge system, meaningful citizen participation in the adjudicatory process was an unfamiliar concept in its rich history. Once upon a time, however, Japan briefly experimented with substantive citizen involvement in the judicial process. In fact, this experiment started in the late nineteenth century.

1. Historical Underpinnings of Citizen Participation in the Justice System

As it explored major legal reforms, the Meiji government commissioned a French professor named Gustave Émile Boissonade de Fontarabie with drafting a civil code and suggesting reforms for Japan’s criminal justice system. In 1877, he presented a draft of the Chizai-hou or Code of Criminal Procedure that embraced the concept of a French-style quasi-jury tribunal consisting of three professional judges and ten citizens empanelled for three-month periods. Two years later, the Code of Criminal Procedure was presented to the Genro-in (the Senate) with the quasi-jury tribunal provision included. Despite encountering no opposition in the legislature, Sanetomi Sanjo, the Daijo Daijin (Grand Minister) at the time, eventually stripped all provisions related to the quasi-jury tribunal from the final version of the code that went into force in 1882.

Behind the scenes, it is thought that a key bureaucrat named Kowashi Inoue was actively working to quash the concept of citizen participation in the judicial process. His efforts initially succeeded. In 1877, Inoue

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authored two pamphlets opposing the introduction of a citizen jury. Opponents of jury trials in Japan have used the arguments in Inoue’s pamphlet to attack citizen participation for well over a century. In essence, Inoue opined that it is unfair for citizens chosen by lottery to act as representatives of Japan in judging another citizen because common citizens are too easily influenced by public opinion and personal feelings. He also believed that citizen jurors would be incapable of distinguishing between facts and the law, and that there was a high risk that citizens would be unable to render a verdict in accordance with the law. Finally, Inoue contended that professional judges are less prone to being influenced by a defendant’s behavior during trial and would issue fairer decisions.

Notwithstanding the failed attempt to introduce citizen participation into the judicial process during this period, the seeds had been planted and the concept started taking root. In other countries, all-citizen juries or mixed tribunals comprised of citizens and professional judges (collectively ‘jury trials’) provided a popular check on the government’s political and judicial power. Among other things, jury trials supply an important societal shield against governmental oppression and unreasonable prosecution. They can also function as a check against powerful private interests, act as a catalyst in strengthening the perception of fairness and legitimacy within the courts, and promote the importance of lay participation in society. Jury trial can also help ensure essential concepts including the presumption of innocence, burden of proof, observance of evidentiary standards, and principles of orality.

Recognizing the potential benefits of citizen engagement in the judiciary, public calls for participatory justice continued in the form of newspaper articles, private drafts of a constitution for Japan, calls from the Lawyer’s Association and socialist movements. Based on this pressure combined with Prime Minister Takashi Hara’s political leadership, Japan briefly experimented with jury trials prior to the Second World War. Adopted in 1923 during the Taisho Democracy period, the Jury Act of Japan established jury trials in criminal cases starting in 1928. A byproduct of compromise among those advocating an independent body of citizens to balance the government’s expansive power and those who opposed any form of civic participation in the justice system, Japan’s new

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21 Law No. 50 of 1923, Jury Act of Japan (Baishinho).
jury trial system amalgamated elements of both the Anglo-American all-citizen jury and continental European mixed jury systems.

Between 1928 and 1943, Japan’s new jury trial mandate allowed literate male Japanese taxpayers over the age of 30 who were registered in the same local town registry for more than two years to adjudicate cases involving serious crimes as part of a 12-man jury panel. There was a long list of men excluded from jury service, including persons related to the facts at issue in the trial, criminal convicts, civil servants, members of the military, politicians, priests and certain professionals such as lawyers and doctors. In terms of applicable subject matter, criminal matters involving charges that might possibly result in a sentence of death or life imprisonment were automatically referred to a jury. In cases with a potential penalty of imprisonment exceeding three years, the accused had the right to demand a trial by jury. In any of the applicable cases, the Jury Act provided for a bench trial in the event of a confession.

Unfortunately, the jury system was doomed from its inception as it was plagued by procedural defects and loaded with disincentives due in large part to the compromises agreed to in the creation of the system. The restriction on juror selection to wealthy and educated males did not build trust in the verdicts. The limited power of juries was discouraging. Not only did the Jury Act limit the all-citizen tribunals to determining factual matters, but also the jury did not even have to reach a verdict about innocence or guilt. By a simple majority, the jury simply could adjudicate the veracity of the facts alleged by the prosecutor. Moreover, the accused could not appeal the jury’s factual determinations. In case of a conviction, the defendant also faced the prospect of bearing costs related to the juror’s expenses including transportation, lodging and meals. As further disincentive, if the judge disagreed with the jury, he could dismiss the jury at any point in time, form another body, and hold the trial again.

23 Ortolani, supra note 19, at 155.
24 Id. at 156.
25 Id. at 157.
Cultural inexperience, lack of trust in the new system by attorneys and clients, as well as the rise of authoritarian leaders likely hampered the system as well. In any event, almost all criminal defendants waived their right to a jury trial. In the jury system’s 15 years of existence, less than 500 jury trials occurred before the government discontinued the practice immediately before the war pursuant to Act 88 of April 1, 1943.

2. Citizen Participation in the Judicial Process Largely Excluded by American Drafters of the Constitution of Japan

In the post-war era, General Douglas MacArthur tasked the Supreme Commander of Allied Powers (SCAP) with revamping Japan’s legal system and transforming the rule of law in Japan. Using the US Constitution as a model, SCAP drafted a new constitution for the country with the goal of converting Japan into a democratic nation. With the initial draft in hand, SCAP secretly negotiated with Japanese government officials until the two sides fashioned a document that could be presented to the public. The Japanese public played no part in formulating the Constitution, and in 1946, the members of the 90th Imperial Diet adopted the formative document without substantial debate or change. In essence, democracy was imposed on Japan from above.

In many respects, the new Constitution of Japan mirrored many provisions in the US Constitution. In others, it differed significantly. One significant difference was the absence of the right to trial by an ‘impartial jury’ similar to that found in the Sixth Amendment of the US Constitution. Instead, the Constitution of Japan provided for trial only by ‘an impartial tribunal.’ There are differing opinions about the underlying reasons for SCAP failing to include jury trials or embracing lay participation in the judicial process into the new Constitution. However, the Supreme Court of Japan explains that the American reformers likely felt that Japan did not have the political stability or social energy to resurrect the jury trial system at that time. Scholars explain that SCAP suggested the reinstatement of citizen participation in criminal cases, but that Japanese opposition to this idea prevailed simply because it was not a

priority for the drafters. Regardless of the reasons, without a constitutional guarantee or law providing for citizen participation in criminal or civil trials, the concept of jury trials or other forms of lay adjudication was largely alien to Japan for an extended period of time. The limited exceptions were the informal role of citizens working with professional judges in conciliations and nonbinding recommendations issued by Kensatsu Shinsakai or Prosecution Review Commissions (PRCs) in criminal matters.

Albeit in very limited form, Japanese citizens have actually participated in the criminal justice system for over 60 years. Without any substantial attention, Japanese citizens have been recruited to serve at the indictment stage in the context of Prosecution Review Commissions. A creature of the American occupation, these commissions exist throughout Japan. Each Prosecution Review Commission consists of 11 citizens each serving a six-month term. The PRC’s main objective is providing direct civic oversight of the government and its institutions. Each PRC is tasked with investigating and reviewing the propriety of the public prosecutor office’s decision not to indict a criminal suspect when a victim or party of interest submits a petition requesting a secondary opinion and review. If after its review, the PRC disagreed with a career public prosecutor’s inaction, then the Commission would issue a recommendation to the prosecutor to reconsider the decision not to indict. Because these recommendations were nonbinding prior to 2009, public prosecutor offices were overwhelmingly inclined to stand by their initial decision. On average, prosecutor offices modified their initial decision in response to PRC recommendations less than 10 percent of the time.

On May 28, 2004, the Diet of Japan enacted an Act to Revise the Code of Criminal Procedure, which included amendments to the Prosecution Review Commission Law. Japan’s revision of the PRC system constitutes another major judicial reform in re-energizing the citizenry’s active participation in the justice system. As a result of the amendments, the improved Prosecution Review Commissions gained additional power and influence in 2009 when the amendments to the Prosecution Review

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29 Ortolani, supra note 19, at 158.
Commission Law went into effect. Now, each PRC can investigate a decision not to indict without a complaint from a victim or party of interest. Moreover, a PRC has the ability to compel the indictment of criminal suspects as its recommendations are binding. The public prosecutor offices no longer have the ability to ignore PRC recommendations.

Until 2009, Japanese prosecutors were extremely reluctant to indict prominent politicians, government bureaucrats and members of law enforcement and the judiciary. In the revamped system’s first five years of operation, Commissions around the country forcefully indicted a former deputy police chief, three past presidents of Japan Railway (JR) West, which is one of the most powerful Japanese private corporations, and a member of the ruling Liberal Democratic Party. The PRC is now seen as providing powerful civic oversight of political organizations and administrative agencies of the Japanese government.

3. Pressure for Change and Increased Citizen Participation

Around the turn of the century, pressure on the legal system had intensified particularly with respect to criminal justice, transparency and citizen participation. In particular, the Japanese Federation of Bar Associations (JFBA) lobbied vigorously for the introduction of a jury system to be included on the country’s policy agenda. The JFBA demanded greater citizen involvement in both criminal and civil contexts to enhance participatory democracy and balance the immense power of the state. The pressure exerted by the JFBA played a significant role propelling the issue of lay participation onto the national scene.

In the post-war era, Japan’s criminal justice system became renowned for the symbiotic power relationship among the courts, public prosecutor offices and the police. The close interaction between these institutions had evoked criticism that Japanese judges are prone to giving undue credence to prosecutorial investigations. Some have even claimed that judges merely ‘rubber stamp’ prosecutorial conclusions, meaning that the prosecutor has basically convicted a criminal defendant even before the trial begins. Without jury trials, the unfettered power of the Japanese prosecution led to a nearly 100 percent conviction rate of all criminal cases. Such a near perfect conviction rate in criminal trials was achieved through the abuse of prosecutorial power, including the use of substitute prison to concoct forced confessions from criminal defendants.

32 Id.
33 Id.
and the judge’s uncritical evaluations of such confessions resulted in a large number of wrongful convictions in Japan.\footnote{Hiroshi Fukurai, \textit{A Step in the Right Direction for Japan’s Judicial Reform}, 36 Hastings Int’l Comp. L. Rev. 517 (2013).}

Before Japan introduced the lay judge system, all criminal trials were essentially one-phase, intermittent proceedings in which professional judges simultaneously considered guilt and sentencing. Tribunals comprised of one or three professional judges relied heavily on written materials, including the public prosecutor’s investigation dossier. The prosecution thoroughly developed its dossier and structured it to ensure a conviction. Notwithstanding objections from defense counsel, judges generally accepted the dossier into evidence with little reservation. If a prosecutor lost at trial, they found some solace in the right to appeal. Either party in a criminal matter can appeal as of right based on issues of fact, law or sentencing.

Japanese prosecutors derive immense power from their ability to prejudge suspects within a bureaucratic and hierarchical structure. Prosecutors operate in an opaque environment of nondisclosure and largely without the interference of defense counsel. Prosecutors tend to defer to bureaucratic interests or public pressure. 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 courts that focus on determining a defendant’s innocence or guilt.

For decades, groups of scholars and Japanese lawyers promoted the merits of jury trials and citizen participation in the justice system as a means of not only furthering civic engagement, but also as an opportunity to address the various shortcomings of the system. These groups and individuals took issue with an extraordinarily high conviction rate; an over-emphasis on written documentation; judicial discounting of the vital presumption of innocence in favor of a presupposition of guilt; and several high profile cases involving miscarriages of justice that came to light starting in the 1980s. Also, substantial concerns existed about the criminal justice system’s violation of criminal defendants’ rights including the lack of timely access to defense counsel and coercive techniques used in police detention centers to elicit confessions.

The criticism was not limited solely to lawyers and scholars. Takeo Ishimatsu, a former High Court judge who presided over criminal trials for three decades, took issue with several aspects of the Japanese criminal justice system after his retirement. In 1989, Judge Ishimatsu noted that prosecutorial dominance is so prevalent in Japan that the real
criminal trials are conducted in the prosecutor offices when they are deciding to bring charges, and that hearings in open court are simply ‘empty shells’ that result in the ‘egregious trampling of human rights.’

Interestingly, these open criticisms had little or no effect on public opinion. The public has generally been comfortable with a society comparatively free from serious crime and a relatively obscure justice system isolated from political conflict. In fact, Japanese society has maintained that its judicial system is one of the most consistent and sophisticated in the world. Popular sentiment has traditionally been that Japanese judges are intelligent, honest, esteemed, politically independent and professionally competent, particularly in comparison with other countries. Many feel that professional judges are in the best position to competently and neutrally adjudicate disputes. It was not until the JSRC issued its recommendations that things rapidly started to change.

4. Shift Towards Citizen Participation in the Judicial Process 60 Years Later

Interest with the legal community and research about criminal and civil juries quickly came into bloom around the turn of the twentieth century when the Japanese government started moving towards judicial structural reform through the establishment of the JSRC. The announcement of Chief Justice Koichi Yaguchi that the Supreme Court would take the lead in studying the potential adoption of a jury system together with the JFBA’s continuing intention to do the same propelled research, scholarly discussion, and advanced discourse regarding jury systems. The legal community started amassing considerable knowledge about jury systems in common law countries and lay judge systems typical in Europe. In fact, the efforts unleashed by Justice Yaguchi resulted in justices visiting the United States, United Kingdom, Germany, France and other European countries for extended periods of time to study the citizen participation systems. In the end, the Supreme Court published a nine-volume book series on the subject of jury systems and lay judge systems.

From the outset, one of the main agenda items addressed by the JSRC was whether Japan should adopt a jury system. In 1999, the JSRC’s

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discussions involved the potential adoption of jury trials in both criminal
and civil contexts. Civic participation in the judiciary was the focus of
both the Shiho Seido Kaikaku Chukan Hokoku Sho [Judicial System
Reform Council Midterm Statement] issued in 2000 and the Shiho Seido
Kaikaku Iken Sho [Judicial System Reform Council Final Statement]
issued in 2001. During this process, however, the concept of introducing
civil jury trials eventually disappeared from the JSRC’s radar as the
discourse gravitated to the idea of a criminal mixed court system in the
form of a saiban-in seido.

In March 2001, Professor Masahito Inoue from the University of
Tokyo addressed the JSRC about a hybrid or mixed jury system involving
both professional judges and citizens.37 Without any precedent for such a
system, the term 'saibanin' or 'lay judge' was essentially a creation of
Inoue, who advocated a system with the following characteristics: (i) a
role for citizen judges in the judicial process; (ii) a collaborative role
among professional judges and citizen judges; (iii) a standardized method
for selecting citizen judges and a clear delineation of responsibilities; (iv)
joint deliberation of final verdicts; (v) trial procedures consistent with
citizen participation; and (vi) appellate procedures.

Using a top-down approach akin to that when the Constitution of Japan
was adopted, Japanese policymakers decided not to involve the general
public in the future of its criminal justice system with respect to citizen
involvement or participation. Instead, reforms were proposed and eventu-
ally promulgated without any substantial public input, discussion or
debate.

Closely following the JSRC’s recommendations, Japanese policymak-
ers quickly embraced the concept of a lay judge system with respect to
certain crimes. Once the JSRC had issued its final report, the executive
branch created the Saiban-in Seido Keiji Kento-kai or Committee for the
Saiban-in System and Criminal Affairs under the auspices of the Cabinet
Office to draft legislation for the creation of the lay judge system.
Professor Inoue was asked to chair this committee and implement his
own recommendations in the hybrid court system. On May 21, 2004, the
Diet of Japan adopted the new lay judge system as proposed through the
Saiban-in ho or Act Concerning Participation of Lay Assessors in

37 Sosho Tetsuzuki Eno Aratana Sanka Seido Kokushi [A New Mixed Court
System in Criminal Procedures: Suggestions for the Framework] (Mar. 13,
Criminal Trials (the ‘Lay Judge Act’).\textsuperscript{38} This law mandated the creation of lay judge trials for certain serious criminal matters starting five years later. Lay judge trials officially commenced as scheduled in May 2009.

Once the Lay Judge Act took effect, Japan infused significant thought, much preparation and substantial expense into the implementation of its lay judge system. The Japanese government and the JFBA spent well over USD$50 million promoting the new jury-like system to the public through billboards, print advertisements, television programs, Japanese manga (cartoons), Japanese anime (animation), a mascot, mock trials, symposiums, Internet videos and other means. In addition, the government prepared the courtrooms for public participation at a substantial cost. Until 2009, either one professional judge or a panel of three professional judges handled all criminal and civil trials in Japan. The new system created a challenge in terms of the courtroom layout accommodating citizen participation. To create sufficient space for the lay judges, the government needed to remodel courtrooms to create sufficient space for nine individuals to sit on the bench. In contrast to the traditional common law system, citizen jurors do not sit in a ‘jury box.’ Rather, they sit side by side with the professional judges. Also, unlike the previous system, the introduction of quasi-jury tribunals would require a special room for deliberations. Accordingly, deliberation rooms were specially constructed with sensitivity given to the tribunal’s comfort. Facility costs related to the lay judge system combined with other preparatory expenditures exceeded USD$300 million. The Japanese government expended all of these resources based on the presumption that systemic change would enhance citizen understanding of and trust in the legal system and help the citizenry to become more self-sufficient.

5. Characteristics of Lay Judge Tribunals Handling Serious Criminal Cases

By design, Japan adopted a jury trial model tailored specifically for its society and one that it can tout as its own. In scope, the country’s new quasi-jury system restricts citizen participation to adjudicating certain serious criminal cases only.\textsuperscript{39} The trials subject to lay judge participation involve crimes punishable by death or indefinite imprisonment, or crimes committed with intent resulting in death of the victim. More specifically,

\textsuperscript{38} \textit{Saiban-in no Sanka Suru Keiji Saiban ni Kansuru Horitsu} [Act Concerning Participation of Lay Assessors in Criminal Trials], Law No. 63 of 2004 [‘Lay Judge Act’].

\textsuperscript{39} \textit{Id. at Art. 2(3).}
these include crimes of homicide, robbery resulting in bodily injury or death, bodily injury resulting in death, unsafe driving resulting in death, arson of an inhabited building, kidnapping for ransom, abandonment of parental responsibilities resulting in the death of a child, and other serious cases involving certain rape, drug and counterfeiting cases.

The focus on criminal trials stemmed from the reformers desire to roll out citizen involvement on a limited basis initially. Criminal justice involves high stakes. Concerns related to community safety, victims’ rights, criminal deterrence and punishment contend directly with the rights, liberties, lives and reputations of suspects and defendants. The designers of the lay judge system also targeted serious criminal trials for practical reasons. They believed that criminal cases were comparatively straightforward. Accordingly, this would enable the professional judges to narrow down evidentiary disputes before trial. It would also potentially simplify and shorten in-court examinations.\textsuperscript{40} Moreover, the designers of the new system felt that citizens should assess matters involving violent crimes because ‘the more heinous the crime, the more meaning there is in the restoration of social justice by citizens, in whom sovereignty rests.’\textsuperscript{41}

Under the new lay judge system, a defendant charged with a crime prescribed in the Lay Judge Act cannot waive or avoid trial by a lay judge panel. Given Japan’s negative experience with the right to waive a jury trial in the pre-World War II era, the absence of a waiver mechanism was not unexpected or unwarranted. A court does have limited authority pursuant to Article 3 of the Lay Judge Act to remove a case from the jurisdiction of a lay judge tribunal in exceptional instances. Specifically defined, such instances involve threats by the defendant or third parties to the lives or property of the citizen judges or their relatives that would interfere with the person’s meaningful participation in the trial proceedings.

Although the Japanese public as a whole had not called for substantial changes to the criminal justice system or pressed for greater rights for suspects, the reformers felt compelled to start with the citizen participation experiment in this area of great importance. Albeit less important to the reformers, a host of individuals and organizations had long raised some concerns about the closed nature of the judicial system. Progressive

\textsuperscript{40} Setsuko Kamiya, \textit{Preparation for Quicker Criminal Trials Enhances Focus}, The Japan Times, (May 13, 2009), available at http://search.japantimes.co.jp/cgi-bin/mn20090513f1.html (quoting Shozo Fujita, Director of the Saibanin Trial Department of the Supreme Public Prosecutor’s Office).

movements and grassroots activities had encouraged a system that would permit common citizens to constructively participate in the criminal judicial process, thereby infusing societal expectations and norms into such process. For example, the JFBA proactively campaigned for jury trials starting in the early 1980s, when the courts ordered the release of four men who confessed under duress from death row based on wrongful convictions. Notwithstanding, the government and society had largely ignored calls for citizen participation in the judicial process until the JSRC proffered its recommendations suggesting, in part, that this could help prevent wrongful convictions and reduce violations of the rights of the accused. Adding the eyes of the citizenry to the criminal process could help ensure just and substantiated verdicts.

While Japan designed the lay judge system for its own purposes, it borrowed many concepts from other nations in constructing its system. This is typical of many other aspects of Japanese law. In many respects, Japan’s lay judge system is similar to the Schöffe lay judge system in Germany and the échevin system in France in that citizens participate in trials as – lay judges’ deliberating alongside career professional judges. However, identical to jury systems in common law countries like the United States, the government selects Japanese adult citizens randomly from voter registration lists for participation in a single trial. Participation is compulsory, absent permission from the court or exclusion by peremptory challenge.

Japan’s lay judge tribunals consist of six citizen judges and three professional judges sitting together to adjudicate guilt or innocence in certain contested criminal trials. The nine-person lay judge tribunals also collaborate to determine the sentence of a convicted defendant. The composition of the lay judge panel was one of the most contentious issues faced during the planning process. Liberals sought to adopt an all-citizen jury like that typically found in common law jurisdictions, while conservatives wanted a mixed professional judge-lay Citizen tribunal common to continental European-style civil law jurisdictions in that professional judges outnumbered the lay judges. The Supreme Court and Ministry of Justice essentially backed the proposal for a panel of three judges and six citizens. In the end, the coalition parties in power

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announced that they would support a hybrid tribunal in which six lay judges outnumber three professional judges by a 2-to-1 ratio in contested cases, and a panel of four lay judges and one professional judge for uncontested cases.

The selection of the citizen judges occurs at the local level pursuant to the national standards. Each court will be responsible for making a prospective lay judge list. A certain number of prospective lay judges will be summoned from these lists and informed of their obligation to appear for ‘lay judge duty.’ The court will then question each prospective lay judge about whether they have any relationship with the case and related actors, their ability to make an impartial determination, and any reason that they cannot serve. If a prospective lay judge has previously served within a five-year period or has previously appeared as a prospective lay judge within the past year, they may refuse service. Other individuals may also be exempt from lay judge duty including someone over 70 years old, city council members, students concurrently enrolled in classes, members of prosecutorial review committees and other individuals who are injured, sick, have to attend a family member’s funeral, or have unavoidable child care, elderly care or business obligations. Also, certain members of the community are automatically excluded from the process including Diet members, ministers of state, certain governmental employees, lawyers, patent lawyers, judges, prosecutors, police officers and employees of the police department, certain politicians, notaries, legal apprentices, self-defense officers and others.

Additionally, a Japanese citizen may not serve as a lay judge if they have not completed compulsory education in Japan; committed a crime; or have mental or physical incapacities that would preclude them from serving. The prosecution and defense may strike lay judges for cause, and up to four prospective lay judges without cause. The court will then select the lay judges from those individuals who were not excluded.

In both contested and uncontested cases, the professional judges contribute their legal expertise and the lay judges share their respective knowledge, experience and common sense. Theoretically, the lay judges possess authority equal to the professional judges, in that they both determine facts and participate in sentencing. However, legal and procedural matters are reserved for professional judges due to their specialized

43 Lay Judge Act, supra note 38, at Art. 21–23.
44 Id. at Art. 15.
45 Id. at Art. 14.
training and the lay judge’s lack of formal legal knowledge or training.\textsuperscript{46} The JSRC emphasized that citizen jurors should ‘cooperate with judges by sharing responsibilities,’ with the objective of actively participating ‘autonomously and meaningfully in deciding trials.’\textsuperscript{47} Accordingly, citizen judges may question witnesses, victims and defendants during the proceedings. They may discuss and evaluate the evidence during trial instead of waiting until the very end before commencing discussions.

In comparison with jurors in the United States and other common law countries, the authority provided to Japanese lay judges during the trial hearings gives them more direct hands-on participation in the process. Essentially, the mixed tribunals will reach judicial determinations through mutual communication and the sharing of ideas among professional judges and lay judges. The professional judges, together with the prosecutors and defense counsel, have the additional obligation to make trials quick and easy to understand so as to minimize the burden placed upon the lay judges and enable them to sufficiently perform their duties.\textsuperscript{48}

Procedurally, lay judge trials differ substantially from past Japanese court practice. Instead of the discontinuous system of the past when criminal proceedings were sporadically held over the course of months, if not years, trials now take place on consecutive days. To prepare for consecutive hearings, the court holds pretrial meetings to specify the issues at trial and focus the parties on the evidence that the parties intend to introduce during the trial. These procedural changes are intended to accelerate proceedings and improve efficiency within the justic system. It can also help satisfy the constitutional promise of the right to a speedy trial.

For a lay judge tribunal to reach a verdict in a contested case, a majority vote is sufficient. However, at least one professional judge and one lay judge must concur in the majority’s conclusion in the event of a guilty verdict. The prosecutor or defendant has the right to appeal the verdict. In cases involving the death penalty, unanimous verdicts are not required. As such, some organizations and individuals have been urging the adoption of a unanimity rule for death penalty cases.

In terms of the trial proceedings and deliberations, the lay judges have a strict duty of confidentiality. Citizens face severe penalties for disclosing information about the trial and deliberations both during and after the

\textsuperscript{46} Id. at Art. 51.
\textsuperscript{47} JSRC Recommendations, supra note 2, at Ch. IV, Part 1(1).
\textsuperscript{48} Lay Judge Act, supra note 38, at Art. 6.
trial. Although no lay judge has been penalized to date and court officials regularly monitor post-trial press conferences to prevent inadvertent violations of the law, the prospect of facing a penalty despite rendering a service to society can be disheartening and undermines the objective of making the justice system more transparent.

During the trial itself, the lay judges may question witnesses. Victims and their families may also tender questions and provide statements in court during the trial itself. These procedural aspects of the system together with the fact that the trial is not bifurcated into a separate proceeding for guilt and another for sentencing have been subject to considerable criticism.