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# ***Rashomon* Comes to the Courtroom: the Adoption of the Lay Judge System in Japan, Its Impact on Jurisprudence, and the Implications for Civic Engagement**

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*Rashomon* Comes to the Courtroom:  
The Adoption of the Lay Judge System in Japan, its Impact on Jurisprudence,  
and the Implications for Civic Engagement

by

Bryan Matthew Thompson

A thesis submitted in partial fulfillment of the  
requirements for the degree of

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in  
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Thesis Committee:  
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Portland State University  
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## ABSTRACT

In May of 2009, Japan began formal operations of the “*saiban-in seido*” or “lay judge system,” a quasi-jury means of criminal trial adjudication that represents the first occasion since 1943 that average Japanese citizens will be required to fulfill a role in the criminal jurisprudential process. While the lay judge system promises to affect the methods and procedures of criminal trials in Japan, recent scholarship in the United States has raised an interesting question: to what degree can the lay participatory adjudication process facilitate greater levels of civic engagement in past citizen jurists once their service has completed?

It is with this question in mind that the Japanese lay judge system is examined. In this work I first analyze how the Japanese judicial system fits within the global context, measuring it against the adversarial and inquisitorial archetypes that are followed by other liberal democracies. I then look to describe how lay adjudication is handled elsewhere around the world, finding that two major systems are employed – the Anglo-American jury and the European mixed-tribunal – with the Japanese lay judge system bearing great resemblance towards the latter. In investigating the origins of the lay judge system, and the changes this new method brings to Japanese criminal jurisprudence, I seek to detail the goals of this recent reform and the opportunities the lay judge system has to realize those aims. Finally, I look to how lay participation in the courtroom can inspire individuals to be more civically active once their service at trial is finished. In this pursuit, I look to relevant theoretical literature that describes how deliberative participation can spur further participation in civil society, as well as recent research in the United States that document linkages between jury service and

an individual's later inclination to be more civically engaged. With this evidence in hand, I return the focus to Japan and the lay judge system and ask what results can be expected under this new system.

As sufficient data is not readily available to make definitive declarations as to the civic engagement-enhancing potential of the lay judge system – due to the relative newness of the institution – this thesis instead offers theories and hypotheses that may prove fruitful to later investigations on this very question. Moreover, I examine opinions prevalent in the current literature that would question the ability of the lay judge system to invigorate the civic engagement-tendencies of past lay jurists and analyze their veracity. In this manner, I seek to provide future research in this area with a more stable footing to proceed.

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The writings of Dr. John Gastil and several other scholars over the past decade examining the link between jury service in the United States and post-jury service rates of individual civic engagement for past jurors served as the inspiration for much of this work. But I am particularly indebted to Dr. Gastil for providing me with the most recent draft of his forthcoming book, “The Jury and Democracy: How Jury Deliberation Promotes Civic Engagement and Political Participation”, co-written with Drs. E. Pierre Deess, Phil Weiser and Cindy Simmons. This soon-to-be published resource provided critical new insights as to the power of the jury system to foster and promote civic engagement amongst citizens, insights which were not included in previous works. This additional material answers questions I had long held regarding the potential of the jury system to promote non-voting forms of civic engagement, and provides workable research designs for enterprising future researchers who wish to empirically test the civic engagement potential of the lay judge system.

Additionally, thanks are owed to Dr. Hiroshi Fukurai at UC Santa Cruz, Dr. Valerie Hans of the Cornell University School of Law, Dr. David Johnson of the University of Hawaii, Dr. Matthew Wilson of Temple University, Dr. Ellis Krauss at UC San Diego, Drs. Robert Pekkanen and Larry Repeta of the University of Washington, and Ms. Anna Dobrovolskaia for all providing excellent resources and guidance for my investigations. I am very much appreciative to these very busy scholars for taking time out of their own endeavors to help out a graduate student whom they do not know.

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## Chapter I

### Introduction

“Japanese courts convict.” J. Mark Ramseyer and Eric Rasmusen (2001a, 88) give this concise and blunt assessment of the Japanese judiciary in their aptly-titled article, “Why is the Japanese Conviction Rate so High?” While noting that courts in the United States are not shy about condemning American defendants, Ramseyer and Rasmusen contend that Japanese courts differ in that they “convict with a vengeance”; indeed, Japanese courts routinely convict over 99% of all defendants that come before the bench (Ramseyer and Rasmusen 2001a, 55, 88; *see also* Lempert 1992, 67; Maruta 2001, 224). By comparison, the average total conviction rate in England and Wales between 2000 and 2007 was 79.1% for crimes reviewable by the Crown Court (UK Ministry of Justice 2008, Table 6.7).<sup>1</sup> The average conviction rate in U.S. federal courts in 1995 was roughly 85% (Ramseyer and Rasmusen 2001a, 55). By 2009, however, America’s federal courts has started to convict their own with a similar vengeance, as 91% of defendants in cases adjudicated received guilty verdicts (Administrative Office of the US Courts 2010, 14-15, Table D-4; *hereafter* AOUSC)<sup>2</sup>. Amongst American state courts, the median conviction rate was 90% in 2001 (U.S. Department of Justice 2002, 6).

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<sup>1</sup> The total percentage of persons convicted in England and Wales includes those who initially plead guilty to all counts. In 2000, the percentage of defendants who plead guilty to all counts was 56%; by 2007, 67.6% of defendants plead guilty to all counts. Of all defendants who entered pleas of not guilty, between 50% to 61% of such defendants were acquitted during this period (U.K. Ministry of Justice 2008, Table 6.7).

<sup>2</sup> The total percentage of persons convicted in U.S. federal courts in 2009 includes those who initially plead guilty to all counts. Roughly 88% of all defendants plead guilty to all counts; of the 8,892 persons who were not convicted, 94.6% saw their charges dismissed instead of receiving a formal acquittal by the court (AOUSC 2009, Table D-4).

Whether truly vengeful or not, the nature of Japanese jurisprudence has undergone important changes over the past decade, most significantly of which includes the reintroduction of citizens to the decision-making process in criminal trials. In May of 2009, Japan formally implemented the provisions of the Lay Assessors Act<sup>3</sup>, a 2004 statute passed by the Japanese Diet that mandated broad reforms to the Japanese judicial system. At its core, the Lay Assessors Act required the creation of a quasi-jury form of criminal trial adjudication, where citizen judges would serve side-by-side with their professional counterparts and rule on both matters of guilt and sentencing for a limited number of high crimes – usually those offenses with penalties of death or life imprisonment of the defendant, or where the victims dies due to defendant’s actions (Anderson and Saint 2005, 233-234). Known as the “*saiban-in seido*”, or “lay judge system”<sup>4</sup>, the quasi-jury method that Japan has created is one that is simultaneously reminiscent and distinct from other criminal jury constructs employed elsewhere. While the lay judge system’s use of both professional jurists and lay citizens in joint decision-making is similar to European mixed-tribunals, Japanese lay members are selected randomly and serve for only one case, much like their Anglo-American contemporaries. By taking attributes from both the European and the Anglo-American models, the Lay Assessors Act created a criminal

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<sup>3</sup> Kent Anderson and Emma Saint (2005) provided perhaps the first full-translation of the original Japanese text of the statute *Saiban-in no sanku suru keiji ni kansura hōritsu*. In respect to the authors and their efforts, Anderson and Saint’s original translation of the statute’s title, “the Lay Assessors Act”, or “the Act” will be used for the purposes of this paper.

<sup>4</sup> The term *saiban-in* has been translated as “lay assessor” (Maruta 2001; Anderson and Nolan 2004; Anderson and Saint 2005; etc) and “lay judge” (Bloom 2005; Jones 2006; Wilson 2007; etc); Fukurai (2007) translates the term as “petit quasi-jury.” For the purposes of this paper, *saiban-in* will be translated as “lay judge”, and *saiban-in seido* will be translated as “lay judge system”.

jury system for which there is no true international counterpart (Anderson & Saint 2005, 234).

The inclusion of lay jurists in criminal proceedings represents a surprising and important move on the part of both the Japanese government and domestic legal community towards making the judicial system more accessible and transparent to the society at-large. Given the fact that Japan had not had any system of trial-by-jury since 1943 (Dean 1999; D. Levin 2008; Wilson 2007), and the past effectiveness of claims that Japanese culture and the bias of jurors would hamper justice in discounting the reintroduction of a jury in Japan (Maruta 2001; Anderson & Nolan 2004), the successful advancement and establishment of the lay judge system is significant. Moreover, the scope of the overall judicial reform efforts of the past decade – to which the lay judge system was but one component – further highlight the gravity of the undertaking. Indeed, until the implementation of the Act, all criminal cases had been adjudicated by individual panels of professional judges, which as a body ruled on questions of law, evidence and procedure, and decided the guilt and sentencing of a defendant based upon a simple majority vote. This insular method of rendering judgment, free of outside supervision from the public, had long been criticized by defense attorneys within Japan and human rights groups around the globe, who point to Japan's staggeringly high conviction rate of over 99% as evidence of the flawed nature of the old juridical order (Wilson 2007, 835).

Supporters of the lay judge system believe it to affect Japan in five major ways: (1) improve the quality of substantive justice; (2) enhance the legitimacy of the judiciary amongst the populace; (3) increase the economy and efficiency of trials as

well as the state; (4) alter the relationship between the Japanese state and the society; and (5) enable and enhance democratic tendencies on the part of Japanese citizens. In regards to improvements to substantive justice, the effects of lay judge participation at trial will be of massive import to the operations of the Japanese legal system – while judicial reform was being debated in the late 1990s, one scholar surmised that the introduction of a jury system would likely cause Japan’s high conviction rate to decline (Kiss 1999, 282), as “laypersons may be able to avoid biases of experienced career judges concerning the presumption of innocence and correctness of prosecutors” (Kiss 1999, footnote 174). Moreover, legal professionals have long felt that the establishment of some form of jury system would transform criminal trials and decrease the rate of *wrongfully convicted persons* (Fukurai 2007, 318), not just the overall rate of conviction. In other regards, the lay judge system is expected to facilitate contracted trials, require expanded discovery, invigorate the heretofore weakened Japanese defense system, and reduce the usage of the prosecutor’s official case dossier and increase the importance of live oral testimony of witnesses as key evidence at trial. In Foote’s (2007, xxxiii) estimation, the lay judge system is the crucial element that binds these broader goals of judicial reform together.

Additionally, there are expectations that the participation on the part of everyday citizens in trials will strengthen the legitimacy of the judiciary amongst the Japanese populace. In an undated pamphlet designed to educate citizens on their role as lay jurists, the Supreme Court of Japan, the Ministry of Justice, and the Japan Federation of Bar Associations (JFBA) expressed their collective desire that the inclusion of citizen jurists will “increase the understanding and trust of the general

public toward the judicial system” (Supreme Court of Japan, Justice Ministry and JFBA, 3, *hereafter SCJ, Justice Min. and JFBA*), thereby increasing the institution’s legitimacy within society. Such expectations are supported by research within the United States, which has shown that citizens who have served on juries exhibit a greater degree of support for the courts and the legal system in general once their service is completed (Diamond 1993, 282, 284-286).

Beyond the procedures of the courtroom and the application of justice, the broader efforts at judicial reform and the lay judge system itself are expected to affect and alter the traditional relationship between the state, the society, and the individual. Indeed, the judicial reform was seen as a crucial component to the larger aims of deregulation and the reduction of administrative guidance – i.e., the direct influence that the Japanese bureaucracy exercised in many facets of the state, such as in directing the economy and the move the Japanese state and the society – advanced in earlier administrative reform efforts (Foote 2007, xxviii). In their place, Japan was expected to convert to “an after-the-fact review/remedy type society”, where the rule of law and the principles of the free-market would be emphasized (Foote 2003, 206-207; Foote 2007, xxviii, xxxv; Kingston 2004, 85-86; Miyazawa 2001, 100).

Closely related to the above-mentioned point is the question whether the involvement of everyday citizens in crucial judicial functions will affect the overall strength of democracy within the country. Kent Anderson and Mark Nolan (2004, 943) note that advocates of the lay judge system, while touting that a return to a form of trial-by-jury would improve the quality of justice in Japanese courts, also assert that the presence of such a system would promote and reinforce democratic tendencies

within society overall. Along that same notion, the final recommendation report of the Judicial Reform Council (JRC) stated that judicial reform was necessary to facilitate broader national reorganization efforts under the concept of the rule of law, as well as to transform the consciousness of the Japanese people from “being a governed object [to becoming] a *governing subject, with autonomy and bearing social responsibility...[emphasis added]*” (JRC 2001), speaking to a recognized need to increase citizen participation in the nation’s political and governing processes. In this way, the JRC regarding the strengthening of popular sovereignty as an ultimate aim of judicial reform (Foote 2007, xxxv). By linking the active participation of citizens in the judicial process to the general strength of democracy in Japan, the JRC and Anderson and Nolan hint towards the axiom expressed Putnam and Goss (2002, 6), namely that “the characteristics of civil society affect the health of our democracies, our communities, and ourselves.” In this new society, the individual is expected to assume a more prominent role, which their service as lay judges exemplifies.

It is with the question of how the lay judge system might enhance Japanese democracy that this paper is ultimately concerned. Research on jury systems has long spoken to the democracy-enhancing potential and the civic educational benefits of involving citizens in the judicial process. Recent scholarship in the United States has examined the effect of juror service on individuals who have participated, finding that the experience alters the way that persons view themselves and their place within civil society, as well as their tendency to be active participants within society (Gastil et al. 2002; Gastil et al. 2008; 2010). Yet scholarly work examining other methods that employ laypersons at trial – including the mixed-tribunal systems of Europe – and the

resultant political and social consequences within those countries make up only a small fraction of the literature on jury systems (Hans 2003; Anderson & Nolan 2004, 932); beyond the United States,

it remains astonishingly difficult to learn about other countries' jury systems. There is no central, short, and easily-accessible English source to which scholars and policymakers...can turn for basic facts about the jury systems used in democratic countries (Leib 2008, 629).

More specific to Japan, Hiroshi Fukurai<sup>5</sup> (2009, 41) observes that “little research has been done to examine the effect of the institutionalized form of deliberation on democracy in Japan.” Towards the goal of filling prevalent gaps in the literature surrounding lay jury systems as a whole and in Japan in particular, this paper seeks to analyze the democracy-enhancing aims of the lay judge system; yet instead of looking to the nation-wide effects on democracy that this quasi-jury construct *might* have, this paper asks whether the act of service as a citizen jurist in this system subsequently increases the likelihood that a given individual will be a more active participant in civil society. By analyzing the lay judge system in such a fashion, I seek to construct a workable research design and analysis built upon the existing literature of Gastil, et al, and their examination of the effects of juror participation upon the individual in the United States. In this work, I will apply those findings to the case study of Japan, using recently-obtained survey data from the Supreme Court of Japan on lay jurists. Moreover, such a design avoids the difficult problem of how to translate any net effect on the strength of democracy or rates of citizen involvement in civil society within the country as-a-whole to the employ of one specific institution. Finally, in referencing the research of Gastil, et al. and applying it to the case of Japan, I also seek to question if

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<sup>5</sup> For the purposes of this paper, all Japanese names, when mentioned in full, will be listed with the individual's given name first, followed by their surname.

the conclusions of these authors in regards to enhanced civic participation on the part of former U.S. jurors are correct; for as valuable as their detailed experimentation and analyses are regarding the participatory inclinations of American jurors following their service, the fact remains that no comparable research examining the democratic tendencies of other nationals after similar judicial service exists, particularly with regard to Japan. This work seeks to follow the lead of Gastil and company and fill some of these gaps in the literature.

In the intervening years between the Allied occupation and the establishment of the lay judge system, there had been much speculation as to whether a jury could return to Japan and function effectively. The aforementioned-jury system – which operated a mere 20 years before being terminated during the war – was regarded as having been a failure due to its precipitous decline in use after implementation, a decline facilitated by defendant reluctance to choose a jury trial over a bench trial and institutional resistance from both the judiciary and the procuracy (Anderson & Nolan 2004). Prior to the formation of the JRC, Richard Lempert (1992, 69) noted that “[i]t is difficult to decide in advance whether the consequences of instituting a system of jury trial would on balance be good or bad for Japan.” One could make a similar statement at present about the lay judge system, for though already established, the *n* of citizens who have served as lay jurists is still far too small, the institution itself too new, the number of cases and range of offenses tried under this system too few, and the amount of qualitative and quantitative research on the post-inception effects of this quasi-jury system still too sparse to make any definitive declarations. Therefore it should be stated at the outset that this thesis does not purport to make *definitive*

declarations as to whether or not Japanese citizens will be more likely to be involved in civil society after their service as a lay jurist than those persons who do not serve. Instead this work seeks to lay forth the theoretical evidence as to why a correlation between individual civic participation and one's service as a lay judge might exist, to provide a workable research design, and to lay the foundation for additional works that could test such expectations at a later date. In this way, I hope to contribute to the literature surrounding this issue and facilitate future analyzes of lay judge participation and civic society involvement once the necessary data exists. As Lempert (1992, 70) declared, "[t]he best way to learn whether the benefits or dangers that the jury might bring...would in fact exist is for Japan to adopt a jury system and systematically study its implications." This paper seeks to do just that.

In reviewing the literature surrounding this issue, it was interesting to reflect on how the concept of justice in Japan is revealed through popular culture. Kent Anderson (2003) began a review of David Johnson's book *The Japanese Way of Justice* by noting that while some American lawyer-based dramas like *L.A. Law* and *Ally McBeal* rank as a few of the popular foreign programs in Japan, *Law & Order*, a remarkably-popular and long-enduring program in its native United States, has failed to similarly catch on with Japanese audiences. After reading *The Japanese Way of Justice*, Anderson states:

I now know why. The tensions and potential conflicts that are *Law & Order's* *raison d'être* and which make it so compelling for American audiences simply do not exist in Japan. Thus, the show cannot surmount the significant hurdle of cultural and contextual familiarity necessary for a Japanese audience to appreciate the program's drama (Anderson 2003, 169).

Likewise, the idea of a jury system operating in Japan was reflected in how the Japanese public portrayed and perceived such systems in the media. In their examination of the Japanese lay judge system, Kent Anderson and Mark Nolan (2004, 937) open by observing how the presence of a jury system in Japan had been portrayed in recent popular culture. In the early 1990s, director Shun Nakahara, seeking to create a farcical comedy, decided to remake the classic American film *12 Angry Men* with a comedic twist by setting the action in Japan. Given how supposedly non-confrontational, reserved, and respectful of hierarchy and authority Japanese citizens supposedly are, Nakahara saw the situation of twelve citizens working together in a jury setting as humorous. In the resulting picture, titled *12 Kind Japanese (12nin no yasashii Nihonjin)* Nakahara gives nearly every stereotypical element of modern Japanese society – from the salaryman to the civil servant to the housewife – a role as a jury member, and much of the film is played for comedic effect. Yet as Anderson and Nolan recount, the film ultimately succeeds in showing that the citizen-led adjudication process can be successful even in Japan.

One last reflection comes from perhaps an unlikely source: Akira Kurosawa's 1950 classic film *Rashomon*. Set in the feudal era of Japan, *Rashomon* focuses on the depiction of a rape of a woman and the murder of her samurai husband by an infamous brigand. But the audience is thrust into the situation several days after-the-fact, and is given the task of determining whose recollection of the events is more credible: the wife, the bandit, the slain samurai (as told through a medium), or a peasant who witnessed the affair. In many ways *Rashomon* speaks to the heavily reliance on truth-seeking that has been the primary focus of Japanese jurisprudence since the Meiji

Restoration and the advent of the modern Japanese state in the late 19<sup>th</sup> century – there is never any doubt as to the offender’s culpability in the movie; rather the audience-as-adjudicator is tasked with determining what exactly was the truth of the crime. But *Rashomon* also speaks to the changes that the Japanese judiciary has undergone and will continue to undergo via the implementation of the lay judge system – namely in that the true nature of the crime depicted is still left ambiguous at the end of the film, forcing the audience to weigh the elements of the crime and determine for themselves whose position is more credible. With the lay judge system, citizens are now routinely forced to undertake a similar task, weighing testimony and evidence to determine the culpability of the defendant. Unlike the movie audience, however, Japanese lay judges will have to take those determinations into the deliberation room and pass binding judgments upon the accused, judgments which could ultimately strip an individual of their liberty or even life. In the ensuing years, greater data generated in studies of the lay judge system will reveal whether *Rashomon* comes to the Japanese courtroom – that is, if the lay judge system fosters true deliberation between laity and professionals – and what effect that might have on citizen participation in civil society. In the end, it will be interesting to see if, in the act of judging their fellow citizens, Japanese lay judges are inspired to go forth and participate in civil society with any increased regularity.

The structure of this thesis is as follows: chapter two will detail various judicial systems around the globe that employ citizen judges in their criminal proceedings, as well as look to Japan’s historical attempts to introduce a domestic jury system. Chapter three will look to Japan specifically, and will discuss the background of the

reform efforts that culminated in the adoption of the lay judge system. Chapter four will examine the institutional change that the lay judge system represents for the Japanese judiciary, as well as the initial aims of the reform and the debates that have surrounded those efforts. Chapter five will discuss the theoretical notions behind the democracy-enhancing aspects of lay jury institutions and how they may affect to citizen participation in civil society, and will investigate the real and the potential consequences of the lay judge system in this regard. Finally, chapter six will revisit the themes and conclusions of earlier chapters and will pose the comparative and theoretical lessons learnt from the recent Japanese judicial reforms.

## **Chapter II**

### **Comparative Judiciaries and Lay Judges**

#### I. Introduction to Comparative Judiciaries

Before we can fully understand just where the recent judicial reforms have taken Japan and examine the other questions central to this thesis – i.e., how the lay judge system involves Japanese citizens at trial and might ultimately foster greater civic participation – it is necessary to examine the various judicial systems around the world that employ citizen jurists in their design, in order to properly understand just how close or how divergent Japan’s new system is from other systems elsewhere. After all, in the development of the lay judge system, Japan looked to systems employed in the world beyond its borders and borrowed heavily from lay systems used elsewhere to craft a lay judge system that has no true contemporary (Anderson and Saint 2005, 234). Such an examination is also important to understand just what challenges the lay judge system might face by looking to the experiences of its cousins.

In this chapter, I will examine the differing approaches to criminal trials themselves and the various means by which countries include lay participants within the adjudication process. Before proceeding, however, it is necessary to define the terminology that will be used in this chapter.

Section II will discuss the two differing methods of criminal prosecution, the adversarial and the inquisitorial models, and how the use of one each model affects the

type of lay participatory organs that a nation is expected to employ. Broadly speaking, trials in adversarial systems are just that: rival presentations of opposing theories, where the prosecution and defense are ostensibly equal parties and are in contest to convey the more persuasive argument (Bradley 1996, 471-472). Trials in inquisitorial systems are primarily judge-run affairs that focus on the task of truth-seeking (Herrmann 1996, 128) as opposed to alternate theories of a crime. Such systems assume that the truth not only can be discovered, but must be, and the state, as opposed to rival parties, is best suited to conducting the necessary investigation (Jörg et al 1995, 43).

Section III will discuss the differences between the two major means of lay participation at trial: jury systems and mixed tribunals. Juries will be defined as a group of more than three average, unelected citizens who are selected to sit in judgment for criminal matters in courts of the first instance (Leib 2008, 630), and decide matters of guilt and/or sentencing wholly independent from professional judges. Mixed-tribunals, also called mixed-courts, are criminal adjudications panels comprised of both laity and professional judges who determine the guilt and/or sentence of the defendant cases *together* as a body (Kutnjak Ivovic 2003, 94).

## II. Adversarial and Inquisitorial Systems

At the outset, it is important to recognize that a state's adherence to either of the two major models of criminal prosecution commonly frames how its judicial system will try the accused and employ lay participants at trial. The adversarial model is common to nations associated with the Anglo-American traditions of common law

such as Great Britain, the United States and Canada, while the inquisitorial system is more generally found in the civil law nations of Europe, Asia and Latin America (Herrmann 1996, 128-129; *see also* Bradley 1996, 471).

Cases in adversarial systems are argued and decided before either a judge or a jury that serves as neutral decision-makers with no knowledge of the case before the trial (Bradley 1996, 471-472). Judges in such trials are generally passive players, serving to supervise the process of the case, and rule on admissibility of evidence and the permissibility of procedure (Herrmann 1996, 128-129);<sup>6</sup> on the other hand, while attorneys are much more active participants, and are charged with the presentation of evidence, introduction and examination of witnesses, and are expected to challenge the veracity of the opposing party's position (Herrmann 1996, 128-129). Juries are commonly found in adversarial systems that permit lay participation (Hans 2002, 85; Hans 2008a, 278).

In the inquisitorial model<sup>7</sup> judges are granted and required to assume a much more active role, whereas the attorneys are relegated to a more passive role (Kutnjak Ivovic 2007, 435). The judge – or chief judge, if more than one is empanelled on a case – oversees the introduction of evidence, summons and examines witnesses, and is actively involved in deliberations and determinations of guilt or innocence. Judges have access to the official dossier – the summation of the case and evidence compiled by the prosecution – during all stages of the trial. Attorneys may ask questions or petition for the introduction of further evidence, but their role and rights are far more

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<sup>6</sup> Herrmann (1996, 129) does acknowledge that judges are in adversarial systems able to take more active roles, but the opportunities are far more limited than in the inquisitorial systems.

<sup>7</sup> The inquisitorial model is also known as “the continental model” (*see generally* Bradley 1996; Weber 2009). This paper will use both terms interchangeably.

circumscribed than those of adversarial attorneys (Bradley 1996, 471; Herrmann 1996, 128). When inquisitorial systems do allow lay participation, they generally employ mixed-tribunals, where professional judges and lay citizens deliberate and decide guilt and sentencing together (Hans 2002, 85; Hans 2008a, 279).

These depictions are, of course, how each system is designed in theory; in practice there are deviations from the pure concept of either model – for example, potential jurors are not the wholly uninformed and neutral adjudicators that the adversarial model rests upon, as media exposure can provide potential jurors with information about the case before they are summoned for service.

Both systems seek to avoid different errors at trial: while the adversarial model endeavors to protect the accused from being unjustly imprisoned by having the state rigorously argue the merits of its case, the inquisitorial system seeks to prevent the obfuscation of the truth, and likewise a miscarriage of justice, by self-interested and competing counsel. In short, the adversarial system seeks to prevent the punishment of the innocent while the inquisitorial system tries to prevent the guilty from walking free. As a consequence of these different aims, both methods have their advantages and disadvantages, depending upon one's perspective. Adversarial systems place a heavy reliance on the equality of both sides during the initial stages of the trial, and permit the defense to spiritedly contest the state's position. The defendant typically retains certain rights that aid in his or her defense – e.g. the right to counsel, the protection against improperly seized evidence and the right to not be a witness against him or herself. Additionally, the common act of being tried by a jury of one's peers

offers that the judgment of the court will not be one rendered by bureaucratic judges far removed from the lives of ordinary citizens (Bradley 1996, 473).

Some disadvantages of the adversarial model include a resource imbalance between the prosecution – which can summon the power and monies of the state – and the defense, as well as a disparity in the quality of attorneys if the accused is indigent and requires court-appointed counsel. Truth-seeking also suffers, as both sides seek to advance evidence helpful to their position, suppress detrimental facts, and skew the make-up and perceptions of the jury. As Nico Jörg and company (1995, 48) note, in adversarial systems:

There is no investigating judge to seek out ‘truth’ and, despite official rhetoric about impartiality in prosecution, the concrete legal duties of police and prosecution lawyers do not extend to seeking out exculpatory evidence. Indeed, what constitutes truth is subject to negotiation by the parties. Extensive plea bargaining simply produces an agreed approximation of events. . . . It is rare for any judicial authority to challenge these agreed assertions (*also cited in Bradley 1996, 479-480*).

Moreover, attorneys who are more persuasive, savvy, and knowledgeable about procedural rules can stack the deck in their favor, making outcomes more dependent upon the skill of the advocates rather than the facts or the actual culpability of the defendant (Bradley 1996, 473-474). Suffice it to say, the verdict in the O.J. Simpson case would likely not have occurred in an inquisitorial system dedicated to truth-seeking.

In contrast, issues surrounding the inquisitorial method focus primarily on the power bestowed upon the state – particularly judges and the prosecution. Judges have the responsibility to introduce evidence, examine witnesses and rule on both the guilt of the defendant and his or her sentence (Bradley 1996, 471-472; Herrmann 1996, 128). Such systems are sometimes praised for their efficiency in rendering verdicts

due to judicial control of the trial. There is more emphasis on fact-finding in such trials as opposed to alternate viewpoints of competing counsel. Witnesses that are called are witnesses of the court, as opposed to being witnesses of the parties in adversarial systems, and are questioned in a manner to facilitate fact-finding over the interests of either party (Bradley 1996, 472). Yet inquisitorial systems are criticized as paternalistic and dictatorial, with a judicial official determining facts, evidence, guilt and sentence. Such systems are resultantly hierarchically structured, with the judge at the apex and the accused in a relatively weak position to offer a spirited defense (Herrmann 1996, 128). Shinomiya (2002, 126) states that while either the adversarial or the inquisitorial method can accomplish “justice”, the adversarial system is better suited to convey a sense of fairness to the process.

Mirjan Damaška developed the hierarchical and coordinate ideals typology based upon the distributions of power within judicial systems. Looking to the way that power is arranged in both systems, the inquisitorial model can be placed within the hierarchical ideal, as power originates and emanates from the top, very much in line with the great control offered to judges in inquisitorial systems. Conversely, the adversarial model ascribes to the coordinate frame, as the inclusion of temporary lay decision-makers from outside of the court’s official structure, and the relatively equal footing of attorneys representing opposing parties fit Damaška’s concept of dispersed and horizontal authority in such trials (Damaška 1986, 18-28; *see also generally* Chapter 1). Damaška (1986, 18) himself recognized as much, stating that Continental decision-makers would be more comfortable and familiar with a hierarchical system, while Anglo-Americans would, due to tradition, greet such a system with disfavor.

Japan's place within this bipolar dimension will be discussed in greater detail in chapter four, but for the moment it is safe to say that it leans closer towards the inquisitorial system, due to primacy of judges at trial, the imbalance of power between the prosecution and the defense, the evidentiary reliance on the official dossier, and the employ of a lay judge as opposed to a jury system (*see* Kodner 2003; D. Johnson 2007; Miyazawa 2002; Shinomiya 2002; Weber 2009). Despite the attempts of the American occupational authorities to make Japanese law more adversarial after World War II by establishing the judiciary as an independent branch of government and instilling fundamental rights of the accused into the post-war Constitution (Murayama 2002, 42), they were not entirely successful, as the country's legal code and practices still retained many of its inquisitorial aspects (D. Johnson 2007, 344-345; Miyazawa 2002; *see also generally* Weber 2009). To highlight but one example, Article 35 of the post-War Constitution shares very similar language with the Fourth Amendment of the U.S. Constitution in its protection of individuals against unwarranted searches and seizures. Despite this technical limitation on police powers, the Japanese authorities still engage in warrantless searches, and the courts have been remiss to invalidate such actions or to deem the seized evidence as inadmissible (Foote 1992a, 333; Sanders 1996, 335). Such repeated deference by the judiciary to the police regarding illegally-obtained evidence would likely not be seen in an adversarial system that seeks to protect the rights of the accused. Further highlighting the inquisitorial nature of jurisprudence when it comes to evidence, the Supreme Court of Japan (SCJ) has held that the exclusion of unlawfully-seized evidence represents an "improper way to *investigate the truth of the case* [emphasis added]" (32 *Keishu* 1672, *qtd. in* Urabe

1990, 70). The Supreme Court's acknowledgment of the centrality of truth-seeking to criminal trials is especially striking. In Urabe's (1990, 70-71) estimation, the SCJ regards the seeking of truth more important than the procedural protections that are supposed to be afforded to the accused by the Constitution.

Such facts might give credence to the argument that Japan's adversarial system failed to emerge due to cultural factors. Yet several scholars believe there are institutional reasons for the reversion to an inquisitorial system of justice. Urabe (1990, 61-62) notes that modern Japanese jurisprudence originated from Germanic law, and that the way that modern law is practiced reflects its continental origins. Channeling Urabe, Murayama (2002, footnote 2) contends that despite the additions to the Constitution, the inquisitorial traditions of the prewar institutions were not wholly dismantled, and the judiciary and the prosecution continued to approach criminal matters with the truth-seeking objective still in mind. Miyazawa (2002, 10) reinforces Murayama's point and states that the reasons for the endurance of the inquisitorial system are less related to culture than to Japan's historical embrace and practice of the continental model of jurisprudence. Shinomiya (2002, 124) ultimately questions whether or not a judicial system can truly be "adversarial" in the absence of an institutionalized jury system, and asks if a jury system is indispensable its emergence. In noting that the adversary system divides power amongst the various participants at trial, Shinomiya states that when a jury system is absent, the judge is bestowed with the most crucial role in a trial – i.e. determining the culpability of the defendant – and moves the judge from being a passive and neutral umpire into a more assertive role. Citing Feeley (1987, 756), Shinomiya further declares that having a judge decide

questions of guilt undermines other aspects of the adversarial system, such as the presumption of innocence of the defendant, standards of proof for guilt, and the exclusion of ill-gotten or immaterial evidence – as the judge will have had access to and reviewed these materials even if they were subsequently excluded. In his estimation, this lack of a particular institutional component could account for the decided un-adversarial characteristics of Japan’s system of justice. Jury systems, Shinomiya (2002, 127) maintains, are crucial institutions that give life to adversarial courts.

### III. Defining Mixed-Tribunals and Juries

While the preceding paragraphs state that mixed-tribunals are typically found in inquisitorial judicial systems, mixed-tribunals themselves have heretofore remained loosely defined.

Mixed-tribunals are consociational adjudication panels comprised of professional judges and lay citizens, who subsequently sit and work together, and determine as a body the guilt of the accused and, if applicable, appropriate sentencing (Bloom 2005, 5). Such tribunals are more common in nations with civil law legal systems (Kutnjak Ivković 2007, 434). The lay judges who serve in such systems typically have no experience in law, while professional judges are servants in the legal profession (Kutnjak Ivović 2007, 437). Mixed-tribunals function as “active inquisitor[s]” that control the direction of the inquiry, and require the full participation of both judges and lay members at all stages of a trial, including within the courtroom where participants are able to question witnesses and during deliberations (Kutnjak

Ivović 2007, 435; *see also* Hans 2002, 87; Hans 2008a, 278). In determining the culpability of the accused, a majority vote usually prevails, with votes of lay judges and professional judges carrying equal weight (*see also* Kutnjak Ivović 2007, 436). Lay judges in Europe are typically appointed to their position for an extended period of time, from two weeks in France to three months in Italy, to five year terms in Germany (Yomiuri Shinbun, 2008, 189); however service during these appointments is typically stretched out over non-consecutive days.

Anglo-American jurors, like their lay judge counterparts, are lay citizens un-professionalized in criminal adjudication, who sit in judgment and determine guilt and/or punishment, and sit for just one case (Leib 2008, 630). In contrast from mixed-tribunals, jury systems establish sharp divisions between jurors and judges, with the jurors sitting and ruling independently of the professional judge. In British and New Zealand trials, and American cases at the federal level, twelve persons are empanelled in each jury, with one judge overseeing the court proceedings. In determining the guilt of the defendant, unanimous verdicts are required for conviction in federal trials in the United States and New Zealand (Bloom 2005, 5, footnote 20; Cameron, Potter & Young 2000, 201); while trials in Britain also generally seek unanimity in issuing guilty verdict, less-than-unanimous verdicts are allowed if sufficient and extended debate has occurred between jurors and at least ten members vote to convict (Bloom 2005, 5, footnote 20; Yomiuri Shimbun 2008, 189). Juries in American state courts are slightly more varied: though traditionally state courts juries mirrored the federal model and required both 12-member bodies and unanimity for guilty verdicts, in the 1970s the US Supreme Court upheld the constitutionality of six-member criminal juries and

less-than-unanimous convictions in state courts (Bloom 2005, 5, 21), an approach used in Oregon and Louisiana (Leib 2008, 630). Jury trials do not typically allow for the jurors to question witnesses, though some jurisdictions do permit this practice (Hans 2002). In comparison to the more active role that professional and lay judges have in mixed-tribunals, Mirjan Damaška likens the passive role that American jurors have at trial to that of “potted courtroom plants” (qtd., Hans 2002, 87).

Mixed-tribunals have received a great deal of criticism, particularly to the degree that they marginalize the influence of their lay participants. Hans (2002, 86) finds that lay judges in tribunals are often dominated and influenced by professional judges during joint deliberations, where a minority of professional judges can effectively sway the majority of laypersons to alter their positions, thus limiting the real impact that lay judges can have. Herrmann (1996, 133-134) maintains that this is an unavoidable outcome of the professional judge’s dominant role during the trial, while Hans (2002, 86) states that the experience and legal proficiency of the career jurists has an overriding effect on lay members. Machura (2001, 454) instead looks to the organization of the German courts and the professional judges’ control over rules of procedure to account for their dominant status. Kutnjak Ivočić (2003, 111) notes that the status of professional Croatian judges as legal experts and their duty to control proceedings leads to the perception that professional judges are more competent adjudicators; importantly, this perception is held both by the career jurists and the lay judges and contributes to the higher status to which they enjoy (*see also generally* Kutnjak Ivočić 1999). Regardless of the source, there is at least a consensus that

mixed-tribunals embody the hierarchical ideal, where professional judges maintain their position at the apex of the court.

In looking to the Croatian system, Kutnjak Ivović (2007) finds that these differences in expertise lead to real problems of status on mixed-tribunals, where the inexperience and naïveté of lay judges often affect the group dynamics of the panel in favor of the professional judges. The end result is that lay judges are often dominated in deliberations, rarely express disagreement with their professional counterparts and, if disagreements do exist, lay judges are more apt to be swayed by the arguments of the professional jurists (Kutnjak Ivović 2007, 441). The consequences of judicial domination of lay judges trouble scholars such as Hans and Kutnjak Ivović on a number of grounds. Firstly, there is the perception that lay judges in some systems contribute little to the overall outcome of a case: in one of the first modern studies of mixed-tribunals, Gerhard Casper and Hans Zeisel determined that lay judges in the German mixed-court system minimally impact the outcome of a case, and instead often surrender their opinions to those of professional judges (Kutnjak Ivović 2007, 442-443; Perron 2001, 193; *see also generally* Casper & Zeisel 1972). Similarly, one Croatian district attorney saw the professional judge as the sole individual who tries cases and determines the verdicts in their system, despite the presence and participation of Croatian lay judges in the courtroom (Kutnjak Ivković 2007, 443). Richard Lempert (2001, 11) echoes his fellow scholars on the problem of domination, and states that in comparison, mixed-tribunals fair worse than jury systems in democratizing citizen participation in criminal jurisprudence.

Other potential consequences of mixed-tribunal systems may be that lay judges serve as mere window-dressing, offering the judicial system ill-gotten and unwarranted legitimacy without allowing lay jurists a meaningful role (Hans 2003, 91); conversely, if it is well-known that lay jurists occupy an inconsequential position at trial, the legitimacy of the courts could be further eroded (Hans 2007, 309; Hans 2008a, 289).

The truth-seeking quality of inquisitorial trials and lay judge systems are also assailed in relation to the rights of defendants, with the claim made that adversarial systems like those in the United States strengthen the rights of the defendant because the adversarial practice forms sharp divisions between the state, the defendant and the court. No such division exists in the Continental model, where the judge or mixed-tribunal takes an active role in extracting the truth (D. Levin 2008, 207). As a consequence, adversarial systems are also perceived to be fairer in judgment-rendering than other systems, attributing some of that perception to juror neutrality and the passive, “potted plant” role preventing the emergence of prejudicial tendencies in decision-makers (Hans 2002, 88). Lempert (2001, 13) shares similar concerns about mixed-tribunals, particularly with regard to Japan, claiming that the adoption of a lay judge system over a jury compromises potential gains in criminal procedure.

Yet despite all that has been written on the problems associated with mixed-tribunals and the lack of influence of its citizen judges, research by Kutnjak Ivković (1999; 2003; 2007) into the lay judge systems of Eastern Europe suggests that there remains general diffuse support for the system amongst both professional judges and lay jurists, with lay participants expressing higher rates of approval. Given that

professional jurists retain a dominant role in mixed-tribunals, one might expect the degrees of approval to be reversed; however, Kutnjak Ivković finds that lay judges viewed their experience more positively than those with legal backgrounds. Amongst Croatian lay judges, more than 85% harbored positive feelings towards the lay judge system, whereas slightly over 50% of professional judges and state attorneys shared similar opinions (Kutnjak Ivković 2007, 444). In a study of Polish lay judges, it was found that participants valued their role in representing the community and appreciated having different people to sit in judgment at trial; furthermore, many believed that lay involvement at trials helped to promote the confidence of the people in the system. More broadly, lay judges felt that their contribution represented the “principle of democracy” (Kutnjak Ivković 2007, 445). The lack of real impact of lay jurists apparently does not diminish the rate at which the public supports the mixed-tribunals, at least in Eastern Europe as states have transitioned to democratic rule. Such evidence highlights that the democratic and participatory benefits of such mixed systems may be independent of the real contributions lay judges are able to make to the case at hand. In this regard, Kutnjak Ivković sees much value in lay participation, as do her contemporaries:

While most authors who have written about mixed tribunals discuss negative characteristics of trials by mixed tribunals, they all agree that the political function of mixed tribunals is considerably more important, and that this function by itself justifies retaining the system (Kutnjak Ivković 2007, 444).

Though Hans does well to point out the issues surrounding lay judge systems, she decrees in an earlier work with Neil Vidmar that “the political functions of the jury are not to be ignored. They coexist with the fact-finding functions and should be considered in judging the jury’s role in society” (Hans & Vidmar 1986, 249).

Moreover, jury systems help to confer legitimacy to the law (Hans & Vidmar 1986, 248). Given that mixed-tribunal systems have emerged recently in states undergoing transitions to democracy – particularly in former Soviet countries of Eastern Europe (Kutnjak Ivković 2007, 431-432) – the use of a mixed-tribunal may serve the overriding political purpose of bestowing legitimacy to law while allowing a role for judges in ensuring consistency in rulings.

Moreover, Anglo-American-style jury systems are not themselves free from derision. The use of laity in adversarial systems has been criticized for being unable to accurately adjudicate increasingly-complex criminal and civil matters (*see* Cameron, Potter & Young 2002, 183-185; Hans 2002, 86). And while citizens of nations with Anglo-American criminal juries expressed generally high levels of confidence in their systems (Hans 2008a, 280-283), some scholars are troubled by the rate at which this method has fallen into relative disuse. In the United States, where trial-by-jury was once the most common means of dispute resolution, it is now used to determine less than 10% of criminal matters; plea bargaining has since eclipsed the one method of adjudication constitutionally-guaranteed as the most frequently-used way of settling criminal cases (Hans 2003, 86). In Britain, the sovereignty of Parliament leaves the English jury much more exposed to alteration by the government than its American counterpart (Lloyd-Bostock & Thomas 2000, 53, 57); most recently under Tony Blair's Labour Government, Westminster sought to amend the rights of defendants to trials-by-jury in certain instances (Lloyd-Bostock & Thomas 2000, 89-90). Further implicating the health of the British jury system is the fact that the majority of criminal cases are now being advocated in magistrate courts, as jury trials only occur when a

defendant pleads not guilty in the Crown Courts (Lloyd-Bostock & Thomas 2000, 61). The New Zealand criminal jury has experienced a similar steep decline in use (Cameron, Potter & Young 2000, 209). The problem of disuse is particularly important when one considers that both the New Zealand and English *civil* juries have become largely extinct due to lack of utilization (Cameron, Potter & Young 2000, 209; Lloyd-Bostock & Thomas 2000).

The problems faced by mixed-tribunals and juries demonstrate that, no matter which route Japan may have gone in its efforts to bring laity into the courtroom, no path was free from peril.

#### IV. Lay Participation across the Globe

In examining Japan's lay judge system, it is important to discover where it fits within the broader global order of lay participation in criminal proceedings. But the task is not as straight-forward as it might seem; indeed, as mentioned in chapter one, many legal scholars praise the vast amount of research on the American jury system but simultaneously lament the dearth of comparative and substantive literature examining lay participatory methods used elsewhere (*see* Hans 2003, 87; Hans 2008a, 277, 280; Leib 2008, 629). In his analysis of whether nations belonging to the British Commonwealth after independence still employ lay citizens at trial, Neil Vidmar (2002) discovered that the last serious attempt to conduct a similar survey had been conducted in 1942. Yet impressive strides have been made since the end of the twentieth century in filling in the knowledge gaps: the conference "Lay Participation in the Criminal Trial in the Twenty-First Century", held in Italy in 1999, brought

together 55 legal professionals and academics from all over the world to discuss how various countries integrate their citizens into the courtroom. In 2001, the *Saint Louis University Public Law Review* and the *International Review of Penal Law* published the conference attendees' papers and findings,<sup>8</sup> providing a wealth of country-specific and comparative works on jury and mixed-tribunal systems, while the Japan Federation of Bar Associations (JFBA) organized a conference related to the then-upcoming judicial reforms and what shape lay participation should take (Thaman 2002, 3-4). Since 2000, scholars have continued to add to the growing body of literature in this field, expanding the knowledge base of how lay participation manifests itself across the globe.

In describing the differing jury and mixed-tribunal systems, it is important to note that there is not one single model in either category that states adhere to; rather if one is to conceptualize lay participatory systems along a spectrum, with the typical Anglo-American jury on one end and the Germanic lay judge system on the other, one would see that there are different gradations of both, and that most nation's lay participatory systems fall in between these two poles. Ethan Leib (2008) provides a very concise summation of nations with and without active jury or lay judge systems. The author looks beyond the volumes written on the US and focuses instead on the 28 nations that have been democratic since the early 1990s and have populations in excess of 5 million persons. Though not stated by the author directly, Leib examines lay participation in courts of the first instance.

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<sup>8</sup> All information that was written in Spanish and dealt with the Spanish and Argentinean lay participatory systems were published the book *Jurados en el Proceso Penal* (2000), edited by Ruben O. Villela. That work was not reviewed for the purposes of this paper.

Recognizing that the presence of a criminal jury is not a necessary prerequisite for a state to be deemed democratic (Leib 2008, 642), the author begins his survey with democratic nations where a formal criminal jury or lay judge system is absent. Such nations include: Argentina, Chile, the Czech Republic, Hungary, India, Israel, Mexico, the Netherlands and South Africa (Leib 2008, 631-634). While not reviewed by Leib, it should be noted that Taiwan<sup>9</sup> likewise does not have either a jury or a lay judge system; instead it follows the inquisitorial system and adjudicates its cases either by a single professional judge or a panel of jurists (Wang & Alarid 2001, 612). Though the Taiwanese Judicial Yuan did recently propose the adoption of some sort of lay judge system (Chang 2006; Hans, 2008b, 2), no such system has since been authorized by the legislature (Hans 2008b, 3).

Leib (2008, 635-638, 642) classifies Australia, Belgium, Brazil, Canada, England, Wales, Scotland, Ireland, Spain, and Switzerland as being states with mostly-pure jury systems – i.e. jurors decide matters of fact and sentencing independent from professional judges. New Zealand as well employs a mostly-pure jury system (Cameron, Potter & Young 2000), though the low population of the islands likely prevented this system from coming to Leib’s attention.<sup>10</sup> Yet even in jury system states, the American requirement of unanimity for conviction is more anomalous than common; only Canada, New Zealand and a few Australian jurisdictions require a similar concurrence of all jurors to in all criminal cases to deprive an individual of liberty, while Australia as-a-whole requires unanimous verdicts in extremely serious

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<sup>9</sup> With a population of nearly 23 million (CIA World Fact Book: Taiwan, 2010), one can only assume that Taiwan was not analyzed by Leib due to issues relating to being classified a proper democratic state.

<sup>10</sup> As of December 2009, New Zealand’s population was 4.35 million (Statistics New Zealand 2010).

cases, such as murder or treason (Cameron, Potter & Young 2000, 209; Leib 2008).<sup>11</sup> England, Wales, Ireland and the remaining regions of Australia come closest among the other jury states to requiring unanimous verdicts, in that unanimity is initially sought, yet still permit the conviction of a defendant by a supermajority of jurors after a sufficient period of deliberation. In Spain, supermajorities are needed to convict, and in all other states simple majorities are required.

Most states empanel twelve randomly-selected citizens on their juries, yet there is some divergence: Brazilian juries are comprised of seven people, while Spanish juries employ nine. Scotland's jury system requires 15 people per jury, while Switzerland's juries vary between six and twelve jurors, depending upon the type of court where the trial is held. Spanish and Swiss jurors are also required to give explanations as to their verdict, a trait that is not shared in other systems (Leib 2008).

The Belgian system edges closer to the mixed-tribunal model in that its jurors are not completely autonomous. If a jury votes to convict based upon a simple majority, they then deliberate with the three-judge panel that oversaw the case as to proper punishment.

South Korea recently established its jury system, which began operations on January 1, 2008, on a five-year experimentation plan, with the final format of the system to be determined and adopted in 2013 (Lee 2009, 181). Leib (2008, 634) places Korea as a state without a functioning jury system, for at the time of Leib's writing – October 2007 – the Korean jury experiment had not even begun; the Korean National

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<sup>11</sup> Leib (2008, 642) calls this the “symmetrical unanimous decision rule”, as verdicts to convict *and* acquit require unanimity; all other less-than-unanimous decisions result in hung-juries and do not absolve or condemn the defendant in the eyes of the law.

Assembly had only just passed the statute establishing the jury system that same year, but mandated it to begin proceedings in less than twelve months (Lee 2009). In developing its jury system, Korea, like Japan, looked to the American criminal jury and the Germanic lay judge model and incorporated aspects of both into its system. Korean trials require between five to nine jurors per case, depending upon the severity of the offense, and whether or not the defendant contests the charges; the number of jurors can also be altered if the prosecution and the defense agree to the change. Jury trials are restricted only to serious offenses. Like the American system, Korean jurors deliberate independently and must reach a unanimous verdict to convict; however, jurors can ask the opinions of the three professional judges that oversee the case, and if they are unable to reach a unanimous verdict, Korean jurors are required to poll the opinions of the judges. In the end, the judgment of the jury is merely advisory and can be set aside by the court (*see generally* Lee 2009). The Korean jury system, while enjoying high levels of support amongst the populace - around 90% (Hans 2008a, 283) – faces constitutional challenges, namely in that the Constitution gives the defendant a right to a trial by *judge* and not jury. At the moment, the ability of the defendant to opt instead for a trial-by-judge and the relegation of jury verdicts to advisory status skirt the constitutional issues; however, if the jury system is to be permanent and the rulings of the juries to be made binding, these will need to be resolved (Lee 2009, 185).

Regarding mixed-tribunals, one finds that states such as Austria, Denmark, Finland, France, Germany, Greece, Poland, Portugal and Sweden employ this

particular method (Leib 2008, 632-641).<sup>12</sup> One commonality between mixed-tribunal states is that none require unanimous verdicts. The Danish and French mixed-tribunal systems are the only systems that demand a two-thirds supermajority to convict, while all over systems require simple majorities. The size of mixed-tribunal panels varies considerably across the states of Europe: Austria has three professional judges serving alongside eight lay members; in Demark, three professionals sit with either six or nine lay citizens, with the size of the panel fluctuating based on the severity of the offense; France employs a panel of three professionals and nine laity in every applicable case; in both Greece and Portugal the ratio of professional to lay judges is 3-4. Italy requires a lower number of professional jurists and has a ratio of 2-6 for trials. Among other mixed nations, the low numbers of *both* professional judges and lay participants cause Leib (2008, 632-633) concern. Poland requires only one professional judge and two lay jurists to rule. Finland and Sweden have only one professional judge and three citizen judges sitting on each case. In Germany, panels are composed either of one professional jurist and two lay citizens, or two-to-three professionals with only two lay participants, depending on the nature of the case; for certain high crimes, such as espionage, lay participation is not allowed (Perron, 2001, 181-182). Interestingly, in

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<sup>12</sup> Leib (2008, 638-641) classifies Austria, Denmark, France, Greece, Italy and Portugal as utilizing “mixed juries”. Conversely, the author refers to the systems in Germany, Poland, Finland and Sweden as “mixed courts,” believing that they do not properly fit his definition of a “jury” (Leib 2008, 632-633). For the purposes of this paper, however, distinctions between “mixed-courts” and “mixed-juries” are unimportant and ultimately confusing, primarily because they share the defining feature that sets them apart from the mostly pure jury states listed above – i.e. the joint adjudication of cases by multiple lay citizens and professional judges via consociational deliberations (Kutnjak Ivković 2003, 94). Moreover, when compared one sees that mixed-courts and mixed-juries differ in their application by mere degrees. For the sake of clarity, the systems used in these states will be referred to as either mixed-tribunal or lay judge systems, and their differences will be discussed in terms of gradation and not variety. Leib (2008, 641) also notes that juries are used for serious offenses in Italy, but places its lay participatory system in the mixed-tribunal camp.

the German system, the number of lay judges empanelled *decreases* as the severity of the offense *increases* (Thaman 2001, 99). In Croatia, the composition of mixed-tribunal panels is similarly varied: for misdemeanors, one professional judge will decide the case alone; small panels of one professional and two citizens hear cases that hold punishments between one to fifteen year in prison; and large panels of two professionals and three lay members sit on cases with more serious punishments (Kutnjak Ivković 2001, 63). The low numbers of participants in these systems lead Leib, along with Jackson and Kovalev (2006, 98), to regard the Polish, Swedish, Finish, German and Croatian systems as markedly different from their above-listed brethren.<sup>13</sup>

Mixed tribunals differ from Anglo-American and other jury systems in that their participants are often required to serve for more than one case. Austria, France and Portugal are the only exceptions amongst mixed tribunal states, as lay judges in those states sit only for a single case (Jackson & Kovalev 2006, 106; Leib 2008, 638-641); Austria, Denmark, and Germany require lay judges to serve for non-consecutive periods over multiple years (Jackson and Kovalev 2006, 106). Likewise, the process of selecting lay jurists can differ: while states such as France, Greece, Italy and Portugal choose participants randomly, others do not. German lay judges are elected for a period of five years (Jackson & Kovalev 2006, 106; Yomiuri Shimbun 2008, 189); Croatian lay judges are also elected, by the provincial parliaments for a period of four years upon the recommendations by local leaders for district, commerce and regional

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<sup>13</sup> Jackson and Kovalev (2006, 98) only make a distinction between the German and the French systems in regards to the number of persons at trial, though Leib (2008) uses their conclusions to support his separating of these systems from other, more jury-like mixed-tribunal systems.

courts (Kutnjak Ivković 2001, 64). Greek lay judges serve for a period of 24 days (Leib 2008, 641), while Italian participants serve for three months (Yomiuri Shimbun 2008, 189).

Looking beyond Europe, Vidmar (2002) found that jury and lay judge systems remain in many of the post-colonial Commonwealth nations of Great Britain, but that a complete picture is lacking due to insufficient survey responses and a lack of detailed scholarship.

Russia and China are more puzzling cases; while both have institutions for lay involvement, their respective judiciaries are plagued with systemic problems that raise serious questions as to the effectiveness of lay participants at trial. Stephen Thaman (2007) gives an in-depth and insightful analysis into the modern Russian jury system, and ultimately concludes that the string of post-Soviet judicial reforms to strengthen lay participation have been so compromised and undermined by the legislature and the courts to the point of annulling the jury in practice. In Thaman's estimation, the Russian jury no longer serves as effective independent check in the courtroom (2007, 360).

The Chinese mixed-tribunal has been enshrined in the Chinese Constitution since 1982, but was largely deemed to be optional and not required through much of its history (Landsman & Zhang 2008, 199). The Chinese lay judge system exhibits many of the same flaws that plague other mixed-tribunal systems elsewhere – namely, professional judges assert a dominant role while its lay members embrace passivity and are heavily influenced by professional judges (Yue 2001). Defense attorneys likewise are passive players and prosecutors enjoy great discretion in cases (Landsman

& Zhang 2008, 204). Further complicating things, corruption and graft permeate the Chinese judiciary, and judicial incompetence is seen as especially serious, as many of the nation's 17,000 judges are retired military officials who have had little legal training (Landsman & Zhang 2008, 200-201). Yet despite these and many other concerns, Landsman and Zhang (2008, 221-222) hold out hope for this system, noting that the Chinese government is actively promoting the lay judge system to combat some of the more egregious problems plaguing its judiciary.

Amongst all of the states with either jury or mixed-tribunal systems reviewed by Leib and others, the amount of variance between systems is striking: from panel size and composition to the means of selecting lay participants, from the duration of juror service, to the vote requirements for conviction and acquittal and other features, few systems directly mirror one another; instead each add their own variation on how to involve their citizens in criminal adjudication.

#### V. Conclusion - Japan's Lay Judge System in the Global Order

Given all that has been said above regarding lay participation elsewhere, the ultimate question is: where does Japan's lay judge system fall? As mentioned in chapter one, the Japanese lay judge system is a hybrid institution, one that borrows heavily from both the Anglo-American jury systems and the European mixed-tribunals whilst simultaneously creating a system new to the global legal experience (Anderson & Nolan 2005, 234). Though the features of this system will be discussed in greater detail in chapter four, it is useful here to denote that, while it incorporates aspects from both Anglo-American jury systems and the Germanic mixed-tribunals, on its face

Japan's new system is more reminiscent of a mixed-tribunal system. This is due to Japan's civil law traditions, the inquisitorial nature of its trials, the limited jurisdiction of lay judge trials, the composition of the lay judge panels – three professionals and six citizen jurists – as well as the fact that Japanese lay jurists deliberate and decide matters of guilt and sentencing with their professional counterparts (*see generally* D. Levin 2008; M. Levin & Tice 2009; Weber 2009).

In light of all that has been said about the problems surrounding mixed-tribunal systems elsewhere, it may seem curious that Japan has adopted many features of these systems into its uniquely-designed lay judge system. Indeed, Thaman (2001, 99) maintains that if Japan truly wishes for its lay judges to have autonomous and meaningful participation at trial, then several aspects of the German system that permits domination of lay members by professional judges needs to be rejected. While the machinations behind the decision for a lay judge method will be explored in greater detail in chapter three, it is important to note Japan's past experience with a failed domestic jury system, an experience that may have colored and ultimately influenced the choice to avoid a pure jury system altogether (Anderson & Nolan 2005, 964).

During the so-called Taisho Democracy period – named after the reigning emperor at the time – Japan experimented with a jury system. Established under the Jury Act of 1923, the Japanese jury system represented one of Japan's first forays in encouraging broad lay participation in its criminal trial processes (Anderson & Nolan 2005, 962; D. Levin 2009, 203). The Jury Act created a 12-member jury, and provided for verdicts reached by majority vote. A citizen could elect whether to have a jury or

bench trial, and when a jury trial was chosen, the verdict was ultimately not binding upon the court (D. Levin 2005, 203). The Japanese jury system operated from 1928-1943, and was ultimately suspended during World War II; yet even before its suspension, the jury system had fallen into disuse and was regarded as a failure. Though initially popular, the number of jury trials had fallen to just two in 1942 (D. Johnson 2002, 42).

The reasons offered for the failure of Japan's first jury system are numerous. One explanation is that defendants found jury trials an unattractive option, namely because those who opted for a trial-by-jury lost their right to appeal, even on factual errors by the jury. Additionally, the non-binding nature of the jury's judgment, the ability of the presiding judge to ignore the jury's verdict, and the power of the court to change the composition of the panel until the jury issued a verdict the court found acceptable all showed the weaknesses inherent to the system. As a consequence, there was little to gain and much to lose for defendants if they chose to be tried by their peers instead of a professional judge. Cultural factors, such as the hierarchical nature of Japanese society, offer some explanation as to why defendants might have preferred a trial adjudicated by a professional judge. Finally, institutional resistance and opposition from the procuracy may have also contributed to the jury's downfall, as evidence from the trials held in city of Sendai shows that jurors acquitted defendants at a high rate, and produced verdicts that prosecutors found unfavorable (*see generally* Dean 1995, 386-389; D. Levin 2008, 203-204; D. Johnson 2002, 42-43; D. Johnson 2009; Lempert 1992, 37-38).

During the post-war era, jury trials did return to one locale for a limited period. Founded in Okinawa under US administration – due to US control over the island as stipulated in the San Francisco Peace Treaty – the only post-war jury in Japanese territory began in March, 1963, and lasted until the end of US occupation and the return of sovereignty of the island back to Japan in 1972. The Okinawan jury system was, perhaps unsurprisingly, reminiscent of the system in the United States: juries were comprised of randomly-selected people and were charged with determining the culpability of the defendant independent of judicial participation. However, any person who lived on the island and could speak English was eligible to serve as a juror, meaning that not only Japanese, but Americans, Ryukyuan and other nationals could serve. Additionally, Okinawans, Japanese and Americans could be tried under this jury system (*see generally* Dobrovolskaia 2007, 66-70).

Though the number of trials conducted under this system was small, they did have a lasting effect on some of their participants, particularly Chihiro Isa, a Japanese national who served as a juror on an Okinawan trial during the US occupation and later became a proponent of the reintroduction of jury trials to Japan (Dobrovolskaia 2007, 65). Isa, who would later go on to become one of the founding members of the Research Group on Jury Trial (RGJT) and a fierce advocate of a jury system over the introduction of the lay judge method, spoke of his experience as a juror as a life-changing event, one that awakened his legal consciousness (Fukurai 2007, 317, 333).

Both of these historical experiences in many ways helped to frame the choices that Japan would make in regards to judicial reform in the latter portion of the twentieth century, ultimately leading up to the adoption of the lay judge system. It is

with these choices, decisions, and reasons for the lay judge system that we will examine in chapter three.

## **Chapter III**

### **The Sources and Aims of Japan's Judicial Reform**

#### I. Introduction

The discussion in chapter two concerning the theories and data regarding the democracy-enhancing abilities of jury systems and their application to Japan's quasi-jury system would be incomplete without providing some context as to how the juridical reform movement first emerged in Japan and gained prominence within the policy making apparatus. Such context is necessary in order not only to understand the purported aims of the system – as declared in the final report issued by the Judicial Reform Council (JRC), the Lay Assessors Act and elsewhere – but also what the proponents of the lay judge system wish it to achieve, and whether or not Japan's mixed-court system will meet such expectations. Moreover, the lay judge system is but one part of a series of efforts to reshape the Japanese judicial structure – indeed, the final JRC recommendation report (2001) listed a mixed-tribunal system as but one mechanism in the overall efforts to reshape Japan's legal system; other proposals included reshaping the National Bar Examination, establishing American-style law schools, re-examining judicial appointment procedures, among others. To realize how the lay judge system itself was expected to meet the goals that the government and its

supporters have ascribed to it, it is essential to understand the general climate and forces that led to the overall reform movement.

On the surface, the stated goals of judicial reform – and the lay judge system more specifically – appear very basic. As stated in previous chapters, prior to the establishment of the lay judge system, criminal jurisprudence in Japan had no mechanism to involve citizens in the decision-making process at trial; the only means by which citizens were involved procedurally was via the Prosecutorial Review Commissions (PRC), special investigations groups comprised of randomly-selected citizens to review whether the non-indictment decisions of the prosecutor's office were proper. Yet until the most recent reform efforts, the PRCs were underutilized and poorly attended, and had not mechanism to actually compel the prosecutor's office to take actions recommended by the PRC (Fukurai 2007). Consequently, the judicial system as a whole had long been seen as far removed from the lives of ordinary people (Parry 2009; Deguchi & Ito 2010); indeed, one author maintains that the average Japanese person has traditionally regarded the judiciary as a realm where upright citizens should have no business (Jones 2006, 365). By creating a role for civilians to actively participate in criminal proceedings, it was hoped by the government that citizen involvement in the lay judge system will “increase the understanding and trust of the general public toward the judicial system” (SCJ, Justice Min., and JFBA, 3), and would in turn enhance the legitimacy of the judiciary within society (Kingston 2004, 91). Other proponents of the lay judge system believe that it will advance the aims of justice by “injecting common reason and limiting elite bias [of professional judges and prosecutors from trial]” as well as bringing about “more democracy by

educating the public about the justice system and encouraging civic engagement” (Anderson & Ambler 2006, 56). Anderson and Nolan (2004, 946) boil down the rationales given for law involvement in Japan into three camps: (1) participation by citizens will enhance the quality of the juridical process and judgments by including contemporary notions of common sense and shielding trials from the more institutionally-focused viewpoints of professional judges; (2) the lay judge system will advance Japanese democratic society by establishing an alternative political forum where citizens are compelled to participate; and (3) the lay judge system is in response to international demands and is needed to make trials more efficient and faster.<sup>14</sup>

However, the true forces and the motivations of those behind the efforts to reshape Japan’s juridical landscape are not entirely clear. Anderson and Nolan (2004, 939) have stated that the eventual establishment of the JRC represented the culmination of a “serendipity of events” that eventually propelled the proposals of juridical reformists from the fringes and into the policy-formation apparatus. Such fortuitous circumstances for the forces of reform had theretofore not occurred since the end of World War II, even though proposals scholarly works on the subject and even concerted efforts within the legal community were not uncommon in the intervening years (*see* Anderson & Nolan 2004, 939; Lempert 1992; Dean 1995; Kiss 1999; Miyazawa 2001). Yet tracing the arch of this “serendipity of events” is a difficult quandary – as Anderson and Nolan note:

[w]hat exactly were the political influences and objectives that combined to result in the judicial reform movement during the late 1990s and the early 2000s is a highly debated and speculative area (2004, footnote 7).

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<sup>14</sup> Anderson and Nolan (2004, 946) state that the international demand for Japan to adopt some form of a trial-by-jury is a questionable notion, but do not detail their concerns with this position.

To achieve a fuller understanding of the forces at work that may have contributed to the adoption of the lay judge system, this chapter will attempt to trace the overall arch of judicial reform since the 1980s and explore the changes within the legal community, the political establishment and the political climate that moved reform to the forefront of state policy.

## II. The Ongoing Struggle to Improve the Quality of Justice

For the more law-focused reformists, the impetus for Japan's modern judicial transformation stems from a series of high-profile miscarriages of justice in the 1980s and early 1990s coupled with persistent pressure from within the legal community to address the deficiencies in the Japanese juridical processes.

McKenna (2001) classifies Japanese jurisprudential reform as occurring in three waves since the end of World War II: (1) from 1946 until 1955 as the nation was reforming after the War under the direction of the Allied powers; (2) from 1955 through 1975, a period when progress in judicial recruiting and the expansion of judgeships were stymied due to conflicts between the Supreme Court and the Japanese Federation of Bar Associations (JFBA), over the practice of recruiting judges from practicing attorneys (*housouichigen*); and (3) from 1975 through the end of the 20<sup>th</sup> Century and the establishment of the Judicial Reform Council.

During this third-wave of reform, interest in reestablishing the nation's long-dormant jury system amongst Japanese legal professionals existed since at least the early 1980s. In 1982, a veritable who's-who "of the most influential Japanese law professors, defense attorneys, and liberal or radical-thinking professional judges"

formed the Research Group on Jury Trial<sup>15</sup> (RGJT) in order to educate themselves on how jury systems operate, with the hope of eventually establishing one in Japan (Fukurai 2007, 318-319). For the next quarter-century the RGJT, its members, and its sister chapters across the nation held educational debates and forums on the issue of jury introduction, and published their views in the RGJT's official bulletin, *Jury Trial (Baishin Saiban)* (Fukurai 2007, 319). Additionally, local bar associations and the Supreme Court of Japan (SCJ) sent its members on fact-finding missions to Western nations which employed some version of trial-by-jury in order to learn the various means in which lay jury systems function (Lempert 1992, 38).

Also at this time, the high-profile reversals of four death row convictions in which the defendant's confessions to the crime were overturned brought new attention and controversy to the Japanese judiciary and its practices (Foote 1992; Lempert 1992; Dean 1995; Kiss 1999; Bloom 2005; Fukurai 2007; Fukurai 2009). Each defendant spent over 25 years in jail before being released (Kiss 199), with the sum number of years served by all four defendants totaling in excess of 130 years for crimes which they were later acquitted (Bloom 2005; Fukurai 2007). The fact that all four defendants has received capital sentences set them and the resultant public shock apart from past high profile instances where defendants had been found guilty and later had their convictions overturned (Dean 1995, 391). Consequently, the controversial nature of these cases and their reversals set off much debate regarding needed reforms to the judiciary (Dean 1995, 391-92). As a result of these overturned convictions, the judiciary's role in wrongfully condemning four men and the consequential decline in

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<sup>15</sup> From *Baishin Saiban wo Kangaeru kai*, as translated by Hiroshi Fukurai (2007).

public trust for the judiciary, the SCJ authorized studies of foreign lay jury methods (Weber 2009, 149) and in 1989 former Chief Justice of the Supreme Court of Japan Koichi Yaguchi commissioned a governmental investigation to examine the practicality of instituting a domestic jury system (Bloom 2005; Fukurai 2007).

The reverberations from the release of the death penalty defendants spread beyond the judiciary itself and into other areas of the legal profession. Prompted by these miscarriages of justice, the three Tokyo Bar Associations established a joint task force to investigate Japan's method of substitute imprisonment, where the accused can be detained by police in the precinct's cell for extended periods without charges levied. The bar associations discovered that there was a *prima facie* case that Japan was in violation of the International Covenant on Civil and Political Rights due to its treatment of persons detained (Dean 1995, 393). Given that it is in such circumstances that the possibility that a false accusation can lead the accused to give a false confession (Gudjonsson et al. 1993), and that 86% of convictions in Japan are based on confessions<sup>16</sup>, the significance of the issue of false self-incrimination upon the administration of justice are apparent (Dean 1995, 393), despite the constitutional protections against the admissibility of coerced confessions and the conviction of persons based solely upon confessional evidence.

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<sup>16</sup> Comparable data as to the conviction rates linked to confessions specifically in other liberal democracies is in short supply. However, in looking to the rate of convictions based upon guilty pleas, the picture becomes slightly clearer. In examining the total number of persons who entered a plea of guilty against the total number convicted, we find that 84% of defendants in England and Wales were sentenced based upon a guilty plea in 2007, a 14% increase since 2000 (UK Ministry of Justice 2008, 124). The proportion of convictions based upon guilty pleas for the United States federal courts, however, is staggeringly high: out of the 85,665 defendants who were convicted in US District Courts in 2009, nearly 97% of defendants entered a plea of guilty (AOUSC 2010, Table D-4).

In this atmosphere of questioning the means of jurisprudence, public criticisms of Japan's method of rendering justice became more pronounced. Shortly before his retirement, Osaka High Court Judge Takeo Ishimatsu openly criticized the nation's criminal trial system in a 1989 lecture before the Hokkaido University Law Faculty entitled "Are Criminal Defendants in Japan Truly Receiving Trial by Judges?" In his estimation, the system of trial by judges had devolved into being "trial by investigators" and "trial by dossier" – the official finding of facts briefing compiled by the prosecutor's office – causing the trial itself be "merely a formal ceremony" and an "empty shell" of a process (Dean 1995, 399).

### III. Economic and Deregulatory Roots for Judicial Reform

The account given above, though informative about the evolving attitudes in the Japanese legal community towards jury systems and concerns over the proper administration of justice in the wake of multiple high profile exonerations, does not fully explain the changes within the political climate that were necessary to advance a notion as significant as massive judicial restructuring into the policy making apparatus. Indeed, McKenna's (2001) analysis does not even address the specific conditions that led to the establishment of the JRC, nor does it inform us why the political leadership felt it necessary to consider reform in the first place. Such accounts, reflected in other works discussing Japan's changing jurisprudential environment, represent an almost sterile assessment of how judicial restructuring was advanced, and fail to account for the political climate in which judicial reform ultimately took shape. Weber (2009, 149) is even more critical, stating that the genesis

of the lay judge system came from “a government-driven reform movement aimed at strengthening the rule of law” and did not directly result from the outrage over the wrongful convictions. Because judicial reform, at its heart, meant not only a restructuring of Japanese jurisprudence but also a reimagining of the state’s place within society, it is worth exploring those additional factors that led not only the JRC to propose such significant changes, but also the Cabinet to accept and enact those proposals into law.

While the idealistic notions of injecting the judicial process with the reasoning of the common citizen, improving judicial legitimacy and facilitating civic participation certainly played a part in the eventual rationale for reform, others find the roots for broad judicial reform stemming from economic and deregulatory imperatives. From this perspective, the modern drive for juridical modification originates not solely from a desire to increase civil society or make the criminal justice system more efficacious or transparent, but rather as one in a series of deregulatory alterations of the state structure that had occurred since the 1980s, ultimately culminating in the 1990s as Japan’s struggled to emerge from the economic stagnation of the Lost Decade. This explanation looks beyond the lay judge system itself and instead sees the totality of the reform effort, and how the attempts to remake Japanese juridical structure went from being a cause championed mainly by legal professionals and concerned parties from outside of Japan to a major policy initiative.

Japan has long been regarded as a state ruled by the elite within the bureaucracy and its practice of administrative guidance – the extra-legal means by which the bureaucracy would coerce and cajole parties to adopt the economic and

developmental goals of the state (C. Johnson 1995, 13). In this vein, Japan has traditionally fit the mold of the developmental, plan-rational state, where the state is actively involved in setting substantive goals for the economy; in such states, the developmental orientation of the economy, typically in regards to domestic industrial growth and capacity, dominates government policy as the state seeks to increase its global economic competitiveness (C. Johnson 1982, 17-20). In contrast, in market-rational states like the United States, the government's involvement in economic activities assumes a more regulatory approach, where the government is concerned more with forms and procedures instead of the overall, substantive direction of economic development. Instead of actively encouraging and directing industrial economic policy, market-oriented states typically find themselves without an acknowledged industrial policy, and instead stress in its domestic and foreign economic policy the rules and regulations by which economic development is to follow (C. Johnson 1982, 18-19).

The developmental, plan-rational state model usually occurs within states that are late to the process of industrialization, and it is a process that Japan has adhered to since the Meiji Restoration in 1868; at that moment in time, Japan was transitioning from a feudalistic nation into an industrial state and subsequently tied its economic direction to its industrial policy (C. Johnson 1982, 19-20). In many ways, the eventual strength of the Japanese administrative bureaucracy was reflected in the Meiji Constitution of 1889, where state ministers bore ultimate responsibility to the emperor and not the Parliament (Richardson & Flanagan 1984, 346), in that it highlights that since the earliest days in modern Japanese history, the persons and institutions

responsible for the economic direction of the state were embedded within the governing structure, but were often divorced from the elected representatives of the people. As Japan embraced the developmental state model during the Meiji Era, the United States pursued the market-oriented/regulatory approach (C. Johnson 1982, 20).

The strength of the state in steering the economy through administrative guidance was exercised via the Ministry of International Trade and Industry (MITI) (*see generally* C. Johnson 1982), which was reorganized and renamed the Ministry of Economy, Trade and Industry (METI) in 2001 (“History of METI/MITI” 2008). According to Chalmers Johnson (1982, 24), the bureaucracy as represented by MITI was responsible for most of the ideas for economic development. Reflecting its extra-legal character, administrative guidance was typically informal and heavily situational (Schaede 1995, 301); indeed, the bureaucracy did not often give explicit commands to businesses, but rather businesses paid attention to the interests of the government and responded accordingly (C. Johnson 1982, 24). Companies that complied with ministry directives could expect rewards later, such as greater access to capital and reduced taxes, while the ministry in charge retained means to obstruct future endeavors against those companies that remained noncompliant (C. Johnson 1982, 24; Schaede 1995, 301). Interestingly, companies traditionally had no legal recourse since compliance with ministry suggestions was deemed “voluntary” (Schaede 1995, 301). So important was this practice that prior to the 1990s the government had endeavored to keep the legal profession in a weakened position to prevent it from interfering with the programs of the administrative state (Shinomiya, 2010). Though an ever-present

element to Japanese politics since the 1960s,<sup>17</sup> administrative reform gained salience as a policy initiative under Prime Minister Yasuhiro Nakasone during the early-to-mid 1980s as his government sought to reduce the financial burdens of the state via deregulation (Miyazawa 2001, 97). Administrative and economic reforms in arenas such as telecommunications, national rail transportation and tobacco had taken place in Japan since the early 1980s (Rokumoto 2007, 325-326) and with such deregulatory efforts came the “political opportunity to reexamine many aspects of the postwar political and economic structure, particularly the role of the administrative bureaucracy” (Miyazawa 2001, 98). That opportunity also gave long-time adherents of various legal reform efforts the occasion to achieve some modest goals, such as enacting revisions to the Commercial and Civil Procedure codes and prohibiting agencies from conducting administrative guidance in areas beyond their jurisdiction (Miyazawa 2001, 98). Yet substantive judicial performance, even after the miscarriages of justice in the 1980s, still was not a high priority of the government during this period (Shinomiya 2010).

After the economic bubble burst in the early 1990s, however, a sense that “the overall Japanese system of organizing and governing society was facing a deep crisis” prevailed as the initial attempts to rescue the economy faltered and “made it clear [to the Japanese public] that the renowned ‘Japan Incorporated led by bright bureaucrats’ was no longer working” (Rokumoto 2007, 326). Indeed, Japan’s long-standing practice of administrative guidance bore much of the blame for the country’s

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<sup>17</sup> Chalmers Johnson (1975, 5) details how administrative reform had been a topic of conversation in the government since 1948, but states that it was only in the 1960s when such efforts were regarded with a true sense of urgency, particularly in regards to making the bureaucracy accountable to the political leadership.

economic predicament (Weber 2009, 150; *see also* Foote 2007, xxviii-xxix). With the onset of the economic malaise of the post-bubble economy, the business community – as represented by the Japan Business Federation (*Keidanren*) – and the political leadership, including factions within the ruling Liberal Democratic Party (LDP), sought to advance broader judicial reform efforts as a means to shift Japan from a society marked by administrative and bureaucratic guidance “to an after-the-fact review/remedy type society” (Foote 2003, 206-207)<sup>18</sup> based on the free market (Kingston 2004, 85-86; Miyazawa 2001, 100).

The significance of the LDP embracing efforts to move Japan away from using administrative guidance to further the ends of the state cannot be understated, for not only does it suggest a change in how Japan intends to govern itself, but it also denotes a reimagining of the proper role of the state within society. After all, the process of administrative guidance had been in effect since the founding of the modern Japanese state. Urabe (1990, 61-62) highlights that Japan, unlike nations governed under the Anglo-American traditions of rule of law, has traditionally followed the German notion of *Rechtsstaat*, or rule *by* law. At its core, the principle of *Rechtsstaat* is only concerned that administrative actions of the state be based on a codified law, and is not directly troubled by the *contents* of said statute. Furthermore, this concept of governance assumes that all powers of the state originate from and reside with the

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<sup>18</sup> In a statement in 1999 explaining the necessity for establishing the JRC, then-Justice Minister Takao Jinnouchi used language very similar that quoted above advocating for the changes to the system of jurisprudence as part of a broader effort to transform Japanese society: “In the 21<sup>st</sup> century, the Japanese society will become more complex, varied and international, and deregulation and other reforms shall transform our advanced-control type society into a post-check type society. Changes of the society in many ways will make the role of administration of justice more crucial than ever. It is indispensable to reform and reinforce the judicial function so that it shall be able to respond to the social needs” (JRC, “Points at Issue in the Judicial Reform”).

government, and gives a very limited role to the courts in terms of restraining state actions under the principle of judicial review (Urabe 1990, 62). In many ways, the process of rule by law supports the efforts of developmental states, as it places very few restrictions upon the government and denotes the passive role of the judiciary in terms of oversight. Such views of Japanese governance were shared by the JRC chairman, Kōji Satō, a law professor at Kyoto University who had been involved in past administrative reform efforts. Writing that even after the Pacific War Japan had followed the principles of “rule by law”, Satō regarded administrative reform as the first component to the rejection of this process and towards the eventual establishment of the rule of law in the country (Satō 1999; Miyazawa 2001, 107). For Satō, judicial reform which would facilitate citizen involvement in the legal processes was not merely an end unto itself; instead it was necessary in order to “complete the transformation of Japanese society that autonomous individuals would be able to design their own society through their participation in legislative and judicial processes” (Miyazawa 2001, 107-108). In both its preliminary and final reports, the JRC reflected Satō’s views and regarded a shift away from rule by administration and towards a more litigious society based on rule of law as critical to Japan’s progress in the 21<sup>st</sup> century. In this way, the JRC found itself not only proposing structural changes to the nation’s judicial design, but also advocating for a fundamental reimagining of the role of the state. The goal for reducing administrative guidance may have been long held by the LDP; after all, administrative reform had been pursued for a least a decade prior to the JRC’s formation. However, it is significant that the government’s intent was stated so explicitly via its appointment of Satō as the JRC

chair, and by former-Minister of Justice Takao Jinnouchi when first explaining the law authorizing the JRC's formation before the Diet (JRC 1999b). Moreover, the fact that the views of Satō and the JRC were later embraced by the LDP via the adoption of many of the Council's final recommendations is all the more striking.

Beyond the lofty goals of instilling the rule of law, on a more practical level judicial reform was regarded as a necessary component of deregulation by both the LDP and the *Keidanren*, for as the level of intervention by the state receded and administrative influence was curtailed, citizens would need a strong and accessible judicial system to protect their interests (Miyazawa 2001; Foote 2007, xxix). In a similar manner, judicial reform was also seen as crucial for protecting the legal interests of the business elite in an ever globalizing and litigious world (Maruta 2001, 215; Kingston 2004, 85; Rokumoto 2007, 329).<sup>19</sup> Such concerns were reflected in the JRC's Recommendations Report in a section aptly titled "Responses to Internationalization":

In the 21<sup>st</sup> century, people will be clearly aware of the reality that our country is forced to find its way in a world where globalization is promoted in every sense....As a result, we will be offered opportunities to act globally while, like it or not, we will be involved in global competition and will watch it accelerate....

From the standpoint of global competitiveness and the ability of the Japanese social and economic system to meet the global environment, the justice system (legal profession) of our country will – more than ever – be required to social needs and to make its presence felt in the provision of fair and prompt dispute resolution methods that support a free and fair society and efficient market system....Various reforms suggested in these Recommendations are essential from the standpoint of responding to globalization... (JRC 2001, CH 2, Part 3).

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<sup>19</sup> The desire of the LDP and the *Keidanren* to use reforming the nation's juridical structure as a means to facilitate economic development is not without credence. As the World Bank has noted on the matter, history and comparative analyses demonstrate that rule of law and more efficient judicial systems are able to foster economic growth (Messick 1999, 123). Seeing "good governance [as essential] for economic growth" to which judicial performance is closely tied, many bodies such as the Bank and USAID have undertaken and encouraged judicial reform in developing countries and transitioning economies "as part of a larger effort to make [those countries'] legal systems...more market friendly" (Messick 1999, 117-118).

Towards tackling the problems posed by globalization, both the *Keidanren* and the LDP regarded “the strengthening of the judicial system as a fundamental part of the infrastructure of the economy and society [and saw such efforts as] an immediate priority” (Miyazawa 2001, 100). Much as the deregulation and privatization efforts of the 1980s were seen as necessary to reduce the expenditure burdens of the state, “reform of the justice system was now in order for the [latest] component of the overall governmental structure” (Rokumoto 2007, 326-327). In this manner, the politics that advanced administrative reform in Japan in the 1980s transformed to advance judicial reform in the 1990s (Miyazawa 2001, 106; see also Foote 2007, xxviii).

The concerns about governmental performance and the economy were important not only in the context of motivating the LDP to regard judicial reform as a critical issue in the 1990s, but also because it helped to change the landscape of just which parties would be involved in determining what reforms would be considered and offered to the government for adoption. Past reform attempts had only involved the so-called three branches of the legal profession – i.e. the courts, the procuracy, and the Bar. One such example of the limited number of parties in past efforts was the effort increase the number of persons admitted each year to the Japanese Bar during the late 1980s and early 1990s. With only slightly more than 16,000 practicing attorney in Japan in 1998, and a passing rate of 2.66% that same year<sup>20</sup>, the incredibly restrictive nature of the National Bar Examination has made Japan’s bar “the smallest

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<sup>20</sup> Eight hundred twelve persons passed the Japanese Bar in 1998 (Miyazawa 2001, 90).

among developed countries” (Miyazawa 2001, 90).<sup>21</sup> Comparatively, across the United States an average of 74% of all persons who sat for the bar examination bar passed in 2009 (National Conference of Bar Examiners 2010; *hereafter NCBE*), while in England and Wales the percentage of persons admitted to the bar was 60% during the 2007/2008 period, an 11.3% increase since 2003/2004 (Bar Standards Board 2009). In the interest of expanding the number of young attorneys into the legal profession, the Japanese Ministry of Justice began consultations with the JFBA and the Supreme Court in 1987 to implement reforms to make the bar more passable. Yet no interest groups outside of the legal profession were consulted, and up through 1998 the changes that were proposed amongst the JFBA, the Justice Ministry and the SCJ were miniscule, with the process marked less by substantive progress and more by the proliferation of renegotiation sessions between the three parties (Miyazawa 2001, 90-95).

However, unlike in the 1980s, when “the cast of players involved [in discussions on reform was limited to] the traditional groups of legal professionals (judges, prosecutors and attorneys)”, the reform effort in the late 1990s saw the range of relevant parties expand to include “the major actors of the larger political process, namely the Liberal Democratic Party...and the...*Keidanren*..., one of the most influential organization representing business interests” (Miyazawa 2001, 89). Indeed, the involvement of these new participants was of critical significance to the success of

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<sup>21</sup> After the reform, the rate of persons who pass the Japanese Bar has risen steadily, though has never met the goals that the government initially held: in 2009, 2043 persons passed the Bar, given Japan a passage rate of 27.6 percent. However, this government had hoped for at least 3000 new lawyers to be admitted to the Bar per year, and to have a passage rate between 70 and 80 percent of all new law graduates (*Daily Yomiuri* 2010a).

the reform movement on several fronts, merely beyond curtailing the practice of administrative guidance. While the *Keidanren* may not have wholly been invested in the idea of a lay judge system *per se* or other proposed changes that did not necessarily directly affect their interests, its support for judicial reform broadly helped to recast the issue as an important policy program that was not just a matter reserved for the legal community alone to address; “once the justice system became an object for debate among a broad range of constituencies, the door was opened for wide-reaching reforms” (Foote 2007, xxix).

Not only was the sphere of players expanded, but the representation and the influence of the bureaucracy, the JFBA, and the Supreme Court was curtailed: of the Council’s thirteen members, no active member of the judiciary or any ministry served, but were instead represented by a former president of the bar association, a former chief judge of the Hiroshima High Court, and a former Chief Prosecutor respectively (JRC 1999c; Foote 2007, xxi; Rokumoto 2007, 322). Amongst the entire panel, only these three representatives were practicing attorneys (JRC 1999c; Shinomiya 2010), and of the remaining members of the panel, five were academics, “two represented business, one labor, one housewives’ association, and one was a writer.... [while a] passionate Constitutional law specialist from Kyoto University presided...” (Rokumoto 2007, 322). The end result was that at the very outset of the reform effort in 1999, the bodies that had been relevant actors in past reforms saw their role in determining how the judiciary would change in the near future reduced, though not entirely eliminated. According to Daniel Foote (2007, xxi) the diverse composition of the JRC was instrumental to its success, allowing the body to critically examine the

judicial system. What is more, the fact that the Diet approved of the non-legal representatives of the Council granted additional legitimacy to those members (Foote 2007, xxi). Finally, when the issue of developing the JRC was initially under consideration, the Japanese Diet regarded of judicial reform “as weighty enough to bypass the bureaucracy” and tasked the JRC with reporting directly to the Prime Minister (Kingston 2004, 87), thereby eliminating the possibility of overt influence by other state entities like the Justice Ministry or the Supreme Court on the JRC’s proceedings.<sup>22</sup>

In examining the development of judicial reform in Japan since the late 1990s, the economic and deregulatory imperatives in driving judicial reform in Japan are important to consider. Beyond restructuring the country’s means of jurisprudence in order to improve the quality of justice, judicial reform was viewed as a critical lynchpin in the ongoing efforts to refashion broader Japan’s system of governance, moving the nation away from the rule by administration that had dominated in the past (Takahashi 2007). From this perspective, economic necessity and deregulation permitted the LDP government, with the necessary backing of the business alliances, to successfully propel judicial reform efforts from being a topic discussed and negotiated mainly solely within the legal community (JRC 1999; McKenna 2001, 135)

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<sup>22</sup> It is important to note, however, that such bodies were not entirely unable to convey their wishes for judicial reform to and influence the eventual recommendations of the JRC. Indeed, as McKenna (2001, 134) points out, the JFBA, local bar associations and legal scholars across Japan offered a great deal of feedback and information as to their respective points-of-view on issues throughout the JRC’s deliberations, and Dobrovolskaia (2007, 59) directly attributes the rejection of an Anglo-American jury system by the JRC due to objections raised by the Supreme Court of Japan.

where no significant progress had been made prior (Miyazawa 2001) to a viable policy program.<sup>23</sup>

#### IV. The Recommendations of the Judicial Reform Council

The JRC was created by the Diet in 1999 in order to clarify the role of the judiciary within the Japanese state in the 21<sup>st</sup> century (JRC 2001). In its charge, the Council was directed to consider those changes

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 (JRC 1999; Kodner 2003, 231).

Importantly towards the nature of the eventual proposals offered, the JRC was charged by its mandate to review the nation's judiciary and the nature of the reforms from "the people's viewpoint" (JRC 1999a).

After two years of study, testimony and deliberation, the JRC submitted its final report to then-Prime Minister Jun'ichiro Koizumi in 2001, in which the Council recommended the adoption of some form of a quasi-jury system as one in a multitude of possible legal reforms (Anderson & Ambler 2006, 58). Along with the *saiban-in seido*, the JRC proposed: improving civil litigation by strengthening civil legal aid and shortening the length of the litigation process; overhauling the pre-trial criminal

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<sup>23</sup> The validity of the economic necessity for judicial reform is not without its critics. Hisaei "Chuck" Ito, Professor of Law at Chuo University in Tokyo, conveyed to this author in a personal interview that the economic revitalization potential of changing the system of jurisprudence in Japan is minimal, but the argument served as an after-the-fact means to garner support for the proposals made by the JRC (Deguchi & Ito, 2010). Instead Professor Ito sees a major cause for judicial reform resulting from trade negotiations between the United States and Japan under the Structural Impediments Initiative (SII) in the early 1990s in which the US demanded that the ability of American lawyers to work in Japan, fitting the internationalization imperative cited by the JRC (2001, CH 2, Part 3) and goal of facilitating cooperation between Japanese lawyers and "foreign law solicitors" (JRC 2001, CH 2, Part 3, Sec. 4), while simultaneously arguing against the economic importance of reform as cited by the JRC in the aforementioned sections.

processes to allow the accused access to free counsel from the investigation stage as opposed to after indictment; changing the indictment requests of the PRCs from being merely advisory suggestions to prosecutors to compulsory orders; establishing a system of professional law schools; and reforming the National Bar Examination and raising the number of persons admitted to the Bar every year (JRC 2001; Miyazawa 2001, 119-120). These are merely some of the changes that the JRC thought prudent. When Prime Minister Koizumi, with the backing of his Cabinet, “adopted the [JRC’s] recommendations, it suddenly appeared that the lay jury system would be realized without much debate or opposition” (Wilson 2007, 843-844).<sup>24</sup>

Wilson’s assessment necessitates some qualification; fore while there was little *public* debate as to whether Japan should establish a lay judge system, there was some debate within the JRC itself. But the question remains as to how the lay judge system became part of the overall reform package offered up by the JRC. Indeed, Anderson and Ambler (2006, 58) point out that when the Council first raised the possibility of some version of a lay-judge system in its 1999 interim report, the proposal was initially surprising; for years the idea of “reintroduc[ing] a jury system had been raised on the fringes...but it had never received serious consideration”. In Shinomiya’s (2010) estimation, Satō’s presence as the JRC chairman was of considerable benefit to advancing lay participation as an element to judicial reform. During the initial deliberations of the JRC concerned the possibility of establishing an Anglo-American-style jury system in Japan; such a system was supported by the

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<sup>24</sup> Wilson highlights Anderson and Nolan’s point to illustrate this notion: “As often happens in Japan, bills and recommendations endorsed by the Cabinet will generally become law” (Anderson & Nolan 2004, at 940, qtd., Wilson 2007, 844; *see also* Anderson & Ambler 2006, 58).

JFBA (Dobrovolskaia 2007, 59, footnote 8). Weber (2009, 152-155) notes that the JRC was effectively divided into two camps on the topic, with the “reformer” members of the Council adamant about including lay participants at trial, while the SCJ and the Ministry of Justice were more hesitant. Though reformist members generally agreed on the importance of lay participation, they were split as to whether it would be via a mixed-tribunal or an all-jury system (Weber 2009, 153). While the JFBA advocated strongly for the inclusion of an independent jury (Kodner 2003, 242), the Supreme Court was highly skeptical of introducing an Anglo-American jury to Japan, and resisted the substantive inclusion of lay members until 2000 (Dobrovolskaia 2007, 59, footnote 8; Weber 2009, 155; *Daily Yomiuri* 2000). Indeed, the SCJ went so far to suggest that the establishment of a jury system might be unconstitutional; given that the Supreme Court has heretofore invalidated acts of the Japanese Parliament only six times in the post-war era (Ramseyer and Rasmusen 2001b, 333), such a declaration was a bold assertion of the judiciary’s opposition to an Anglo-American jury system on its shores (Jones 2006, 366-367). In contrast to the truly independent jury advocated for by the JFBA, the SCJ suggested that if a jury system was adopted, jurors should be permitted to participate and offer their opinions, but denied any formal power to render binding decisions for the court; in the Court’s estimation, this proposal was an attempt to balance the inclusion of laity while adhering to the inquisitorial trial practice of truth-seeking via professional judges. However, a majority of the JRC members found this proposal unacceptable, and the Supreme Court soon shifted its approval for a mixed-member system in the hopes of ensuring some judicial influence (Weber 2009, 155).

There remain other views as to why the judiciary was reticent about an Anglo-American jury system in Japan. According to Deguchi and Ito (2010), there were concerns that a full jury system would place too many demands on Japanese citizens. In Takashi Maruta's judgment, however, the real objections of the legal establishment to the adoption of a jury system stemmed from the desires of elites in the profession to maintain the traditional consistency and predictability of Japan's criminal law. Towards this goal, the professional judge-led systems of Europe provided a better model to emulate (Jones 2006, 368). Ultimately, the adoption of a mixed-trial system represented a compromise between these opposing factions.

Though the JRC eventually advocated for a lay judge system, it did not explicitly state just what the lay judge system should look like – e.g., the types of cases that would be under its jurisdiction and the composition of each panel at trial was left unclear by the Council's final report. Consequently, the government allowed a further three years for consultation to determine just how this new system would take shape (Anderson & Ambler, 58-59). During this time, the JFBA, Supreme Court and the Ministry of Justice all defined their positions on the issue, and their opinions were taken under consideration by the ruling LDP and their coalition partner, New Komeito (Anderson & Ambler 2006, 59-61). And while there were negotiations between and compromises amongst all consulted parties as to just how the lay judge system would be constructed, there was never any doubt after 2001 whether a lay judge system would be adopted or not.

## V. The Political Climate Surrounding the Adoption of the JRC's Proposals

While Wilson (2007) reminds us the passage of the JRC's recommendations into law was a foregone conclusion once it received the tacit backing of the Cabinet in 2001, it is important to note the political climate in Japan that existed as these reforms saw relatively quick passage. Yet it is hard to have a conversation on the political climate of that era if one only focuses on the political debates surrounding the lay judge system or the broader judicial reform efforts, as they were fairly non-contentious policy programs in the Diet; as noted above, judicial reform moved from being a policy proposal offered by a working group to actual governmental policy with relative ease. Once the Cabinet publicly supported the JRC's recommendations, the implementation of reforms was a foregone conclusion, with much of the remaining debate conducted in Cabinet's Office for the Promotion of Justice System Reform, centered on the eventual shape of the reforms (*see* Matsubara 2003). Towards this end, it is instead helpful to examine the political atmosphere that led to the unusual rise of Jun'ichiro Koizumi to the head of the LDP and the Japanese government. Koizumi came into office a little less than two months before the JRC issued its final report and recommendations to the Cabinet, and pursued policies during his five year tenure as new prime minister that bespeak to the reformist atmosphere in Japan's political culture at the time.

Though the JRC existed for just two years, it operated under three different prime ministers: Keizo Obuchi, Yoshiro Mori, and Jun'ichiro Koizumi.<sup>25</sup> Koizumi's ascent to the Office of Prime Minister came at the heels of Mori's resignation, a departure prompted by Mr. Mori's deep unpopularity and inability to address Japan's

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<sup>25</sup> Obuchi died after a stroke in April 2000 (*BBC News* 2000), and Mori resigned his post in April 2001 after a highly unpopular tenure (*Japan Times* 2000a; 2001b).

sclerotic economy (*BBC News* 2001; French 2001). Yet the selection of Koizumi to lead the country – and the governing LDP – was surprising, given that he did not favor and was not a participant in the factional system that racked the party; as prime ministers were typically selected from the heads of dominant factions within the LDP, Koizumi’s lack of membership in *any* faction is striking (Kabashima and Steel 2007, 95). Instead, Koizumi adopted a populist strategy and appealed directly to citizens via the media, making the case that solving of Japan’s perennial and intractable economic and political could only be made through structural reforms, reforms that required a *reformer* at the helm of the state (Kabashima and Steel 2007, 102; Yokota 2009). As the race to head the LDP unfolded between Koizumi and Ryutaro Hashimoto, then head of the LDP’s largest faction, the media began labeling Koizumi as the reformist in the contest, which in turn primed the public not only regarding the need for general reform in society, but also for a reform-minded leader. As he was simultaneously anointed with the reformist label and positive press coverage, Koizumi exploited recent changes in the selection process for the leader of the LDP that gave more say to prefectural party chapters, which allowed him to turn what was supposed to be a likely coronation for Hashimoto into an unlikely victory for the anti-factionalist candidate (Kabashima and Steel 2007; *see also* Strom 2001).

During his tenure, Koizumi endeavored to live up to his reformist label on several fronts. In regards to confronting the power of factions in his party, Koizumi began early in his government by appointing cabinet officers himself, some from the private sector, while also shying away from the practice of allowing the dominant factions to dole out high posts to their leaders based on seniority. Moreover, he

embraced the expansion of the free market, the reduction in appropriations to LDP stalwarts, and reforming Japan's troubled banking system (Yokota 2009). In his efforts to remake the Japanese state, Koizumi called for "structural reform with no sacred cows" (qtd, MacLachlan 2006, 7). Yet towards exemplifying his reformist efforts, one issue in particular – the privatization of the national postal service – deserves special mention, for it readily serves to highlight the lengths to which Koizumi fully embraced challenging reforms, even in the face of strong opposition within his own governing party. Postal privatization, a long-time vision of Koizumi's that was deemed a high governmental priority for Koizumi personally after taking office, was met with stiff resistance from several members within the LDP who had significant ties to the postal industry – a body that played a not insignificant role in the electoral prospects for many lawmakers; indeed, one scholar notes that LDP insiders in 2003 estimated that upwards of 70% of LDP members of the Diet opposed Koizumi's postal privatization effort,<sup>26</sup> and that anti-reform LDP members constituted an important element in the alliance of parties and groups determined to prevent privatization (MacLachlan 2006, 5). In his initial attempts to pass postal reform, Koizumi's proposals were rejected by the LDP and the Diet – after bristling at the demands of party leaders for greater concessions and compromise, the postal privatization bills offered by the Prime Minister in 2005 passed the Lower House of the Diet with a five-vote margin, but were subsequently defeated in the Upper House, where 30 LDP members either voted nay or abstained (MacLachlan 2006, 13).

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<sup>26</sup> MacLachlan (2006, 5) states further that many of those in opposition were reluctant to voice their concerns publically for fear of detrimentally impacting their careers.

In response, Koizumi went against the wishes of his party and dissolved the Lower House and scheduled a general election for mid-September 2005. During the election, Koizumi called on the public to use the election as a referendum on his postal privatization plans (MacLachlan 2006, 14), a potentially costly maneuver since only 2-7% of the public felt in the spring of 2005 that privatization should be a central priority for the government (MacLachlan 2006, 13). In addition, the Prime Minister went after those LDP members that had defied his efforts, denying his opponents within the party official endorsement in the coming election whilst simultaneously recruiting young Koizumi supporters in the LDP to run against them (MacLachlan 2006, 14). The electoral results signified a massive victory for Koizumi, yielding the LDP the largest win in its history, garnering the party 296 out of 480 seats in the House. Shortly after the election, the postal privatization bills were resubmitted to the Diet and passed both chambers with ease (MacLachlan 2006, 14).

The manner in which Koizumi was able to become the head of the LDP and to push postal privatization bespeak to both the nature of Japan's political climate and the implicit desire for reforms on the part of the Japanese public in the period when the proposals of the Judicial Reform Council were finally made public in mid 2001 and codified into law under the Law Assessors Act in 2004. If Koizumi was able to mobilize enough public support around him to not only deny the premiership to Hashimoto – the supposed heir-apparent to the LDP presidency – in 2001, and turn the tepid public support for privatization into a referendum on anti-postal reform members of parliament in the 2005 elections, then the fact that judicial reform and the lay judge system passed the Diet with relative ease in 2004 should not be that surprising. Partly

this is due to the fact that judicial reform was not as hotly contested of an issue, publicly or politically, as refashioning the national postal system was. Compared to postal privatization, the Lay Assessors Act was a bill that harbored and exacted far fewer consequences on the lives of LDP members if enacted into law; yet as the postal privatization effort denotes, the political damage that could be wrought against those LDP or coalition members who defied the Prime Minister, even on programs that enjoyed only tepid public support, provided little incentive for opposing initiatives that received the backing of the Cabinet. Instead of outright opposition, the political machinations surrounding the lay judge system were more emblematic of negotiations, as the LDP, its coalition partner New Komeito and other involved parties working to compose a mutually-agreeable system (*see* Matsubara 2004). Indeed, a supposedly-major source of contention between New Komeito and the LDP during the 2001-2004 review period was the composition of the judicial panels, with New Komeito seeking a professional judge-to-laity ratio of 2-7, while the LDP wanted three professional judges but only four citizens (Matsubara 2004). Yet the conflict was resolved not by political machinations on par with those later employed during the postal privatization efforts, but with a compromise, in which the coalition partners split the difference and settled on an eventual ratio of three judges and six citizens.

The fact that judicial reform – and the lay judge system specifically – emerged onto the political scene during an era when the public’s desire for reform was strong enough to vault an anti-faction candidate to helm the LDP *and* expel those party members who had opposed the prime minister’s restructuring program from the Diet surely did not help the judicial reform effort’s chances of being enacted into law. Still,

as the above sections demonstrate, the relative ease with which the political branches accepted and adopted those changes to the nation's system of jurisprudence, even in the Koizumi era, is surprising. Unfortunately, we do not have a clear sense why, in the inner circles of policy making and implementation, this topic was not hotly debated. The explanation offered in the preceding paragraph regarding the costs for LDP Diet members in opposing the programs offered by the prime minister is helpful, but it does not give us a complete picture. Hopefully future scholarship will shed further light on this critical question. But at the very least, we are at this moment able to describe the overall political atmosphere surrounding one of the most contentious efforts undertaken by Koizumi in which he was massively successful. We can only assume that that general atmosphere, which permitted him to taken on vested interests within his own governing party, existed one year prior and smoothed the way for passage of the uncontroversial Lay Assessors Act.

## VI. Conclusion

This chapter sought to explain the various motives behind the judicial reform efforts of the late 1990s, ranging from concerns over the quality of justice to the powers of the state and its attempts to facilitate deregulation and transform the state/society relationship. Further, chapter III looked to the motivations of key players within the JRC as it debated how to change Japan's jurisprudential system. Finally this chapter explored the political climate in which the JRC's eventual proposals were offered to the political establishment, in the hopes of providing some background as the conditions that led the broad reforms suggested by the JRC to relatively easy

passage through the Diet. Chapter four will move beyond how the judicial reform, and the lay judge system itself, became viable policy programs and instead will focus on how the details and design of the lay judge system: i.e. how it modified the previous criminal trial process, how it fits within the Japanese judicial system presently, the range of its jurisdiction, and how its operations have and are expected to unfold. All of this will allow us a firmer basis from which to proceed to chapter five, where the theoretical implications of jury service on civic participation will be discussed, and beyond into chapter six, which will look towards the Japanese case directly.

## **Chapter IV**

### **Institutional Changes Accompanying the Lay Judge System**

#### I. Introduction

While chapter three spoke to the reasons why Japan undertook judicial reform as a serious policy program in the latter part of the 20<sup>th</sup> century, chapter four will review and analyze just how the implementation of the lay judge system has changed and seeks to change the nature of Japanese jurisprudence. Specifically, section II of chapter four will look to how Japan's judicial system functioned before the reforms; section III will examine to how the judicial institution itself has changed with the founding of the lay judge system; and section IV will discuss the issues and concerns related to lay participation in Japan.

The lay judge system that was proposed in broad strokes by the Judicial Reform Council (JRC) in 2001, codified into law by the Diet in 2004 and developed over the ensuing five years by the Supreme Court of Japan (SCJ) fell short of the all-jury system advocated by the Research Group on Jury Trial (RGJT) and its sister

groups over the preceding quarter century. So disappointed were some members with the resultant system that they publicly voiced their opposition to its establishment – most notably Chihiro Isa, the RGJT’s founder (Fukurai 2007, 320). Beyond the RGJT, there exist reformers who remain unhappy with the lay judge system because of the perceived impotence of citizen jurists in this new structure. Such critics claim that public participation under the system that the Lay Assessors Act provides for will be so nominal that lay judges will merely be ornaments and will not change the legal practices in Japan in substantive ways (Dobrovolskaia 2007, 58). However, others have embraced the lay judge system and the additional reforms attached to the movement as significant institutional developments worthy of support, even though it does not completely adhere to the original goals the RGJT had for creating independent juries. Shinomiya (2010), another RGJT member, speaks positively as to how the system has developed so far after watching the initial cases where citizens have served as lay jurists, and notes that the additional reforms that accompanied the lay judge system – such as expanded procedural and evidentiary rights afforded to defendants and their counsel – are important towards advancing justice in Japan. In regards to whether an Anglo-American-style jury system will ever come to Japan, Shinomiya further expressed his belief that the creation of a pure jury system akin to that used in the United States is only possible in Japan if the lay judge system works well.

But how exactly does the lay judge system alter the institutional framework of the Japanese legal system? It is with this question that chapter four will concern itself.

## II. The State of Japan's Judicial System Prior to the Lay Judge System

Reflecting the Continental origins of Japanese law after the Meiji Restoration, the justice system has traditionally been inquisitorial in nature<sup>27</sup> (Weber 2009, 135), as opposed to the adversarial system used in the United States. Even in the post-War years, Japanese criminal jurisprudence continued to place an emphasis on continuity and uniformity of rulings, give limited importance to case law or constitutional protections of the accused over the interests of the prosecution, hold trials over non-consecutive days, grant broad powers to the procuracy, and exclude non-legal professionals from the adjudication process (Weber 2009, 134-149). Weber (2009) holds that the “Continental” characteristics of the Japanese inquisitorial system placed it squarely within Mirjan Damaška’s (1986) “hierarchical model” of justice.

Criminal cases were adjudicated by either one or a panel of three professional judges, who were tasked with deciding all questions relating to facts and law (Weber 2009, 138) as well as guilt (Kodner 2003, 231) based upon majority vote. Judges were largely concerned with consistency and uniformity in decision making – i.e. ensuring

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<sup>27</sup> There is some debate as to whether this is really so. Joseph Kodner (2003) has called this an incorrect classification, claiming that Japan’s judicial system is really more of a “hybrid” in that it incorporates features from both American and Germanic law (236); yet Kodner admits that the Japanese system traditionally shared similarities with inquisitorial systems, including discontinuous trials, heavy reliance on prosecutorial dossiers at trial and the lesser importance of oral testimony (footnote 34, 237). Fukurai (2008, 32) is more blunt, calling Japan’s justice system a “purely professional, inquisitorial system.” Setsuo Miyazawa (2002) states that while theoretically the legal system was supposed to have taken a more adversarial quality after the war, the pervasive imbalance of power between the prosecution and defense means that Japan’s system is not meaningfully adversarial. David Johnson (2007, 344-345) maintains that if there were ever hopes of Japan from moving from an inquisitorial to an adversarial system in practice, those hopes have not materialized. Satoru Shinomiya (2002; 2010), in reflecting on his own experiences as a defense attorney in Japan, notes that Japan’s system stands in stark contrast to the common notions of how an adversarial system should function. Ingram Weber (2009) finds on a number of fronts that Japan’s system resembles the hierarchical ideal of justice as described by Mirjan Damaška, which is closer in line with the Continental judicial model than the coordinate ideal of the American adversarial system (2009). *See also* Urabe (1990).

that judicial rulings fit with both past verdicts of similar cases and the Supreme Court's interpretations of law (Weber 2005, 138-141).

Japanese criminal justice is primarily concerned with uncovering and disclosing the "truth" of cases instead of presenting the opposing viewpoints of the state and the defense, and it is with this goal that police and prosecutors are chiefly concerned (D. Johnson 2007, 345), as is the judiciary (Weber 2009, 153). The outcome of trials typically rested heavily upon the fact-finding dossier prepared by the prosecution and the police summarizing the results of their investigations, as well as the confession of the defendant, both of which often comprised the only evidence admitted during the trial (D. Johnson 2007, 344-345). Instead of focusing on punishment of the accused, Japanese justice has typically been more concerned with rehabilitating offenders, to which confessions have played a pivotal role in conveying the remorse of the defendant for his or her actions (Weber 2009, 146). Rehabilitation has often been expressed via judicial leniency through the use of suspended sentences (D. Johnson 2007, 344) and has been regarded as beneficial to the defendant in that it avoids the stigma and the disruption to a life that accompanies imprisonment (Weber 2009, 147). This practice allowed Japan to simultaneously have one of the highest conviction rates amongst Western democracies yet one of the lowest per capita incarceration rates among liberal democracies, the latter for which the Japanese criminal justice system was generally praised domestically and abroad (Foote 1992a, 317-318). As of 2009, Japan had an incarceration rate of 63 for every 100,000 persons; in comparison, many of the European nations exceeded Japan's internment rate: the Scandinavian nations interned people at slightly higher rates with Finland's prison

population rate at 64 persons per 100,000, while Norway and Sweden had imprisoned their citizens at rates of 69 persons and 74 persons per 100,000, respectively. The domains of the United Kingdom all had rates higher, with an average of 131 persons jailed throughout the Kingdom. Of the major nations of Europe, only Iceland had an incarceration rate lower than that of Japan (44), while Denmark tied Japan at 63 persons. The United States has the highest prison rate in the world, with an incarceration rate of 756 per 100,000 persons (Walmsley 2009).

Yet the concerns for rehabilitation and actual culpability are not the only causes for Japan's high conviction rates. Instead, there are concerns that Japanese judges instinctively favor the prosecution during the trial and determinations of guilt. Part of this results from the inquisitorial nature of cases, where the truth is sought, instead of the more convincing of two alternate theories of the crime, as is typically done in adversarial systems. Foote (1992b, 83) details how one former judge describes the "typical judicial mind-set": "In general, there is a feeling from the outset that the defendant is guilty....There's a psychological brake at work that leads judges to issue as few acquittals as possible" (*see also* D. Johnson 2002, 242). Moreover, Japanese judges have not traditionally sought to significantly impair the conduct of prosecutors or police during the pre-trial and trial stages of cases. Weber (2009, 144) notes that rationales for high barriers to the admissibility of evidence in adversarial systems – i.e. to exclude prejudicial evidence from trial and to correct for overzealousness or corrupt actions on the part of the procuracy – are rejected in civil law systems such as Japan. Consequently, protections enshrined within the Japanese Constitution to protect defendants from improper evidence collection are not an effective impediment to the

procuracy, as judges have traditionally interpreted the Constitution that render protections for the accused moot (Weber 2009, 144-145). Indeed, while Article 38 of the Japanese Constitution stipulates that no person shall be found guilty when the only evidence against the accused is his or her own confession, this protection is not always enforced. Instead, “[o]nce a confession is uttered, it is practically set in stone and the suspect’s fate is sealed”, as judges tend not to question the veracity or validity of the defendant’s admission of guilt (D. Levin 2008, 231). This is even true when suspects recant their confession at trial (D. Levin 2008, 231; *see also* Saito 1990, 412). This may not be surprising, given that the official dossier, which the professional judges have access to before and during the trial, has great power to prejudice the jurists’ attitudes against the accused (Landsman & Zhang 2008, 185). Finally, the professional disincentives linked with acquitting a suspect – such as the slowing of a judicial career or the transfer to less-prestigious courts – may weigh heavily on the mind of jurists during a trial (Landsman & Zhang 2008, 185; *see also* Ramseyer and Rasmusen 2001a, 54).

Judicial favoritism and interpretation aside, prosecutors traditionally have enjoyed a great degree of power in Japan’s criminal justice system. Instead of seeing their role as advancing the position of the state in an adversarial trial system, Japanese prosecutors have long viewed their role as that of an impartial officer in search of the truth (Weber 2009, 142-153), largely fitting the inquisitorial model of justice. The long absence of a jury, along with historically-low crimes rates, light caseloads, unobtrusive politics and statutes supportive to the aims of the government, had made Japan a proverbial prosecutor’s paradise (D. Johnson 2002, 47), as the Japanese

procuracy has historically enjoyed near-complete control over the employ of its power (Weber 2009, 141). Indeed, the procuracy is so powerful that it dominates many aspects of the criminal trial process, including vast authority to order police to search for evidence, interrogate suspects, and compile all evidence into the all-important case dossier, a document that often serves as the only evidence submitted to the court at trial (Weber 2009, 143). Moreover, the prosecutor's office makes virtually all decisions regarding whether to advance a case to trial, even the discretion to not initiate prosecution, even when a prosecutor might deem the accused guilty (Inouye 2002, 183). Instead, prosecutors often only try those cases where conviction, based on past cases, is assured (Weber 2009, 142). This specific control directly contributes to the staggeringly-high conviction rate of over 99% (Haley 2007, 125; Weber 2009, 142). Ramseyer and Rasmusen (1992) place more blame on the understaffing and under-budgeting of prosecutor's offices<sup>28</sup> for the tendency of the attorneys representing the state to pursue only those cases that are assured convictions, while authors such as Weber (2009) highlight the very-real concern how career ambitions might dissuade prosecutors from advancing cases where conviction was not certain. One prosecutor claimed that their profession was trapped in a disgraceful, vicious circle, where the procuracy's reliance on proof beyond a reasonable doubt means prosecutors will advance only those cases where guilty verdict is all but assured; because acquittals are resultantly rare, whenever one is handed down, prosecutors become even more careful

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<sup>28</sup> This point deserves special attention: as of 2000, there were only 2,250 judges and slightly over 18,000 lawyers in the whole of Japan, with the bulk of attorneys residing and working in Tokyo, Osaka, Nagoya and other major cities. Insofar as civil cases were concerned, the dearth of lawyers meant that around 40% of the parties were not represented by an attorney in the District Court phase of the case (Ota 2001, 562-563; *see also* Landsman & Zhang 2005, 183).

to avoid future exonerations. This tendency has wedded Japan to the practice of dispensing convictions to a high degree (D. Johnson 2002, 242). Regardless of the ultimate source, the notion that “Japanese courts convict” (Ramseyer and Rasmusen 2001a, 88) was certainly true, with prosecutorial control of cases representing a significant factor to the nation’s high conviction rate.

Prosecutorial control over nearly all stages of a case also rendered defense counsel largely impotent. In the critical pre-trial phase of a case, indigents did not enjoy the right to appointed counsel until *after* they are indicted and the police and prosecution have interrogated the suspect and possibly extracted a confession (Foote 1992a, 374; *see also* Landsman & Zhang 2008, 184). Even when suspects had counsel, defense attorneys lacked the right to attend interrogation sessions, and were commonly denied access to their clients until after a confession was made (D. Levin 2008, 230), helping to ensure that 90% of the cases sent to trial had the defendant offering a full confession (Foote 1992a, 336-337; *see also* Landsman & Zhang 2008, 184). Milhaupt, Ramseyer and West (2006, 80) claim that this system deems a confession the prerequisite for a suspect to exercise their right to counsel. When access was granted, prosecutors traditionally would dictate when and for how long a suspect could meet with his or her counsel. In discovery, attorneys for the state were not required by criminal procedures to reveal all papers and evidence to the defendant’s attorneys; instead the defense counsel had the right to see only those items that were to be submitted as proper evidence at trial (Weber 2009, 144). Indeed, if the trial system was focused more on seeking the truth than in advancing two adversarial positions from opposing camps, such limitations of evidence perhaps would not be as unusual as

they seem, especially if incidental facts would obscure the larger truth as to the defendant's overall culpability. Moreover, prosecutors have been accused of not only routinely coercing suspects to confess, but that they doctor dossiers and confessions - which are written in a narrative by the prosecutor - to make the accused seem more culpable (D. Johnson 2002, 39; D. Levin 2008, 230). Critics charge that judges are aware of the methods prosecutors use, but implicitly support such actions by holding that the illegal actions of the prosecutors were not sufficiently serious to bar the evidence obtained (D. Levin 2008, 231; *see also* D. Johnson 2002, 218; Mitchell 2002, 197).

The overall weakness of the defense establishment certainly did not help. Criminal defense law has generally not been seen by attorneys as a promising field, and most practicing lawyers have generally been young and untried (Landsman & Zhang 2008, 184). Defense attorneys have felt that the position of the prosecution makes the contestation of a case a hopeless enterprise, one that might garner a harsher sentence than if their client confessed, showed repentance and asked for leniency (Foote 1992a, 338; Landsman & Zhang 2008, 185).

Just as problematic, institutions and mechanisms designed to theoretically give the public the ability to check and review the decisions of the procuracy - such as the Prosecutorial Review Commissions (PRC), civil suits and public opinion - historically have been ineffective means for lay oversight of the prosecutorial bureaucracy (D. Johnson 2002, 222-224). The failures of the Prosecutorial Review Commissions to limit prosecutorial powers deserve particular attention, as they served as one of the primary means to involve lay participants in the criminal process prior to the

implementation of the Lay Assessors Act. A hybrid institution that blends the civil and criminal grand jury institutions of the United States into one body, the PRC system was created by the occupying-Allied powers after World War II. Comprised of eleven randomly-chosen lay citizens, Prosecutorial Review Commissions serve as *ex-post facto* examination tools for citizens to inquire into the proper functioning of local government departments, including the prosecutor's office. With regards to the procuracy, the PRC system is permitted to inquire into the non-indictment decisions of the local prosecutor's office and assess if decisions to not pursue criminal charges were appropriate in certain instances (Fukurai 2007, 323). The PRC can submit one of three recommendations to the prosecutor's office once its review is completed: (1) non-indictment is proper; (2) non-indictment is improper; or (3) indictment is proper (Fukurai 2007, 324). In those instances when the PRC as-a-whole feel that the prosecution had erred and indictment was warranted in a particular case, the PRC is able to recommend to the government to levy charges against the accused. However, the PRCs originally had no mechanism to compel the prosecution to follow its advice for indictment – instead the indictment suggestions of the PRCs were regarded merely as advisory, and the prosecution often ignored the recommendations offered by the commissions. Consequently, public confidence in the PRCs has been low and their use has been rare (Fukurai 2007). In 2000, complaints triggered PRC reviews in less than 1% of all decisions where the prosecution chose not to indict; even when PRCs were empanelled, they tended not to ask the procuracy to take any action. Indeed, between 1953 and 2002 PRCs recommended either an indictment or a reconsideration to indict in only 12% of the total number of cases under its review; of those situations where

the PRC recommended action, the procuracy only followed the PRC recommendation only 7.4% of the time (Fukurai 2007, 324-325). As a result of its rare use, the existence of the PRC system had not been widely known amongst the populace (Anderson & Nolan 2005, 965), which further undermined confidence in the system (Fukurai 2007, 324).<sup>29</sup>

In sum, the strength of the Japanese procuracy, the tendency of judges to lean towards the prosecution during cases, the relative weakness of defense counsel, and the impotence of the lay participatory mechanisms that nominally served as a check on the legal arm of the state, led to the perception of Japanese jurisprudence being in reality “prosecutorial justice” (Weber 2007, 142).

### III. Design of the Lay Judge System and Institutional Changes Accompanying its Implementation

The system that resulted from the Act created “a new global model for lay participation in justice” (Anderson & Saint 2005, 234). The lay judge system, more of a hybrid than a wholly original construct, mixes elements from the American jury system and the European mixed-tribunals – it mandates that professional judges and lay citizens work together and decide guilt and sentencing as one body, much like the mixed-courts of Europe. However, lay jurists under Japan’s quasi-jury system are

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<sup>29</sup> The PRC system also underwent important changes as part of the overall efforts of judicial reform discussed in chapter three. PRCs will now have the power to compel prosecutions to go forward, even if the prosecutor’s office disagrees, changing the nature of PRC recommendations from advisory to compulsory. This revision to the PRC system now gives citizens a powerful means to check local government and a meaningful form of lay participation in governance (Fukurai 2007).

chosen randomly from the voter rolls and serve for only one case, like Anglo-American jurors (Anderson & Saint 2005, 233-234).

By injecting non-legal professionals into judicial proceedings, jury systems conflict with the hierarchical model as they complicate the decision-making process and allow for normative non-legal factors to affect the eventual judgment (Weber 2009, 149). Under the new lay judge system, six civilians will join three professional judges in cases where the guilt of the defendant is contested; in matters where the defendant has admitted guilt, four citizen jurists will serve along side of only one professional judge (Wilson 2007, 844; Anderson & Saint 2005, 234). In looking back to the mixed-tribunal systems examined in chapter two, Japan falls roughly in the middle range with regards to the number of laity employed per case – less than the one-to-two citizens employed per case in Germany, yet less than the six-to-nine lay members used in the French courts. Japan employs the same number of laity in cases where guilt is contested as Italy does, but Japan includes more professional jurists in such cases.

These mixed-tribunals will be responsible for not only determining guilt but also sentencing (Foote 2007, xxxi). Again, judgments will be based upon majority vote, with the caveat that the majority ruling includes the votes of at least one professional judge and at least one lay jurist (Wilson 2007, 846-847). The professional judges assembled for each case are charged for making all decisions related to the interpretation of laws, procedure, and other matters to which lay judges do not enjoy specific statutory authority to make rulings on under the Lay Assessor Act (Anderson & Saint 2005, 240-241).

The jurisdiction of the lay judge system is limited to high criminal matters only. The range of offenses applicable to the lay judge system is by-and-large restricted to crimes of a serious nature – e.g. where the sentence for the defendant is death or life imprisonment with hard labor, and those crimes where the victim dies due to the defendant’s actions (Anderson & Saint 2005, 233-234). Examples of such offenses include homicide, manslaughter, rape/assault resulting in the death of the victim, arson resulting in death, vehicular manslaughter, abandonment of children by parents/guardians, kidnapping for ransom, as well as other serious crimes causing injury or death to the victim (Wilson 2007, 844). Additionally, certain offenses that do not result in the death or injury of the victim have been placed under the purview of the lay judges, such as the possession/usage of narcotics, counterfeiting, forgery and embezzlement (Wilson 2007, 844). Japan is not alone in limiting the applicability of its quasi-jury system to only serious crimes – countries such as Austria, Belgium, Hungary, Greece and others similarly restrict their jury or quasi-jury systems to such matters (D. Johnson 2009). In 2007, there were 2,643 criminal cases which would have been reviewable under the lay judge system had it been in effect, with robbery with injury to the victim comprising the majority of applicable criminal acts (SCJ, Justice Min., and JFBA, 4).

The lay judge system is employed only in Japan’s district courts, of which there are 50 throughout the country – one in each of the 47 prefectures plus three additional in the Hokkaido cities of Hakodate, Ashikawa and Kushiro – with an additional 203 local branch offices to assist the respective district courts (JRC 1999a, CH 1). The district courts are the courts of the first instance for the majority of civil

and criminal matters (JRC 1999a, CH 1). Much like the American jury system, the lay judge system has no role at the appellate level. Similar to the Croatian system (Kutnjak Ivković 2001, 63), when a defendant is charged with a crime reviewable under the lay judge system he or she cannot waive his or her right to a trial by the mixed-tribunal (Anderson & Ambler 2004, 62). However the Lay Assessor Act does empower the overseeing district court, upon application by prosecution, defense counsel, the defendant or at the discretion of the sitting judges, to determine whether or not to allow cases that fall under the lay judge system's jurisdiction to nevertheless be tried by a simple three-judge panel if certain circumstances exist which might impact the trial – e.g. the appearance of lay judges or their alternates cannot be guaranteed for the duration of the trial; violence or threats of violence directed against lay judges or their relatives from outside persons due to their service at trial; or other limited situations (Anderson & Saint 2005, 238). Despite this power to procedurally circumvent the system, Anderson and Ambler (2006, 62) note that concerned parties in the legal community believe that judges will rarely use their powers to exempt a case from lay judge trial, as professional jurists would be wary of being seen as undermining the new system.

Potential lay judges are selected from the voter registration lists within each jurisdiction (Wilson 2007, 845), giving the lay judge system a *de facto* minimum age limit for participation of 20 years old (D. Johnson 2009). A wide range of persons are exempted – or in another perspective, prohibited – from lay judge service by the Lay Assessors Act, including members of the Diet, ministers, employees of particular state agencies, lawyers, judges, court and Justice Ministry personnel, governors and

mayors, officers in the national Self-Defense Forces, and others (Anderson & Saint 2005, 244-246). Additionally, other classes of persons are able to decline service, including those over 70 years old, enrolled students, those who are the primary caregiver to children or other family member, as well as persons in particular, temporary hardships that overlap with the dates of their summons (Anderson & Saint 2005, 246-247). Persons who answer their summons and are considered for appointment by the court will undergo a limited form of *voir dire*; during this procedure, both the defense and the prosecution are permitted by the Lay Assessors Act to exclude up to four persons each without providing any reason (Anderson & Saint 2005, 258).

At trial, lay jurists are able to ask questions of witnesses and the defendant during periods of testimony, provided they are recognized by the chief judge (Anderson & Saint 2005, 267). This empowerment of lay jurists fits very much with the inquisitorial approach, which requires the active involvement of persons charged with making decisions at trial (Hans 2008a, 278).

Upon completion of the trial phase, the lay jurists and the professional judges deliberate as one body, deciding the judgment of the court based upon majority vote, again with the stipulation that the court's ruling must have the support of at least one professional judge and one lay participant. This means that under the lay judge system, two important mechanism inherent to the American system of trial-by-jury – i.e., the separation of jurors from judicial oversight and pressure and unanimity of verdicts – are absent from the lay-judge system, preferring instead the Continental method of consociational deliberations (*see* Weber 2009, 213; Wilson 2007, 855). Yet even while

many European court systems allow for non-unanimous verdicts, many such systems do indicate a preference for unanimity (Weber 2009, 213) the provision that at least one lay judge and one professional jurist concur on the verdict is apparently unique to the Japanese system – the closest parallel that can be found is the supermajority vote requirement in the judicial systems of Malta, Norway and Spain (M. Levin & Tice 2009). Lay judges are required to appear on the date that the verdict of the court is handed down (Anderson & Saint 2005, 269), and the verdict is delivered by the chief judge. Unlike the rulings issued from the US Supreme Court, no mention is made by the court of the presence of or number of dissenters among the judicial panel who disagree with the verdict, and individual lay jurists are unable to voice their opposition to or reservations with the ruling (Deguchi & Ito 2010).

The lay judge system does not simply inject citizens to sit at trial and to vote on guilt, innocence and sentencing; instead the provisions of the Lay Assessors Act and the rules of the resultant system fundamentally reshape the ways that criminal trials are to be conducted and the outcomes they produce (*see generally* Anderson and Saint 2005, CH 3). In the traditional inquisitorial trial method, prosecutors have viewed their role as one of non-adversarial actors pursuing the truth at trial (Weber 2009, 142-143). The injection of common citizens at trial disrupts this practice, in that it seeks to move away from the traditional inquisitorial method and democratize decision-making at trial (Fukurai 2008, 32). Noting Takashi Takano's (2002) findings that Japanese professional judges rarely challenge the veracity of confessionary evidence produced by police and prosecutors, Fukurai (2009, 55) points to recent findings that lay citizens are more willing to critically question the credibility of

confessions and the properness of police and prosecutorial actions when confessions were extracted, especially when defendants later recant their confession in open court. Taken together, Fukurai believes that lay participation can mitigate the wrongful conviction, punishment, and even execution of innocent persons, particularly when the bulk of evidence against them is only their confession. This may denote a fundamental philosophical shift in Japanese jurisprudence, where criminal trial outcomes are regarded as just when the procedures that produce them are just. As mentioned in section II, the Japanese judiciary had typically regarded truth-seeking as more important than protecting the rights of the accused. If the participating laity are willing to question practices by the police and the prosecutors in the lead up to trial, and if this questioning ultimately affects the verdict offered by the court, then Japanese jurisprudence may begin to regard the protection of defendant's rights with a growing sense of importance, one that may potentially complicate the traditional truth-seeking inherent to the continental model of justice. However, it must be mentioned that the design of the lay judge system endeavors to maintain certain inquisitorial aspects of the Japanese juridical design, such as the ability of judges to question witnesses, despite the overall goals to democratize the verdict-rendering process.<sup>30</sup> To what extent those efforts prevent the emergence of procedural justice in the Japanese judicial process is not yet known.

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<sup>30</sup> Indeed, the JRC was conscious of maintaining a role for professional judges in this system, and opted for a lay judge system so that it might fit with "what it believed were the essential features of the justice system" (Weber 2009, 156). Whatever the resultant system might look like, it was believed that the insertion of lay participants should not demand any departure from the core features of the judiciary, such as the role of professional judges in maintaining judgment and sentencing consistency (157).

The lay judge system, by employing persons who can practically serve only for a limited number of days, is expected to speed up Japan's historically-drawn out trial process as well. Criminal trials had typically been drawn out over many weeks or months, with proceedings occurring on non-consecutive days, a time schedule that lay jurists would be unable to reasonably serve (Weber 2009, 147). Instead, provisions were added to the Lay Assessors Act and revisions made to the Code of Criminal Procedure to allow for uninterrupted trials (M. Levin & Tice, 2009), and prosecutors and defense attorneys have begun implementing new pre-trial procedures to meet the new advanced time frame for trials, such as consulting with the presiding judge prior to the trial to identify areas of dispute in the case (Weber 2009, 162). Consequently, the Supreme Court of Japan initially expected the bulk of lay judge trials to last only three days (*Nikkei Weekly* 2009). In its first survey since the lay judge system began operations, The SCJ (2010) already found that cases are proceeding on an expedited basis: in the majority of lay judge cases adjudicated in 2009, most were resolved in less than five days. In some ways, this accelerated process is counter-intuitive, for one might reasonably expect that the lay judges, in their unfamiliarity with judicial proceedings and deliberation, might require greater explanations from judges, prosecutors, defense counsel, and even witnesses in order to understand the particularities of the case, the importance of evidence, and their proper role as lay jurists at trial. Moreover, deliberations might be expected to take longer with lay judges involved, as professional judges might have to answer questions that are clear to career jurists. Yet the data presented by the SCJ demonstrates despite the relatively

novice character of lay judges, their presence and the newly instituted procedures, has helped to streamline judicial proceedings.

This advanced trial schedule has consequences for the economy and efficiency of criminal proceedings, as a shortened trial timeframe can be expected to reduce the overall cost of bringing a defendant to court as well as streamline judicial procedures. But it also has implications for the fundamentals of justice in Japan, as a shortened trial consequently impacts the truth-seeking ability of the judicial system. The accelerated trial timeframe means that the long, laborious investigations and trials that were necessary to truth-seeking under the previous model are no longer possible in lay judge trials.

The advanced schedule of lay judge trials is also predicted to reduce the importance of and the heavy reliance on the dossier prepared by the police and prosecution at trial, which typically served as the primary evidence against the accused in the past. Oral testimony from witnesses is expected to assume a more prominent role at trial as the importance of the dossier fades (D. Johnson 2009; Weber 2009, 162-163). The roles and rights of defense counsel also have changed as a result of the lay judge system. Coupled with the new quasi-jury system is the requirement that all information and evidence unearthed by the prosecution, if it is to be used at trial, must be disclosed to the defense, even if such evidence is missing from the dossier (Weber 2009, 147). Additionally, defense attorneys are to have greater access to their clients during the pre-trial stages (D. Johnson 2009).

The conduct of attorneys during trial also will undergo changes. For instance, Article 55 of the Lay Assessors Act imposes a statutory requirement for the

prosecution and defense counsel to provide opening statements to the court vis-à-vis their respective positions on the case (Anderson & Saint 2005, 267). Additionally, there are expectations that the lay judge system may move Japan towards a more adversarial system of justice. While Japanese defense lawyers place much more trust in authority – i.e. prosecutors – than their American contemporaries (Foote 2002) recently more law school students and legal professionals have been training in the methods of trial advocacy, and more defense attorneys have been engaging in a spirited defense of their clients (D. Johnson 2009; *see also* Shinomiya 2008). In interviews with this author, Satoru Shinomiya (2010) claimed that the presence of lay participants had affected how defense and state attorneys were presenting their respective sides, even in cases where the defendant had pled guilty and the only determination to be made was sentence. Indeed, it appears that attorneys are shifting their approaches at trial based upon what they believe the lay judges would like to see in the proceedings: according to *The Daily Yomiuri*, defense counsel in the second trial under the lay judge system had listened to the comments and impressions of the lay judges in the first trial and adjusted their strategies to meet the citizens' expectations (*Daily Yomiuri* 2009b). Attorneys have also begun using plain language at trial instead of legalese more suitable for the ears of professional jurists (Kamiya 2010). In the end, the lay judge system has reshaped how the pre-trial, courtroom, and verdict-rendering stages of a criminal matter are conducted.

In these varied ways, the lay judge system refashions and re-conceptualizes not only how justice is to be delivered in Japan, but also the eventual product that the justice system is to produce. Given the parameters and constraints of the lay judge

system, trials that fall under its jurisdiction are expected to be faster, more economical and efficient, with less reliance on the official determinations of fact made by the prosecutors and more use of witness testimony. Operationally, lay judge trials are anticipated to be more adversarial, and the presence of lay judges is believed to serve as an important counter-balance to the overly deferential attitudes of career jurists towards the prosecution, potentially making trials more just and fair. While these shifts in procedure, operations, and fundamental aims affect lay judge trials, it remains to be seen if non-lay judge cases will see similar changes. It may be that cases with charges outside of the scope of the lay judge system will continue to operate in the same inquisitorial fashion; conversely, changes might be witnessed in these types of cases as well, as the broader judicial system adapts and is modified by the alterations to the juridical system spurred by the limited inclusion of laity in the courtroom.

#### IV. Issues With, and Concerns about, Lay Participation in Japan

Despite all of the change to the criminal justice system, it is important to note the limitations of some of these modifications. Indeed, Richard Lempert (2001, 12-14) calls the adoption of a lay judge instead of a jury system “a timid option”, one is less disruptive to traditional Japanese law, but a move that will compromise both citizen participation and criminal procedure gains, and alter the very concept of Japanese democracy. As this work delves deeper into the issue of how Japanese citizens relate to the state and how they might be affected by the process of lay judge service in chapter five, many of these issues will be revisited as they directly relate to the

potential of the lay judge system to foster civic engagement tendencies amongst past citizen jurists. However, they still deserve mention here.

Reflecting the concerns of scholars cited in chapter two regarding mixed-tribunals, there are questions amongst many who have examined the Japanese lay judge system as to whether it will highlight the failings of the European mixed-court systems. Echoing Daniel Foote (1992a, 322), Joseph Kodner (2003, 245) is concerned as to whether Japanese judges will be able to participate in a meaningful and independent fashion under this new system. Raising the same conclusions deduced by Kutnjak Ivković and others in their studies of European lay jurists, Kodner (2003, 251) holds that Japanese citizens also will regard their professional counterparts with higher esteem, which will lead to greater deference by citizens judges. The historic opposition of the Japanese judiciary to lay participation also does not bode well for the surrendering of power by professional jurists and the welcoming of citizens to the decision-making process. This lack of meaningful participation could compromise judicial legitimacy instead of advancing it (*see* Hans 2007, 309).

Looking to how the Japanese lay judge system is structured and operates, the limited range of cases to which the lay judge system applies is one of the most significant issues. For those offenses that are not applicable under the lay judge system, the old trial system will persist, meaning that for crimes outside of the scope of lay judge adjudication, many of the old problems of prosecutorial zealotry and favoritism of the professional judges for the state may still prevail. What is more, the prosecutor's offices still retain the discretion of whether or not to charge an offender with a crime. Though this non-indictment discretion is not as vast as it once was

thanks to the recently-expanded powers of the PRC (Fukurai 2007), prosecutors are still able to circumvent the lay judge system by charging defendants with crimes that do not fall under its purview (D. Levin 2008, 211-212). Both of these potentially undermine several of the stated aims of the lay judge reform: such as substantive improvements in the quality of justice dispensed, enhancing judicial legitimacy and lay member participation, and the efficiency of trials. However, it is worth noting that some scholars believe that to place a vast range of offenses under the purview of the lay judge system would place undue strains on the courts, the citizens and society (Deguchi & Ito 2010). Furthermore the lay judge system is to be reviewed by the Supreme Court in 2012, and there are expectations among some scholars, those in the Japanese legal community, and the JRC itself that the range of cases applicable to a lay judge trial will be expanded in the future (JRC 2001; M. Levin & Tice 2009; Deguchi & Ito 2010; Shinomiya 2010).

Yet there are issues for democracy with the large numbers and wide swaths of the population that are made ineligible for lay judge service by the Act. Despite its use and the nearly 2,000 persons already employed as citizen jurists, certain provisions tied to the lay judge system do cause consternation and concern amongst legal observers and citizens alike. One such area of concern is the large degree of the population that is either prohibited outright from service, or has the ability to opt out if they are summoned. As noted above, there are vast groups of people who are barred from lay judge service merely because of their chosen profession, including past and current attorneys and judges, employees of the courts and certain governmental agencies, even professors or associate professors of law in schools governed under the

School Education Act (Anderson & Saint 2005, 245-246). Though some European mixed-tribunal nations do bar people with legal education or those in the profession from serving as lay jurists in order to preserve the lay character of the system – such as France, Germany and Norway (Kutnjak Ivković 2007, 432) – Japan’s prohibitions appear more extensive. Resident aliens, as they are not citizens and cannot vote, are also unable to participate as lay jurists, much like non-naturalized immigrants in the United States (Fukurai 2007, 343).

Deep within the articles of the Lay Assessors Act is a secrecy provision that bars citizens from discussing the particulars of their service except for their general impressions about their time as a lay judge (Kamiya 2010). Mark Levin and Virginia Tice (2009) note that while other nations do have nondisclosure provisions for citizens who serve at trial, Japan’s are particularly harsh: for revealing details of the deliberation, the votes for or against conviction or other secrets connected to their service, lay judges can be fined up to ¥500,000 or receive six months imprisonment. Such disclosure prohibitions bind lay judges from the start of their service throughout the rest of their life. Professional judges are also required not to discuss particulars of a case, but are not similarly bound by criminal penalty (Jones 2006, 369; M. Levin & Tice 2009). Levin and Tice (2009) regard such strict requirements to not disclose any information about their time in service beyond generalities as unfairly weighing citizens with a huge psychological burden – both in terms of fear of imprisonment, but also the knowledge that they might gain at trial adjudicating on some of the most heinous crimes committed in Japan. The exposure to particularly distressing information that the court is privy to during the trial – such as graphic photos and

images of a crime, witness and victim testimony and brutal descriptions of the offense – can take a psychological toll on jurors; the inability of lay jurists in Japan to speak to family or mental health professionals in great detail regarding their experiences due to the secrecy provisions may have unforeseen consequences, both on the individual and the broader aims of the judicial reform movement. Indeed, in his review of the 2004 book *Saiban-in Seido*, Colin Jones (2006, 370) notes author Takashi Maruta's point that if one purpose of the lay judge system is to promote greater public understanding and awareness of the judiciary, then the prohibition against relaying one's experiences, even to family and friends, undercuts this aim. Moreover, it may enable professional judges to more easily lead or coerce lay judges during deliberations to accept their determinations on a case. Eiji Yamamura (2009) raises similar concerns both in regards to the burden placed upon the individual and the compromising of the functions and the legitimacy of the judiciary that accompany the secrecy provision. In his estimation, the ban on discussing one's experiences needs to be abolished, or at least severely modified.

More generally, the fact that the Japanese lay judge system has merely a legislative – and not constitutional – mandate could serve as a potential problem. Douglas Levin (2008, 207-208) raises the point that the source of power for the lay judge system is ordinary statute, as opposed to the American jury, which is enshrined as a right of the people in the US Constitution. Looking to Japanese history, where constitutional protections and rights under the Meiji Constitution were seen not as *inalienable* rights but rather as gifts promulgated from the emperor – gifts which could be revoked by the government (*see also* Mitchell 2002, 10-13) – Douglas Levin (2008,

207-208) sees the Lay Assessor Act as “more of a legislative gift or privilege than a permanent or constitutional right of the people”. This legislative gift aspect could affect how greatly citizens and political leaders value the lay judge system, particularly if participation is seen as a burden rather than a duty. If public and political confidence in the system wanes, the lay judge system might fall into a state of disuse and irrelevance, suffering a fate similar to the defunct Taisho-era jury system mentioned in chapter two. While the current lay judge system has obviously learned from and tried to account for the failures of the Taisho-era jury system in its design – e.g., defendants cannot refuse a lay judge trial, as defendants could do in the jury system – a loss of trust in the lay judge system could spell its demise. Since its value is not directly connected to the protection of constitutional liberties, but is merely seen as a legislative creation, a collapse in trust for the lay judge system could cause it to fall into disuse – e.g., if prosecutors begin indicting defendants at high rates for crimes not covered under the new system, thereby circumventing the new trial method altogether (D. Levin 2008, 211-212). After all, it should be remembered that the failed Taisho-era jury system was never abolished, only suspended.

Any discussion of potential problems with the lay judge system would be remiss if it did not at least briefly mention the cultural concerns as to whether any jury system is amenable to Japanese concepts of justice and society as a whole. Indeed, juries are typically seen as vehicles to instill community values in the judicial system and ensure that verdicts are consistent with a community’s conceptions of justice (Hans 2003, 83; Hans 2008a, 276). Juries are also able and expected to dispense *individualized* justice, where the law is flexibly applied depending on the

circumstances of the case (Hans & Vidmar 1986, 19; Lempert 1992, 55). Further to the point, juries are typically seen in adversarial systems, where oral testimony forms the bulk of the evidence (Hans 2008a, 278). Given all that has been said in regards to the truth-seeking, uniformity, and hierarchical aspects of the Japanese judicial system, the injection of any lay presence into the courtroom seemingly runs counter to the Japanese conceptions of justice. Perhaps in sharpest contrast to the nature of Japanese law, “[a] truly autonomous panel of lay assessors ...bring[s], as does a classic jury, a greater amount of unpredictability into the criminal trial...” (Thaman 2001, 105).

Landsman and Zhang (2008, 180) point out that the tendencies towards compromise inherent to both the Japanese legal system and culture, a characteristic that stretches back to at least the Tokugawa era, where mediation was preferred in the absence of a formal judicial system that adjudicated the resolution of disputes. Frank Munger (2007) goes further and states that there may be a cultural disconnect between the group decision-making aspects of juries and the values of people in East Asia, including the notions of legal consciousness and participatory governance. Yet Munger does address the installation of the lay judge system in Japan, as well Korea’s recently instituted quasi-jury system, as responses to social changes and the strengthening of liberal democratic tendencies (2007, 466).

In this vein, the hierarchical nature of overall Japanese society and the blending of those norms into concepts of law and justice deserve mention. In the 1960s Tokyo University law professor Takeyoshi Kawashima claimed that the traditional cultural preferences for harmony made Japanese more inclined for informal mediation, reluctant to litigate, gave the people an overall weak sense of legal

consciousness, and made them more amenable to trial by judge (Fukurai 2007, 331). Kawashima further claims that the Japanese people are more deferential by nature (Weber 2009, 158)<sup>31</sup>. Echoing Kawashima, Kiss (1999, 275) points out that features common to Japanese culture – e.g. the respect for authority and for those in positions of higher status, as well as a desire to maintain harmony – create problems in the act of deliberation, particularly in mixed-tribunals, where the professional judges are sitting in the same room with the lay jurists. Kiss maintains that the respect of lay jurists for their professional counterparts would lead to deference to the professional judges’ opinions, even if citizens were instructed by the judges to voice their own opinions; the tendency for a plumber to openly disagree with a professional judge is, in Kiss’s opinion, not prevalent in Japan. Bloom (2005, 24) reminds us that the Confucian adage that “the nail that sticks up gets hammered down” exists for a reason, for it serves to reflect Japanese reticence and desires for harmony over conflict. Such claims of trust in authority, group-oriented thinking and harmony-seeking lead RGJT founder Chihiro Isa to oppose the lay judge system for the very reasons mentioned by Kiss two years before it was even proposed (Fukurai 2007, 331), and have led others to question the feasibility of instituting the lay judge system.<sup>32</sup> Other cultural arguments stem from the idea that the Japanese populace has a weak level of civic-mindedness and the functionality of any jury or lay judge system would consequently suffer (Jones 2006, 367-368).

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<sup>31</sup> For further detail, *see also* Kawashima (1963) and Kawashima (1967). Sources cited in works by Fukurai (2007) and Weber (2009).

<sup>32</sup> *See also* Bloom (2005) for a concise summation of the cultural arguments against the lay judge system and a questioning of their veracity.

As compelling as the political immaturity claims might be, other authors dispute the cultural reticence argument. Haley (1978) was one of the first to attack this line of thinking, claiming instead the tendency for Japanese to avoid litigation and seek mediation stemmed from “institutional incapacity” – i.e. a dearth of lawyers, lack of adequate access to the court system, and the inability of courts to provide sufficient relief when cases are heard (*see also* Ramseyer 1988; Fukurai 2007, 332).

Anderson and Nolan (2004, 987-989) question the likelihood of lay jurists simply to defer their opinions for those of the professional judges. Claiming that many of the assumptions of great deference stems from simplistic cultural assumptions, themselves built upon dated notions of Japanese social structure from the World War II era, the authors state that much work has been done by social psychologists in the intervening years to question the inability of citizens engage in effective deliberation. Mock lay judge trials conducted in Osaka prior to 2004 suggested not only the ability of randomly-gathered citizens to engage in debate during deliberations, but also that mixed courts can help facilitate better justice and democracy within Japan (Anderson & Nolan 2004, 986-987).

Other scholars are less apt to dismiss the issue of deference so quickly, though not wholly on cultural grounds. In Germany’s mixed-tribunal system, research has shown that lay jurists are quick to defer to the judgment of the professional judges in cases, and do so with great frequency (Iontcheva 2003, 375; *see also* Wilson 2007, 855), making their influence at trial minimal; indeed, it had been found that German lay judges influenced the trial outcome to the rarest extent: in determinations of guilt, lay judges had an impact on around 1.4% of cases, and 6.2% in sentencing decisions

(Herrmann 1996, 133; *see also* Wilson 2007; 855). This routine deference and consequential lack of influence ultimately defeats the very purpose of lay representation at trial – i.e. giving voice to the community in the courtroom and serving as a check upon both the prosecution and the professional judges (Bibas 2006, 961; *see also* Wilson 2007, 855).

Related to deference, *domination* by professional judges of lay jurists is another concern, particularly due to the fact that lay members serve and deliberate with their professional counterparts. In her studies of the Croatian mixed-tribunal system and levels of support between citizens and judges, Kutnjak Ivković (2003) noted that the difference of status between the lay citizens and the professional judges is a very real issue; though the Croatian Criminal Procedure Law stipulates that professional judges and lay jurists are equals at trial and in deliberation, in actuality professional judges enjoy a dominant status amongst the panel (111). This is due to both the legal expertise and administrative responsibilities at trial of professional judges, and the resultant group dynamics of having professionally-trained individuals work in a small group where their status as experts is well known (*see also* Kutnjak Ivković 2007, 437)<sup>33</sup>. Such discrepancies ultimately lead to the perception, amongst professionals and lay jurists alike, that the professional judges are more competent in their role. A further consequence is that professional Croatian judges are less likely to support mixed-tribunals than their lay counterparts (Kutnjak Ivković 2003, 111). In a later comparative study of mixed tribunals, Kutnjak Ivković (2007) elucidated this point of imbalance, stating that the differences in status allow professional judges to

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<sup>33</sup> For more general information on the imbalances in status and power affect the dynamics of mixed-tribunals – particularly those of Germany – *see also* Kaplan and Martin (1999).

dominate both proceedings and deliberations if they so choose. Moreover, when professional judges are in the minority, they are more able to convince lay jurists in reversing their opinions to those of the professional judges than the lay jurists are able to convince the professionals to adopt the opinion held by the majority of the empanelled citizens (Kutnjak Ivković 2007, 442). Hans (2008, 289) points out the potentially deleterious effects of deference and domination, in that they can either lead to lay participants being mere window dressing to unduly increase the legitimacy of the legal system, or cause a widespread erosion of legitimacy if the ineffectiveness of lay participation is well known (*see also* Hans 2007, 309). Ultimately, it remains to be seen whether these deference and domination features are consequences of cultural proclivities, or if they are institution features of mixed-tribunals.

Fukurai (2007) disputes the legal consciousness argument of Kawashima, and indicates that what is critical for Japanese is to actually have a vehicle in which to serve as a lay participant in the justice system. In his examination of persons who had served as a PRC member *before* the reforms that made its recommendations mandatory, Fukurai (2007, 336) details that people who actually served had higher rates of confidence in the PRC system than those who did not, and felt their experience as a PRC member was a positive one. This pattern mirrors that of Americans who serve as jurors, who also exhibit higher degrees of confidence in the legal system after their service than before (Hans 2008a, 281). Much like with lay judges, PRC members generally did not want to serve initially, but were affected by their service experience. Moreover, later research by Fukurai (2009) indicates that when PRC service is framed to citizens as an official duty or one's social

responsibility, Japanese citizens overwhelmingly express a desire to serve. For Fukurai (2009, 45) the framing of service as an official duty is greatly important to the perceptions of Japanese respondents.<sup>34</sup> In light of such research, it appears that the Japanese people are not politically immature or lacking a legal consciousness; instead what they have lacked are the institutions that would help that consciousness blossom and flourish. Chihiro Isa's experience as a juror in Okinawa in 1964, when the island was still under U.S. occupation and had trials-by-jury, illustrates this point succinctly. Isa describes the act of receiving a jury summons and serving as a juror for 11 days as a life-changing experience, one that altered his priorities in life and caused him to pay more consideration to the concept of rights (Fukurai 2007, 333; *see also* Isa 2006). Based on his own cross-national studies of PRC and American jury members, Fukurai (2007, 333) holds that "Isa's experience was not an aberration." Beyond an individual's experience and awakened legal consciousness, Fukurai (2007, 353) maintains there is additional social import in having criminal matters examined by all-citizen bodies comprised of members of the community.

In the end, cultural issues cannot entirely be ignored. Indeed, the JRC's final report (2001), in highlighting the necessity to move people from governed objects to governing subjects, made it clear that culture is still an important factor, particularly the notion of the individual and the state's respective places within society. Beyond the JRC, such cultural arguments are pervasive, both within Japan and without. As Fukurai (2007, 332-333) details, the very cultural arguments advanced by Kawashima and assailed by the authors above were often embraced by the Supreme Court of Japan

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<sup>34</sup> In contrast, the level of Americans who expressed a desire to serve on a jury was not significantly affected by the framing of service as an official duty (Fukurai 2009, 45).

and the Ministry of Justice to question and discount the appropriateness of a jury system; in their reliance on cultural rationales for opposing juries within Japan, both institutions perpetuated and reinforced the myth that Japan's legal culture is built on conformity.<sup>35</sup> Such arguments over the believed political immaturity of the Japanese people permeated throughout the JRC's deliberations and eventually colored the system that was created (Weber 2009, 159). But while culture certainly matters, to exaggerate its influence to the point of dismissing the potential of a jury or lay judge system ignores the deepening of liberal democratic tendencies and other social changes occurring within Japan that would make the nation more amenable to lay participation in the courtroom (Munger 2007).

Landsman and Zhang (2008) offer perhaps one of the best operational analyses and critiques of the Japanese system. In sum, the authors harbor deep reservations about the lay judge system, claiming that it is simply a collection of half-measures that sets itself up for failure: citizen jurists will be under the control of professionals and will only hear a narrow range of cases; prosecutorial discretion still allows the state to circumvent the lay judges by indicting suspects on charges not reviewable under the new system, leading to a winnowing of cases reviewed by citizen jurists over time and setting the lay judge system up for failure, similar to the Taisho-era jury system (Landsman & Zhang 2008, 220-221). In their estimation, Japan has created a system much like the German mixed-tribunal, and has ensured that the lay judge system will

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<sup>35</sup> Satō (2002, 79; footnote 12) assailed the advancement of these notions by the Supreme Court as means to legitimate its policies and justify its suspicions against judicial reform, including the addition of lay participants at trial. Weber (2009, 159) details that the supposed-political immaturity of the Japanese public gives judges the ability to assert their role as legal educators in the new system, and Maruta claims that the desire to maintain the predictability of trials, as opposed to actual cultural concerns, was the real reason that Japan shied away from an Anglo-American style jury (*see* Jones 2006, 368).

exhibit many of the failings of its German counterpart (Landsman & Zhang 2008, 194-197). Finally, the design of the lay judge system – with its consociational deliberations and many restrictions on citizen participants – denotes a lack of trust on the part of the government and the courts in the Japanese citizenry in their collective ability to decide not only the outcome of particular cases, but also to decide the course of the Japanese state (Landsman & Zhang 2008, 220-221). In their view, such a trust is crucial for the success of any lay jury system. Bloom (2005, 17-18) raises a similar point, that that for all of the lofty goals laid forth by the JRC, the adoption of a lay judge system severely undercuts the potential to achieve greater democracy and legitimacy, and denotes “a distrust of the average Japanese citizen to effectively decide legal issues.” In Bloom’s opinion, the actual level of participation of Japanese lay judges “will be minimal as opposed to mixed.”

Together with Bloom, Landsman and Zhang echo many of the same concerns regarding lay judge systems that Landsman himself raised years earlier. In looking to the lay judge systems of Croatia and Russia, Landsman (2003) points out that citizens in those systems tend to be passive, and that professional judges do not have much interest in involving lay community members at trial. Landsman ultimately concludes the mixed-tribunals do not seem well designed towards bringing democracy to the judiciary and questions their continued incorporation.

As all of the above articles were written before the Japanese lay judge system began, the trepidation of Bloom, Landsman and Zhang, and other authors is understandable, both due to the lessons learned from the Taisho jury system and the problems that mixed-tribunals have faced in Germany and elsewhere. These authors

approach their analyses of the Japanese lay judge system from a desire to have lay participation in court be meaningful, and for the institutions themselves to be significant and robust. For all of these hopes and desires, however, these scholars are troubled by what history and contemporary practice teaches. Yet they may be too quick to pronounce the Japan's system a likely failure, particularly because it is not wholly like any other mixed-tribunal system employed. On just one point, the fact that Japanese citizens will serve as lay judges for only one trial – unlike in the German system where citizens are appointed for five-year terms (Yomiuri Shinbun 2008, 189) – may make them more amenable to active participation. Moreover, their claim that “a lack of faith [is] displayed in the reforms adopted” (Landsman & Zhang 2008, 221) seems misplaced, for it ignores the efforts of the JRC, reformists and the political establishment to address several deficiencies of Japanese justice, and instead sees failure as the only option for the lay judge system. Finally, in their comparative assessment between the Japanese and Chinese lay judge systems, Landsman & Zhang hold out greater hopes and offer higher praise for the Chinese system, despite the numerous, potentially deeper challenges that system faces in actually incorporating lay jurists into a meaningful role in Chinese jurisprudence. Landsman and Zhang's praise stems from the fact that, comparatively, for the Chinese lay judge system there is almost nowhere to go but up: China's judiciary is wantonly corrupt and unprofessional to troubling degrees, and its lay judge system has room to help the juridical system improve; conversely, Japan's legal system is highly professional and elite, and the reforms to the judiciary that the lay judge system can offer are only of modest proportion (Landsman & Zhang 2008, 213). The authors seem to be disparaging

Japan's reforms because its legal system has fewer serious problems to address. But to undertake such a comparison is an odd enterprise, considering that Japan is an established liberal democracy and China is still an authoritarian state. Their judicial and broader governing constructs are not only different in design but in purpose. Realistically, if the authors had wished to do a careful and honest analysis of the lay judge systems in both countries, this one paper should have been divided into two, and the Japanese system should have been compared to the mixed-tribunal system of another established liberal democracy. Compounding the curious nature of this piece, the lopsided assessment these authors have for the Chinese and Japanese systems seems particularly bizarre, given Landsman's reservation towards lay judge systems as a whole in his 2003 piece. Moreover, it ignores additional aims of Japan's jurisprudential reforms – i.e. to incorporate lay participants while still maintaining the country's continental legal traditions, and ensuring continued consistency in verdicts and sentencing, goals that makes the continued presence of professional judges in the judgment phase of trial critical (Weber 2009, 128).

In defending their views as to the *potential* failure of Japan's lay jury system and the *potential* success of the Chinese version, they remind the reader of a point that Richard Lempert (1992, 45) made in his article, "A Jury for Japan?" – namely, any analysis of lay participation must be done with alternatives in mind. Yet Landsman and Zhang have seemingly forgotten one of the most important lessons that Lempert leaves the reader with: that it is difficult to determine ahead of time whether or not a jury system – or any other form of lay participation – would be good or bad for Japan,

and that the only way to effectively do so is to establish a system and study its implications as it unfolds (Lempert 1992, 69-70).

Fortunately, we are now in a position to begin the type of investigations that Lempert recommends. Though the lay judge system is still very young, so far the great fears of Japanese culture or specific structural elements of the lay judge system inhibiting citizen performance may not be coming to pass. In communiqués with Kumamoto District Court Judge Masataka Nakagawa (2010), the judge conveyed that, on the two lay judge cases he had served on as of March 2010, the citizen jurists spoke their opinions freely, even arguing points with the professional judges. In addition, professional judges try to facilitate the participation of lay citizens and the voicing of opinions during deliberations (Kamiya 2010; Nakagawa 2010). It may still be far too early to tell if the dire predictions of the lay judge system's detractors come to pass. Yet even if all of the problems with lay judge and mixed-tribunal systems discussed both in chapter two and in these pages manifest themselves, there is a feeling amongst scholars who have studied such systems that the political function of mixed-tribunal systems is of much greater significance, and it alone justifies their retention and employ (Kutnjak Ivković 2007, 444-445).

As Hans and Vidmar (1986, 245) discovered, American jurors take their responsibility to decide a person's fate seriously. This seriousness has been reflected in the way that lay jurists have approached their duty as well (Shinomiya 2010). In this regard, Isa's comments on the transformative experience of juror service deserve another mention, for they bring to bear the idea that the weak legal consciousness of

Japan's citizens, once advanced as a component to Japanese culture, may really be a byproduct of long absence of institutions that allow lay participation.

The lay judge system ultimately has an important position within Japanese politics and governance, for it allows for the testing of these cultural and institutional claims. In measuring the effects of laity participation in the judicial process, future researchers will be able to shed light on which argument has more weight. The results might be surprising to scholars across the spectrum, but at least the examination of the lay judge system across these various dimensions can help to identify whether the domestic culture or the institution itself is the primary driver for the results unearthed. In the meantime, careful analyses of the scholarly works written on the subject will have to suffice.

Yet what does lay judge service portend for one's later levels of civic engagement? Chapter five will address this question by examining the recent qualitative and quantitative work done to measure levels of civic engagement of American jurors and how an individual's service as a juror affects one's participation in society, looking particularly towards the groundbreaking studies conducted by Gastil, et al (2002; 2008; forthcoming). The later sections of chapter five will ask whether one can expect to find individuals in Japan more civically engaged after their lay judge service is completed, given the particulars of the Japanese experience. For it must be remembered that the Japanese quasi-jury method is different from the American jury and the European mixed-tribunal systems. It asks Japanese citizens to fulfill different roles for different periods of time. With different institutions and duties, different outcomes may result.

## **Chapter V**

### **Lay Participation, Civic Engagement, and Potential Consequences for Japan**

#### **I. Introduction**

This chapter looks beyond the descriptive analysis offered thus far as to how and why the Japanese lay judge system came about, and instead delves into the dependent variable of civic engagement, and the potential effects that an individual's involvement in the lay judge system may have in their future inclinations to be civically active. The general hypothesis offered – that participation as a lay judge in Japan is expected to increase the post-service civic engagement levels of citizens – will largely be discussed on theoretical grounds due to a lack of evidence. As the Japanese lay judge system is barely past its one-year mark, there is far too little data available to conduct the quantitative research necessary to properly evaluate this

question. Without such data, it is impossible to tender definitive assessments as to the post-service civic engagement tendencies of particular Japanese lay judges. Yet this discussion will serve to point out the pitfalls and possibilities not only of the potential of the lay judge system to inspire citizens to be civically engaged once their service has terminated, but to also question whether research indicating the potentiality of lay adjudication to transform participants into more involved citizens is applicable beyond America's shores. Towards those ends, this chapter will look to the general assumptions, the theoretical rationales, and the research that suggests linkages between lay participation in the criminal adjudication process and an individual's post-service propensity towards civic engagement. Because much of the literature in this area deals specifically with the American jury experience, the perspectives gained in this review will have to be assessed with a critical eye, evaluating their relevancy to the particularities of Japan. The institutional features of the lay judge system might mean that the findings concerning post-service participation in the United States would not be expected in Japan; cultural and structural issues in Japanese society likewise raise additional points to evaluate. But we must also take care to remember that the results we would expect to find are country-specific, and that the transformative effects of lay adjudication may manifest differently in Japan than in the United States; in short, we need to be looking for Japanese style effects of lay participation, however they might differ from American results.

The remainder of this chapter will be structured as follows: section II will provide the theoretical and evidentiary background as to why lay participation in trials is believed to facilitate civic participation, particularly in regards to recent studies

conducted by John Gastil and company (2002; 2008; forthcoming). These authors are perhaps the first to test and verify the theories regarding lay participation to civic engagement by measuring the post-service rates of American jurors with respect to levels of voting, community involvement and other criteria. Section III will offer hypotheses regarding the transformative effects of lay judge participation in Japan and highlight the particulars of not only the participatory adjudication process but also civic engagement in Japan that may cause us to question whether the findings of Gastil, et al, are relevant or applicable to the Japanese case. Section III will also look to system effects that might interfere with civic engagement separate from the independent variable – such factors include culture, expectations surrounding the lay judge system, political alienation, and others. Finally, Section IV will conclude the chapter with a general reflection of on the limitations of present research into this area, but also will lay out how such an investigation could be conducted in Japan once data is readily available, as well as the expectations of this author regarding how civic engagement might be affected by this new system. Finally, section IV will conclude by offering some policy recommendations regarding the lay judge system for Japan to contemplate; these policy suggestions address ways in which the function of the lay judge can be improved, not only to aid research into the central question around which this chapter revolves, but also to potentially increase the civic engagement effect of the lay participatory adjudication process.

Before beginning with section II, it is useful to define the key terms to be used herein. Firstly, it is helpful to identify the dependent and independent variables to be discussed. For this paper, the level of civic engagement of the individual will serve as

the dependent variable, and the participatory adjudication process – i.e., lay judge service – will be the independent variable.

Secondly, it is necessary to note what is meant by the term “civil society.” In reviewing relevant literature, it was surprising to learn that “[a] consensus on how to define civil society has not been reached [amongst scholars]” (Heinrich 2007, 1:xxii); indeed, in examining several authors on the subject, no less than four differing definitions were unearthed. Initially, this work intended to use CIVICUS’s definition of civil society as “the arena outside of the family, the state, and the market where people associate to advance common interests” (Heinrich 2007, 1: xxiii). Also appealing was Robert Pekkanen’s (2006, 3) definition, which regards civil society as “the organized, nonstate, nonmarket sector.” Though attractive in their simplicity, these definitions are problematic in what they exclude; Pekkanen (2006, 4) readily admits his designation excludes important groups, such as labor unions, political parties, trade and professional organizations, the family, and other groups that might help us paint a better picture of the character of civil society in Japan. Gastil et al. (forthcoming, CH 1, figure 1.1) draw a distinction between political society and civil society in their definition, with civil society representing the arena where private acts are done for private desires, and political society encompassing associational acts that have public aims in mind; each sphere is distinct from one another, but overlap at certain points with each other and the state. Though this chapter cites Gastil et al. heavily, it is helpful to rely on a broader definition of civil society used within the social sciences, which highlights the relations between voluntary organizations outside of the state (Janoski 1998, 12). Towards that end, civil society is recognized as “a

sphere of dynamic and responsive public discourse between the state, the public sphere consisting of voluntary organizations, and the market sphere concerning private firms and unions” (Janoski 1998, 12). This more nuanced terminology gives us flexibility and allows for the inclusion of bodies that might be important to Japanese civil society but atypical elsewhere in the world.

For defining “civic engagement”, I borrow Valerie Hans’s (2008, 276) definition, and hold the term to include “active citizen participation, including volunteering, voting, and other forms of social and political action,” but to this definition I add that an individual’s participation *must be voluntary*. This definition encompasses an individual’s involvement in civil society through a variety of means, and includes such acts as participation in informal groups – e.g. sports and book clubs – and community organizations, membership in formal associations like trade unions and business groups, religious affiliation and political participation. The reason for this broad definition is two-fold: the first is that many scholars do so – Robert Putnam (1995; 2000, 27) writes of these different forms of participation as being different components of civic engagement. Secondly, it is hard to consider several of these activities as being wholly different from the overarching concept of civic engagement; indeed, are not acts of voting or participating in a political protest a form of involvement with one’s community? Instead it is more helpful to regard political participation, associational membership, religious affiliation, et cetera, as components belonging to the broader notion of civic engagement; they are distinct from each other but still speak to the rate at which individuals are active within their community. Importantly, Gastil et al. (forthcoming, CH 5, 9) make a distinction between political

and civic engagement in terms of effects measured in their study, but for this analysis such a fine distinction is not necessary; rather it is more useful to think of both types of activities as being different components to an overarching concept.

The inclusion of the voluntary aspect to the civic engagement definition is important, for it denotes both an individual's willingness to be an active participant in society and an absence of compulsory measures on the part of the state to force the populace to assume certain responsibilities or roles. The voluntary caveat thus means that lay judge service in Japan and jury service in the US, UK and elsewhere cannot themselves be considered acts of civic engagement, due to their compulsory nature. Without this voluntary condition, lay judicial participation would certainly have fit Hans's "civic engagement" definition, yet this inclusion is problematic; after all, how can an action that a citizen is legally compelled to take part in on pain of fine or imprisonment be truly civic in nature? Moreover, in many of the states reviewed in previous chapters, lay judicial service is a role that citizens are typically allowed to decline in certain circumstances, but normally cannot voluntarily assume. Including such acts of participation confuses the civic nature that this engagement is supposed to reflect. In short, voluntary participation comprises the *civic* nature of civic engagement. Here too I depart from Gastil et al. (forthcoming, CH 5, 2) with their view that actions such as voting and jury service are formal responsibilities of citizenship that are more similar to other responsibilities – like taxes and military conscription – than to other voluntary community engagement activities. I agree with these authors in regards to jury service, but I hold electoral participation apart and place it squarely within the civic engagement camp. In the United States and Japan, no citizen is forced to vote in

the same manner as they are required to pay taxes or, if called upon, serve in their nation's armed forces. Voting is still a time-consuming task to which the participant must still desire to engage in, sometimes to the point of waiting for hours outside of their electoral precinct for the chance to cast a ballot. And while citizens interviewed by Gastil et al. (2008, 13) likewise view jury duty as a *responsibility* that is similar the responsibility of voting, the fact that voting remains willful act undertaken with promise of neither reward nor reprisal sets it apart from other forced requirements of citizenship. A formal act of citizenship it still might be, but the voluntary character of voting sets it apart.<sup>36</sup>

Several components of civic engagement measured by Gastil et al. which will be discussed herein also require proper definition. "Public affairs media use" focuses on the degree to which individuals consume different media – i.e. TV news, internet, or radio – for the purpose of learning about politics, government, or other public issues. "Political action" measures to what degree an individual voluntarily engages in partisan or non-partisan political activities; such activities can range from attending political speeches, volunteering for a candidate/party/issue group, contacting public officials or agencies, and involvement in civic organizations. "Public talk" analyzes the degree to which citizens are interested in local politics and affairs, discuss local community issues with neighbors, their tendency to discuss broader political matters with others, the degree to which they debate issues with others in the hopes of changing their opponent's opinion. Finally, "community group participation" asks

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<sup>36</sup> Likewise, in countries with compulsory voting laws – such as Australia (Australian Electoral Commission 2007) – electoral participation cannot be considered an act of civic engagement under this definition.

how active citizens are in charitable, service, cultural, and neighborhood groups, as well as religious organizations and educational institutions (Gastil et al., forthcoming, table 5.2; *for public talk, see also* Delli Carpini, Cook, and Jacobs 2004).

## II. Theories and Research Regarding Lay Participation and Civic Engagement

Many of the scholars mentioned in this chapter and those previous have spoken of the ability of lay participation to inject a nation's justice system with democratic qualities and principles, mainly through the incorporation of community values regarding justice and fairness into court rulings (Hans 2003, 83). Indeed, as mentioned prior, such were the aims of the Judicial Reform Council (JRC) in proposing Japan adopt the lay judge system.

Additionally, scholars who have focused on the American jury system have frequently spoken of its democratic character, and its potential to foster democratic tendencies amongst its participants (Hans 2008b, 7; *see also* Gastil et al., forthcoming, CH 1; Lempert 1992, 52-63; Lempert 2001, 9-10). A favorite source for this belief among scholars is Alexis de Tocqueville ([1835] 1990, 280-287), who in his studies of the American jury concluded it to be one of the best means with which society can educate its citizens towards the proper duties of democratic citizenship (*see also* Gastil et al., forthcoming, CH 1, 7). Recognizing that democratic governance required the participation of the people in the governing processes, de Tocqueville claimed that the jury is the most effective method of teaching the people how to rule in that it “is the most energetic means of *making the people rule*...[emphasis added]” ([1835] 1990, 287).

This concept from Tocqueville was later termed the “participation effect” by Carole Pateman (1970). Pateman theorized that any type of civic engagement activity undertaken by an individual is likely to cause an increase in that person’s predisposition to civic engagement tendencies in the future. Also called the “participation hypothesis”, its central holdings are that the involvement of an individual in one civic activity would foster the talents, habits and predisposition that would make civic engagement more likely in the future (Gastil et al. 2008, 1). Moreover, there is the belief that the participation effect can not only draw those regular members of civil society more deeply into its realm, but can also inspire disaffected persons into civic life (Gastil et al., forthcoming, CH 2, 22). Closely related to the participation effect is the *deliberative participation hypothesis*, which has its roots in deliberative democratic theory. While the participation hypothesis looks broadly to all forms of civic engagement, the deliberative participation hypothesis looks to those activities where individuals meet, discuss and debate amongst themselves, such as town halls, civic forums, study groups, and the like (Gastil et al. 2008, 2). Citing a litany of sources, Gastil, Deess, Weiser and Meade (2008, 2) conclude that civic deliberation – such as “public talk” – can not only be engaging acts of participation in-and-of themselves, but can influence one’s later levels of civic engagement (*see also* Delli Carpini, Cook, and Jacobs 2004; Gastil and Dillard 1999, 20-21).

The participation effect and the deliberative participation hypothesis, which is more crucial to this work, have largely remained untested; as late as 2004, scholar Jane Mansbridge (qtd, Fung 2004, 52) stated that while she believed in the

participatory hypothesis, the social sciences still had not been able to persuasively demonstrate its existence (*see also* Gastil et al. 2008, 1). Moreover, there were feelings among Mansbridge and Pateman that the participation effect might remain untestable, who questioned whether an appropriate experiment could be created to measure its effect (Gastil et al., forthcoming, CH 2, 1). Even in the United States, despite years of research into the jury system specifically, “[w]e do not yet completely understand the mechanisms by which jury participation enhances civic engagement...” (Hans 2008a, 291). The paucity of corroborating data aside, the belief as to the jury’s power to instill participants with has been reflected outside of the academic realm. Indeed, even though supporting evidence has traditionally been sparse to support this notion, as Anderson and Nolan (2004, 943) state, one of the reasons lay adjudication was adopted in Japan was to foster grassroots democratic participation among Japanese citizens through temporary judicial conscription.

In 2002, Gastil, Deess and Weiser endeavored to test the effects of the participatory adjudication process on civic engagement by examining the post-service voting patterns of jurors near Seattle, Washington. In their research, the authors examined 794 jurors who participated in the 110 criminal trials in Thurston County, Washington, during the period of Sept. 8, 1994, and Nov. 1, 1996 (Gastil et al. 2002, 589-591). The authors then examined the voting patterns of those persons during elections held in the research period from 1994 to 1997, comparing their pre and post-service voting patterns through state election records. In what they would later dub “The Olympia Project”, Gastil, Deess and Weiser discovered that there was “a *causal* relationship between jury service and voting... [and] that a conclusive deliberative

experience raises future voting rates above those expected based upon prior voting history” (Gastil et al. 2002, 593). The authors discovered two important relationships between jury service and post-trial voting levels: firstly, jurors who served on trials through to deliberation and had a conclusive deliberative experience – i.e. the jury issued a unanimous verdict – were 9.6% more likely to vote in the following election (Gastil et al., forthcoming, CH 2, 15). Secondly, the Olympia Project discovered that when “the seriousness of the case stimulates greater deliberations, then...the positive effect of jury service on future voting likelihood increases in proportion to the depth and gravity of a jury’s deliberation” (Gastil et al. 2002, 593; *see also generally* Gastil et al., forthcoming, CH 2). In the authors’ estimation, the act of deliberation and the ability to reach a unanimous verdict was closely tied to an individual’s later propensity to vote frequently after their service was concluded.

In 2004-2005, Gastil, Deess, Weiser and Meade (2008) were able to expand their survey to several jurisdictions across the United States to test the veracity of the Olympia Project findings. The National Jury Sample gathered data from eight county court jurisdictions across the US that were geographically and otherwise diverse to create a broad data sample. While the study did mirror the Olympia Project in certain ways – i.e. measuring the post-service voting frequency of jurors – new dimensions were added the national study, such as conducting in-depth interviews with jurors in King County, Washington, to discover whether participants viewed their duty to serve on a jury in a similar vein as voting. Finally, again using data from King County, Gastil et al. sought to distinguish whether it was the deliberative experience of jurors that was affecting their post-service voting tendencies, or if their *subjective* experience

as a juror was the overriding cause (Gastil et al. 2008; Gastil et al., forthcoming, CH 3).

Though the National Jury Sample generally ascribed to the findings of the Olympia Project, there were some noticeable differences in the results. While criminal jurors who were previously infrequent voters *and* who reached a verdict had a greater inclination to vote in future elections, it was previously infrequent voters who sat on a *hung jury* that saw the biggest effect – such jurors were on average 6.8% more likely to vote in future elections; the authors subsequently attributed this hung jury result to the intense deliberations that surround such juries which are unable to come to unanimous agreement. Again reflecting the importance of deliberations to engagement, the researchers found that the number of charges matter to previously infrequent voters, with each additional charge increasing the post-voting likelihood of the juror by 1.3%. In an important discovery, the National Jury Sample found no increased post-service participation amongst civil jurors or previously-frequent voters. (Gastil et al., forthcoming, CH 2, 28-30).

Finally, chapter five in the upcoming book by Gastil, Deess, Weiser and Simmons examined the ways that jury service affects civic engagement beyond the ballot box. The authors returned to Seattle and measured the post-service interactions of former jurors in regards to four particular forms of engagement: (1) public affairs media use; (2) political action of the individual; (3) public talk; and (4) participation in community groups primarily apolitical in nature (Gastil et al., forthcoming, CH 5, 11).

The evidence related to post-jury civic engagement beyond voting is considerably varied and multifaceted: relating to deliberation, which the authors linked

to increased post-service voting tendencies, the only post-service civic participation increase that they could attribute to the deliberative effect was with regards to community group inclusion (Gastil et al., forthcoming, CH 5, 36-37). Moreover, limited *negative* effects for non-voting civic engagement were noticed for particular types of jurors in specific circumstances (Gastil et al., forthcoming, CH 5, 38, figures 5.2 and 5.3). However, while Gastil et al. conclude that the relationship to jury service seems more solid for post-service voting than for other forms of civic engagement, it seems safe to say that the ability of jury service to motivate citizens to be civically active extends far beyond electoral participation (Gastil et al., forthcoming, CH 5, 39). Gastil and company (forthcoming, CH 8, 27) ultimately contend that jury participation is a transformative experience for most who answer their summons, and maintain that

The jury...must be recognized as a powerful means of civic education that reaches across all demographic and cultural divides, and it has particularly powerful effects on the civic behaviors and attitudes of citizens who, short of jury service, might otherwise not be drawn into the public sphere (Gastil, et al., forthcoming, CH 7, 4).

Such research demonstrates that while the *why* of jury service spawning higher levels of voting and other forms of civic engagement in certain circumstances may not be fully known, the fact that lay judicial participation can serve as a vehicle to move otherwise apathetic, intransigent or disinterested members of a community into becoming active citizens in civil society offers valuable insights into how the jury as an institution fits within the broader society.

The findings of these authors strongly suggest that there is a transformative effect regarding the participatory adjudication process, particularly in deliberation, which inspires citizens to be more civically engaged. But it must be remembered that Gastil et al.'s findings are limited to the United States, which has a different means of

employing its laity at trial, and a different civil society, than Japan. These differences beg the question whether the Japanese lay judge system can similarly affect past participants to be more heavily involved in civil society. It is with this question in mind that the next section seeks to review.

### III. The Lay Judge System and Civic Engagement in Japan

Before continuing further, the inherent limitations with asking such questions at this point in time must again be mentioned. With the evidentiary limitations referenced at the chapter's beginning in mind, this section proceeds to analyze the expectations regarding the ability of the participatory adjudication process to transform individuals into more civically engaged citizens, using the abovementioned works as a logical basis to establish this inquiry. This section will also look to the particulars of the Japanese lay judge system and the ways that civic engagement manifests itself presently, and how these elements, as well as external factors, might alter the type of civic engagement enhancement effect observed.

To guide this analysis, section III will be divided into the following subsections: (a) differences in the independent variable; (b) differences in the dependent variable; (c) and differences in system effects. Furthermore, to potentially aid future research on this subject, the following independent variable, dependent variable, theory and hypotheses are identified and proposed:

**INDEPENDENT VARIABLE:** the participatory adjudication process (i.e. lay judge service)

**DEPENDENT VARIABLE:** civic engagement of the individual

**THEORY:** *For those Japanese citizens who have served on trials through deliberation and the issuance of a verdict, their individual levels of post-lay judge service civic engagement will be higher than those persons who have not served on a full trial (i.e. verdict rendered), or who were not selected for service.*

**HYPOTHESIS<sub>1</sub>:** *For those Japanese citizens who are selected to serve as a lay judge and are involved in deliberations on guilt and/or sentence, we can expect those individuals to exhibit higher levels of civic engagement than they had demonstrated prior to service on the court.*

**HYPOTHESIS<sub>2</sub>:** *For those Japanese citizens who are not selected to serve as a lay judge, or are selected as a lay judge alternate but who do not participate in deliberations, we can expect those individuals' levels of civic engagement to remain static.*

These elements attempt to account for the participation effect and the deliberative participation hypothesis that Pateman, Mansbridge, and Gastil et al. regard as important to the tendency towards later civic engagement.

#### A: The Independent Variable – The Lay Judge System

There are many reasons to wonder whether the engagement effects measured by Gastil and company would be repeated in Japan. Perhaps most crucially, the lay judge system and the Anglo-American jury method are two different institutions. Though both employ laity to decide criminal matters, they differ in multiple respects, such as the roles and duties assigned to citizens, the position of professional jurists during trials and deliberations, and the freedom of lay participants to discuss their experiences freely once the trial has concluded. Beyond this, the Japanese judicial system is of an entirely different character than the American model. As demonstrated in previous chapters, the Japanese judicial system has a more inquisitorial character, a character that the lay judge system reinforces via the judges' ability to question

witnesses and consociational deliberations. This characteristic is not mirrored in Anglo-American jury systems, which relegates their participants to the role of passive potted-plants (Mirjan Damaška, qtd., Hans 2002, 87). If the deliberative participation process is crucial to unlocking the post-service civic engagement potential of individuals as Gastil et al. argue, then this passive role *in* the courtroom should not matter to an individual's later levels of civic engagement. In these authors' estimations, deliberation is what matters. Yet the fact that Japanese lay judges have a different role to fulfill at this and later stages of the trial denotes that the specific qualities of American jury service that might lead to expanded civic association may or may not be present in the Japanese system.

Again given the high primacy that the research of Gastil et al. give towards deliberation for spurring future civic engagement, the deliberative process of Japanese lay judge trials raises immediate concerns whether the deliberative participation effect will be observed in Japan. If Gastil et al. are correct in assuming that the deliberative process is a critical element in transforming previously infrequent voters and community participants into civically-engaged members of civil society, the inclusion of professional jurists in deliberations might compromise the ability of the deliberative process to transform lay participants into civically engaged citizens in the future. Indeed, questions still loom as to whether the mixed-tribunal nature of the Japanese lay judge system will mean that Japanese lay jurists will likewise find themselves ineffective adjudicators, a situation that is emblematic to the mixed-tribunal experience in Germany (Bibas 2006, 961; Herrmann 1996, 133; Iontcheva 2003, 375; *see also* Wilson 2007, 855) and elsewhere in Eastern European (Kutnjak Ivković,

2007). As demonstrated in earlier chapters, domination of proceedings by professional jurists is a real possibility, one which could impact the degree to which citizen judges are not only active in the deliberative process, but also affect the ability of laity to shape the eventual verdict; all this might impact how ultimately satisfied citizens are in the results of the trial (*see generally* D. Levin 216-219). Indeed, if Japanese lay judges wind up being mere window-dressing for democratic participation in the judicial process or subsequently feel their participation was unimportant to the eventual outcome of the trial, a lack of satisfaction with either deliberation or the verdict on the part of lay judges might be a problem in Japan in terms of inspiring citizens to become more civically engaged.

Yet data collected by the Japanese judiciary question whether the quality of the deliberation and lay judge satisfaction are really problems. A recent survey of past lay judges by the Supreme Court of Japan (SCJ) found the satisfaction rate of lay jurists has been incredibly high; though 58.6% of the people who became lay judges in 2009 stated that they initially did not wish to, by the end of the trial 98% of all participants viewed their experience as either “good” or “great”, with 75.6% of lay judges answering that the atmosphere during deliberations was positive and lent itself to a free and full discussion (Kamiya 2010; *MSN/Sankei News* 2009; SCJ 2010). Insofar as far as operational effects, roughly 72% of lay judges and 80% of alternates stated that the cases were easy to understand (Supreme Court of Japan 2010). Personal correspondence with Kumamoto District Judge Masataka Nakagawa (2010) also reveals that encouragement by professional judges for citizen participation during deliberations is not always be necessary – Judge Nakagawa stated that on the two lay

judge trials on which he served, lay participants were very active in deliberations, even to the point of arguing with the professional judges when they disagreed. Though Judge Nakagawa's experience with lay judge trials has heretofore been limited, his testimony as to his early involvement with citizen jurists suggests that vigorous deliberation is not absent from all lay judge trials, even in the system's early years. These positive experiences around and evaluations of deliberation may hold important implications for post-service future civic engagement.

Importantly, Hypothesis<sub>1</sub> accounts for this lack of influence on the part of lay judges, for it simply denotes that lay judges will have to be involved in deliberations, but not necessarily effective to the outcome. This distinction is worth noting, for it not only accounts for potential domination/leading by professional judges during deliberations, but also for the fact that, unlike the American criminal trials, unanimity is not required for conviction in Japan. This lack of unanimity means that there always rests the possibility that several lay jurists would leave the courthouse not in agreement with the final verdict or sentence. What this dynamic might have on participation is a curiosity that the American studies could not give due consideration.

Issues of status discussed in chapter two serve as potentially real concerns for the deliberative and decision-making process, however it seems that not only are Japanese professional judges working to include laity in the process, but that the citizens themselves are overall pleased with the experience. As Kutnjak Ivković (2007) reminds us, in the end the effectiveness of laity to the decision-making process may not matter to the citizen's level of satisfaction with their service. Japanese lay jurists might wind up holding opinions similar to those of their Polish counterparts,

many of whom expressed satisfaction with their service at the same time professionals in the judiciary deride their effectiveness to shape trial outcomes (Kutnjak Ivković, 2007, 444-445). However, it seems that lay judges for the moment, are taking their role seriously once they sit at trial (Johnson 2009), regardless of whether or not that dedication will have any effect upon the eventual judgment. Beyond the SCJ's survey, Fukurai (2007) offers perhaps the best analysis in regards to Japan. In his investigations of the Prosecutorial Review Commissions (PRCs), Fukurai contends that such citizen-led panels were often very ineffective in forcing the prosecution to reverse course and re-open cases they had initially chosen not to pursue; however citizens who served as PRC members and participated in deliberations had higher marks for the PRC system as-a-whole and for their experience once their service was completed (Fukurai 2007, table 2). This low effective participation/high level of satisfaction may have consequences for civic engagement that the examination of Gastil et al. could not account for.

An additional concern for the civic engagement potential of the Japanese system is the secrecy provision that accompanies lay judge service. As noted at length in chapter four, several scholars who have analyzed the stipulations of the secrecy provision contend that it places unnecessary burdens upon the individual citizen jurist in perpetuity, and may dampen the democracy-enhancing aims of the lay judge system. Further reflecting the literature discussed, personal interviews with attorneys, legal scholars and law students in Tokyo indicate that there are concerns that the secrecy provision places heavy burdens on citizens after their service, and inhibits open public discussion about the lay judge system (Deguchi and Ito 2010; Nishihara

and Kondo 2010). The prohibition from substantively discussing the particulars of service seems particularly problematic for enhancing the civic engagement tendencies of individuals, as it effectively forecloses the ability of former lay judges from sharing some of the most important, crucial, or interesting aspects of their service with friends, family, or eager scholars researching the effects of lay participation on civic engagement. Gastil et al. (forthcoming, CH 5, 8) maintain that the ability of an individual to share their experiences as a lay jurist, to think aloud and verbalize their feelings or thoughts on judging matters in court might serve to ignite deeper passions for civic engagement beyond the ballot box. Particularly for retirees, the ability to share their jury experience through conversation greatly influenced their later degree of public talk and community involvement (Gastil et al., forthcoming, CH 5, 34).

Ultimately, the authors suspect that

Talking about jury service after the fact represents an effort to bridge the courthouse experience with the rest of one's life. Regardless of whether one's experience was triumphant or tragic, this conversational behavior could strengthen preexisting cognitive connections between being a juror and being a democratic citizen more generally. Rather than treating jury duty as an isolated, almost private responsibility performed exclusively while "on duty," these conversations increase the likelihood that jurors *remain jurors in spirit* after leaving the courthouse. Proverbially carrying their jury duty cards with them out of the courthouse, these jurors become more likely than their peers to carry with them a heightened sense of responsibility to continue their public service—in other ways—after being dismissed by the judge [emphasis original] (Gastil et al., forthcoming, Ch 5, 23-24).

For Japanese lay jurists, the prohibition against speaking of their experience beyond mere generalities, coupled with the threat of financial penalty or incarceration for disclosing confidential material, may prevent individuals from carrying their lay judge experience out into the world and fully engaging in civil society.

Fukurai (2007), however, offers a glimmer of hope. Stating very briefly that the United States as well prohibits its grand jurors and jurors from divulging

deliberation secrets or other information specific to the case on which they served, Fukurai then indicates that Japanese citizens have only slightly higher levels of unease with non-disclosure provisions that accompany service than their American peers – 54% Japanese citizens who had served as a PRC member stated they would find it difficult to never divulge information related to the case, while 49.2% of American jurors shared similar trepidations (Fukurai 2007, 337-339, Table 3). The specific disclosure prohibitions placed on American jurors go unmentioned by Fukurai, but even in light of such restrictions, Americans who served as jurors apparently feel free to discuss their experience with whomever they wish. In interviews with senior citizens in Seattle, Gastil et al. (forthcoming, CH 5, 7-8) found that roughly 96% of those persons interviewed who had served as jurors also had freely discussed their experiences with friends, co-workers, and family both within and outside of the household. Out of over 1000 persons interviewed, only 1.3% had never discussed their experience with anyone. As Articles 70 and 79 of the Lay Assessors Act only prevent lay judges from disclosing the contents of deliberation, secret or confidential information learned during their service, or reveal that they or other members of the court agreed or disagreed with the eventual verdict and/or sentence imposed (Anderson and Saint 2005, 274-278), the possibility remains for Japanese citizens to discuss their experience in broad terms and remain within the law. More to the point, the *Daily Yomiuri* (2010b) recently found that roughly 94% of previous lay judge participants had talked with friends, family, and/or co-workers about their experiences at trial, despite concerns as to what was or was not permissible to discuss. If the provisions of the Lay Assessors Act give enough flexibility for vast percentages of

former judges to discuss their experiences with those close to them, then perhaps all is not lost for civic engagement on this front.

### B: The Dependent Variable – Civic Engagement

But even if lay judge service inspires citizens to be more civically engaged, is Japanese civil society vibrant enough for them to go forth and be active members of society? To phrase the question another way: are Japanese citizens even inclined towards civic engagement? Some authors and data would suggest not; Haddad (2006, 1220-1221) notes that measures like the World Values Survey or the Comparative Nonprofit Sector Project commonly indicate that volunteerism is high in the United States and low in Japan, with rates in most nations of Europe falling in between. Complementing such data, Hirata (2004) chronicles that the number of NGOs in Japan has historically been low, with around 400 having been established in country at the dawn of the 21<sup>st</sup> century, though this number is the result of a marked-increase since the 1980s. Moreover, as Pekkanen (2006, 33) points out, most of Japan's civil society organizations are under-professionalized, employing just handfuls of people; indeed, the nation's largest anti-smoking association employs only one person (Pekkanen 2006, 1). Finally, the Japanese state's traditional practices of making it very difficult for nonprofit organizations from becoming legally-incorporated has been recognized as having a great role on the shape of Japanese civil society. Recognizing that state regulation, more than any other single feature, is responsible for molding the eventual shape of civil society (Pekkanen 2003, 133), it is critical to point out that the Japanese

state has historically made it difficult for large, autonomous organizations such as Greenpeace to thrive through its regulatory powers (Pekkanen 2003, 6; 2006, 7).<sup>37</sup>

Yet we must caution against the expectation that civil society is supposed to look the same everywhere. Several authors who examine Japanese civil society and social capital declare that Japanese civil society is not weak, only different, and that the Japanese version is poorly reflected via commonly-used measures (Haddad 2006; Pekkanen 2003, 133; Pekkanen 2006, 24). In fact, it is interesting that the presence and vibrancy of large organizations such as Greenpeace are used to measure civil society. Robert Putnam (1995, 71) calls such groups “tertiary associations”, which are typified by having large memberships but extremely loose membership qualifications, such as through paying membership dues. Additionally, such groups offer limited social connectedness amongst their members; to this point, the relationship or bond between members of the same tertiary organization is likened to two fans of the same sports franchise – they may cheer for the same team and have some other similar interests, but they are largely unacquainted, and perhaps may not know one another exists (Putnam 1995, 71). That such tertiary groups, which Japan has historically made it difficult to form, are given much weight in measures tracking the level of civil society within a state is strange, considering the limited interaction of members in these bodies. Scholars like Putnam question the practice of using the number of NPOs and large, tertiary groups such as Greenpeace and the American Association of Retired Persons (AARP) for measuring social capital and civic engagement within a state,

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<sup>37</sup> In 1998, Japan passed the NPO Law, which loosened considerably the requirements necessary for nonprofits to gain legal status (Hirata 2004, 111).

noting that when it comes to the social connectedness between members, the AARP and a local gardening club are not in the same league (Putnam 1995, 71).

But even if the number of NPOs were an accurate measure, Japan still fairs better than traditional surveys indicate. Japanese civic organizations typically have embedded relationships with the government, where groups frequently interact with bureaucrats in order to realize their goals, and develop close and sustained relationships with relevant agencies and government officials. Groups in the United States, meanwhile, are typically non-embedded, and seek to lobby politicians instead of working with the state to achieve their aims. In many ways, this is reflective of how these different societies view the role of the state in solving problems. As Japanese citizens commonly think that the government has an important responsibility in combating social-welfare issues, organizations have developed a particularly close relationship with the state towards solving such issues. In contrast, as Americans generally prize individual responsibility in addressing such problems, groups typically are distant and operate independently from the government (Haddad 2006, 1221). Consequently, Japanese exhibit higher rates of participation in embedded groups than their American contemporaries (Haddad 2006, 1225). Other nations such as Germany, Spain, and South Korea also see higher rates of embedded organizations and greater citizen involvement with such organizations, thus signifying that Japan is hardly an outlier in this particular feature of its civil society (Haddad 2004, 1238). This embedded characteristic has led to an intertwining of the Japanese state and civil society (Schwartz 2002, 205), and is reflective of the primacy of the government in developmental states; however, it is that engrained characteristic that often makes such

groups invisible to traditional surveys – as they are not wholly divested from the state – and deflates the size of Japanese civil society when measured. Haddad (2006, 1226-1227) finds that surveys like the World Values Survey and the Comparative Nonprofit Sector Research Project (CNSRP) do not include ways for respondents to record participation in embedded volunteer groups. Separately, Takashi Inoguchi (2000; 2002) finds that Japanese civic organizations are more likely to be business associations, whereas in the United States such groups are more civically and socially oriented. Reflecting the importance of business in Japan, Inoguchi (2002, 360) finds that, citing the Japanese Establishment Census, there were 6.7 million associations in Japan as of 1996. Inoguchi concedes that, due to the Establishment Census primarily focusing on business and industrial organizations, only a rough macro-level sketch of nonprofits emerges from this survey; yet it does reveal how the importance of business associations manifests via nonprofits in Japan. Further reflecting the embedded nature of Japanese civic participation, Inoguchi (2000; 2002) finds that roughly 18,000 nonprofit organizations created through private-sector initiatives (NPO/PSIs) and 7,000 NPOs created as governmentally-affiliated organizations (NPO/SGOs) existed at the turn of the century. Citing data from Tsujinaka (1996), Inoguchi (2000, 76) places the total number of nonprofits in Japan at just shy of 40,000, compared to roughly 95,000 in the United States. This stands in contrast to the 400 groups identified by Hirata (2004). To put it in another perspective, amongst major liberal democracies, Japan's nonprofit sector is second to only the US in terms of the number of persons employed (Yamauchi et al. 1999, 243).

Ultimately, the critical point is that Japanese civil society has formed differently from that in the United States, not that Japan is suffering a lack of civil society. Pekkanen (2006, 4) declares that Japanese civil society has three important attributes that set it apart: (1) the existence of a sector that is under-professionalized and engages in limited advocacy; (2) a locally-focused component with strong grassroots tendencies; and (3) a recent growth in size. Reflecting the first two features, both Haddad (2006) and Pekkanen (2003; 2006) note the importance of neighborhood associations (NHAs) in Japan as well. With over 300,000 NHAs around the country, and with 90% of Japanese citizens belonging to an NHA – of which between 40 to 70% indicating that they participate in their association’s functions – this one type of association alone indicates a healthy civil society in Japan, at least at the local level (Pekkanen 2006, 29-32). Similar to how most surveys fail to notice the embedded nature of civic associations in Japan, so to do they ignore the locally-centered nature of such groups. The CNSRP, in its effort to measure the strength of the nonprofit sector in various countries, overlooks small, local entities staffed entirely by volunteers (Haddad 2006, 1226), a characteristic that fits many of Japan’s associations. In missing these embedded and largely volunteer-run enterprises,

comparative studies of civil society [have] created a *systemic bias* in favor of organizations, in particular, the types of organizations that are found in the United States, and a bias against the types of organizations found in many other countries in the world, Japan in particular (Haddad 2006, 1228).

The strength of the Parent Teacher Association (PTA) in Japan is another positive indicator for Japanese civil society. At nine million members, Japan has three million more of its citizens affiliated with the PTA than the United States does (Haddad 2006, 1221). Putnam (1995, 69) regards the PTA as an incredibly important

means of civic engagement, as parental participation in shaping education symbolizes a type of social capital that is very productive. Haddad (2006, 1221) raises the relevant question of how can Japan have per capita twice as many volunteer firefighters<sup>38</sup> and three times as many PTA members than the United States if Japanese civil society is weak? By these measures, Japan may be doing better than the United States when it comes to the vibrancy of associations that foster true civic engagement.

In regards to the volunteer aspect of civil society, Haddad (2006) asserts that Japanese volunteerism manifests differently – mainly through embedded organizations of which the PTA and volunteer firefighters are but two – and that measures of civil society have long favored the kind of non-embedded volunteerism the US enjoys. Pekkanen (2006, 32) states that when volunteerism rates are accurately measured and compared internationally, Japan falls not at the back of the pack but squarely in the middle, with nearly 25% of adults volunteering (*see also* Inoguchi 2000, 78). Instead, Pekkanen calls the United States the outlier country for having comparatively abnormal volunteer rates – about 50% of its adult population. In examining volunteerism, Hirata (2004), Haddad (2006), Pekkanen (2003; 2006) and Schwartz (2002; 2003) all regard the civilian volunteer response to the devastating 1995 Kobe earthquake as a particularly telling example of the vibrancy of Japanese civil society. In the face of a weak response from the national government to the catastrophe, volunteers poured into the city to help, with 1.2 million volunteers offering their services and nearly US\$1.6 billion donated in aid (Pekkanen 2003, 126).

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<sup>38</sup> Japan has 951,069 voluntary firefighters compared to 777,350 in the United States (Haddad 2006, 1222).

Considering the nature of involvement in Japan, it should not be surprising that civil society can still be vibrant, even if large groups such as Greenpeace struggle; moreover, we should not be astonished to learn that a domestic equivalent to the American Association of Retired Persons (AARP) – a national and wealthy organization that boasts millions of members and thousands of employees and volunteers – is virtually non-existent. In its place are 133,219 local neighborhood associations of elderly people, with a total membership of 8.7 million seniors across the country, but which have no power to impact policy on the national level themselves (Pekkanen 2003, 117; Pekkanen 2006, 9).<sup>39</sup>

Given what has been said above, it is in how Japanese interact with their civil society that the expanded definition of civil society becomes important, for to use a more limiting definition that would exclude the importance of associations that enjoy highly engrained relationships with the state would paint a much bleaker picture of the health of Japanese civil society. Indeed, as several of the authors above state, efforts to analyze civil society in Japan are guilty of mistaking the nature of Japan's civic sphere by using measures more indicative of civil society in the United States. After all, if civil society scholars are not able to agree on a standard definition of the term, it would seem unfair to use the types of measures that would indicate the health of civil society in America elsewhere around the globe. One wonders just how the civil society measures of other nations would change, and where Japan would stand.

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<sup>39</sup> Haddad (2006, 1224) does note that Japan does have a national equivalent to the AARP, though this equivalency is more in name and purpose than size and power. The *Zenkoku Rojin Kurabu Rengokai* (Japan Federation of Senior Citizens Clubs [JFSCC]) has an office in Tokyo, but enjoys no full-time staff and has a budget of US\$2 million, a stark contrast to the AARP's \$600 million annual revenue. The JFSCC was not formed to be an advocacy organization like the AARP, but rather to represent the over 133,000 local seniors clubs at the national level.

Ultimately, if the lay judge system does have transformative effects on its participants, Japanese civil society – particularly in regards to community groups – has more than enough outlets to accommodate their new participatory passions.

#### C: Case Heterogeneity – Potentially Disruptive External Factors

Finally, we ask if all things concerning the dependent and independent variables were equal whether the civic engagement effect of lay service still might be hampered in Japan as compared to the United States. In this subsection, we look to elements such as the expectations of participants in the lay judge system, political alienation/public trust, differences in culture and more.

In chapter three, the various motivations that led to the adoption of the lay judge system were explored – from the improvement in the quality of justice and the injection of the criminal justice system with democratic values, to the transformation of the populace into autonomous and governing citizens. But what the citizens expect out of the system is unclear. Though the Lay Assessors Act passed the Diet with only two nay votes, and though the government had endeavored over the five-year interim to educate the public regarding the lay judge system, just one month before the start of operations in May 2009, 79% of adults stated that they did not wish to serve as lay jurists, with 25% stating that they would not respond to a judicial summons; additionally, only 13% of the public expressed an interest in serving even if it were not a legal obligation to do so (Johnson 2009; McNeill 2009; *Nikkei Weekly* 2009). In interviews with city government employees in Fukuoka, Japan, I learned that citizen hesitancy and confusion as to why this system was enacted still remained. One city employee informed me he was still nervous about the prospect of service, and that it

felt as if the lay judge system was a burden imposed upon the people by the government with little explanation as to why (Yasukawa 2010). And some of the first lay judge participants indicated how challenging a task it is to pass judgment on a fellow citizen that will shape the course of their life (Johnson 2009).

According to Douglas Levin (2008, 207-211), part of this is due to the nature of the Act fitting the mold of representing a gift from the legislature, as opposed to the right of the people, as it is enshrined in the US Constitution. The linkage between the constitutional right of the accused to a fair trial and the civic responsibility of jury service may have a powerful but heretofore unseen affect on post-service civic participation given the way that Americans conceptualize the jury and jury service. According to a 2004 Harris Interactive poll, fully 84% of Americans stated that jury duty was an important civic responsibility, one that should be fulfilled even if it is inconvenient (Hans 2008a, 281). If the Japanese public remains unclear as to what their long-term collective expectations are for the lay judge system, the engagement-enhancing attributes of the participatory adjudication process in Japan could be compromised. At the moment, however, summons response and attendance by citizens has been high, with over 85% of those summoned reporting for duty (*MSN/Sankei News* 2009; Supreme Court of Japan 2010; *see also Daily Yomiuri* 2009a).

The novelty of the lay judge system might be related these response levels, however. Considering that over 2000 potential spectators lined up to get one of the 58 seats during one of the first trials (Johnson 2009), perhaps too the attendance of potential lay jurists was similarly inflated due to participant curiosity. As the newness of the lay judge system wears off, it will be interesting to watch if the attendance rate

of summoned potential lay jurists declines as much as public interest in observing cases. As expressed elsewhere, the potentiality for large swaths of the population to seek exemption from service exists, either due to professional, personal, or familial responsibilities or other reasons, and it is an issue that has already shown itself to be a real concern. Of the total 7423 persons summoned for service in 2009, over 50% of those persons were exempted from service by the court, with the majority of those exemptions in response to requests made before appearance at the court (*MSN/Sankei News* 2009; Shinomiya 2010; Supreme Court of Japan 2010). Yet as this design is interested in the civic engagement aftereffects of lay participation upon persons, the degree to which people can be excused has implications that, while important to democracy, are not crucial to this question. Nevertheless it is important to highlight the broader issues surrounding the ability for individuals to opt out of service, as well as the outright exclusion of certain persons from lay judge service. The consequence of these exclusions and exemptions is that large numbers of persons, simply due to their employment or citizenship status, will never have the experience of being able to serve, undermining the democratic participation and judicial legitimacy aims of the reform effort. Moreover, removing vast swaths of the population from potential lay judge service does not facilitate the redefinition of the state/society relationship, as such persons are prohibited from the transformative effects that the JRC saw as part of the reform.

In terms of political alienation, the story in Japan is mixed. While Pharr, Putnam and Dalton (2000, 12-13) state that Japanese disillusionment with government, the bureaucracy, political institutions and parties has been invasive –

even more so than in the US and Europe – Inoguchi (2000, 78-83) states that trust in democracy and society, elections, and political institutions has risen over the preceding decades, and has in turn become more solidified. The picture that develops is that Japan as a whole has embraced the idea of democracy but become disillusioned with the state itself and its political leadership (Pharr, Putnam and Dalton 2000, 12-13). But political alienation is not limited just to Japan. In the United States, alienation has skyrocketed since the 1960s, while trust in America’s political institutions has collapsed. Europe has seen similar declines in support for its institutions – between 1985 and 1995, support for the British House of Commons fell from 48 to 24 percent. Globally, citizen support for politicians and parties has also declined measurably (*see generally* Pharr, Putnam and Dalton 2000). More to the point, lay participation could possibly serve to fill in the gaps created by political alienation. In the case of the United States, Gastil et al. (forthcoming, CH 2, 15) found that jury service with a conclusive deliberative experience can make an individual 9.6% more likely to vote in the following election. If Japanese citizens are as alienated or more so than their American counterparts, lay judge service could fill a similar gap and encourage participation.

Considering that the particular nature of Japanese culture has shaped much of the discussions regarding lay participation in general, it is necessary to examine this feature of Japanese society, one that could be disruptive to post-service civic engagement levels of individual lay judges. As detailed in chapter four, the notion of Japanese culture inhibiting effective participation in lay judicial systems permeates the relevant literature. So too do such cultural arguments try to account for the perceived

reticence of Japanese citizens to be civically involved as well as for the supposed weakness of the country's civil society (Pekkanen 2003, 125-126). Culturalist arguments claim that culture shapes a person's and a people's general tendency to be active members in civil society (Pekkanen 2006, 11), and consequently look towards the cultural characteristics of Japan to explain the potential under-involvement of citizens in society. As Keiko Hirata (2004, 107) observes, many who view Japanese democracy as underdeveloped see the passivity of the Japanese people as not only a cause of this state of affairs, but also an effect, looking to the paucity and lack of influence of social movements in the country as evidence. The traditional deference of the public towards authority is also seen as symptomatic of such cultural inclinations (Hirata 2004, 119; *see also* Kiss 1999, 275). Jones (2006, 367-368), again reminds us that the belief that the Japanese people suffer from a weak level of civic-mindedness is not an unpopular notion. Pekkanen (2006, 11-12) does well to summarize many of the culturalist arguments to account for a weak civil society or reluctance on the part of the Japanese to be civically engaged: several culturalist-leaning authors argue that the collective mentality of the Japanese makes it difficult for them to work towards advancing general or intangible principles; that Japanese unit identity, which is often closely tied to either family or company, provides too little space for civil society – and by extension too little opportunity to be civically engaged; or that Japanese are not able to participate in horizontal organizations – presumably due to the hierarchical nature of the society (Pekkanen 2006, 11-12). One scholar is more direct, declaring that voluntary organizations are not reflective of Japanese traditions (*as cited by* Pekkanen 2006, 11-12).

As in chapter four, I take issue with such accounts. Culturalist positions like those outlined above take a “never-have-been, never-will-be” approach to explain the current state of affairs and ignore crucial evidence to the contrary. These arguments do not consider other factors, such as the presence or absence of certain institutions or the influence of the state, which could account for the reluctance of Japanese citizens towards civic engagement. Related to this discussion is Japan’s first jury system, which ended in failure. As noted in chapter two, there were many reasons for the collapse and scuttling of the Japanese jury, to which cultural inclinations to defer to authority are but one explanation. Perhaps more critical to the eventual death of the Japanese jury system were the structural disincentives built in, which made it greatly disadvantageous for defendants to opt for a trial-by-jury over a bench trial – mainly due to the fact that a jury’s verdict was nonbinding on the court, but that the selection of a jury trial meant that the defendant gave up his/her right of appeal. Assertions based on cultural characteristics of the Japanese – like their deference to authority – may be convenient, but rarely do they give us the entire picture.

Other authors who examine the ways in which the state has shaped the development of Japanese civil society place more responsibility on the institutions of the state rather than the cultural idiosyncrasies of its populace (*see* Pekkanen 2006, 32). As mentioned above, the notion of Japan being a nation where the population is not civically engaged due to cultural inclinations does not match up with the data suggesting that the Japanese volunteer and associate at relatively high levels. Such culturalist arguments blind scholars and observers of Japan alike to the fact that civil society may in fact be thriving, as the preceding sections indicate. Indeed, it is hard to

declare that voluntary associations are an anathema to Japanese society when nearly all citizens are members of local neighborhood associations (Pekkanen 2006, 87), or that the voluntary spirit is in conflict with the Japanese culture given the outpouring of donations and volunteer efforts in the wake of the Kobe earthquake. In the presence of such information, culturalist claims that the Japanese possess a weak level of civic-mindedness should be viewed skeptically, if not dismissed.

Moreover, culturalists ignore the potential for change that occurs when institutions themselves created or altered, and when citizens are exposed to new roles. Looking back to the comments of Chihiro Isa in chapter four, one can see how an individual's experience within a state institution – in Mr. Isa's case, as a juror in American-occupied Okinawa – can alter their perspective and foster deep-seated changes within their character. Mr. Isa spoke of his legal consciousness being awoken by his experience as a juror, a condition that Fukurai (2007, 333) states is not an abnormality amongst persons who serve in the participatory adjudication process. Accordingly, it seems as though the function of the lay participatory institution matters more to civic awakening than the culture in which it is employed. As Putnam (1993, 184) observes, the altering of formal institutions can lead to changes in a population's political practice through "learning by doing" and eventually foster to the reshaping of values, practices, the nature of power and identities. Learning by doing, Putnam declares, can reshape political culture. Therefore, even if there is some validity to the culturalist arguments, they must still be treated with heavy skepticism, as the forced inclusion in the lay judge system can change the practices of lay jurists once their service has completed.

Much as Anderson and Nolan (2004, 987) regarded criticisms of the lay judge system, I view culturalist claims that the Japanese are weak in terms of civic mindedness as similarly based on obvious cultural stereotypes, for they generally rely on gross generalizations about a people to back up their assertions whilst they simultaneously ignore evidence to the contrary.

#### IV: The Story So Far, the Story to Unfold

The preceding sections denote that the Japanese lay judge system is already starting to see interesting results. Since its inception, the lay judge system has not suffered from lack of use: in the seven months between its inception and the end of 2009, lay judge panels were convened in 138 instances (Asahi Shimbun 2010); by the end of February 2010, the number of lay judge cases had jumped to 232, with a total of 1,956 persons serving either as lay jurists or alternates (Kamiya 2010). Out of the total participants, nearly all state that their experience as a lay judge was a positive one, and over 75% maintain that they felt free to voice their opinions during deliberations.

Yet for the scrupulous researcher, it is important not to interpret these and other early returns too broadly, particularly with regards to the future civic engagement tendencies of past lay jurists, as such claims need to be supported with relevant survey data. Despite all that has been said in this section, we are not able to make definitive declarations or even evidentiary sound assumptions as to the rate at which Japanese citizens might be civically engaged after their lay judge service is over. It is too early to tell what the ramifications are for the lay judge system on an

individual's civic association tendencies, or if findings similar to those of Gastil and company will be mirrored in Japan. Moreover, we do not know if encouraged civic engagement is a feature inherent only to Anglo-American-style jury systems, as no comparable studies examining the mixed-tribunal systems of Europe have, to my knowledge, been conducted.

In the end, however, the research of Gastil et al. and the examinations of the particular characteristics of the Japanese lay judge system, civic engagement, and the broader society give like-minded researchers a steppingstone from which to conduct further queries pertaining to the broader consequences of lay judicial participation on levels of civic engagement in the future. Such researchers should be ever mindful of that they are trying to discover the effects of lay judge service on civic engagement in Japan, and not looking to replicate in their entirety the findings of Gastil et al, with only the location, institution, and populace different. Instead, we should expect that the cause of increased civic engagement might be different in Japan; while Gastil et al. primarily tied their findings to the deliberative participation hypothesis, future researchers may find that the mere act of being selected to serve as a lay judge or lay judge alternate lends itself to greater civic involvement in the future. Moreover, one could reasonably expect the civic engagement effect to manifest itself differently in Japan: newly inspired Japanese citizens may become more active in their local associations but not flock to the ballot box with any greater frequency. Finally, the possibility that individual post-service civic engagement levels may not experience any positive effects, or may suffer negative effects, must be acknowledged.

Yet this chapter has endeavored to show why the propensity for Japanese citizens to exhibit greater tendencies towards civic engagement after their lay judge service should not be discounted on several fronts. In this chapter, relevant theories and data from the United States have been discussed to show why one might expect citizens to be more civically active after trial. In relation to Japan, pertinent theories and hypotheses have been offered as a guide to future scholars who wish to take the question that has surrounded this chapter and conduct the necessary research. Finally, the particulars of the lay judge system, the character of Japanese civil society, and the nature of Japanese culture have been analyzed to suggest why the participatory effect should not be discounted in the Japanese case.

But the only way that we will know is to watch as the system unfolds and to study its outcomes. In the short run, we can only speculate as to the results.

All that has been said up until this point begs the eventual question: how would a successful research design to measure the impact of the lay judge system on an individual's level of civic engagement, and just *what* would be measured? For this question, the forthcoming work by Gastil et al. provides fantastic guidance as to how to go about this enterprise. In looking to measure whether or not lay participation impacts an individual's likelihood to vote in future elections, a study analyzing the voting patterns of individuals before and after their service should be conducted across multiple jurisdictions in order to get a large enough sample size as well as account for differences across regions and localities. To control for the potential effect of lay participation, researchers should analyze the voting patterns of not only the persons selected to serve at trial, but rather *all persons* who had received a summons to serve –

i.e. those who were able to opt out of lay judge service, those who were not selected for service, and those who were selected to serve as lay judge alternates. If Japan's electoral and unitary court systems are willing to grant those future researchers the same level of access to their respective records that Gastil and company enjoyed during the National Jury Sample, then the surveyors in Japan will have a wealth of pre-service voting data at their disposal. However, an effective analysis of the lay judge system's effect on post-service voting levels may not be known for several years as new elections must be held.

In examining other areas of civic engagement beyond voting, ongoing research can at least begin now, as post-service participation in these areas is not contingent upon the occurrence of an external event, like an election. To measure non-voting civic engagement levels of prior lay judges, researchers should conduct a two-wave survey of lay judge participants, ideally with the first survey conducted as citizens they enter the courthouse in response to their summons but before the process of selecting lay judges has begun in order to properly gauge the level of civic participation of those citizens before they are exposed to any potential effects that their involvement in the lay judge system might have. Additionally, follow-up surveys should be conducted with citizens after a sufficient length of time has elapsed since their first encounter with the courthouse to gauge any changes in participatory behavior. Questions devised by the researchers and submitted to the citizens should be crafted in a way to effectively measure the four previously mentioned engagement areas of public affairs media use, political action, public talk, and community group participation. However, questions should be crafted to account for and reflect the

particular nature of Japanese civil society and civic engagement discussed in section IV, which manifests in ways fundamentally different than in the U.S. We have already seen that an individual's chosen means of volunteerism or other involvement in civil society might come in the form of participating in trade groups, neighborhood associations, PTAs or volunteer fire brigades, to name just a few outlets; the researcher investigating this phenomenon in Japan should be cognizant of the fact that measures that accurately track participation in the United States might fail to register any effect in Japan despite upticks in participation of past jurors. In short, the participation measured in Japan should reflect the *nature* of participation in Japan. By and large, the four non-voting dimensions of civic engagement as crafted by Gastil et al. (forthcoming, CH 5) are satisfactory in this regard, but in seeking to implement a workable research design in Japan, researchers should be diligent in its application, ever mindful of the context in which it is applied.

Effective controls should be put in place to account for differences amongst respondents in demographics such as age, gender, education, employment, income level, the strength of the citizen's political leanings or ideology, their voting frequency and the degree to which their friends and family are politically engaged.<sup>40</sup> Many, if not all, of the above can be accounted for with relevant questions on the civic engagement survey, and should be asked of participants during both waves.

On the second wave survey, all respondents to the first wave should be contacted once more and re-questioned. For those who served as lay judges, additional questions relating to their experience should be asked, such as their opinion as to the

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<sup>40</sup> Many of these control variables were employed by Gastil and company (forthcoming, CH 5, 12-14) in their attempt to measure the effects of jury service on non-voting avenues of civic engagement.

quality of the deliberation, the rate to which they were active during both the trial and deliberation phases of the trial, their own perceived effectiveness at trial, their own perceived value in the lay judge system itself, the degree to which the professional judges were either effective at involving lay judges or were domineering over citizen participants, and their views as to an individual's duties that are related to citizenship. In this way, research might be able to account for the differences in system design between the Anglo-American jury and the mixed-tribunal systems of Europe and Asia, and see if the effects of the lay participatory adjudication process are traits that belong to a specific system, or the broader practice of employing laity in the jurisprudential practices of a state and vesting them with temporary authority.

So what effects should we expect to see in Japan? Given what the early data suggest – i.e. citizen jurists are highly supportive of not only the lay judge system and their service in it – I wager that we will see former lay judges will be more civically engaged in their post-service lives. I am not able to make accurate assumptions, or even assumptions that are logically-based, as to what degree and in what realms we might see changes due to their time behind the bench. But I suspect that lay judge participants, much like their American counterparts, will go forth and participate in civil society with greater frequency than they did prior to their service. I base this notion on the extensive research that Gastil et al. have done on the subject over the past decade and the early data that the Supreme Court of Japan has provided on the views of lay judge participants. In addition, I see the main arguments that suggest otherwise – particularly those in the culturalist camp – as unconvincing, resting on either inaccurate data or weakly supported beliefs on the cultural reticence of the

Japanese as a whole to engage in democratic society. If no upward effect in civic engagement is measured amongst past participants, I suspect that the blame would rest more in the institutional differences between the jury and mixed-tribunal systems, and would merit similar studies in several of the mixed-tribunal states of Europe. In the final analysis, however, I believe we will see causation between lay judge service and further civic engagement despite the institutional differences that surround these systems and cultures. More than likely we would see results similar to those discovered by Gastil et al. – i.e. we would observe a greater effect wrought upon those who were disaffected and less inclined towards civic participation prior to their service than those persons who were already highly active in civil society before they entered the courthouse. Yet to what *degree* would an upward spike in individual post-service civic participation be deemed statistically significant I am unable to say at the moment. Gastil et al. (forthcoming) found that the ability of jury service to impact civic engagement varied depending upon the particular means of participation (e.g. voting vs. public talk). However, I argue that even if we find that the lay participatory effect only increases the tendency of participants to be civically active by only a few percentage points, this still is significant; after all, Gastil et al. found that increases in civic participation for American jurors were often in the single digits. Though it remains to be statistically seen whether lay involvement in the Japanese judicial process will influence the frequency of civic participation, I hope future scholars can be more enlightening than I am able at present.

Beyond the research design suggestions offered above, a few words on how Japanese policy makers should augment or improve the lay judge system should be

given. The Lay Assessors Act mandates that the lay judge system be reviewed in 2012 by the government and the Supreme Court to make any structural or operational changes to the system that might be deemed necessary. In the hopes of understanding whether or not the participatory effect is a trait that is inherent only to jury systems which separate judge from jury, the core design of the Japanese lay judge system should not be radically altered. Whatever reforms are thought to be needed in 2012, they should not erase the central character of this quasi-jury system – i.e., even in a refashioned lay judge system, laity and professional judges should continue to sit and work together at trial; citizens should still outnumber the professional judges on each panel; career jurists and lay members should still retain individual votes of equal weight during deliberations; and the agreement of at least one professional member of the court and one citizen judge should still be required for conviction. This retention of many key aspects of the system is necessary in order to for the lay judge system to maintain its similarities with mixed-tribunals, so that we might be able to better understand the potential of mixed-tribunal-leaning methods of criminal jurisprudence to awaken the civic-mindedness of its citizen participants. Also, given that the Japanese model is a hybrid of the American and Continental designs, maintaining the defining characteristics of the current lay judge system will help to augment any research that enterprising scholars might wish to undertake presently in the mixed-tribunal states of Europe. Such research would allow academics and policy makers to learn if the problems, issues, and possibilities regarding civic engagement under the Japanese lay judge system are unique to this particular construct or are systemic to judicial bodies that emphasize consociational deliberations between citizen and judge.

Despite all that should remain, some changes should be enacted. Firstly, the jurisdiction of the lay judge system should be widened to include less severe offenses. This broadening of the system will allow the population more opportunities or chances to not only be summoned for service, but potentially for selection as a lay jurist. In expanding the range of offenses that are reviewable by mixed-judge panels, two aims are satisfied: (1) the selfish wishes of researchers such as myself are met in that we will have a wider pool of participants to review and study, hopefully accounting for variations in populations and demographics; and (2) if the lay judge system does truly foster civic engagement tendencies, then increasing the rate at which the population serves as citizen jurists helps to fulfill the desires of the Japanese government in reshaping the state/society relationship, as discussed in chapter III. We are reminded that Japan has identified the need to increase the role of citizens in governing as a crucial component to Japan's ability to meet the challenges of the 21<sup>st</sup> century, and that the Judicial Reform Council saw judicial reform in general as a means to facilitate (*see generally* JRC 2001, CH I). This expanded position of the people in the governing process is crucial in Japan's attempts to promote deregulation and reduce administrative guidance (*see generally* JRC 2001, CH 1, Part 3). While one should not conflate increased rates civic participation amongst past lay judges with actual participation in the governing process, any upward civic involvement of those individuals portends well for this aim of the Japanese government. In the end, we are reminded of Alexis de Tocqueville's ([1835] 1990, 280-287) contention that lay judicial participation is one of the best ways to teach citizens about duties that surround democratic citizenship. Through their service, citizens learn the essential

tools required to fulfill the promise of self-government, in that they are forced, for however briefly, to actually rule. If Japan truly hopes for its population to seize the reins of governance with a firmer grip, it must give the people more opportunities to actually rule. An expanded range of cases reviewable by lay judges will provide such opportunities.

Closely related to the above point is the rate to which the Lay Assessor Act excludes and exempts certain populations from lay judge service. At the moment, the range of persons who are legally barred from lay judge service is too wide. While the prohibition of people who serve in the legal community makes a certain amount of sense – i.e. that lawyers, judges, and police have enough power in the judicial process already and should not be granted additional seats in the courtroom – the breadth of persons who are denied the chance to experience the potential civic engagement effects of this process is excessive (*see* Anderson and Saint 2005, 244-246). This seems particularly true in that employees of certain state agencies and departments, even Self-Defense Force personnel are prohibited from taking part in the criminal adjudication process. If the government wishes to balance the dual goals of eliminating elite bias at trials while also allowing the largest number of persons possible to experience the participatory effects of service, then the exclusion should apply only to those persons or professions that are emblematic of harboring the same elite bias that the JRC was seeking to ameliorate in the courtroom – i.e. judges, prosecutors, police, and trained attorneys. Additional exclusions against other certain elite positions, such as governmental ministers members of parliament, legal professors and prefectural governors and mayors should also be maintained in order to

continue to reduce elite bias in the courtroom. However, restrictions against Self-Defense force personnel and low level governmental employees in certain branches should be either modified or abolished.

While former lay judges are seemingly having no real problems with discussing their experiences at trial with those around them (*Daily Yomiuri* 2010b), the confidentiality provisions of the Lay Assessors Act should be modified in a way as to dispel concerns as to what is or what is not permissible for citizens to discuss once their service is completed; particularly, it seems helpful if lay judge would be permitted to discuss all aspect of their experience – including their personal opinions as to the results of the case, their votes during deliberation, the positions of other laity and the professional judges during deliberations, etc – except those critical facts of the case deemed as deserving non-disclosure by the court, such as the names of minors or victims. Also, the punishments that can be imposed on citizens for accidentally leaking information needs to be revised in order to remove the psychological fear of criminal retaliation on the part of the state, which would further encourage public discourse about the lay judge experience. Such revisions to the confidentiality provision would go well to addressing the concerns raised by Yamamura (2009) on this issue, and would remove a potentially severe impediment towards greater discussion of what lay judge service is like.

With these research and policy suggestions, I hope that not only can scholarship surrounding the lay judge system improve, but also the function of the system as well. For in the final analysis, we must not be concerned just with the findings of how systems such as Japan's operate, but must also look to the broader

ramifications of that operation, particularly when those ramifications involve the democratic conduct of a society. It is not enough to be content if data that corroborate the theories and hypotheses that we devise is discovered; when reviewing institutions like the lay judge system, we must also ask how we can improve them, not just to improve the quality of the research results, but the quality in which they impact the lives of the people who pass through them. At the end of the day, we are still wondering how this new institution will affect the lives of defendants and the citizens charged with ruling on their guilt or innocence. Hopefully the steps outlined here will improve both future scholarship and the quality of the lay judge experience.

## **Chapter VI**

### **Has *Rashomon* Come to the Courtroom?**

#### I. Final Thoughts

The preceding chapters have investigated and detailed the Japanese jurisprudential system, and the lay judge system specifically, on multiple fronts. Chapter two looked to see how the Japanese legal system as a whole relates to and differs from the criminal adjudication processes used around the globe; ultimately, Japan's method of jurisprudence was identified as an inquisitorial system, with the newly-founded lay judge system as resembling the mixed-tribunal model of lay participation. Chapter three explored the sources, motivations and goals behind the adoption of the lay judge system, and placed the broader goal of judicial reform within the continued efforts to decentralize the national government that had been pursued

since the 1980s. Chapter four explained the institutional changes to Japanese criminal jurisprudence that have accompanied the adoption of the lay judge system, and the problems that the lay judge system could face in achieving some of the larger aims of judicial reform. Chapter five looked specifically to the issue of civic engagement and explored the question of whether the participatory adjudication process can foster greater tendencies for civic engagement amongst past lay jurists. Considering that the conclusions of chapter five were hampered by a lack of complimentary evidence, theories and hypotheses were also provided to guide future examinations of the civic engagement enhancing potential of this system once such data becomes available. Finally, research and policy suggestions were offered in anticipation of the mandatory review of the lay judge system in 2010 with the hope of making sure that the participation experience of citizens, and the researchers who study them, will be more fruitful.

In the end, I cautiously argue that participation in the lay judge system will likely motivate participants to be more actively involved in civil society upon completion of their service. I base this assumption upon the groundbreaking work conducted by Gastil et al. (2008; 2008; forthcoming) over the past decade in the United States, who collectively show that the participation of Americans in their domestic jury system leads to greater civic engagement, especially for those who were previously infrequently-engaged citizens. While the findings of Gastil and company show a much stronger relation between an individual's jury service and future voting frequency – particularly amongst previously infrequent voters – enough of a causal relationship exists between juror service and other forms of civic engagement for these

authors to declare that the transformative effects of the jury upon previous participants extend far beyond the voting booth. But the expectation that the Japanese lay judge system might similarly inspire past citizen jurists to go forth as active members of civil society is done guardedly, tempered by the fact that the lay judge system is a completely different institution from the Anglo-American jury system. I am mindful that the findings of Gastil et al. pertain only to the American experience, and cannot be expected to wholly apply to the practice of lay judge participation in Japan. Additionally, no comparable study seeking to measure the engagement effects of the mixed-tribunal systems of Europe has heretofore been undertaken, so the effects of a hybrid method of lay participation such as Japan's can, at the moment, only be speculated about in the broadest sense. But the general value of Gastil et al.'s findings is that the long-held but little-proved belief that participation begets future civic engagement finally has some evidentiary basis. The examination of the participatory and the deliberative participation hypotheses no longer must be done on a purely theoretical level. Instead, Gastil et al., as well as the theories and the additional hypotheses I offer in chapter five, provide a basis for future investigations into the lay judge system which seek to examine this very phenomenon.

But even if the mixed-tribunal system and the Anglo-American jury generally have similar abilities as institutions to motivate citizens to be more civically active in their post-service lives, Japan-specific issues such as the novelty of this new quasi-jury system, political alienation, and the particularities within Japanese political culture may compound the ability of future researchers to discover any effect the participatory adjudication process in Japan might have on an individual jurist's inclination towards

civic activism. Yet as I argue in chapter five, there are reasons to doubt many of the criticisms levied against the lay judge system's ability to encourage civic engagement in its former participants, especially when evidence supporting the detractors' positions is lacking. Research from mixed-tribunal states such as Poland suggests that lay judges there do see value in their role, even if their ability to shape the eventual outcome of the trial is low; in a similar vein, Japanese lay jurists express high levels of satisfaction with the new system, demonstrating a significant contrast between the trepidation for lay judge service amongst those who have yet to serve and the post-service adulation of those who have so far been selected to sit at trial.

Japanese civil society, thought to be weak and underdeveloped by commonly-used measures such as the World Values Survey, instead shows surprising vibrancy. Volunteerism in organizations embedded with the state is high in Japan, and citizen involvement in local groups such as neighborhood associations, parent-teacher associations (PTAs) and volunteer fire brigades reveals the close-knit quality of Japanese civic engagement. Far from being weak, Japanese civil society is simply different from that in the United States, with distinctive qualities that have not up until now been caught by other civil society indexes.

Finally, culturalist arguments stating that the deference to authority and harmony-seeking traits of Japanese culture compromise civic engagement within the populace appear to be based on little beyond general assumptions of how the Japanese people are thought to behave. Some of these assumptions can be invalidated or at least seriously questioned in the light of available evidence on the rate to which Japan's citizens are currently involved within their communities. Though data showing the

effects of lay participation within the Japanese justice system is not so abundant as to start making definitive predictions regarding the civic engagement potential of this particular participatory adjudication process, speculative arguments such as those made in chapter five discounting the ability of the Japanese people to engage in their communities based on unsubstantiated culturalist positions should not be so readily embraced as to discount the lay judge system's ability to inspire greater civic participation as dead-on-arrival.

In the final analysis, however, it must be asked to what all this portends. After all, why should we be concerned if a particular institution does or does not foster civic participation? Again, we return to the comments of Putnam and Goss (2002, 6) made in the opening sections of this thesis, in which they declared that the nature of civil society in a state has important ramifications, affecting the health of the nation's democracy, its local communities, and even its citizens. Robert Putnam's (1993) analysis of civic engagement and regional government effectiveness in Italy offers a more thorough explanation. In his twenty-year investigation, Putnam found that the efficiency of recently-instituted governing bodies across Italy at the regional level was tied to the degree to which that region's populace was civically engaged in formal and informal local civic groups, such as the religious groups, neighborhood associations, issue-advocacy organizations, and even sports teams or clubs that have no political purpose or agenda inherent in their design. Putnam's work provides powerful evidence as to the consequences for governmental effectiveness if its population is actively engaging one another in such organizations. The participation by local citizens in such groups reinforces community ties, strengthens local civic society and enhances social

capital (Putnam 1993, 183-185). In the end, Putnam declares that the social context and the history of a region significantly affect the operations of governing institutions – in more civically engaged regions, where citizens were likely to participate in formal and informal groups with greater frequency, the governments in those areas functioned better than areas marked by low levels of association and social capital. Putnam (1993, 183-185) also concludes that social capital is the crucial element that fosters success in representative government and democracy, and that institutions have a tremendous power to shape the political practices to which social capital and good governance depend upon. Civic involvement, in short, improves the function of democracy.

If the Judicial Reform Council (JRC) and the Japanese government were serious in their mission to reorganize the nation's means of jurisprudence with the hope of improving democratic governance and reshaping the relationship between the citizen and the state, then the lay judge system can serve as a vital organization towards that enterprise. For if it does foster individual lay jurists to become more active and enduring members of civil society, then it is possible that increases in civic affiliation may help lead Japan towards the broader aims of improving the performance of the state that the JRC long ago envisioned. Perhaps the changes that result from involving laity in the judicial process will not just affect the quality of verdicts, but the quality of the Japanese democracy and governance as well.

Such a macro-level analysis is not what this paper endeavored to conduct. Certainly, as mentioned in the final pages of chapter one, an undertaking of that scope would be extraordinarily difficult to accomplish, and any conclusions made would be dubious at best. To attempt such a feat would have been as if Gastil et al. tried to

contort their findings to indicate that jury service strengthens democracy or representative governance in the United States. Declarations of this kind are exceedingly problematic and cannot readily be proven; moreover, such leaps in logic ignore too many variables that could ultimately negate the effects of the participatory adjudication process. However, for the conclusion of this paper, it seems worth noting that the aspirations of the JRC and the state in strengthening Japanese democracy by establishing a means in which Japanese citizens can participate in criminal jurisprudence are not wholly misplaced, though additional and more in depth research is ultimately required to explore any link between the lay judge system specifically and the vitality of Japanese democracy. But such an analysis is for another time.

Returning to a theme mentioned in chapter one, it seems as though *Rashomon* has indeed come to the Japanese courtroom, in that Japanese citizens appear to be participating with some vigor in their new role as lay adjudicators. According to both survey data and scholarly efforts to analyze the effects of service heretofore, as well as first-hand accounts by professional judges and past participants, case-by-case citizens are embracing the role assigned to them via the Lay Assessors Act, a role that many had questioned whether the Japanese public was ready, willing, or even capable of assuming. It will be curious as to what future analyses can reveal as to the rate at which the laity bring their own opinions, perspectives and analysis of testimony and evidence into the deliberation room to pass judgment on their peers. In the meanwhile, this work concludes by saying that the lay judge system represents an interesting effort on the part of Japan to not only improve the quality of justice delivered within the country, but to also bring its citizens into the governing process, if only for a short

while. This desire to draw citizens into the decision-making machinery of criminal jurisprudence may in fact lead citizens to assume a greater role in the practice of governing, as the JRC initially wished. It may also have the additional effect of inspiring citizens to become more civically active, either at the ballot box or in local associations. Such potential consequences of the lay judge system merit continued investigations of this new participatory adjudication process, especially once data become more readily available. I have sought to fill this interim period by examining why enhanced civic engagement on the part of past lay judge participants might be expected, and to dispel several criticisms of both the system itself and of Japanese society that might be used to question such assumptions. While this paper has not been able to offer any definitively declarations one way or the other concerning the lay judge system's ability to spur citizens to be more active in civil society, it leaves a good basis from which future research can proceed, and offers hope for the lay judge system in this regard. After all, as Robert Putnam (1993, 184) declares, "changing formal institutions can change political practice." With this in mind, I look forward to what the future holds in examining the implications of the lay judge system, and, with a healthy measure of caution, hope to see past participants involving themselves more readily in civil society through whatever means they choose.

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