

PRIME TIME FOR JAPAN TO TAKE ANOTHER STEP FORWARD IN LAY PARTICIPATION: EXPLORING EXPANSION TO CIVIL TRIALS

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Systems that incorporate citizen participation into the legal decision-making process, such as all-citizen juries or mixed tribunals, can significantly impact a country's political system and political culture.¹ Such systems can also influence society in many ways.

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1. Iwao Sato, *Emergence of Citizen Participation in Trials in Japan: Background and*

Randomly selected bodies of citizens have the potential to function as powerful vehicles in educating, ensuring justice, and enhancing the credibility of the judiciary.² They also provide a valuable civic engagement tool that enables self-governance.³

As societies around the world face rapid change and related challenges, many nations are searching for potential solutions. Many civic reformers view juries or quasi-jury systems both as a solution in part and means of compelling positive political, economic, and even social change. In fact, the major players in Asia and several other countries around the world have recently integrated lay participation into the administration of justice in an effort to effect change, advance public policymaking, and manifest popular sovereignty.⁴ These bold and innovative moves stand in stark contrast to other parts of the world where established jury systems and lay participation in the judicial process have been criticized, attacked, and even face diminished use. In light of these emerging global trends and the diverse views on lay participation in the administration of justice, it is valuable to closely examine the experience of one major newcomer to the citizen participation club—Japan.

For over sixty years, Japan was behind the curve in terms of citizen participation in the judicial process. Meaningful public participation in the trial process was largely a foreign concept.⁵ In fact, Japan was the

Issues, 43 SOC. SCI. IN JAPAN 3 (Sept. 2010); see also generally Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441 (1997).

2. John Gastil, Colin J. Lingle & Eugene Deess, *Deliberation and Global Criminal Justice: Juries in the International Criminal Court*, 24 ETHICS & INT'L AFFAIRS 1 (2010).

3. *Id.*

4. Japan, South Korea, China, Kazakhstan, Mexico, and Croatia are several of the nations that have recently adopted lay participation. See Ryan Park, *The Globalizing Jury Trial: Lesson and Insights from Korea*, 58 AM. J. COMP. L. 525, 534-36 (2010); Sanja Kutnjak Ivkovic, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, 40 CORNELL INT'L L.J. 429, 430-32 (2007); see also Hiroshi Fukurai & Richard Krooth, *The Establishment of All-Citizen Juries as a Key Component of Mexico's Judicial Reform: Cross-National Analysis of Lay Judge Participation and Search for Mexico's Judicial Sovereignty*, 16 TEX. HISP. J.L. & POL'Y 37, 54 (2010).

5. Although Japan did not have a jury system, its citizens did have limited involvement in the criminal justice system for over sixty years in the form of Prosecutorial Review Commissions (PRC) or *Kensatsu Shinsakai*. See Hiroshi Fukurai, *The Re-birth of Japan's Petit Lay Judge and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT'L L. J. 315, 323-28 (2007); *Kensatsu Shinsakai Hō* [Prosecution Review Commission Law], Law No 147 of 1948 (Japan). The PRC essentially reviewed prosecutorial decisions not to charge suspects. Fukurai, at 323-24. If a victim or party of interest requested PRC review and the PRC disagreed with the prosecutor's inaction, then it would make a non-binding recommendation that the prosecutor's office reconsider its determination. *Id.*

only G-8 nation without a citizen participation system in either criminal or civil trials.⁶ As part of a historic internal transformation of Japan's legal system, however, this drastically changed on May 21, 2009, as Japan revived citizen participation in certain criminal trials pursuant to the "*Saiban-in ho*" or Act Concerning Participation of Lay Assessors in Criminal Trials (the "Lay Judge Act").⁷ As part of its new "*saiban-in seido*" or lay judge system,⁸ Japan now conscripts registered voters to serve on mixed trial tribunals comprised of citizen participants and professional judges. By design, the Lay Judge Act purposefully limits lay participation in its new quasi-jury system to involvement in certain serious criminal cases only.

Citizen participation in serious criminal trials is one of many revolutionary legal reforms that Japan implemented to address its prolonged economic slump and better position itself for a more prominent role in global affairs. The socio-economic crisis that ensnared Japan in the 1990s fueled significant reforms in established institutions, policies, and society. The primary concept underlying these reforms was to transform Japan's mindset and culture from a society known for its excessive regulation to a global model based on transparent, *ex post facto* review.⁹ In part, self-responsibility and greater civic engagement could help achieve these objectives. By assimilating citizen participation into criminal trials, Japan also sought to promote civic responsibility, enhance the tools of democracy available to society, and increase public understanding of the judicial process. Additionally, some reformists hoped that citizen participation would infuse sound common sense into the judicial process as well as ensure justice, due process of law, and prosecutorial accountability. At this point in history,

The PRC recommendations were largely ineffective as prosecutors decided to rarely prosecute. *Id.* at 325. On May 28, 2004, the Diet of Japan (Japanese legislature) enacted the Act to Revise the Code of Criminal Procedure that empowered PRC to compel prosecutions. *Id.* at 327.

6. *Lay Judge System Starts in Japan Amid Lingering Concerns*, KYODO NEWS, May 20, 2009.

7. *Saiban-in no Sanka Suru Keiji Saiban ni Kansuru Horitsu* [Act Concerning Participation of Lay Assessors in Criminal Trials], Law No. 63 of 2004 (Japan), translated in Kent Anderson & Emma Saint, *Japan's Quasi Jury (Saiban-in) Law: An Annotated Translation of the Action Concerning Participation of Lay Assessors in Criminal Trials*, 6 ASIAN-PAC. L. & POL'Y J. 233 (2005) [hereinafter *Lay Judge Act*].

8. "*Saiban-in seido*" translates as "lay assessor system" or "lay judge system." It has also been referred to as Japan's quasi-jury trial system or simply as the *saiban-in seido*. For purposes of consistency, this Article will simply use the "lay judge system" terminology.

9. *The Points at Issue in the Judicial Reform*, JUDICIAL REFORM COUNCIL, II.2 (Dec. 21, 1999), <http://www.kantei.go.jp/foreign/judiciary/0620reform.html> [hereinafter *The Points at Issue*]; see also Luke Nottage & Stephen Green, *Who Defends Japan?: Government Lawyers and Judicial System in Reform in Japan*, 13 ASIAN-PACIFIC L & POL'Y 129, 130 (2011).

citizen confidence in the justice system had started eroding due to increased attention on forced confessions, intolerably slow trials, indifference to crime victims, and claims of leniency.¹⁰ Conversely, opponents of the new system initially argued that citizen participation was an expensive exercise in futility. They pointed to declining jury systems around the world and also argued that Japan had wasted millions of dollars implementing a groundbreaking quasi-jury system that not only was adopted without significant public debate, but that also faced considerable doubt among the public, ran counter to Japanese legal traditions, and faced opposition from some within the legal community.

With Japan marking its three-year anniversary of the lay judge system, now is an ideal time to assess the progress of the new system, examine its effect on Japanese society, and explore future possibilities. More significantly, this paper asserts that the convergence of various forces makes this an ideal time to expand lay participation into the civil realm so as to enhance the justice process and fully achieve the objectives of Japan's major legal reforms. Accordingly, this paper is separated into three sections. First, Part I details the underpinnings of Japan's new lay judge system and examines its triumphs and shortcomings. Not only does close scrutiny of the lay judge system benefit Japan, but it can also offer valuable lessons on an international scale to other countries using or considering the use of jury or quasi-jury systems. Second, Part II addresses the future and explores a concept largely unaddressed in academic discourse by suggesting that Japan should seriously consider expanding the use of citizen judges beyond serious criminal trials and into the civil realm. This section addresses the merits of potential expansion and examines possible drawbacks to lay participation in certain civil trials. Finally, Part III points out several issues that Japan would need to address if citizen judges were able to participate in certain civil trials. Now that lay participation in serious criminal trials has apparently taken root in Japanese society, it is a prime time to assess and explore the possibility of expanding the use of citizen judges to further and fully achieve the expressed goals of Japan's ongoing judicial reforms.

10. Jerome A. Cohen & Mizuki Koshimoto, *Has Japan Found the Best Way for Ordinary Citizens to Take Part in Deciding Criminal Cases?*, CHINA TIMES, Aug. 18, 2011, available at <http://www.usasialaw.org/?p=5809>.

I. LAY PARTICIPATION IN CRIMINAL TRIALS IN JAPAN

A. *Recent Implementation of Lay Judge Trials*

Until recently, citizen participation in Japan's justice system has been extremely limited. During the fifteen-year period immediately preceding World War II, Japan briefly and unsuccessfully experimented with jury trials in criminal matters.¹¹ There was some discussion after the war about reinstituting jury trials as part of democratic reforms, however this idea was dismissed.¹² Subsequently, a handful of groups have periodically championed the return of lay participation, but direct public involvement in the justice process did not materialize until nearly seventy years later when Japan finally held its first trial involving citizen judges as part of its new lay judge system in August 2009.¹³

Japan's new lay judge system was not a solitary reform. Rather, it was one segment of sweeping reforms to the entire justice system.¹⁴ The genesis of these reforms, including the new quasi-jury system, was not public pressure.¹⁵ Facing enormous financial deficits, economic difficulties, and challenging social issues, Japan felt compelled to welcome the twenty-first century with major legal reforms.¹⁶

11. Before World War II, Japan operated a jury system for certain criminal cases pursuant to the Jury Act. Baishin-hô [Jury Act], Law No. 50 of 1923 (Japan). Between 1928 and 1943, Japan conducted 480 criminal jury trials. Saikō Saibansho [Sup. Ct.] Nov. 16, 2011, no. 1196, 65 KEISHU 8 (Japan); see generally Takuya Katsuta, *Japan's Rejection of the American Criminal Jury*, 58 AMER. J. COMP. L. 497, 503-506 (2010); Dimitri Vanoverbeke, *The Taisho Jury System: A Didactic Experience*, 43 SOC. SCI. IN JAPAN 23 (Sept. 2010). With the rise of militarism and the government's need to control criminal justice, the Jury Act was suspended in 1943. Baishin-hô no Teishi ni Kansuru Horistu [Act Concerning the Suspension of the Jury Act], Law No. 88 of 1943 (Japan). There were also a host of other factors that contributed to the demise of this system. See generally Jon P. McClanahan, *Citizen Participation in Japanese Criminal Trials: Reimagining the Right to Trial By Jury in the United States*, 27 N.C.J. INT'L L. & COM. REG. 725, 748 (2012); Sato, *supra* note 1, at 3.

12. Katsuta, *supra* note 11.

13. See *Hanging in the Balance*, THE ECONOMIST, Aug. 6, 2009, available at <http://www.economist.com/node/14191260>; *First Japanese Jury Trial for 66 Years Convicts Man of Neighbour's Murder*, THE GUARDIAN, Aug. 6, 2009, available at <http://www.guardian.co.uk/world/2009/aug/06/japan-jury-trial-murder/>. Although the system was implemented in May 2009, it took several months for the first qualifying lay judge trial to occur. *Id.*

14. Mikio Kawai, *The Impact of the Lay Judge System on Japanese Criminal Justice*, 43 SOC. SCI. IN JAPAN 18 (Sept. 2010).

15. Although a few civic and legal groups (including the Japan Federation of Bar Associations) advocated civic participation in the judicial process based on wrongful convictions and other shortcomings of the judicial system, the general public did not support the adoption of jury trials. See Makoto Ibusuki, *Quo Vadis? First Year Inspection to Mixed Jury Trial*, 12 ASIAN-PAC. L. & POL. J. 24, 27 (2010).

16. *The Points at Issue*, *supra* note 9.

Established in June 1999, the *Shiho Seido Kaikaku Shingikai*, or Justice System Reform Council (“JSRC”), was a thirteen-person panel designed to conduct detailed, high-level discussions about potential civic, legal, and judicial reforms.¹⁷ Faced with a sense of crisis, the JSRC noted that Japan had embarked on a course of structural reform including “political reform, administrative reform, [and the] promotion of decentralization and deregulation” to enable Japan to recover its “creativity and vitality.”¹⁸ In its own words, these reforms were intended to further economic development and ensure that every person would “participate in making a free and fair society” as a governing subject instead of a governed object.¹⁹ For the reformers, the judicial system was viewed as an engine for propelling fundamental societal change. In turn, it was believed that lay judge participation would essentially function as one of the pistons in the engine.

The JSRC set forth wide-sweeping recommendations for revamping the judicial system.²⁰ The specific goals underlying the recommendations generally and citizen participation in the judicial process specifically arose from three pillars of fundamental reform, namely: (i) a justice system that “shall be made easier to use, easier to understand, and more reliable;” (ii) a legal profession “rich both in quality and quantity;” and (iii) a popular base in which citizens’ trust in the legal system is enhanced through their participation in legal proceedings.²¹ The JSRC envisioned that the judicial system and citizen involvement therein would assume an enhanced role to shift Japan away from its traditional model of centralized control and bureaucratic regulation.²²

Between July 1999 and June 2001, the JSRC convened sixty-three meetings to discuss various judicial reforms, including the creation of a jury or quasi-jury system.²³ In the process, it studied major judicial

17. Sato, *supra* note 1, at 3. The JSRC was composed of thirteen individuals from various sectors in society including three attorneys, two law school professors, three college administrators, two businesspersons, an author, and the president of the Japan Housewives Association. See Katsuta, *supra* note 11, at 512; Hiroshi Fukurai, *People’s Panels vs. Imperial Hegemony: Japan’s Twin Lay Justice Systems and the Future of American Military Bases in Japan*, 12 ASIAN-PAC. L. & POL’Y J. 95 (2010).

18. *The Points at Issue*, *supra* note 9, at II. 2.

19. *Id.*

20. *Id.*

21. *Id.*; see also *Ensuring that the Results of the Justice System Reform Take Root*, MINISTRY OF JUSTICE OF JAPAN, <http://www.moj.go.jp/ENGLISH/issues/issues01.html> (last visited Apr. 28, 2013) [hereinafter *Results of the Justice System Reform*].

22. See *id.*; see also *The Points at Issue*, *supra* note 9.

23. See Katsuta, *supra* note 11, at 512; see also McClanahan, *supra* note 11, at 762. The

systems from around the world.²⁴ The JSRC's discussions and debates surrounding the empanelment of citizens as jurors or lay judges focused on the desire to promote a more democratic society by infusing a broader range of background and experience into the justice system.²⁵

On June 21, 2001, the JSRC issued its final recommendations for judicial reform.²⁶ This included a proposal for the *saiban-in seido*, or lay judge system.²⁷ The suggested major changes were consistent with the perceived need for Japanese citizens to not only break away from excessive dependency on the government, but also to develop greater civic consciousness and become more actively involved in public affairs. Allegedly, concerns about a broken justice system did not propel these changes.²⁸

Based on the JSRC's recommended reforms, the Diet of Japan (Japan's national legislature) passed the Justice System Reform Promotion Act.²⁹ As a result, the Japanese Cabinet established the Office for Promotion of Justice System Reform (OPJSR) in December 2001³⁰ to facilitate reform of the justice system and take the lead in enacting relevant legislation.³¹ Within its first few years, the OPJSR

public had access to the JSRC's notes, meeting minutes, and summaries. See Katsuta, *supra* note 11, at 502.

24. See Katsuta, *supra* note 11, at 513.

25. Meryll Dean, *Legal Transplants and Jury Trial in Japan*, 31 LEGAL STUDIES 570, 581 (2011). A discussion of defendant's rights was largely omitted from the discussion. *Id.* at 581-82.

26. *Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21st Century*, JUSTICE SYS. REFORM COUNCIL, June 12, 2001, <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html> [hereinafter *JSRC Recommendations*].

27. Dean, *supra* note 25, at 581.

28. Conversely, most observers have concluded that these internally generated legal reforms constitute responses to economic and social pressures from globalization and the world economy. Kawai, *supra* note 14, at 21.

29. Shihô seido kaikaku suishin-hô [Justice System Reform Promotion Act], Law No. 119 of 2001 (Japan); see also *Results of the Justice System Reform*, *supra* note 21, at 3.

30. The Cabinet is the executive branch of government in Japan. It consists of the Prime Minister and Ministers of State. See generally *Profile of the Prime Minister*, THE PRIME MINISTER OF JAPAN & HIS CABINET, <http://www.kantei.go.jp/foreign/index-e.html> (last visited Apr. 29, 2013); *The Cabinet*, THE PRIME MINISTER OF JAPAN & HIS CABINET, http://www.kantei.go.jp/foreign/cabinet_e.html (last visited Mar. 10, 2013). In 2001, the Cabinet Office was established in 2001 to strengthen the functions of the Cabinet, enable the Prime Minister to better assert leadership over nationally important issues, and cope effectively with Japan's rapidly changing economy and society. *Important Councils*, CABINET OFFICE, <http://www.cao.go.jp/en/importantcouncil.html> (last visited Mar. 10, 2013).

31. *Results of the Justice System Reform*, *supra* note 21, at 3. The OPJSR consisted of the Prime Minister and other Cabinet leaders. The OPJSR was active in promulgating new legislation based on the Plan for Promotion of Justice System Reform, which was approved by the Cabinet in March 2002. *Id.*

advanced and the Diet passed dozens of major reforms,³² including new professional law schools with a mindset of creating a larger and even stronger lawyer population; criminal justice reforms such as the lay judge system, streamlined pretrial proceedings, and a modified court-appointed defense counsel system; civil litigation reforms designed to accelerate civil cases and improve procedural issues; and substantial modifications to the dispute resolution system including the creation of specialized courts and modified alternative dispute resolution mechanisms.³³ On May 21, 2004, the Diet passed the Lay Judge Act and announced that the first quasi-jury trial would occur five years later.³⁴

Japan's lay judge system is a unique hybrid, which integrates elements of the common law jury and European mixed court systems.³⁵ After some debate within the JSRC about whether to adopt an all-citizen jury model typical in common law jurisdictions such as the United States or a mixed tribunal model common in continental civil law jurisdictions,³⁶ Japan settled on a hybrid tribunal that combines elements of both systems to adjudicate serious criminal cases.³⁷ The JSRC emphasized that the new system should enable the public to "cooperate with judges by sharing responsibilities, and to participate autonomously and meaningfully in deciding trials."³⁸ The system was adopted based on Japan's modern needs and not necessarily upon the experiences of other countries. Also, it was constructed to facilitate active participation and cooperation. Essentially, the mixed tribunal would reach judicial determinations regarding guilt and sentencing through mutual communication and the sharing of ideas between the professional judges

32. *Id.*

33. See Nottage & Green, *supra* note 9, at 130-134; Matthew J. Wilson, *Japan's New Criminal Jury Trial System: In Need of More Transparency, More Access, and More Time*, 33 *FORDHAM INT'L L. J.* 487, 511-13 (2010) [hereinafter Wilson, *Japan's New Criminal Jury*].

34. *Lay Judge Act*, *supra* note 7; see also Hiroshi Fukurai, *Symposium on Comparative Jury Systems: Japan's Quasi-Jury and Grand Jury Systems as Deliberative Agents of Social Change: De-Colonial Strategies and Deliberative Participatory Democracy*, 86 *CHI-KENT L. REV.* 789, 806 (2011); Dean, *supra* note 25, at 581.

35. Wilson, *Japan's New Criminal Jury*, *supra* note 33, at 513-14. The lay judge system resembles common law jury systems in that citizen judges are randomly selected from voter lists and participation is limited to a single case. *Id.* Unless excused by the court or excluded by peremptory challenge, participation is compulsory. *Id.* at 514. "[T]he system also mirrors civil law systems, such as the *schoffe* lay judge system in Germany or the *echevin* system in France, in which citizens participate in trials as lay judges alongside professional judges." *Id.*; see also Dean, *supra* note 25, at 581.

36. See generally Katsuta, *supra* note 11.

37. Ibusuki, *supra* note 15, at 27-28.

38. *JSRC Recommendations*, *supra* note 26, at ch. IV, pt. 1(1).

and lay judges. To create a recipe for fair and just results, the professional judges would contribute their legal expertise and the lay judges would share their respective knowledge and experience.³⁹

The Lay Judge Act sets forth the features of the lay judge system. In contested cases, the Act requires that six *saiban-in* or lay judges chosen from among eligible voters join with three professional judges for a single “qualifying” criminal trial and sentencing.⁴⁰ A qualifying trial involves certain serious crimes enumerated in the Lay Judge Act.⁴¹ In uncontested serious criminal cases, four lay judges and one professional judge will handle the matter.⁴² In short, the lay judge panel, including professional judges, will determine guilt and decide sentences upon conviction.⁴³ To reach a verdict, the Lay Judge Act requires only a majority vote with the qualification that at least one professional judge and one lay judge must concur in the majority’s conclusion.⁴⁴

In theory, the right and responsibilities of the lay judges and professional judges are equivalent.⁴⁵ This includes the ability of lay judges to actively question witnesses, victims, and defendants.⁴⁶ In comparison with jurors in the United States and other common law jurisdictions, this gives Japanese lay judges more direct, hands-on participation in the trial process.⁴⁷ Notwithstanding, one significant distinction between the lay and professional judges is that the professionals are solely responsible for interpreting legal and procedural matters.⁴⁸ This is necessitated by the lay judges’ lack of formal legal

39. *Id.* at ch. IV, pt. 1(1)(a).

40. *Lay Judge Act*, *supra* note 7, at Art. 2, 9, 13; *see also* Sato, *supra* note 1, at 3; Ibusuki, *supra* note 15, at 29.

41. *Lay Judge Act*, *supra* note 7, at Art. 2(3). The qualifying serious crimes enumerated in the Act include homicide, robbery resulting in bodily injury or death, bodily injury resulting in death, unsafe driving resulting in death, arson of an inhabited building, kidnapping for ransom, abandonment of parental responsibilities resulting in the death of a child, as well as certain rape, drug, and counterfeiting offenses.

42. *Lay Judge Act*, *supra* note 7, at Art. 2(3).

43. *Id.* at Art. 6.

44. *Id.* at Art. 67; *see also* Dean, *supra* note 25, at 584. Even in cases involving the death penalty, unanimous verdicts are not required. Accordingly, the Japan Federation of Bar Associations and others have been urging that a unanimity rule should be imposed for death penalty cases. *See* Keiji Hirano, *Lay Judge Death Sentences Must Be Unanimous: JFBA*, JAPAN TIMES (Mar. 25, 2012), <http://www.japantimes.co.jp/text/nn20120325a5.html>.

45. *The Japanese Judicial System and Judicial Reform*, JAPAN FED’N OF BAR ASS’NS, http://www.nichibenren.or.jp/en/about/judicial_system.html (last visited Mar. 14, 2013).

46. *Lay Judge Act*, *supra* note 7, at Art. 56-59; *see also* Dean, *supra* note 25, at 584; Zachary Corey & Valerie Hans, *Japan’s New Lay Judge System: Deliberative Democracy in Action?*, 12 ASIAN-PACIFIC L. & POL’Y J. 72, 91 (2010).

47. *See generally* Ivkovic, *supra* note 4, at 435.

48. *Lay Judge Act*, *supra* note 7, at Art. 51.

training. Another difference is that the professional judges, together with the prosecutors and defense counsel, have the duty to make trials quick and easy to understand so as to minimize the burden placed upon the lay judges and enable these citizens to sufficiently perform their duties.⁴⁹

B. Substantial Progress, Changed Attitudes, and Promising Outlook

Now that Japan's lay judge system has been in operation for three years, it has realized substantial progress, altered attitudes, and exudes a promising outlook. Before adoption, some members of the public and Japanese legal community predicted quick failure based on the likely incompetence of lay judges and public hostility to the idea of jury participation.⁵⁰ Public opinion polls preceding the implementation of the lay judge system supported this skepticism as they indicated widespread disdain against the concept of participation.⁵¹ Other predictions encompassed fears that lay judges would lack training, suffer from insufficient knowledge, and rely too heavily on emotion and bias. Opponents also noted the decline of juries in other countries and questioned why Japan would adopt a judicial mechanism that was apparently dying in other countries.

Although the current system has various weaknesses and still faces many ongoing challenges, the system has largely been quite effective. It has also seemingly gained acceptance and recognition from both the government and public.⁵² Moreover, the objectives underlying Japan's ongoing judicial reforms and Japan's recent movement towards more civic engagement place it in a different position than other common law countries. Accordingly, Japan appears well suited for lay participation in the judicial process.

49. *Id.* at Art. 6.

50. Satoru Shinomiya, *Defying Experts Predictions, Identifying Themselves as Sovereign: Citizens' Responses to Their Service as Lay Judges in Japan*, 43 SOC. SCI. IN JAPAN 8, 8-9 (Sept. 2010).

51. Wilson, *Japan's New Criminal Jury*, *supra* note 33, at 495; *see also* McClanahan, *supra* note 11, at 770.

52. Naturally, it is still early in the process and further examination of the system is required. However, the societal acceptance of the concept, high participation rates, changed attitudes, and educational value of the system have been heralded. *See generally* Shinomiya, *supra* note 50, at 8-9; Julia Marsh, *Juries an Essential Part of U.S. Legal System*, YOMIURI SHIMBUN [DAILY YOMIURI] (May 22, 2010); Ibusuki, *supra* note 15, at 26-27.

1. Progress of the lay judge system has been significant

The lay judge system has made substantial strides since its inception. From the start of the lay judge system through the end of February 2013, a total of 4,988 charged defendants were involved in lay judge trials.⁵³ Among these defendants, there were 4,886 brought to verdict including 4,843 who were convicted, 26 who were found not guilty, 13 who were found guilty on some charges and not guilty on others, and 4 defendants whose case was remanded to the family court.⁵⁴ To adjudicate these cases, 28,229 citizens were selected to potentially serve as lay judges and 9,722 others were designated as potential alternates.⁵⁵ For each lay judge trial, approximately 87.8 lay judges were selected for possible service, among which 58.1% were excused prior to jury selection.⁵⁶ On average, approximately 30 lay judges appeared at court for the actual selection process itself.⁵⁷ Over 78% of those citizens called for potential selection as lay judges actually appeared in court when summoned.⁵⁸ This means that the turnout rate in Japan has been much higher than other nations, particularly the United States. The length of lay judge trials has varied, but 62.7% of all trials were completed in less than five days, and there were 13 trials that took more than 40 days to resolve.⁵⁹ The average trial length was 6.2 days,⁶⁰ and the longest trial lasted one hundred days.⁶¹ The mixed professional

53. Saiban-in Seido no Jisshi Joutai Ni Tsuite (Seido Jisshi-12.31.2011-Sokuho) [State of Implementation of Lay Judge System from Inception through February 28, 2013], available at http://www.saibanin.courts.go.jp/topics/pdf/09_12_05-10jissi_jyoukyou/h25_2_sokuhou.pdf (last visited May 27, 2013) [hereinafter *State of Implementation*]. Among the defendants tried via lay judge trials, 1,140 defendants were tried for theft-related crimes; 1,109 for murder; 461 for injuries causing death; 460 for arson-related crimes; 448 for drug distribution; and the remainder were tried for other serious crimes. *Id.* at 4.

54. *Id.* One hundred and two other defendants were not brought to verdict. *Id.* at 5. Among these defendants, there were 2,877 who confessed and 1,999 who pleaded not guilty. *Id.* at 9.

55. *Id.* Among those selected for potential jury duty, 55.4% of the citizens were full-time workers, 14.4% were part-time or temporary workers, 9.90% were stay-at-home mothers or fathers, and 7.3% were self-employed. *Id.*

56. *Id.*

57. *Id.*

58. Setsuko Kamiya, *Lay judges convict 99%; few shirk duty*, JAPAN TIMES (Aug. 2, 2011); see also Corey & Hans, *supra* note 46, at 91.

59. *State of Implementation*, *supra* note 53. The breakdown of timing is as follows: 1.1% of trials lasted two days, 27.9% of trials lasted three days, 34.8% lasted four days, 16.4% lasted 5 days, and 19.8% lasted 6 days or more. *Id.*

60. *Id.* at 10 (noting that trials where the defendant had confessed took 4.5 days on average).

61. *Death sentence after 100-day trial*, JAPAN TIMES (Apr. 20, 2012), available at <http://www.japantimes.co.jp/opinion/2012/04/20/editorials/death-sentence-after-100-day-trial/#.UUJjQqWhD0c>. There have been several other long trials as well including a sixty-day arson trial in the Osaka District Court. *Man pleads guilty to deadly 2009 arson attack at Osaka*

and lay judge panels deliberated on average for 9.33 hours to reach the verdict.⁶²

The lay judge trial process itself appears to be succeeding on many levels. Professional judges educate citizen judges about the relevant law while deliberating alongside lay judges to reach collective decisions about verdicts and sentences. Trial attorneys have settled into their new roles as advocates in the courtroom, public resistance has decreased, and citizen participation in trials has become an integral part of the Japanese justice system.⁶³ The trial process itself has moved from a lengthy, disjointed, and largely opaque system conducted primarily based on written documents over the course of several months (if not years), to a more transparent and cohesive trial system focusing on oral testimony taken on consecutive days whenever possible.⁶⁴ Both prosecutors and defense attorneys have gained considerable practical training in jury trial advocacy techniques.⁶⁵ Defendants have also benefited from a more translucent environment, in which prosecutors disclose more information in advance of trial in comparison with past practice. Although some argue that the disclosures are still insufficient, prosecutors must now disclose additional evidence to defendants during pre-trial hearings due to lay judge involvement.⁶⁶

2. Positive experiences have changed attitudes

Although it is still early in the process, citizen participation has consistently changed attitudes to date. Lay judges have deemed their deliberative experience to be very valuable.⁶⁷ Of those citizens who have participated in trials, over half approached their selection with the

pachinko parlor, JAPAN TIMES (Sep. 7, 2011), available at <http://www.japantimes.co.jp/news/2011/09/07/national/man-pleads-guilty-to-deadly-2009-arson-attack-at-osaka-pachinko-parlor/#.UUJjeKWhD0c>.

62. *State of Implementation*, *supra* note 53, at 10.

63. Ibusuki, *supra* note 15, at 25; *see also* McClanahan, *supra* note 11, at 771-72.

64. Corey & Hans, *supra* note 46, at 73; Shinomiya, *supra* note 50, at 10-11. Before the adoption of the lay judge system, criminal trials could take years as hearings in some cases were only conducted once or twice per month. *See id.*

65. The Japan Federation of Bar Associations ("JFBA") and Ministry of Justice expended significant sums on training attorneys about the art of trial advocacy. In fact, the author conducted and participated in many training exercises for the JFBA, including serving as a member of the Jury Project Team. *See also* Ibusuki, *supra* note 15, at 47.

66. Shinomiya, *supra* note 50, at 10-11.

67. *See generally* Setsuko Kamiya, *Lay Judges Present Ideas to Make System Better*, JAPAN TIMES (Jan. 21, 2012), available at <http://www.japantimes.co.jp/text/nn20120121f2.html> [hereinafter Kamiya, *Lay Judges Present Ideas to Make System Better*]; *see also* Fukurai, *supra* note 34, at 817-18.

feeling that they did not want to serve.⁶⁸ By the end of the process, over 95% of all citizen judges felt that their overall experience was either positive or extremely positive.⁶⁹ Even more significantly, many individuals felt that their civic service provided an unparalleled opportunity to seriously ponder and think about society as a whole.⁷⁰ These positive experiences have reduced the initially negative public perceptions about the system and alleviated many public concerns.⁷¹

It appears that the lay judge system's initial impact has also facilitated meaningful civic participation in the democratic process and increased public comprehension of the system.⁷² Anecdotal evidence seems to indicate that lay judges are active in their participation.⁷³ Lay judges also consistently assert that they have been able to relate to both the victims and the accused.⁷⁴ In addition, citizen judges have observed that their experience caused them to seriously consider important societal issues such as whether incarceration can rehabilitate criminals and whether societal repatriation is advisable. Even citizens not selected to serve as lay judges have taken a new or renewed interest in the justice system. In addition to increased media coverage of trials, some citizens have willingly participated in mock trial sessions conducted by lawyers and other organizations to teach the public about the justice system.⁷⁵ Although attendance has recently dropped, many citizens have attended actual court sessions. Some have even been willing to pay lawyers for post-hearing review sessions.⁷⁶ After attending court, these citizen observers have visited a lawyer's office to learn about and discuss what they had seen in court. Before the implementation of the lay judge system, such interest and activities were unthinkable.

From a procedural standpoint, the system appears to be functioning

68. *State of Implementation*, *supra* note 53. Among respondents, 7.7% of lay judges really wanted to participate, 23.8% wanted to participate, 15% had not thought about it, 33.6% probably did not want to participate, 19.2% did not want to participate, and 0.7% did not respond. *Id.*

69. *Id.* Among those who responded, 61.9% felt that the proceedings were easy to understand, 29.6% felt they were average, 7.1% thought that the trials were difficult to understand, while 1.4% did not respond. *Id.*; see also Shinomiya, *supra* note 50, at 9.

70. Fukurai, *supra* note 34, at 817-18; Shinomiya, *supra* note 50, at 11.

71. McClanahan, *supra* note 11, at 771-73.

72. *Id.* at 748.

73. *Id.* at 773.

74. See generally *Seido Suta-to 3nen Housou3sha to Hajime no Iken Koukan* [First Exchange of Opinions Among Three Branches Three Years After Start of System], YOMIURI SHIMBUN [DAILY YOMIURI] (Apr. 25, 2012).

75. *Lawyers guide court-watchers / Lay judge system sparks fresh public interest in observing trials*, YOMIURI SHIMBUN [DAILY YOMIURI] (May 16, 2010).

76. *Id.*

relatively well. Inviting citizens to serve as lay judges in serious criminal trials has facilitated understanding, expedited cases, and improved transparency.⁷⁷ Supreme Court surveys confirm that over ninety-percent of lay judges felt that their respective trials were either easy or normal to understand.⁷⁸ Many lay judges commented that not only did they feel comfortable asking questions of witnesses, but they could also participate in deliberations without hesitation.⁷⁹ A wide majority of lay judges felt like they had sufficient time to deliberate in order to find the truth.⁸⁰ Moreover, citizen judges have been able to adequately digest technical information and make impartial judgments in high profile cases involving intense media pressure. For example, in a criminal case involving a famous Japanese actor associated with illegal drug use and the death of another, Japanese legal experts were impressed by the lay judges' ability to weather the two-week storm of intense publicity and scrutiny without giving deference to the celebrity status of the actor.⁸¹ Additionally, they were encouraged by the lay judges' ability to assess the complex medical expert testimony proffered during the trial.

3. Governmental acceptance and support of the lay judge system has been evident

Other indicators that the lay judge system has been successfully integrated into society and the legal system have arisen from within the government itself. First and foremost, the Supreme Court of Japan has resolved any doubts about the effect of the lay judge system. In response to an attack on the constitutionality of a conviction based on the involvement of citizens in the adjudication process, all fifteen Supreme Court judges voted unanimously that the lay judge system was constitutional.⁸² The Supreme Court held that it is possible "to fully

77. Shinomiya, *supra* note 50, at 8-9.

78. *State of Implementation*, *supra* note 53.

79. Corey & Hans, *supra* note 46, at 92.

80. *State of Implementation*, *supra* note 53. Approximately 72% of respondents felt that they had sufficient time, while 19.8% were unsure, 7.2% thought that they had insufficient time, and 1.4% did not answer. *Id.*

81. Setsuko Kamiya, *Lay Judges Handle Pressure of Oshio Trial*, JAPAN TIMES (Sept. 19, 2010).

82. Saikō Saibansho [Sup. Ct.] Nov. 16, 2011, No. 1196, 65 KEISHU 8 (Japan) (noting that the concept of lay participation in the trial process is consistent with the legislative history surrounding the Constitution); *see also Supreme Court Ruling Helps Lay Judge System Take Firm Root*, YOMIURI SHIMBUN [DAILY YOMIURI] (Nov. 17, 2011); *Lay judge system ruled constitutional*, YOMIURI SHIMBUN [DAILY YOMIURI] (Nov. 18, 2011) (Supreme Court rejecting a challenge to the

harmonize citizens' participation in judicial proceedings with the principles provided for realizing fair criminal trials.”⁸³ The Court deemed citizen participation to be completely acceptable because the lay judge system guarantees that trials will be fairly carried out based on law and evidence presented in court.⁸⁴ It also emphasized that the lay judge system has the advantage of integrating the “viewpoints and senses” of the general public with the expertise of professional judges.⁸⁵

Additionally, the Supreme Court of Japan and many High Courts have been protective of verdicts issued by lay judge panels despite government prosecutors' inclination to appeal when dissatisfied with lay judge trial verdicts.⁸⁶ In February 2012, the Supreme Court addressed this proclivity to appeal in ruling that, barring a blatant misapplication of law, verdicts issued by the lay judge tribunals must be respected.⁸⁷ To reverse a lay judge trial acquittal on grounds of factual error, a High Court must have concrete proof that the lay judge ruling was irrational in terms of logical consistency and common sense.⁸⁸ Absent such proof, the appellate courts should respect the verdicts reached by the lay judge panels.

Finally, even bureaucrats have recognized the value of citizen participation by using lay judge verdicts to justify governmental policy and actions. By way of illustration, then Justice Minister Toshio Ogawa approved the execution of three death row inmates in late March 2012. In so doing, he based his decision at least in part on the justification that lay judge trials have supported the death penalty—therefore, this form of punishment is justified because it is based on “a judgment made by a nation.”⁸⁹

constitutionality of the lay judge system by a woman convicted of smuggling stimulant drugs from Malaysia into Japan); *see also Lay judge system OK: top court*, JAPAN TIMES (Nov. 18, 2011), available at <http://www.japantimes.co.jp/news/2011/11/18/national/lay-judge-system-ok-top-court/#.UX3QjnA9K-o>.

83. Saikō Saibansho [Sup. Ct.] Nov. 16, 2011, No. 1196, 65 KEISHU 8 (Japan).

84. *Id.*

85. Corey & Hans, *supra* note 46, at 92.

86. *Japanese Supreme Court issues landmark decision on citizen juries*, MAJIROX NEWS (Feb. 14, 2012) available at <http://www.majiroxnews.com/2012/02/14/japanese-supreme-court-issues-landmark-decision-on-citizen-juries/>; *see also Lay Judges' Decisions Respected by High Courts*, YOMIURI SHIMBUN [DAILY YOMIURI] (Apr. 1, 2010).

87. *See id.*; *see also Landmark ruling on lay judge case*, JAPAN TIMES (Feb. 18, 2012), available at <http://www.japantimes.co.jp/text/ed20120218a2.html>.

88. *Lay judges' acquittal reinstated*, JAPAN TIMES (Feb. 14, 2012), available at <http://www.japantimes.co.jp/text/nn20120214a3.html>.

89. *Ogawa has no qualms about executions: Justice minister says lay judges, public call shots on inmates' fate*, JAPAN TIMES (Apr. 6, 2012), available at <http://www.japantimes.co.jp/news/2012/04/06/national/ogawa-has-no-qualms-about-executions/#.UX3QnNA9K-o>.

C. *Challenges and Concerns Still Exist*

Despite the positive achievements of Japan's lay judge system during its relatively short existence, the system still faces many challenges and concerns that Japan must address. Among other issues, some former citizen judges continue to struggle with the strict secrecy restrictions prohibiting them from speaking freely about the trial proceedings and deliberation process.⁹⁰ These restrictions, in combination with the psychological effects caused by exposure to serious criminal trials, have negatively impacted many citizen judges. In addition to feeling frustrated with the vague boundaries of permissible behavior, citizen judges want to share their experiences with others.⁹¹ Society and the legal community would benefit from the same.

Trial procedures and results have been called into question as well. Some citizen judges have been critical of the limited flow of information within the judicial process. More specifically, they encourage greater disclosure of all evidentiary materials to defense lawyers and fewer limitations on the disclosure of pretrial records to lay judges.⁹² In essence, many lay judges desire access to all relevant information. Restrictions on the information presented to the entire mixed tribunal give rise to the problems and concerns associated with a lack of transparency.⁹³ Others have questioned whether comprehensiveness is being sacrificed for rigidity and time concerns. Breaks are rigidly taken during trial at the expense of thorough examination. Also, the court will typically determine the date and time of announcing the verdict before the trial begins. In nearly every lay judge trial, the panel has announced the verdict at the pre-determined time. Japan needs to explore whether justice is being unreasonably sacrificed at the hands of perceived time constraints. Even more significantly, many remain concerned about the extraordinarily high conviction rate, which continues to exceed 99.5%.

90. See Matthew J. Wilson, *The Dawn of Criminal Trials in Japan: Success on the Horizon?*, 24 WIS. INT'L L. J. 835, 851 (2007) [hereinafter Wilson, *The Dawn of Criminal Trials in Japan*]; see also Setsuko Kamiya, *Scarred lay judges battle stress: Concerns grow over post-trial burdens of new court system*, JAPAN TIMES (Sept. 16, 2010), available at <http://search.japantimes.co.jp/cgi-bin/nn20100916f1.html> [hereinafter Kamiya, *Scarred lay judges*]; see also Wilson, *Japan's New Criminal Jury*, *supra* note 33, at 530-44.

91. Shinomiya, *supra* note 50, at 12.

92. Kamiya, *Lay Judges Present Ideas to Make System Better*, *supra* note 67.

93. See Wilson, *Japan's New Criminal Jury*, *supra* note 33, at 545-65; see also generally *Recordings of interrogations to be expanded to include early stages*, JAPAN TIMES (Mar. 30, 2012), available at <http://www.japantimes.co.jp/news/2012/03/30/national/recordings-of-interrogations-to-be-expanded-to-include-early-stages/#.UX3PxHA9K-o> (noting increased recording of interrogations, although recording measures still fall short of complete transparency).

The balance of power among court participants has been another serious concern. Although the Japanese judiciary has carefully taken steps to minimize the potential for professional judges to dominate their citizen counterparts,⁹⁴ a number of lay judges still feel that professional judges have attempted to influence their decisions.⁹⁵ Substantial apprehension also exists about whether lay judges are unduly influenced by the *higaisha sanko seido*, or system that allows victims and their families to question witnesses, provide statements to the lay judge panel, submit recommended sentences, and give closing statements.⁹⁶ In Japan, criminal trials are not bifurcated into a separate phase for determining guilt and innocence, and then another for sentencing. Rather, these phases are combined into a single phase. Even though impassioned statements and victim questions do not constitute substantive evidence, lay judges will conceivably subconsciously factor these into their determinations of innocence or guilt, particularly given that victims can participate before they deliberate on these questions.⁹⁷ Also, the uneven distribution of human and financial resources when comparing prosecutorial power with resources available to defendants and their attorneys has been noted as a concern. For example, court surveys indicate that defense attorney presentations have been more difficult to follow than the prosecutors.⁹⁸

Notwithstanding these and other challenges, the lay judge system has brought welcome changes consistent with the objectives underlying the system. The creation of a popular base through lay participation has started to make certain aspects of the justice system easier to understand, more reliable, and more transparent. It has also given many individuals and entities greater confidence in public governance. Accordingly, it is worth exploring the possibilities and advisability of expanding the lay judge system given Japan's positive experience with lay participation and the potential benefits that can flow therefrom.

94. Daniel Senger, *The Japanese Quasi-Jury and The American Jury: A Comparative Assessment of Juror Questioning and Sentencing Procedures and Cultural Elements in Lay Judge Participation*, 2011 U. ILL. L. REV. 741, 753-54 (2011).

95. Kyodo News, *21% of lay judges felt decisions guided by pros: Survey reveals mixed feelings on due process*, JAPAN TIMES (Aug. 2, 2010), available at <http://www.japantimes.co.jp/text/nn20100802a1.html>. Six percent of respondents to a court-initiated survey responded that the professional judges tried to influence them and fifteen percent said the professionals tried "somewhat," for a total of twenty-one percent of the respondents. *Id.*

96. See Ibusuki, *supra* note 15, at 48-49.

97. See generally *id.*

98. See Shinomiya, *supra* note 50, at 11.

II. MAKING THE CASE FOR LAY PARTICIPATION IN CIVIL TRIALS

In general, civil dispute resolution plays a vital role in shaping society. It constitutes the core of any legal system and popular base.⁹⁹ In civil law systems, citizen participation is alien to many forms of dispute resolution, particularly civil litigation. Consistent with this concept, Japan does not presently have a jury system or allow lay participation in civil cases.¹⁰⁰ In resolving disputes and administering justice, the value of lay participation is widely recognized in many respects. More specifically, lay participation is gaining greater acceptance in many civil law countries. Japan is no exception. In embarking on a course that encourages civic engagement and seeks for greater access and transparency to the justice system, the idea of lay participation is gradually finding favor in Japan through its new lay judge system.

Given the high interest in Japan regarding lay participation together with the substantial impact that certain civil trials can have on society, the time is ripe for Japan to seriously consider expanding citizen participation into the legal decision-making process in civil trials. Opening certain civil trials to lay participation in lawsuits with major societal impact could be the next logical step for Japan in continuing to advance the goals underlying its legal reforms.¹⁰¹ These lawsuits might involve governmental misconduct, administrative dispositions, environmental disasters, and other disputes having the greatest impact upon society.¹⁰² With five years of intensive preparatory activities and

99. See generally *JSRC Recommendations*, *supra* note 26, at ch. II, pt. 8(1).

100. *Overview of the Judicial System in Japan*, SUPREME COURT OF JAPAN, available at http://www.courts.go.jp/english/judicial_sys/overview_of/index.html (last visited Mar. 13, 2013) [hereinafter *Overview of the Judicial System*].

101. It is not the objective of this paper to engage in a comprehensive comparison of the political, legal, and social environments in Japan with those in other common law countries where the jury trial is purportedly dying or in decline in an attempt to demonstrate that lay participation in civil trials will succeed or fail. Rather, it is sufficient to note that the political, legal, and social environments as well as the factors underlying the drive for enhance citizen participation and civic engagement differ significantly from the current state of the United Kingdom, United States, and other common law jurisdictions. By way of example, the decline of civil juries in the United Kingdom started in the 1850s due to litigant trust in the bench, legal practitioners desire to professionalize the profession, and successful experiments with bench trials at the county level. See Conor Hanly, *The decline of civil jury trial in nineteenth century England*, 2005 THE JOURNAL OF LEGAL HISTORY 26:3, 253-278, 257.

102. Additionally, lay participation could be extended to criminal complaints for professional negligence resulting in injury or death as well. Keihō (Pen. C.), art. 209-211 (Japan) (providing penalties for criminal negligence causing injury or death). A recent example involves a total of 1,324 citizens filed a bill of indictment against TEPCO officials and the government's Nuclear Safety Commission with the Fukushima prosecutor's office on June 11, 2012, in connection with the disaster at the Fukushima Daiichi nuclear plant. Kyung Lah, *Fukushima residents call for*

three years of actual administrative experience under its belt, the Japanese judiciary should be ready for a progressive expansion of the system particularly now that criminal lay judge trials have taken root and started bearing fruit.

A. *Japanese Society is Ready for Lay Participation in Civil Trials*

Although lay judge systems may not be appropriate in all civil cases in Japan, the use of citizen judges in certain areas would have many positive societal effects. Among other things, lay participation in the administration of civil justice would further reinforce the democratic foundation of Japanese society, promote justice, and help ensure equitable results.¹⁰³ While not absolutely necessary, lay participation in the judicial process is the cornerstone of democratic government regardless of its form.¹⁰⁴ The correlation between broader democratic governance and lay participation in the judicial decision-making process is unmistakable.¹⁰⁵ By opening certain civil cases to lay participation, more individuals would have the chance to view the system firsthand, infuse a fresh perspective into civil justice, and provide the system with practical and grounded input. It would also further many of the goals advanced by recent reforms in Japan, particularly the goals of enhancing citizen participation in civic governance, educating, and increasing faith in the judicial system.¹⁰⁶ Assuming that Japan used a mixed tribunal model similar to that used for serious crimes, its citizens would have the opportunity to deliberate with professional judges about serious matters affecting society. This form of deliberative democratic activity will force citizens to offer and defend their opinions, thereby promoting a more informed, reflective, tolerant, and active citizenry.¹⁰⁷

criminal charges against nuclear officials, CNN (Jun. 12, 2012, 8:44 PM EDT), <http://www.cnn.com/2012/06/11/world/asia/japan-nuclear-complaint>; *1,324 Fukushima citizens file criminal complaints against TEPCO, gov't*, JAPAN TODAY (Jun. 12, 2012, 1:30PM JST), <http://www.japantoday.com/category/crime/view/over-1300-fukushima-citizens-file-criminal-complaint-against-tepco>.

103. See Ivkovic, *supra* note 4, at 431-32; see generally Saikō Saibansho [Sup. Ct.] Nov. 16, 2011, no. 1196, 65 KEISHU 8 (Japan) (finding that there is no conflict between “reinforcing the democratic foundation” of society through citizen participation in the justice process and fundamental constitutional principles).

104. The form taken can be a jury, mixed tribunal assessor, magistrate, or lay court. See Ivkovic, *supra* note 4, at 431-432.

105. See Park, *supra* note 4, at 534-36.

106. JSRC Recommendations, *supra* note 26, at ch. IV, pt. 1(1); see also Dean, *supra* note 25, at 585.

107. Corey & Hans, *supra* note 46, at 77.

1. The major impact of certain civil litigation on society supports public involvement

Wrongdoers and victims are not limited to criminal cases. In fact, the civil justice system is designed to address serious harms. There are civil cases that have significant impact on Japanese society as a whole such as those involving nuclear matters, environmental contamination, improper governmental activities, administrative matters, and serious harms such as drug defects. Citizens should have a direct voice in these and other proceedings that directly affect society. In fact, they should have the opportunity to consider and apply public policies for civil wrongs including the deterrence of risk and wrongful conduct, victim compensation, protection of person and property from unjust injury, enhancement of safety, allocation of loss, and formation of minimum standards of social conduct. Important societal disputes should not be relegated to the impulse of the state.

There are many civil lawsuits that significantly impact society. One prime example is the recent lawsuit against the Japanese government in connection with the Self Defense Forces' monitoring of citizens opposed to the deployment of Japanese troops in Iraq.¹⁰⁸ Another even more substantial example is the Fukushima nuclear plant disaster in northeast Japan in March 2011 and lawsuits spawning therefrom. Despite the government's establishment of a mediation system for victim compensation,¹⁰⁹ various entities victimized by the disaster have started filing extensive litigation against Tokyo Electric Power Co., Inc. (TEPCO), operator of the Fukushima nuclear plant, in conjunction with harms suffered at the hands of nuclear contamination.¹¹⁰ This includes lawsuits by individuals, spa and inn operators, schools, golf courses, and even a shareholders' lawsuit against

108. The Self Defense Forces took photos and collected personal information of those attending rallies and demonstrations opposing the dispatch of the SDF to Iraq. *See generally SDF's surveillance of civil protests illegal: court ruling*, JAPAN PRESS WEEKLY (Mar. 27, 2012), <http://www.japan-press.co.jp/modules/news/index.php?id=2977>; *Court says SDF intelligence operation was illegal*, THE ASAHI SHIMBUN (Mar. 27, 2012), http://ajw.asahi.com/article/behind_news/social_affairs/AJ20120327009; *EDITORIAL: Politicians must wield a firm hand over the SDF*, ASAHI SHIMBUN (Mar. 30, 2012), <http://ajw.asahi.com/article/views/editorial/AJ201203300027>. Although the district court found that the SDF violated the plaintiff's right to control the use of their personal information, the court denied any compensation to an overwhelming majority of the plaintiffs.

109. *TEPCO Must Be Proactive in Nuke Crisis Compensation Negotiations*, MAINICHI SHIMBUN, Feb. 25, 2012.

110. Yoko Kubota, *Shareholders to sue Tepco executives for \$67 billion*, REUTERS (Mar. 5, 2012, 5:45 PM EST), <http://www.reuters.com/article/2012/03/05/us-tepco-lawsuit-idUSTRE8240RY20120305>.

current and former TEPCO directors to the tune of over \$67 billion.¹¹¹ The shareholders' lawsuit is believed to be the largest civil lawsuit ever filed in Japan. The public interests in this litigation are diverse. Not only does TEPCO provide electricity to millions of Japanese citizens, but the Japanese government has also infused billions of dollars into the company because of the disaster.¹¹²

Having citizens empaneled on a mixed tribunal with professional judges to decide important civil lawsuits that involve critical societal matters or governmental malfeasance such as those filed against TEPCO and the Self Defense Forces would be beneficial. At minimum, this would give the public a direct voice in the adjudication of these critical societal matters. It would also place a check on governmental pressure and influence. Unlike professional judges, lay judges do not have a career financed by and dependent upon the government. They are not subject to demotion or reassignment, as has often been a concern of professional judges in Japan. Accordingly, lay judges are less dependent upon the state, and therefore more able to reach decisions on important matters without undue influence.

2. Reforms have been targeted at improving the civil litigation system

As part of its recent groundbreaking reforms, Japan has made special efforts to bring the administration of justice closer to the people and improve its civil dispute resolution system.¹¹³ In 1996, the Code of Civil Procedure was revised to provide easier access to the courts and make the civil litigation process more efficient and effective.¹¹⁴ As part of its recommendations, the JSRC suggested that Japan further reform its civil justice system to make dispute resolution more effective, efficient,

111. *Id.*; see also Ben Lewis, *The Legal Aftershocks of Fukushima*, LAW.COM (Jan. 26, 2012, 12:00 AM), available at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202540087107&slreturn=1>.

112. The government has allocated over \$20 billion USD for TEPCO to compensate disaster victims and continue providing services to its 45 million customers. Kazumasa Takenaka & Kaname Ohira, *TEPCO to seek billions more for Fukushima Compensation*, THE ASAHI SHIMBUN (Mar. 21, 2012), ajw.asahi.com/article/0311disaster/fukushima/AJ201203210049. Much of the funds sought by TEPCO will be distributed through the Nuclear Damage Liability Facilitation Fund established by the government to informally resolve claims, as opposed to payouts through formal litigation.

113. *Results of the Justice System Reform*, *supra* note 21, at 4. Japan passed legislation reforming its codes, commercial laws, tort law, administrative procedure, criminal trial procedure, and legal education system. See generally *id.*

114. Minji Soshou-hou [Code of Civil Procedure of Japan], act No.109 of June 26, 1996 (as last amended in 2006) (Japan), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=21495.

and accessible to the public.¹¹⁵ Taking these recommendations to heart, Japan implemented reforms that brought civil justice closer to the public, including, among other things: the appointment of expert commissioners to assist in complex litigation and new civil dispute resolution bodies, such as an Intellectual Property High Court,¹¹⁶ a modified labor dispute system in which labor specialists take a central role in adjudication,¹¹⁷ as well as amendments to its administrative case litigation system and enhancements to its alternative dispute resolution system.¹¹⁸ Over the past decade, Japan has also implemented major reforms to laws involving corporations, insurance, bankruptcy, and civil litigation.¹¹⁹ However, this flood of major reforms did not include a concrete proposal for lay participation in civil trials.

3. Expansion of lay judge system to civil realm is plausible

The expansion of lay judge participation to the civil realm would be a natural extension of the current system. Before issuing its final recommendations, the JSRC discussed the concept of citizen participation in civil lawsuits.¹²⁰ At the time, however, the idea of lay participation in civil trials was pushed aside because serious criminal trials were deemed to carry a deeper meaning, to involve major societal ramifications, and generally easier to grasp.¹²¹ Moreover, there were concerns that this might impose too great of a burden on the citizenry if

115. See generally *JSRC Recommendations*, *supra* note 26, at ch. II.

116. Nottage & Green, *supra* note 9, at 132; Chiteki zaisan koto saibansho sechiho [Act for Establishment of the Intellectual Property High Court], Law No. 119 of 2004 (Japan). An English translation of this law is electronically available at <http://www.cas.go.jp/jp/seisaku/hourei/data/IPHC.pdf>.

117. Rodo shinpanho [Labor Tribunal Act], Law No. 45 of 2004 (Japan).

118. Gyosei jiken soshoho no ichibu o kaisei suru horitsu [Act for Partial Revision of the Administrative Case Litigation Act], Law No. 84 of 2004 (Japan); Saibaingai funso kaiketsu tetsuzuki no riyo ni sokushin ni kansuru horitsu [Act on Promotion of Use of Alternative Dispute Resolution], Law No. 151 of 2004 (Japan); see also Sogo horitsu shienho [Comprehensive Legal Support Act], Law No. 74 of 2004 (Japan). An English translation of the alternative dispute resolution law is electronically available at <http://www.cas.go.jp/jp/seisaku/hourei/data/AOP.pdf>.

119. *Results of the Justice System Reform*, *supra* note 21. Japan implemented a new Bankruptcy Act in 2004, Companies Act in 2005, Insurance Act in 2008, and plethora of other civil procedural laws. See *id.* at 10.

120. See *Saiban-in I-Ro-Ha: Minji ni ha Dounyu shinai no? Kokumin no Futan Omoku Miokuri* [Lay Judge ABCs: Why Not Civil Trials? Put Off Due to Heavy Public Burden], NISHI NIHON SHIMBUN WEEKLY (May 26, 2009) [hereinafter "*Lay Judge ABCs*"].

121. *Id.* The Ministry of Justice supported citizen involvement with violent crimes because "the more heinous the crime, the more meaning there is in the restoration of social justice by citizens, in whom sovereignty rests." See Wilson, *Japan's New Criminal Jury*, *supra* note 33, at 515. The government also believed that criminal cases can be more "straightforward and easier to understand than civil matters." *Id.*

lay judge trials were initially utilized in civil trials.¹²² However, in proposing lay participation, the JSRC did note that a “new system should be introduced, *for the time being* in criminal proceedings, enabling the broad general public to cooperate with judges by sharing responsibilities, and to take part autonomously and meaningfully in deciding trials.”¹²³ This indicates that the JRSC contemplated the possible introduction of lay participation in civil proceedings once the criminal lay judge trial system had taken root. In addition, albeit in a criminal context, the Supreme Court of Japan has already accepted the premise of citizen involvement in the trial process declaring that the Constitution of Japan “does not clearly stipulate that lower courts shall be comprised solely of judges.”¹²⁴ Accordingly, there should not be any legal blockades to expanding the current lay judge system.

4. Mixed tribunals are equipped to render fair verdicts

Particularly with the guidance of a professional judge instructing on legal matters, mixed tribunals in Japan are well suited to render a fair and just verdict. Research has shown that criminal and civil juries produce results that are fair, impartial, and thorough.¹²⁵ This maxim can be applied to mixed tribunals as well. In fact, the Supreme Court of Japan has acknowledged that mixed tribunals are capable of similar results.¹²⁶ Most observers have concluded that there are substantial “fact-finding advantages of a representative cross-section of the community that engages in sustained deliberation” and that citizen jurors are sound fact-finders in the vast majority of cases.¹²⁷

Albeit limited in duration, Japan’s experience with criminal cases has been no different. With the introduction of the lay judge system, citizen involvement in the judicial process is no longer a foreign concept. The experiment with serious criminal cases has demonstrated that non-expert Japanese citizens can be trusted to learn and apply legal concepts. To date, Japanese lay judges have been credited with the ability to render sensible judgments and ignore the pressures associated

122. See Wilson, *Japan’s New Criminal Jury*, *supra* note 33, at 515.

123. *JSRC Recommendations*, *supra* note 26, at ch. IV, pt. 1.1. (emphasis added).

124. Saikō Saibansho [Sup. Ct.] Nov. 16, 2011, no. 1196, 65 KEISHU 8 (Japan).

125. See Gastil, Lingle & Deess, *supra* note 2, at 75 (citing VALERIE P. HANS, *BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY* (New Haven, Conn.: Yale Univ. Press, 2000)).

126. Saikō Saibansho [Sup. Ct.] no. 1196, 65 KEISHU 8 (Japan).

127. Corey & Hans, *supra* note 46, at 83.

with high profile cases.¹²⁸ In the current environment of reform, now is a prime opportunity for Japan to consider allowing lay participation in civil trials and obtaining the benefits of expanded civic engagement.

5. Logistical preparations have already been made

Lay participation in civil trials would not present an undue burden given the preparations made for citizen involvement in criminal trials. For purposes of uniformity and ease, Japan could easily adopt a quasi-jury trial system for certain “significant” civil lawsuits generally along the lines implemented for serious criminal trials. Relative uniformity with the criminal lay judge tribunals would reduce logistical burdens, confusion, and costs in extending lay participation to civil trials. The public has been thoroughly educated about lay participation as a result of government-led educational efforts, promotional materials, mock trials by bar associations, intense media coverage, and other activities related to the current quasi-jury system.¹²⁹ Courtrooms have been structurally modified to accommodate lay judges.¹³⁰ The public is now largely aware of the mechanics of lay judge participation and an overwhelming majority of those who serve as lay judges are satisfied with their experiences.¹³¹ There is no reason to believe that the results from civil trials would be any different.

Naturally, the use of citizen judges would generate additional costs for the judiciary. However, careful planning and reduction of other expenditures might help finance the introduction of civil lay judge trials. To cover the additional expenses, the cost of a quasi-jury panel could be assessed as court costs to the losing party in the litigation. The cost of using lay judges might also be covered, in part, by diminishing the current caseload of professional judges. In Japan, civil cases currently fall within the exclusive province of professional judges.¹³² A single district court judge will handle a civil lawsuit unless the matter is deemed significant or particularly difficult.¹³³ In significant or difficult cases, a panel of three professional judges will hear the matter.¹³⁴

128. Shinomiya, *supra* note 50, at 9-11.

129. See Ibusuki, *supra* note 15, at 27. In addition to spending significant sums on billboards, print advertisements, and commercials, the government spent considerable amounts on symposiums, mock trials, and other educational activities. Wilson, *Japan's New Criminal Jury*, *supra* note 33, at 493-94.

130. See Wilson, *Japan's New Criminal Jury*, *supra* note 33, at 494.

131. See McClanahan, *supra* note 11, at 748.

132. *Overview of the Judicial System*, *supra* note 100.

133. *Id.*

134. *Id.*

Creating a system in which only one professional judge is used in combination with citizen judges would theoretically free up two other professional judges to handle other cases. In the past, the prolongation of large-scale cases resulting from the insufficient number of judges has placed an excessive burden on the judiciary.¹³⁵ Implementation of civil lay judge trials would likely help reduce the duration of proceedings in civil cases and help the judiciary handle an increased civil caseload.¹³⁶ This reallocation of resources might help defray the costs of lay participation. In any event, it would be worthwhile for Japan to explore this matter further and perform a cost-benefit analysis into the expansion of the lay judge system.

B. Citizen Participation in Civil Trials is Consistent with the Original Purpose of Legal Reforms in Japan

Citizen participation in civil trials would also further the objectives underlying recent legal reforms in Japan. The country has made it a top priority to reform its legal system so that it is more accessible, understandable, and reflective of democratic norms. Reforms have centered on “establishing a popular base” and constructing a justice system that meets public expectations.¹³⁷ By taking the next step in direct citizen participation, Japan can also advance understanding of the civil justice system and alter the public’s consciousness regarding civil dispute resolution.

1. Expanded Participation Would Strengthen, Educate, and Empower the Citizenry

Lay participation in trials exposes the public directly to the moorings of democracy. If citizens adjudicate civil cases, Japanese society will benefit. In the words of Alexis de Tocqueville, the “jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens” and “invests each citizen with a kind of magistracy” in essence making them feel bound towards society.¹³⁸ Public service in judicial proceedings will bind citizens to the state.¹³⁹ Lay participation also has the potential to increase public

135. See generally *JSRC Recommendations*, *supra* note 26, at ch. III, pt. 1, 2 (1).

136. See generally *id.* at ch. III, pt. 1, 2 (1).

137. *Results of the Justice System Reform*, *supra* note 21, at 2.

138. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, VOL. 1, 284-85 (Henry Reeve tr., Schocken Books, 1961) (1835).

139. See Valerie Hans, *Citizens as Legal Decision Makers: An International Perspective*, 40

support for the court system and promote civic engagement.¹⁴⁰ It will also open the door to a sense of achievement, civic pride, and democratic empowerment.¹⁴¹

Expanded lay participation will empower individuals to directly impact the society in which they live. It will also supply the public with an extra chance to learn about the law, the civil side of the judicial system, and the important functions played by the judiciary. Through this process, Japanese citizens can obtain a heightened understanding of the pros and cons of civil litigation.¹⁴² Also, hands-on involvement will facilitate enhanced scrutiny of the current dispute resolution system and its participants. This will enable society to better examine and provide meaningful input about the civil justice system.

Extending citizen involvement to civil trials will also provide more opportunities for civic service.¹⁴³ Comparatively, Japan has the lowest crime rates of any of the major industrial nations.¹⁴⁴ In fact, it is the only country that “witnessed significant reduction in violent crime over the course of the last half century.”¹⁴⁵ Serious crimes occur in Japan at a rate much lower than that in other countries.¹⁴⁶ By extension, the number of serious criminal trials is quite low, meaning that many Japanese citizens may never have the opportunity to participate in the judicial process first-hand. In fact, during the first year after the lay judge trials were implemented, only 3,369 citizens had the opportunity to actually serve as lay judges and only 1,298 more as alternates.¹⁴⁷ If lay judge participation is restricted only to serious criminal trials, the opportunity for Japanese citizens to actually participate in the system is limited. Lay judge participation in significant civil trials will generate additional opportunities.

Additionally, with the implementation of lay trials in a civil context, private litigants would also stand to benefit from the expansion of lay judge trials to the civil realm as court proceedings could be expedited even further if trials are held on consecutive days. Identical to

CORNELL INT’L L.J. 303, 306 (2007).

140. *See id.* 307-308.

141. *See Wilson, Japan’s New Criminal Jury, supra* note 33, at 521.

142. *See Lay Judge ABCs, supra* note 120.

143. John O. Haley, *Restorative Justice: Introduction—Beyond Retribution: An Integrated Approach to Restorative Justice?*, 36 WASH. U. J.L. & POL’Y 1, 13-14 (2011).

144. HARRY R. DAMMER & JAY S. ALBANESE, *COMPARATIVE CRIMINAL JUSTICE SYSTEMS*, 14-36 (4th Ed. Wadsworth, Cengage Learning 2011).

145. Haley, *supra* note 144, at 13-14.

146. *Id.*

147. Fukurai, *supra* note 34, at 816 (explaining numbers issued by the Supreme Court of Japan); Kamiya, *Scarred lay judges, supra* note 90.

the criminal lay judge trials, the courts will need to hold trial sessions on consecutive days to minimize the negative impact on the citizenry. This would likely mean expedited private litigation. It would also help courts and the attorneys to meet new requirements that civil trial hearings be held in a condensed period of time.¹⁴⁸ Also, Japan's growing lawyer population that has rapidly expanded due to the recent reform could help alleviate any staffing pressures caused by holding trial on consecutive days.

2. Better reflection of societal values and policy

By incorporating citizen participation in certain civil trials, it is possible to reflect Japanese societal values and policies more thoroughly. The Supreme Court of Japan has acknowledged this fact by recently emphasizing that the viewpoints and impressions of citizens are reflected in the administration and substance of trials through direct citizen participation.¹⁴⁹ These observations by the Supreme Court are equally applicable to civil trials.

Using a mixed tribunal consisting of at least one professional judge and several lay judges would infuse a fresh perspective reflective of society on matters addressed in civil trials.¹⁵⁰ While professional judges are experts at evaluating the law and applying rules of civil procedure, citizen judges are just as capable of determining truthfulness and evaluating facts. In fact, citizen determinations may actually be even more beneficial than those made by professionals given that lay judges can inject their "common sense" thoughts, senses, practical observations, and opinions on public policy questions when asked to consider testimony and evidence in the context of specific cases.¹⁵¹

One of the original reasons underlying Japan's infusion of citizens into the judicial process was the perceived disconnect between professional judges and society. Lay judges can bridge the gap between career judges and society. While Japanese judges are supposed to have an extremely good sense of society and societal values, they have come under attack as being isolated, elitist, hailing from uniform backgrounds,

148. Masafumi Kodama & Jay Tyndall, *International Commercial Litigation in Japan* (Aug. 1, 2001) (paper prepared for the sixth annual meeting and conference of the International Pacific Bar Association in Manila on May 3, 1996) available at <http://www.kitahama.or.jp/english/library/litigatn.html> (noting that courts have recently been striving to hear all witnesses within a single day so as to comply with Article 182 of the Code of Civil Procedure).

149. See *Lay Judge ABCs*, *supra* note 120.

150. See generally Wilson, *Japan's New Criminal Jury*, *supra* note 33, at 521.

151. See Gastil, Lingle & Deess, *supra* note 2 at 75.

and living a sheltered lifestyle.¹⁵² The standard road to a professional judgeship entails constant studies through university graduation. At the university stage, future judges focus almost exclusively on passing their university courses and preparing for the bar examination. Extensive work experience is not typical. Once someone becomes a judge in Japan, they are typically isolated from other aspects of society and interact predominantly with other judges.¹⁵³ By integrating citizen judges into civil and administrative trials, citizens can more effectively link societal values to professional judges' legal knowledge. Reflecting society's feelings and opinions in civil cases will improve the process and enrich the system itself.

C. Reducing the Disadvantages Associated With Serious Criminal Trials

Civil trials have the added advantage of providing a friendlier environment for citizen participation. In adjudicating serious criminal trials, lay judges can be traumatized. Despite the fact that Japan's experiment with citizen participation in serious criminal trials has been relatively positive, limiting participation to criminal matters can carry potentially serious side effects. In most cases, Japan's lay judges have exited the criminal courtroom feeling educated, enlightened, and filled with a sense of accomplishment.¹⁵⁴ However, some citizen judges have suffered from negative after-effects including undue stress and anxiety caused, at least in part, from viewing gruesome photographs, hearing about graphic crimes, and deciding the fate of other human beings during the serious criminal trials.¹⁵⁵ This trauma has been compounded by confidentiality prohibitions governing lay judges.¹⁵⁶ Lay judges may generally express their thoughts about the trial process, but they are prohibited from disclosing details of the deliberations.¹⁵⁷ Due to uncertainty about the acceptable boundaries of disclosure, many lay judges will not even consult or confide even with their spouse about a

152. See Arne F. Soldwedel, *Testing Japan's Convictions: The Lay Judge System and the Rights of Criminal Defendants*, 41 VAND. J. TRANS. L. 1417, 1419–20 (2008).

153. See Wilson, *The Dawn of Criminal Trials in Japan*, *supra* note 90, at 851; Robert M. Bloom, *Jury Trials in Japan*, 28 LOY. L.A. INT'L & COMP. L. REV. 35, 41 (2006).

154. See generally EDITORIAL: *Review of the lay judge system*, JAPAN TIMES (Oct. 4, 2012), <http://www.japantimes.co.jp/opinion/2012/10/04/editorials/review-of-the-lay-judge-system/#.UXRUvIKJTMc>.

155. Kamiya, *Scarred lay judges*, *supra* note 90.

156. *Id.*

157. *Id.*

trial after the conclusion of their service.¹⁵⁸

To deal with the traumatic ordeal, the government has established help lines and offers in-person consultations with clinical psychologists.¹⁵⁹ These rehabilitative services naturally come with considerable costs to both individuals and the government. Moreover, these services may yet be insufficient, as some lay judge veterans have resorted to privately formed comfort groups such as the *Saibanin Keikensha Nettowaku* (Lay Judges Network).¹⁶⁰ By focusing lay participation on civil justice, all of the goals of judicial reform can be achieved without subjecting lay judges to the horrors potentially associated with serious criminal trials and avoid any resulting rehabilitative costs.

D. Accountability, Legitimacy, Transparency, and Procedural Benefits

In many instances, the public eye focuses on civil disputes that have wide-sweeping ramifications. The judiciary is responsible for making many significant decisions that resolve disputes, address civil harms, enhance individual and corporate accountability, and affect society. Some believe that the Japanese economy is hindered by the lack of corporate and governmental accountability.¹⁶¹ In fact, private accountability is often seriously questioned, as in the case with TEPCO and its dysfunctional nuclear reactors.¹⁶² To foster accountability and engender additional confidence in commerce and civil matters, Japan could benefit by infusing public participation into trials on certain civil lawsuits, instead of just focusing on serious criminal ones.¹⁶³

Lay judge participation could facilitate increased scrutiny, transparency, and accountability in significant civil cases. As previously mentioned, public attention could be well suited for major civil cases such as those dealing with nuclear issues, environmental contamination, governmental malfeasance, and toxic torts. Administrative dispositions

158. *Id.*

159. *Id.* According to the Supreme Court of Japan, lay judges may disclose details about their trial participation to clinical psychologists given that the psychologists also have a duty of confidentiality.

160. *Id.*

161. See John Plender, *An accountability gap is holding back Japan's economy*, FINANCIAL TIMES (Mar. 14, 2007), <http://www.ft.com/cms/s/0/034cc9c6-d261-11db-a7c0-000b5df10621.html#axzz2R8P7rXoD>.

162. See generally Kirk Spitzer, *Scant Fallout For Those Behind Japan's Nuclear Disaster*, TIME (Mar. 5, 2012), <http://nation.time.com/2012/03/05/scant-fallout-for-those-behind-japans-nuclear-disaster/>.

163. See *Lay Judge ABCs*, *supra* note 120.

might be well suited for further lay participation as well given their close proximity and direct impact on citizen welfare. Observers have noted that the current system is weak in ensuring governmental accountability and the judicial check function is not working, particularly in lawsuits in which citizens face off against the government, administrative agencies, or military.¹⁶⁴ Citizen participation would add another layer of independent review and diminish the possibility of governmental influence on career judges. Private litigants file lawsuits against the government and military in areas of energy, pollution, refugees, protection of livelihood, anti-war demonstrations, privacy, and other similar issues.¹⁶⁵ At present, the rate of success in these lawsuits is relatively low.¹⁶⁶ Even if the rate of success did not increase, greater public scrutiny through the trial process would provide an even greater deterrent against illegal or harmful conduct by the government.

Furthermore, the involvement of uninterested individuals can dispel doubts about government cover-ups or favoritism among governmental or corporate actors. With the continuing uncertainty associated with the Fukushima nuclear reactor disaster and revelations that the government has not disclosed everything that it knows about this nuclear catastrophe, there is an increasing distrust of government.¹⁶⁷ In serious cases involving the government or governmental support of certain enterprises (its support of TEPCO is a prime example), lay participation in the judicial process can help alleviate this distrust. In fact, it can provide a “powerful counterpoint to the accusation of partial or politicized legal process.”¹⁶⁸ In fact, England first used juries to boost the legitimacy of the judicial process because the judgments were construed as more fair when rendered directly by the lay public.¹⁶⁹ This concept would apply

164. See Nottage & Green, *supra* note 9, at 135-137, 141-143, 152 (noting the low success rate of claims against the government in comparison with other nations); see also *Saibanin Seido ga Wakaranai Kaikakuha Kara Mo Seikei Misu no Hihan Ga* [Not Understanding the Lay Judge System: Criticism of Mistaken Design from Reformer], TOKYO SHIMBUN (Sept. 29, 2008) [hereinafter *Criticism of Mistaken Design from Reformer*].

165. See Nottage & Green, *supra* note 9, at 141-143, 149-151 (discussing several recent high profile claims against government); see also *Criticism of Mistaken Design from Reformer* *supra* note 164.

166. *Id.*; see also *Lay Judge ABCs*, *supra* note 120.

167. See generally David McNeill, *Fukushima lays bare Japanese media's ties to top*, JAPAN TIMES (Jan. 8, 2012), http://www.japantimes.co.jp/text/fl20120108x3.html?fb_ref=article_life.

168. Gastil, Lingle & Deess, *supra* note 2, at 73.

169. *Id.* In England, the use of juries in civil cases has decreased significantly over the past several decades. However, the goals and objectives of Japan at this point in its history with respect to lay participation differ significantly from England or other countries in which juries are in relative decline.

to governmental, military, corporate, and individual actors alike.

In having embraced lay adjudication, Japan finally possesses a mechanism capable of “providing an important check on elite political and judicial power, at last restoring credibility in the legal system through transparency, civic participation, and legal education.”¹⁷⁰ However, the criminal lay judge trial component should only be the beginning of the road. The presence of lay judges on civil trial panels would add another level of potential deterrence against arbitrary, hasty, corrupt or biased decisions.¹⁷¹ This would enhance the legitimacy of the civil justice system. Additionally, such presence would also provide professional judges with the opportunity to use ordinary citizens as sounding boards and justify the basis for their conclusions.¹⁷²

Meaningful citizen involvement and collaborative deliberation can also increase the public’s trust and confidence in judges and the judicial system.¹⁷³ These things will help validate the rule of law and will make Japan’s civil system even more responsive to community values.¹⁷⁴ Identical to the criminal justice realm, the civil justice system would be strengthened if citizens have the chance to debate and deliberate about particular facts, policy issues, and societal norms as part of a quasi-jury body or jury. Moreover, public participation would naturally heighten scrutiny of the process and potentially facilitate quality public discourse among citizens, within governmental institutions, and between government and the public.¹⁷⁵ This process of deliberative democracy will only serve to benefit Japanese society as the public will not only become more familiar with the process and available legal tools, but will also generate results that society can endorse and accept.

170. Fukurai, *supra* note 34, at 829. This important check was evident in the recent trial of former Democratic Party of Japan President Ichiro Ozawa. After prosecutors refused to indict Ozawa on two occasions, the Tokyo No. 5 Inquest Committee comprised of eleven citizens decided to press charges. Setsuko Kamiya, *Jury Out On If Inquest System Lived Up to Role*, JAPAN TIMES (Apr. 27, 2012). During the course of trial, it was discovered that the prosecutors had forged interrogation records and submitted inaccurate reports. *Id.* It was only public scrutiny that revealed these flaws in governmental conduct. *Id.*

171. See Corey & Hans, *supra* note 46, at 86-87.

172. Gastil, Lingle & Deess, *supra* note 2, at 74; see also Corey & Hans, *supra* note 46, at 86-87; Ivkovic, *supra* note 4, at 432 (noting that lay judges have the chance to “correct” professional judges and vice versa as part of the deliberation process).

173. Gastil, Lingle & Deess, *supra* note 2, at 74.

174. See Wilson, *Japan’s New Criminal Jury*, *supra* note 33, at 520.

175. Gastil, Lingle & Deess, *supra* note 2, at 74.

III. RESEARCHING THE POSSIBILITIES AND ADDRESSING POTENTIAL CONCERNS

Over time, Japan has consistently adopted and adapted ideas and legal models transplanted from other countries for its own purposes. Even though the influence and use of civil jury trials have gradually decreased over time in other jurisdictions, Japan has recently taken a foreign concept in lay participation in the administration of justice and adapted it for its purposes and society. Because the objectives underlying Japan's legal reforms focus on systemic change and greater civic participation in the judiciary, lay participation in civil trials would suit Japan nicely. These objectives and the current environment also differ substantially from jurisdictions such as England and the United States where civil juries are in decline based on factors and influences not present in Japan or other Asian nations. As it has done in other cases, Japan can develop its own blend of ideas, principles, and rules suited for its own objectives.

Naturally, the expansion of lay participation into the civil realm would raise various logistical issues that require detailed research and assessment. To the extent that Japan adopts a mixed tribunal system for civil trials, the typical disadvantages of such a system and issues challenging Japan's current lay judge system will need to adequately be addressed.¹⁷⁶ One such issue and primary criticism of mixed tribunal systems in which lay judges jointly serve with professional judges is that citizens are merely puppets, ornaments, or placeholders.¹⁷⁷ If professional judges attempt to unduly influence or look to coerce lay judges into adopting their opinions, then the system will not be successful. Another related potential disadvantage is that citizen judges will defer to professional judges to review case files and fail to attentively listen to the evidence.¹⁷⁸ To date, Japan's experiment with lay participation in criminal trials has not revealed these problems, as lay judges appear to take their duty quite seriously.¹⁷⁹ Also, it appears that Japan's career judges have made a concerted effort to avoid such scenarios. One would expect this to continue, particularly if the professional judges embrace lay participation and manage the trial and deliberation process so as to encourage the lay judges. Notwithstanding,

176. See generally Wilson, *Japan's New Criminal Jury*, *supra* note 33.

177. See Ivkovic, *supra* note 4, at 430.

178. See Corey & Hans, *supra* note 46, at 88.

179. David T. Johnson, *Early Returns from Japan's New Criminal Trials*, THE ASIA PACIFIC J., Vol 36-3-09 (Sep. 7, 2009).

in a civil context, it will be just as important to take measures ensuring that lay judges can take an active role in the proceedings.

Another major challenge facing expansion would likely be the time and costs associated with implementation and administration of the system. Providing for lay judge trials in all civil lawsuits could be costly, time-consuming, and burden the justice system. Measures to mitigate these challenges would need to be fully explored. This might include limiting the scope of civil cases that qualify for lay adjudication. In looking to determine which civil cases would be suitable for lay participation, those cases that traditionally employ a three-judge panel might be most suitable. More specifically, cases having a significant effect on Japanese society such as environmental harms, toxic torts, cases against the government, administrative dispositions, and other similar lawsuits seem quite appropriate for adjudication by lay judge panels in light of the goals underlying Japan's adoption of lay participation. These cases might be worth the extra effort and expense.

Furthermore, Japan could find other ways to cover the costs. For example, it could require the party requesting a lay judge panel to cover the related administrative costs. Payment of these court costs could be guaranteed through a bond mechanism, and even shifted to the loser upon the completion of the litigation. In addition, one professional judge could combine with several lay judges to adjudicate civil matters, thereby freeing up the time and expense of two other professional judges to handle other matters. Along these lines, Japan would also need to determine the optimal tribunal size for civil trials.¹⁸⁰

Another important issue that Japan would need to determine is whether civil lay trials would be compulsory or optional. It would be necessary to decide whether a lay judge panel would automatically be empaneled for all qualifying cases, or whether a single party's request would trigger a lay judge trial, or whether an agreement by all litigants would be necessary. In any event, Japan would need to keep in mind the objectives and benefits underlying its ongoing legal reforms and mixed tribunals when addressing these and other related issues.

IV. CONCLUSION

Japan's experiment with lay participation over the past three years in serious and complex criminal trials has demonstrated that citizen

180. If Japan were to use the lay judge model for criminal trials, one professional judge could serve together with four lay judges, thereby conserving costs. Alternatively, a panel of three judges together with six lay judges could be used.

judges are capable of succeeding in the context of civil and administrative trials. Civic engagement, greater involvement in the judicial process, and self-governance are several of the key prongs in Japan's recent legal reforms. Extending the lay judge system to certain significant civil trials is consistent with these and the other reforms. It would also bring many other benefits to Japanese society and private litigants. Accordingly, Japan should take advantage of the current environment and seriously explore the possibility of integrating citizen participation into the civil justice system.