

**INTRODUCING CITIZEN PARTICIPATION
IN JAPANESE COURTS: INTERACTION WITH
SOCIETY AND DEMOCRACY FROM THE
PERSPECTIVE OF THE AMERICAN JURY SYSTEM**

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LIST OF ABBREVIATIONS

ABA	American Bar Association
JSRC	Justice System Reform Council
MD	Medical doctor
SBS	Shaken baby syndrome

INTRODUCTION

For a long time, the criminal court in Japan has been one of the most unusual places for the general public to get involved, unless they have been accused of or victimized by a crime. Only professional judges decide the question of guilt or innocence and impose sentencing. Many Japanese know the jury system through films such as “12 Angry Men” or the media coverage of high-profile cases in the United States. Most of them, however, have thought that this is from another world.

This situation will change drastically in 2009 when the Lay Assessor [*saiban-in*] Act, which calls for a new quasi-jury system in criminal trials, goes into force as one of the significant pillars of ongoing reform of the Japanese judicial structure. From 1928 to 1943, Japan actually had a jury system that called for 12 jurors. It did not become an integral part of Japanese society, however, and the Jury System Act, which authorized it, was eventually suspended.

The upcoming Japanese lay assessor setup has unique characteristics, influenced by both the Anglo-American jury and the continental mixed-court system.¹ Like American jurors, lay assessors will be chosen at random from the general public and serve for the duration of just one trial. But, as in the mixed-court system, they will collaborate with professional judges. In addition, they will be entitled to decide not only the question of guilt, but also matters related to sentencing, including capital punishment and indefinite imprisonment. With this change, Japanese citizens will be presented with a challenging duty that most of them have never imagined before.

¹Saiban-in no Sanka Suru Keiji Saiban ni Kansuru Horitsu, Law No. 63 of 2004. Kent Anderson and Emma Saint of Australian National University translated this law in their paper “Japan’s Quasi-Jury [*saiban-in*] Law: An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials,” *Asian-Pacific Law and Policy Journal*, Vol. 6 (Winter 2005).

My purpose in this paper is: 1) to clarify the characteristics of citizen participation in justice in Japan and its interaction with democracy and society from a comparative standpoint with the American jury system, and 2) to speculate about how the new arrangement will function in Japan in consideration of the way the American jury system works in the United States.

In Chapter 1, I will review why Japan decided to introduce citizen participation in the judicial system and how it will work. In Chapter 2, I will consider the interaction between democracy and the jury system in the United States and what kind of change is anticipated in democracy and society in Japan with the introduction of the lay assessor system. One of the greatest concerns with the new Japanese system is how the courts will get citizens to agree to be involved as lay assessors for lengthy trials. As part of the research for this paper, I observed jury trials in Massachusetts that took more than two weeks; I will use one of these trials as a case study in Chapter 3. In Chapter 4, I will focus on the commitment of citizens in judging capital crimes, which will be one of most difficult tasks of the lay assessors, as well as lay assessor selection and the obligation of confidentiality for lay assessors.

Whether or not the new system will become established will depend on how citizens will actually and genuinely participate in the judicial system, not as ornaments, but as real players. The goal is not just to implement civil participation in the judicial system, but by doing so, to improve the functioning of society and democracy in Japan. A lay assessor selection that allows for a diversity of citizens to take part as well as for thorough deliberations between judges and citizens will be needed.

CHAPTER 1
THE BACKGROUND AND UNIQUENESS
OF THE JAPANESE LAY PARTICIPATION SYSTEM
FROM A COMPARATIVE VIEWPOINT:
WHY CITIZEN PARTICIPATION IN CRIMINAL COURT NOW?

Despite the hopeful anticipation concerning the upcoming lay assessor system in Japan, I have been asked by many people in the United States why Japan is attempting to adopt this practice in criminal trials now. This question may have emerged because the American jury system has often been at the center of controversy. In this chapter, I will clarify the decision-making process involved in this development in Japan and the unique characteristics of the Japanese system compared to its counterparts in other countries. I will also introduce the now-suspended Jury System Act, which survived in Japan for just 15 years, up to the end of World War II.

The Lay Assessor Act and Its Background

In May 2004, the Japanese Diet passed the Act Concerning the Participation of Lay Assessors [*saiban-in*] in Criminal Trials (Lay Assessor Act). The act calls for a quasi-jury system for serious crimes, to be put into practice by 2009. This will be the first time since just after World War II for a jury to convene in Japan. Currently in Japan, unlike in most other developed countries, only professional judges make all the decisions in trials, and there is no citizen participation that has practical and effective power.

The original concept was proposed by the Justice System Reform Council (JSRC) report submitted to the Cabinet in June 2001.² The JSRC, an advisory body to Prime Minister Junichiro Koizumi, recommended that the government overhaul the entire legal setup. The lay assessor system, which is to be put into practice by the government, is the highlight of the recommendation.

The call for a jury system was not new. Some scholars and other concerned groups had already proposed such a measure, though it was not taken seriously by either the government or the general public. Compared to these initiatives, the entire JSRC report, which the Cabinet Secretariat backed, had considerably stronger significance, with the likelihood of being put into practice. Kent Anderson and Mark Nolan, who teach at the Australian National University College of Law, scrutinized the JSRC report from an international common-sense perspective, described the recommendation of the lay assessor system by the JSRC as a “serendipity of events,” and declared that it “suddenly appeared to be a foregone outcome of process.”³

In February 2002, eight months after the JSRC report was handed in, the Committee for Lay Assessor/Panel Matters, chaired by Masahito Inoue, professor of criminal procedure at the University of Tokyo, began discussions on the issue based on that report and proposed an outline that became the basic framework of the Lay Assessor Act.

Whether or not Japan should implement lay participation in criminal trials might be much more controversial if it had been discussed as a single issue. It creates a new national obligation to serve as a lay assessor and may affect a vast majority of the nation’s citizens – not only the lay

²The Justice System Reform Council, “Recommendations of the Justice System Reform Council For a Justice System to Support Japan in the 21st Century” (Tokyo: Government of Japan, 2001).
<http://www.kantei.go.jp/foreign/policy/sihou/singikai/index_e.html>.

³Kent Anderson and Mark Nolan, “Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System [*saiban-in seido*] from Domestic Historical and International Psychological Perspectives,” *Vanderbilt Journal of Transnational Law* October 2004.

assessors themselves, but also their families, employers, coworkers, and those who will be summoned, but will not become jurors in the end. It will also affect the basic criminal procedure and criminal defendants' rights. This time, however, the lay assessor system was just part of a recommendation to revise the entire legal system, including founding law schools as special institutions to train legal professionals, increasing the number of legal professionals, and implementing various procedural changes in court systems. Hence, the new citizen participation system was not singled out for particularly lively dispute.

Professor Richard O. Lempert of the University of Michigan School of Law points out the compromising situation in the Japanese legal community concerning civil participation, saying: “[t]he Japanese legal establishment has decided it will incorporate lay participation in trials by establishing mixed tribunals, rather than by allowing jury trials.”⁴ Before making this statement, he had anticipated that, if reintroducing juries to Japan was to be discussed seriously, “the most formidable opponents were the Japanese Supreme Court and other leaders of the Japanese Judicial Establishment.” The fact that the way for citizens to participate in trials is not as jurors, but as lay assessors, which will bring less severe change than the jury system, may have mitigated the strong opposition in the Japanese Supreme Court and Ministry of Justice.

Since the idea of citizen participation in the judicial field seemed to be in accordance with the recent trend to encourage citizen empowerment in Japanese politics, all the major political parties supported the Lay Assessor Act. The Diet passed the act, and enforcement was scheduled for within five years, that is, by April 2009. Throughout, the debates about the adoption of new civil participation have focused on “empowering the citizenry,” while the basic discussion of how the judicial powers, bureaucracy, and citizens should interact with one other,

⁴Richard O. Lempert, “Citizen Participation in Judicial-Decision Making: Juries, Lay Judges and Japan,” *Saint Louis-Warsaw Transatlantic Law Journal* (2001).

as well as the cost, efficiency, the burden on citizens, and defendants' rights have been somewhat shunted aside.⁵

Suspension of the Japanese Jury System in the Past

Before and during the early part of World War II, i.e., from 1928 to 1943, Japan had a jury system for criminal cases. During that period, juries decided only 484 cases. Even though it was called "the jury system," it was different from the American set-up in many respects. Takashi Maruta, a professor at Kwansai Gakuin Law School, has indicated that the Japanese jury before World War II lacked the basic and essential characteristics generally regarded as features of the jury system.⁶

The panel consisted of 12 male adults whose taxes were higher than a certain amount, and the decision rule was by simple majority. Crimes that could go before a jury were limited to a narrow range of serious infractions, and defendants could opt for a bench trial if they wanted one. The crucial issue concerning the effectiveness of this jury system was that the presiding judge could overrule the jury if he did not like the verdict; in other words, the verdict did not bind the court at all. Neither party could appeal to the higher court. Above all, this was the era under the Meiji Constitution that legitimated the sovereignty of the emperor. This means that there was no sovereignty stemming from people, and all authority, including judicial power, emanated from the emperor. Thus, the basic idea of this jury system was very different from the American jury.

⁵Kanako Ida, "Shimin Hanji e Nokoru Kadai (Issues Remain to Be Scrutinized: The Lay Assessor Act Enacted)." *The Asahi Shimbun* 21 May 2004: evening edition.

⁶Takashi Maruta, *Baishin Saiban o Kangaeru* (Tokyo: Chuokoron-shinsha, 1990).

The Jury System Act was passed in 1928, but it was not used very often; in fact, the number of cases judged by jury decreased from a peak of 143 in 1929 to two in 1942. Finally, in 1943, the act was formally suspended because of the stress of the war situation. It was to have been revived after World War II, but more than 60 years have passed since then, and this has not happened.

The reason the jury system did not become established in Japanese society was partly because there were few advantages for the defendants in a jury trial. They could not appeal if they were not satisfied with the guilty verdict. Thus, it was natural that the defense attorney did not want to take the risk of a jury trial and chose a bench trial instead.

In September 1946, in response to questions by a lawmaker in a discussion of amending the Meiji Constitution in the Imperial Diet, the Minister of Justice said:

The jury system is appropriate in order to manage trials in a democratic way. It is difficult, however, to manage this system practically. Since the Jury System Act went into effect, only a few cases have been decided by jury. We need to scrutinize whether this system matches the conditions of our country. If we revive the jury system again, we will have to have large courthouses. Given the present circumstances, this is just impossible. I do not intend to deny the jury system in the least and obviously it should be reintroduced at some point; however, we would like to research this issue fully for the future.⁷

He did not deny the effectiveness of the jury system, but just postponed the decision to revive it, expressing skepticism about whether or not it was suitable for Japanese society. The act still exists on the books as suspended, and, in this sense, the system is in limbo in Japan. But most ordinary Japanese do not even know that Japan once had a jury system.

⁷House of Representatives, Minutes.
<http://www.shugiin.go.jp/itdb_kenpou.nsf/html/kenpou/seikengikai/S210705-i06.htm>.

Characteristics of the Upcoming Lay Assessor System

In general, there are two forms of lay participation in criminal trials.⁸ One is the Anglo-American jury system, which United States, Canada, the United Kingdom, Ireland, Australia, and some other countries adopt. The other is the continental mixed court often seen in European countries, in which professional judges and citizens sit together on the same panel and decide the verdict and sentence. In Germany, laypersons are recommended by regional organizations and serve for the duration of several trials as intellectual and experienced individuals.

The lay assessor system in Japan is unique – a combination of the Anglo-American jury system and the mixed-court setup in European countries.⁹ Kent Anderson and Emma Saint, who translated the Lay Assessor Act from Japanese to English, assert that the lay assessor system, with its mixture of both professional judges and laypersons deciding matters together, is like the mixed courts of Europe, but its participants are selected at random and sit for only one case like Anglo-American jurors. “Thus, the experience that will develop under the system will provide another model from which other countries will be able to measure and compare both the macro-efficacy and the micro-efficiency of their own system.”¹⁰

A panel consists of three judges and six citizens. It is different from a jury in that lay assessors are always required to decide not only the question of guilt, but also the appropriate prison term or probation period. A panel makes its decision by a simple majority, but the consent of at least one judge and one lay assessor is required.

⁸John H. Langbein, “Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?” *American Bar Foundation Research Journal*, Vol. 6, No. 1 (Winter 1981).

⁹Robert M. Bloom, “Jury Trials in Japan.” *Boston College Law School Faculty Papers* 41 (2005).

¹⁰See footnote 1.

The lay assessor system is applicable only in trials for serious crimes such as homicide, robbery resulting in bodily injury or death, unsafe driving resulting in death, arson of an inhabited building, kidnapping for ransom, and abandonment by a person responsible for protection resulting in death. Some of these crimes are subject to capital punishment or indefinite imprisonment. Neither counsel can choose a bench trial to replace the panel of the lay assessor system, even if the defendant admits he/she is guilty or hopes to have a bench trial.

Lay assessors are to be selected at random from voter registration lists, then summoned to the court and picked out in a *voir dire* procedure, in which they are questioned about their interest in the case and opinions about the crime.¹¹ Based on the number of cases in 2004, the Supreme Court of Japan estimated that, for the foreseeable future, slightly more than 3,300 cases a year are likely to be eligible for the lay assessor system.¹²

Some potential lay assessors can be excluded because of their professions or connection to the case in question, and some are excused because they have difficulties in fulfilling their duties. Possible issues include injury or illness, childcare responsibilities, or the risk of endangering their livelihood. Both the defense and the prosecution are permitted to exclude four prospective lay assessors without explanation; this is called peremptory challenge. After the verdict, either party can appeal to the higher court.

One of the strongest features of the new system is that most Japanese people conceivably could become a lay assessor. Serving as a lay assessor will be regarded as a national duty, although there is no written statute in the constitution about it, and there will be sanctions for

¹¹*Voir dire* is an Anglo-French term that means “tell the truth.” It is used when attempting to choose jurors who can weigh evidence fairly and objectively.

¹²The Supreme Court of Japan, “*Saiban-in Seido* Booklet.” 2005.
<<http://www.saibanin.courts.go.jp/topics/booklet.html>>.

those who do not fulfill their obligation in this regard. The court and the government will have to attract citizens' interest because, starting in 2009, the criminal justice system will not work unless the participation and understanding of the public are assured.

In discussing the Lay Assessor Act at the Judicial Affairs Committee of the House of Representatives, Koji Sato of Kyoto University, the chairperson of the JSRC, made the following comment: "Whether it is the jury system based on common-law or the European mixed court, civil participation in the judicial system has formed the foundation of modern criminal procedure around the world. I think Japan has finally tried to work on this issue, improving the nation's criminal justice system to make it more credible to its people."¹³

¹³House of Representatives, Minutes.
<<http://kokkai.ndl.go.jp/SENTAKU/syugiin/159/0004/15904060004010c.html>>.

CHAPTER 2
INTERACTIONS AMONG DEMOCRACY, SOCIETY,
AND CITIZEN PARTICIPATION IN TRIALS

The lay assessor system appeared in Japan without strong backing from the general public or active nationwide debate. A public opinion survey conducted by the government in 2005 indicates hesitation and annoyance with the lay assessor system among the Japanese people. How will civil participation in the judicial system affect Japan? In this chapter, I will first speculate on how the jury system is understood as a democratic institution that interacts with society in the United States. Second, I will consider the interactions among the lay assessor system, democracy, and society in Japan.

The Evaluation and Meaning of the American Jury

Trust in the System and Confidence in One's Capability

At first glance, jury duty in the United States seems problematic and sometimes boring, particularly to those with very busy lives. When I attended court in Boston and Cambridge, MA, I often ran into people who had been summoned for jury duty at the security desk of the courthouse in the morning and heard them muttering about their “bad luck” to be called by the court.

Nonetheless, while Americans do not appear to be very enthusiastic about jury duty, it is statistically obvious that they still value the system highly. In 1998, for example, the American Bar Association (ABA) sponsored a comprehensive nationwide survey on the perception of the U.S. justice system. The results indicated that 78 percent of Americans think that “the jury

system is the fairest way to determine the guilt or innocence of a person accused of a crime.” In addition, 69 percent agreed that “juries are the most important part of the justice system in the United States.”¹⁴ As a source of information about the justice system, 57 percent mentioned “jury duty,” which was the third most important after “personal experience” (63 percent) and “school or college courses” (59 percent).

Another ABA survey conducted in 2004 shows that 75 percent of Americans would want a jury, rather than a judge, to decide their case if they were on trial.¹⁵ In the same survey, to the statement of “I don’t want to stand in judgment of others as a jury member,” 61 percent disagree. From these figures, the ABA concludes that American adults feel fairly comfortable with the fact that they might be in the position of judging others as a juror.

What is more, to the statement, “I don’t know enough about the law or the legal system to be a good juror,” 71 disagree. This implies that Americans feel confident in their abilities to serve as competent jurors.

These positive views indicate that U.S. citizens have a fair amount of confidence in the jury system. This is totally different from the attitude of the Japanese public towards the upcoming lay assessor system, which I will discuss later in this chapter.

The Jury as a Democratic Institution

The American jury system has a strong background as an institution of democracy. The 19th-century French political thinker and historian Alexis de Tocqueville mentions that the

¹⁴The American Bar Association, “Perception of the U.S. Justice System.” 1998. The survey was conducted by telephone interviews on August 6 - 31, 1998. The sample was 1,000 Americans. <<http://www.abanet.org/media/perception/perception.html>>.

¹⁵The American Bar Association, “Jury Service: Is Fulfilling Your Civic Duty a Trial?” 2004. The survey was conducted by telephone interviews on July 15 - 18, 2004. The sample was 1,029 Americans. <<http://www.abanews.org/releases/juryreport.pdf>>.

American jury is more a political institution than a judicial one. “Every American citizen is both an eligible and a legally qualified voter. The jury system as it is understood in America appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage. They are two instruments of equal power, which contribute to the supremacy of the majority.”¹⁶

This view seems to have lost none of its luster over the past 200 years or so. Professor Stephen C. Thaman of St. Louis University School of Law points out that, when Europe turned to the purely professional inquisitorial system, juries in England – where the American jury system originated – began to be seen as a vehicle for protecting the right of political and religious speech against attempts by the royal government to suppress it.¹⁷

Thaman mentions that a check of judicial power is the historic political reason for insisting on lay participation. He notes certain undesirable tendencies in a professional judiciary, such as: (1) possible dependence of the judiciary on organs of the executive branch or on political parties; (2) substantial dependence of the judiciary on public opinion; (3) in a society with serious class, ethnic, or social divisions, the judges may belong to the ruling class, the main ethnic group, or a particular social elite; (4) the routinization of judging or the case-hardening of judges after long years on the bench; (5) over-bureaucratization of the judiciary, reflected, for instance, in judicial decision-making influenced by a desire to rise in the judicial bureaucracy; and (6) an excessive judicial formalism in procedure, practice, and language. These are characteristics that a democratic nation tries to avoid and that, on the contrary, repressive dictatorships tend to hold in high esteem.

¹⁶Alexis De Tocqueville, *Democracy in America*, trans. Henry Reeve (London: Saunders and Otley, 1835).

¹⁷Stephen C. Thaman, Japan’s New System of Mixed Courts: Some Suggestions Regarding Their Future and Procedures” *Saint Louis-Warsaw Transatlantic Law Journal* 89 (2001).

Professor George L. Priest of Yale Law School supports the democratic nature of the jury system, saying: “Among the various mechanisms and institutions of American democracy, there are two it seems simply unthinkable to criticize: the right to vote and the system of trial by jury, both civil and criminal.”¹⁸ His point, however, is relatively critical when it comes to how the jury system functions in each case. He indicates that the verdict in the Rodney King case in 1992, perhaps for the first time in modern history, allowed the public to see much of the evidence against the defendant, to evaluate it, and to compare their evaluation with the jury’s. Even though there are many controversial jury decisions, “the public has never before been able to accurately evaluate the variety of intangible characteristics.” Thus, he suggests, ironically, that “the public has deferred to the jury.”

Realistic Perspectives on Juries

Inconvenient but trustworthy. Democratic but controversial. Whether it is supported positively or out of necessity, the jury system seems to be compatible with American society, but nonetheless in an ambiguous situation. Jeffrey Abramson, a professor of politics at Brandeis University near Boston, sums up the relation between democracy and the jury system by saying: “Today, the jury continues both to attract and to repel us precisely because it exposes the full range of democratic vices and virtues. No other institution of government rivals the jury in placing power so directly in the hands of citizens.”¹⁹

¹⁸George L. Priest, “Justifying the Civil Jury,” *Verdict*, ed. Robert E. Litan (Washington D.C.: Brooking Institution, 1993).

¹⁹Jeffrey Abramson, *We, the Jury*. First Harvard University Press paperback edition. (Cambridge, MA: Harvard University Press, 2001).

In his book, *We, the Jury*, Abramson characterizes skepticism about jury justice as follows:

1) Justice is not always popular, and the conscience of the community is not always pure. Today's juries, therefore, substitute the rule of people for the rule of law.

2) The average jury rarely understands complex cases. Trial by jurors has thus become trial by ignorance.

3) The search for representative juries sends a message that cases are won or lost not on the basis of evidence, but on the basis of who the jurors are.

4) Jury verdicts are unpredictable, ad hoc, arbitrary, idiosyncratic, and whimsical. One jury will sentence a defendant to die for a crime, while another will call for life imprisonment.

5) A jury decides cases according to emotion more than according to law and evidence, on the basis of the defendant's clothing, race, or ethnicity.

6) Jury democracy is really pseudo-democracy because it permits anonymous people to spurn laws passed by a democratically elected legislature.

Despite all this skepticism, he thinks highly of "the jury version of democracy," which offers people a much more direct and realistic opportunity to participate in governing themselves than voting and election. It is certain that, no matter how actively people participate in elections, they feel that their views are not adequately reflected in policies, and that their political power is extremely limited.

In order to consider the influence of the jury system in American society, the functions suggested by Professor Valerie P. Hans of the University of Delaware and Professor Neil Vidmar of Duke Law School, both of whom have an interdisciplinary background in criminal justice and psychology, are persuasive.

One is a legitimating function. In their view, in the United States, Canada, and the United Kingdom, the jury is an important symbol of conferring legitimacy to the law. To illustrate this, they give the example of cases without legitimacy, such as the one that resulted in the Miami riot that took place in 1980 after the acquittal by an all-white jury of the four policemen accused of killing an African-American salesman. Even if the verdict had been the same, the riot might not have occurred if African-Americans had been on the jury.

Another function is an educational, socializing function. They suggest that not only does the jury allow people to contribute to the legal system, but that the legal system, through the jury, contributes to the education of the people.²⁰

Worldwide Trend to Civil Participation

Although the jury system exists along with the constitutional right, there has been criticism that it is not used properly in the United States. The number of criminal jury trials is decreasing, and most cases are settled by plea-bargaining. Hence, just a small percentage of crimes today actually go before a jury.²¹ According to the Department of Justice, Bureau of Justice Statistics, in 2002, in the state courts, of a total of approximately 1,051,000 offenses, just 26,020 (2.5 percent) were decided by jury trials and 26,220 (2.5 percent) at bench trials while 998,750 cases (95 percent) were guilty with no trial. The respective percentages in 1992 were 4, 4, and 92.²²

²⁰Valerie P. Hans, and Neil Vidmar, *Judging the Jury* (Cambridge, MA: Perseus Publishing, 1986).

²¹John H. Langbein, "On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial," *Harvard Journal of Law & Public Policy*, Vol. 15, Issue 1 (Winter (1992)).

²²U.S. Department of Justice, Bureau of Justice Statistics, "State Court Sentencing of Convicted Felons." 2002 and 1992. <<http://www.ojp.usdoj.gov/bjs/abstract/scscfst.htm>>.

Recently, in fact, there has been a somewhat widespread shift away from lay participation. Thamen indicates in his thesis on the European jury that there has been a long-term trend toward the dismissal of the classic jury in favor either of courts composed exclusively of professional judges or of mixed courts in which judges and lay assessors decide collegially.²³

In England, where juries originally dealt with the full range of cases, it was slowly recognized that “in most civil cases, no overriding public interest was served by having juries, since these cases did not involve allegations of claim and a potential loss of liberty”; thus, judges were given the power to deal with civil cases with some exceptions such as libel and slander, malicious prosecution, and false imprisonment.²⁴

On the other hand, Russia and Spain reintroduced the jury system, in 1993 and 1995, respectively. This was regarded as a “surprising reversal” by comparative legal system scholars.²⁵ South Korea is also planning to implement lay participation in criminal cases in 2007.

Effects of the Lay Assessor System on Democracy and Society in Japan

In the United States, it has been generally accepted that the jury system and voting are the representative institutions of democracy. In comparison, Japanese democracy has developed in its own way without any kind of practical citizen participation in the judicial system. Will the upcoming lay assessor system have an influence on democracy and society in Japan?

As an Educational Institution Rather Than a Democratic One

²³Stephen C. Thaman, “Europe’s New Jury Systems: The Cases of Spain and Russia.” *World Jury System*, ed. Neil Vidmer (New York: Oxford University Press, 2000).

²⁴Helena Kennedy, *Just Law* (London: Random House, 2004).

²⁵See footnote 23.

In *Duncan v. Louisiana* in 1968, the Supreme Court Justice Byron White described the meaning of the jury system as follows:

A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary, but insisted upon further protection against arbitrary action.

In this interpretation, the jury trial is “an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.”²⁶

Just civil participation functions as “a safeguard.” John H. Langbein of Yale Law School suggests that this essence of “safeguard” works not only in the jury, but also in the mixed court system, which has both judges and laypersons as decision-makers.²⁷ Whether it is the jury or the mixed court system, having individuals who are not dependent on the opinions of the authorities and do not have an interest in professional advancement in the criminal court system can deter the judiciary from deferring to authority in criminal justice.

Speculating on the upcoming lay assessor system in Japan, we cannot find this kind of tension between powers. That is, interestingly enough, this “safeguard” concept has not been stressed by the Japanese government, in spite of the fact that it is strongly supported globally.

It is little wonder. The Japanese government’s official opinion is that “we recognize that basically our current judicial system has gained the strong trust of Japanese citizens.”²⁸ In the JSRC report, which triggered the citizen participation system, there is no rigid perception of the

²⁶*Duncan v. Louisiana* 391 U.S. 145 (1968).

²⁷See footnote 8.

²⁸In the debate on the Lay Assessor Act in the House of Representatives, this was a response by the Vice Minister of Justice to a question by a lawmaker. House of Representatives. Minutes. <<http://kokkai.ndl.go.jp/>>.

necessity to stop or check the abuse of judicial or bureaucratic power. Rather, there is the strong desire to transform the Japanese people's thinking from the concept of "being governed" to "governing" with autonomy and social responsibility. This concept is what other pending reforms in Japan, such as political reform, administrative reform, promotion of decentralization, and reforms of the economic structure, have in common.²⁹

In contrast with the American jury, the fundamental right of which is assured by the constitution, it is obvious that the lay assessor system characteristically stresses the educational and socializing function, as described above.

The JSRC's Sato has a more critical and frank view of the relation between the current judicial system and the people. "Although the institutional framework seems to have drastically changed since World War II, the administration has basically remained a major player in Japan. The judicial branch has tended to fade away with the outstanding power of administration and, for that reason, it may have looked like 'the ultimate bureaucracy' to the people.... So far, Japan has 'run with just a single lung.'"³⁰

It is unbecoming for the Lay Assessors Act to declare its purpose in the first article: "This legislation seeks to contribute to the promotion of the public's understanding of the judicial system and thereby raise their confidence in it." Professor Yukio Hasebe, a constitutional scholar at the University of Tokyo, raised objections to this, saying: "If the lay assessor system is to be introduced, the purpose should be to contribute to fair and proper trials, and then the citizen participation in the trial in pursuit of this purpose will improve the understanding about the

²⁹In Chapter 1, the JSRC report emphasizes: "a transformation in which people will break out of viewing the government as the ruler (the authority) and instead will take heavy responsibility for governance themselves, and in which the government will convert itself into one that responds to such people."

³⁰See footnote 13.

judicial system among people.”³¹ It certainly sounds as if the purpose of the act is not to make the judicial system better for people, but to stabilize the authority of the judicial branch.

Thus, from the citizen’s standpoint, the reason why Japan needs to introduce the lay assessor system seems weak and ambiguous. Is it like a kind of the study tour to learn about the judicial system? If so, is it worth the cost and burden to the public? Are there any risks to the defendants’ rights? It is natural for most Japanese not to feel very much confidence in the lay assessor system, at least in the beginning.

The Necessity of Ordinary People in the Criminal Justice Community

This does not mean that there is no tension or conflict between judicial power and the citizens.

One shocking event, which raised questions about criminal justice in Japan, was the series of releases of inmates on death row after they were found not guilty by retrials in the 1980’s. In 1983, Sakae Menda, an inmate who had been sentenced to death, was acquitted in a retrial. This was the first such case in Japanese judicial history, and he was released after more than 34 years of incarceration. Following this, between 1984 and 1989, three additional death row inmates were acquitted after serving sentences of 28 to 34 years. These four cases resulted from the revision of the retrial system, i.e., the Supreme Court of Japan relaxed the standards for granting retrials in 1975.

Professor Daniel H. Foote of the University of Tokyo asserts that:

by providing a graphic reminder that – even in a system, such as Japan’s, that prides itself on accuracy in fact-finding and provides investigators with a wise

³¹Hasebe was called to the House of Councilors of Japan to give his opinion on the Lay Assessor Act. House of Councilors, Minutes <<http://kokkai.ndl.go.jp/>>.

array of tools to ferret out the truth – individuals may be mistakenly convicted and executed for a crime they never committed, these cases have engendered much soul-searching by Japanese criminal justice officials, judges, attorneys, and scholars and have led to numerous proposals for reform.³²

These proposals have covered a wide range, from methods of investigation to detention facilities. Reintroducing the jury system was also discussed, and this led to serious research on the jury system by the Supreme Court of Japan.

In February 2006, the Yokohama District Court terminated a retrial for five now-deceased people who were arrested, tortured, and convicted in the wartime “Yokohama Incident,” which suppressed free speech in the media. The incident took place between 1942 and 1945 under the strong control of the government. Based on postwar reviews of this case by researchers, the individuals who were convicted were innocent victims of a frame-up by the Special Police. The Yokohama District Court decided not to determine the question of guilt because of technical legal reasons, and this disappointed the public. It was one of the worst cases in which justice failed to restrain the police bureaucracy. In this sense, judicial responsibility in wartime still needs to be investigated and clarified.

As for the prosecution, David T. Johnson of the University of Hawaii, who did field research in the District Public Prosecutors Office in Japan in the 1990’s, suggests that the absence of a jury has a significant effect on the prosecution.³³ He raises two points as effects on the prosecution without juries and with the “certainty and predictability of bench trial.” One is the high conviction rate – exceeding 99 percent. “Simply put, no jury means more certainty, and more certainty means fewer ‘mistaken’ prosecutions. This predictability is one of the main

³²Daniel H. Foote, “From Japan’s Death Row to Freedom,” *Pacific Rim Law & Policy Journal* (Winter 1992).

³³Johnson, David T. *The Japanese Way of Justice* (New York: Oxford University Press, 2002).

reasons for Japan's high conviction rate." Another point is incentives for prosecutors and suspects to settle cases before the trial.³⁴

There are several systems in Japan that work to avoid the abuse of judicial power. Among them, only the Prosecution Review Commissions are composed of laypersons. Their task is to check prosecutorial discretion based on a claim by a victim or an authorized proxy. Victims do not make such claims very often, however, and the effects of these commissions' decisions are extremely limited.³⁵

Hesitation by the General Public

How does the general public in Japan respond to the lay assessor system? In general, the system was not welcomed with much enthusiasm. A public opinion survey conducted by the Cabinet Office in 2005, nine months after the Diet passed the Lay Assessor Act, shows that 70 percent of the Japanese did not want to serve as a lay assessor.³⁶ This figure was shocking to those who were committed to the Lay Assessor Act in the government and the administrative office of Supreme Court, even though they had not expected a particularly positive response.

The 70 percent (negative group) consisted of *don't want to be a lay assessor* (35.1 percent) and *don't feel like being a lay assessor* (34.9 percent). Another 25.6 percent thought they

³⁴As to the high conviction rate, J. Mark Ramseyer of Harvard Law School says that it should not be criticized just because it is high (personal communication, November 2005). The number is the outcome of the selection of cases that the prosecutors believe have sound and strong evidence. He analyzes this phenomenon in "Why Is the Japanese Conviction Rate So High?" *The Journal of Legal Studies* (January 2001).

³⁵Mark D. West, "Prosecution Review Commissions: Japan's Answer to the Problem of Prosecutorial Discretion," *Columbia Law Review* (April 1992).

³⁶This was a poll of 2,077 adults taken by individual interviews between February 10 - 20, 2005. Cabinet Office, "The Public Opinion Survey on *Saiban-in Seido*," 2005. <<http://www8.cao.go.jp/survey/h16/h16-saiban/index.htm>>.

would like to participate (positive group); these included *want to be a lay assessor* (4.4 percent), *may be able to be a lay assessor* (21.2 percent). Another 4.4 percent answered *I don't know*.

The proportion of women in the negative group, at 75.4 percent, was higher than among the men (64.2 percent). When age is taken into consideration, the percentage in the negative group increased with the respondent's age. Among the respondents in their 20's, the negative group was 61.2 percent, while 33.0 percent were positive. On the other hand, among respondents in their 60's, 77.1 percent were in the negative group.

The main reasons people gave for not wanting to be a lay assessor were: 1) It seems difficult to decide the question of guilt (46.5 percent); 2) I do not want to judge another person (46.4 percent); 3) I do not know very much about the lay assessor system (23.9 percent); 4) I do not want to be involved in trials and criminal cases (23.7 percent); 5) I am worried about retaliation (23.6 percent); 6) I do not know the significance of the lay assessor system (22.8 percent); and 7) I think being a lay assessor will disrupt my work (19.9 percent). The reason that caused the most worry when the Lay Assessor Law was discussed was how busy people could serve. As seen in the above, however, this reason came at the bottom of the list of objections to serving.³⁷

The answer to another question reflects the attitude toward the relation between the upcoming system and Japanese society. To the question of "How will both trials and citizen's perceptions change with the implementation of the lay assessor system?" 39.3 percent, the largest group, chose the response: "Inappropriate decisions could be made on questions of guilt and

³⁷Participants were required to choose among 10 responses, including those above, to the question. The other three responses were: "sounds troublesome" (17.4 percent); "I think being a lay assessor will interfere with housework" (10 percent), and "other reasons" (2.9 percent).

sentencing, because lay assessors are not legal specialists.”³⁸ Thus, nearly four in 10 questioned their competency to decide a verdict. A consistency can be seen between this point and the reasons why Japanese people do not want to serve as lay assessors shown in previous question – uncertainty and insecurity about getting involved in trials and judging others.

As I reflect on the ABA survey, which shows that the majority of American have confidence in their ability as jurors and trust or preference in being judged by a jury, rather than a professional judge, the gap between Americans and Japanese is significant.

When the consumption tax and the single-seat constituency were at issue, there was huge debate in Japan. The fact that the controversy over the lay assessor system was not so spirited may be unfortunate for the system itself in that the general public did not have an opportunity to think about it seriously.

Interactions

Anderson and Nolan introduced the supposed rationales for civil participation in criminal trials in Japan, including: 1) delivering better justice, and 2) promoting a more democratic society.³⁹ There will be more practical changes. The Japanese government also insists that, with the implementation of the lay assessor system, trials will become shorter and the trial procedure will be more efficient and understandable; courts will have to speed up trials in order not to disrupt the daily lives of the lay assessors. In addition, evidence will be shown directly and visually to lay assessors, though to date, most evidence has been shown in documents. By their

³⁸Several responses to the question were shown and participants could choose more than one of them. The possible answers included those above and “the perception to think and solve problems related to the crime, law, and order will be strengthened among Japanese citizens” (31.2 percent), and “trials will reflect the opinions of the general public, and trust and understanding in the justice system will be deepened” (27.6 percent).

³⁹See footnote 3.

nature, these changes could be put into practice without the introduction of laypersons. In this sense, the system is regarded as a quick-acting medicine for chronic disease, that is, the problems that the criminal justice community of Japan has not solved by itself.

Lester W. Kiss, an American attorney and scholar who did research in Japan from 1995 to 1996, when the introduction of citizen participation was under considerable discussion, analyzed general Japanese behavior patterns in predicting the probable success of the civil participation system and noted the following characteristics: 1) the importance of hierarchy in human relations; 2) a higher level of trust in authority figures than in other societies; 3) group consciousness; and 4) the emphasis on maintaining harmony in the group. Given these predispositions, he thinks that Japan should adopt the Anglo-American jury system, not the mixed-court system like European countries. According to him, the mixed-court arrangement is undesirable in that it will be difficult for a Japanese layperson to “go in voicing disagreement with a professional judge’s opinion even after being told he must do so.”⁴⁰ This view seems to be in accordance with the above-mentioned public opinion survey that shows persistent hesitation to play a subjective role in deciding cases.

On the contrary, Anderson and Nolan protest against what they call “cultural criticism,” such as the notion that “most Japanese citizens will simply and routinely defer to the views of their high-status superiors (the judges) on a mixed court.”⁴¹ They argue that this approach came from a simplistic cross-cultural view, such as “all Westerners are individualistic in social-value orientation and are robustly critical of authority” and, in contrast, “the Japanese are

⁴⁰Lester W. Kiss, “Reviewing the Criminal Jury in Japan,” *Law and Contemporary Problems* 261 (Spring 1999).

⁴¹See footnote 3.

group-oriented and psychologically dependent on authority.” And they think this view deserves revision, based on recent research findings.

Professor Lawrence Repeta of Omiya Law School believes that the upcoming lay assessor system will be extremely important for Japanese society, because it will bring the judicial system much closer to the public. To date, he says, the judicial system has been out of reach. In the 1980’s, he brought a lawsuit arguing that the courts had acted illegally in not permitting court spectators to take notes. He won the case in the Supreme Court and it became the breakthrough for each court to allow note-taking. After that, drawings of the inside of the courtroom were permitted, though taking photos during trials is still prohibited. Each change was revolutionary in the traditional court culture of the time. He said the new citizen participation would bring innumerable democratic changes as compared to what had gone before.⁴²

I think the new system will have a strong impact and can potentially change the mindset of the Japanese people. For years, Japanese have thought that justice is to be achieved by someone else, i.e., someone else who is professional and intelligent. The lay assessor system can fundamentally alter this view. Once the system goes into effect, most citizens will become prospective lay assessors. Extrapolating from the 2004 figures, about 3,000 cases annually will be tried by the lay assessor system, and about 18,000 people will participate in panels. In addition, many more people will be summoned to be interviewed by the judges. Even if they are not summoned by the court, just to know that a case is being decided by ordinary people like themselves will encourage citizens to think about criminal justice – more specifically, crime, punishment, ethics, correction, and victims. Things that seemed irrelevant to them in the past may emerge as major interests to them.

⁴²Personal communication, March 2006.

There is plenty of empirical socio-psychological research on the jury system in the United States; by comparison, little has been done in Japan. Professor Hiroshi Fukurai of the University of California, Santa Cruz, points out that: “[i]n order for the institution to succeed, it still must go through a series of critical analyses and examinations to make the necessary adjustments and revisions.”⁴³

If the government and courts really hope to obtain public confidence in the judicial system, the solution is not simply to call laypersons as members of the panels. They have to consider how to make the most of ordinary people’s opinions and thoughts in the decisions.

⁴³Hiroshi Fukurai, “Reviews of Socio-psychological Research on American Juries and Their Applications to Japan’s New Quasi-jury System.” *Japanese Psychological Review* 48, No. 3 (2005).

CHAPTER 3

TRIAL BY JURY: A CASE STUDY

How do American jurors manage to participate in relatively long trials that require them to absent themselves from work and daily life? How is one potential juror excused and another chosen as a juror in jury selection? In order to answer these questions, I observed three jury trials of criminal cases in the court of Judge Peter Lauriat, Middlesex Superior Court, and of Judge Raymond Brassard, Suffolk Superior Court, both in Massachusetts. All three took more than two weeks from the jury selection to the verdict.

I would like to present one of them, a Middlesex case in which the defendant was prosecuted for shaking a baby to death. In this trial, the jury selection alone took four days.

Outline of the Case

The defendant, a 57-year-old day-care provider in Reading, MA, was accused of killing a three-month-old girl in her care. According to the Middlesex District Attorney's office, on June 4, 2003, the defendant found the baby unconscious and unresponsive. The baby was taken to the hospital and pronounced dead on the following day. The prosecutor said shaken baby syndrome (SBS) was the only explanation for the child's death. The defense attorney argued that there was no evidence to prove that the defendant had shaken the baby and raised the possibility that one of other children in her care might have done it. On the day the baby was injured, the defendant had 14 children ranging in age from one month to six years old, with seven of them in diapers, in violation of state law. The defendant had previously been cited by the state government for taking too many children and her license had been suspended in 1994. Along with the murder of

the baby, she was also charged with operating an unlicensed day care center and pled guilty just to the illegal operation in 2003.

The trial started on January 17, 2006, and the jury selection continued for four days, from the 18th to the 23rd, excluding Saturday and Sunday, the 21st and 22nd, respectively. Opening statements from both counsels were on the 23rd, the evidence was shown starting January 24th, and the closing argument was on February 3rd. Jury deliberation started on that day. Following three days of deliberation, on February 6th, the jury returned the verdict of guilty of involuntary manslaughter by wanton or reckless conduct, which meant the jury did not think she had shaken the baby to death herself, but that she was criminally responsible for the baby's death.

Jury Selection

From the pretrial procedure, Lauriat anticipated that the trial would take about three weeks. In the jury selection, the judge, prosecutors, and defense attorneys interviewed 164 prospective jurors. In the end, 16 people, including four alternates, were chosen.

General Questions by the Judge and Questionnaire

At first, the prospective jurors listened to the judge's brief explanation about the case and then filled in a questionnaire that had been prepared by both counsels and agreed to by the judge. While questionnaires are not often used, they are effective in jury selection for complicated cases.

The questionnaire consisted of 17 questions on seven pages. Questions were related to the case, asking about the prospective juror's work experience as au pairs or medical doctors (MD), as well as their knowledge of SBS and whether it might affect their ability to be a fair and

impartial juror. Prosecutors asked whether they could find someone guilty beyond reasonable doubt based solely on circumstantial evidence, because, in this case, all the evidence was circumstantial. Defense attorneys added the question of whether the potential jurors tended to give greater credibility to MDs simply due to their credentials; this was because they wanted to call in a biomechanical engineer to rebut the MD who would testify for the prosecution.

Then, the judge asked whether they knew the defendant, victim, or their families; whether they knew about the case and had specific opinions about it; whether they had any prejudice or bias about the police or the prosecution; and so on. A court officer kept a record of those who raised their hands.

The question that concerned the largest number of prospective jurors was the possible length of the trial. Before questioning them, the judge let them know that the trial would probably take three weeks and that no one could tell how long the jury deliberation might be. More than two thirds of the prospective jurors were worried about this.

Individual Examination

Following this, individual examinations started. The judge called each potential juror to a lobby next to the courtroom. Both counsels, the defendant, court reporters, and a court officer also participated. The questions asked in this session were based on the interviewee's answers to the general questions in the courtroom and to the questionnaire.

The length of the trial was always the first question if the interviewee had raised his or her hand on that issue. The judge was generous enough to excuse those who were concerned about their work, studies, or taking care of their children. To those who mentioned financial issues, the judge explained that the jurors would be paid \$50 per day after the third day and that

some companies would pay the balance of their salaries. There were not any interviewees who withdrew their concern about the length of the trial after being told of the payment policy.

The next biggest issue was the perception of circumstantial evidence. The prosecutor asked the judge to explain its validity to prospective jurors, then asked whether they thought they could understand and adopt it in the trial. The judge said that there was direct evidence and circumstantial evidence and that, in Massachusetts, a person can be found guilty based solely on the latter. After the judge's explanation, a man in his 30's commented, "circumstantial evidence can be interpreted in any way." Another man in his 20's said, "I believe evidence is stronger than circumstances." These discussions between legal professionals and laypersons indicated that circumstantial evidence was somehow confusing to ordinary people.

Several potential jurors confessed that they felt they were biased saying, for example, "I have two children, so I am sympathetic to the baby's mother" (a woman in her 20's), and "I think anything can happen if we leave our children with others" (a man in his 30's). They were excused after the individual examination. Both this man and the woman returned to the jury pool that day and waited for other interviews by other presiding judges, for both civil and criminal cases. Another woman mentioned that she had been convicted of cocaine possession three times. A man said he was once accused by his wife of battery. Two people said they had a mental disorder. Not many people want to disclose such matters in public.

On the first day, the judge and both counsels met with 55 people and asked 21 of them to stay; in other words, the judge excused 34 people. On the second day, the judge asked 27 people from among 66 to stay and, on the third day, six out of 43. Thus, in total, 54 people were called to the court on fourth day of jury selection.

Individual examination in a judge's lobby is relatively rare, since most judges tend to do this in front of the other potential jurors in the courtroom or, if they hope to do it more quietly, at the side bar, which means both counsels come together next to the judge's seat in the courtroom and ask questions of individual potential jurors.

Lauriat adopted the lobby practice in 1992. According to him, its advantages are that: 1) potential jurors tend to be more candid; 2) it puts less pressure on them than if they were in the court room; and 3) it is much easier to hear people's voices as compared to the side bar. Lauriat allows reporters from the media to cover the individual examinations; in this case, however, no such reporter was present.⁴⁴

Peremptory Challenge

Each counsel was allowed to exclude 16 potential jurors without explanation. In the beginning, 16 potential jurors had their seats in the jury box. The prosecutors challenged two men. The judge excused them, and another two people were called. Then it was the defense attorneys' turn. They named seven people in a peremptory challenge. After these seven people were replaced, the defense attorneys challenged five more people. Then the prosecutor named one person. In the end, the prosecutors challenged 10 people and the defense side, 14. In this way, peremptory challenges were conducted by turns, and finally 16 jurors were decided on.

Before the peremptory challenge, Lauriat asked all potential jurors not to be offended if they were excused without explanation and told them that, even if they were dismissed, they were entitled to serve as jurors in other cases.

⁴⁴Personal communication, January 2006.

Evidence

The trial continued for nine days, which was shorter than the judge had expected. Following the opening statements by the prosecution and the defense, 32 witnesses for the prosecution and three for the defense, including the defendant herself, testified. They included MDs, paramedics, police officers, the state government officer responsible for the day care center, and parents who had used the defendant's facility. An MD testified that the injury to the baby could not have been caused a child less than six years old. A biomechanical engineer suggested that even a six-year-old girl could cause serious damage to a baby in a car seat by shaking the seat, even though she would not be strong enough to do so directly.

Deliberation and Verdict

The verdict was returned right after lunch on the third day of deliberations following 12 hours of discussion. After the verdict, the judge paid a visit to the jury room and expressed his appreciation to the 16 jurors. He told them when sentencing would be scheduled and that 20 years would be the maximum. Several jurors asked him if it would be possible for the defendant to own a day care center again in the future, what the minimum sentence would be, and why it had taken two and half years before the trial started.

Selecting Is Excluding

It was good that 16 jurors were able to stay until the end of the trial. Sometimes in lengthy trials, jurors want to be excused while the trial is pending. For this reason, courts have to prepare alternates. The length of the trial is really a major issue in choosing jurors.

The Japanese government has explained that most trials in the lay assessor system will take no more than several days. Experts, however, anticipate that, when the sentence may be harsh, the trial will take several weeks or more, since it is a matter of the defendant's life or a long prison term, and both counsels want to be cautious and prudent.

Given this situation, it may be difficult to form a panel that is representative of society at large. For instance, self-employed workers or specialists such as teachers or MDs will not be able to serve as lay assessors because of the demands of their jobs. Even office workers who can anticipate that their companies will pay them minimum wage while they are serving on a jury may still hesitate to be away from work for weeks. In fact, in the jury selection of the above-described case, there were many employees who said they were reluctant to serve for such a long period.

Another issue is the manner of excusing prospective jurors. In the case I observed, the jury selection was conducted very carefully. In view of the importance of SBS in this case, questions as to what kind of expert is most trustworthy as a witness, confidence in circumstantial evidence, feelings about the defendant's having run her facility without a license, and opinions on day care givers and users, were crucial, and finding "impartial jurors" in such a case might be quite complicated. In addition, both prosecutors and defense attorneys sought jurors who might be favorably inclined to their arguments.

Before the trial, defense attorney J.W. Carney conducted a mock jury to ascertain what kind of people would be less conviction-prone specifically in this case. He made a presentation of arguments by both the defense and prosecution to the mock jurors and then asked them to decide which one was more plausible and persuasive. Factors such as age, marital status, being a parent or not, and employed or not were some of the issues. The results indicated that older men

were the most sympathetic to the defendant and that working mothers were better than housewives. Based on these findings, they challenged prospective jurors.⁴⁵

Prosecutor Nathaniel Yeager discussed his general thoughts on jury selection, not specific to this case, as it would be pending in appeal court. For cases in which medical terminology will be used frequently, he prefers to have educated jurors, i.e., at least a college degree. He carefully watches how potential jurors follow the instructions of the judge in the individual interviews. Another factor is their respect for the court. In this regard, clothing is often a clue. As for the day care issue, a juror's age is also important, as opinions regarding day care for children have changed drastically over the past 30 years. More generally, from the prosecutor's viewpoint, diversity, which is a strong tool against an overzealous defense attorney, is needed.⁴⁶

Both counsels did their best to select "favorable jurors." I wonder if this will be the case in the future in Japan. When I consider the unique characteristics of Japan's citizen participation in criminal trials, however, I believe that it should focus more on how to achieve thorough deliberations than on how each side can obtain "favorable" lay assessors.

Three judges and six citizens: people from various walks of life can get to know each other, exchange their opinions, discuss evidence, and sway one another in pursuit of a decision that will – hopefully – satisfy all of them. This is the true value of the lay assessor system, which is quite original and unique to Japan.

⁴⁵Personal communication, February 2006.

⁴⁶Personal communication, February 2006.

CHAPTER 4

WHAT IS NEEDED TO MAKE CITIZEN PARTICIPATION FUNCTION IN JAPAN

Even if the lay assessor system is legitimated as a national obligation, to ask a person to serve for several days may be difficult, particularly when the arrangement is unfamiliar to most citizens.⁴⁷ A key issue may be how Japanese citizens really participate in the system. In this chapter, I will speculate on more practical issues aimed at making the lay assessor system function in a democratic way – such as how to choose lay assessors, capital punishment sentencing, and the obligation of lay assessors to maintain confidentiality – and compare the United States and Japan.

How to Have the “Ideal Jury”

The selection of lay assessors is crucial, not only to achieve a fair trial with those who can evaluate the evidence fairly and objectively. It is also crucial to achieve public understanding of and trust in the judicial system. This is because trials are the most accessible element of the entire system. The number of people who experience the lay assessor selection will be much greater than the actual number of lay assessors, and, therefore, will have a sizeable influence on society.

⁴⁷Kanako Ida, “Shimin Hanji e Nokoru Kadai [Issues to Be Scrutinized]: The Lay Assessor Act Enacted.” *The Asahi Shimbun* 30 December 2004. Three judges from Yokohama District Court and members of the general public joined the mock lay assessor trial held at Toin University of Yokohama Law School in November 2004. After the deliberation, several participants who took the role of lay assessors said it would be difficult to be absent from their work even for several days. Other participants commented that they were not sure whether lay assessors’ opinions would be useful in determining the verdict and sentencing. Judge Manabu Yamazaki, having presided at the trial, told me that he realized how important it was to make the trial procedure easier for laypersons to fully understand.

It Has Been Changing in the United States

Even in the United States, which adopted the jury system early in its history, the arrangement has gradually been changing and becoming democratized. What is more, crucial changes have been achieved in the relatively recent past. It was not until 1860, for example, that African-Americans could serve on juries.⁴⁸ Nor were women allowed to serve as jurors until 1898, starting with Utah. Before the 1960's, there was what was called an "elite jury" policy, i.e., juries should be above average in intelligence and morality. In 1968, Congress changed the policy in federal court with the new Jury Selection and Service Act, which requires that jurors be selected at random from a fair cross section of the community. The Supreme Court mentioned this cross-sectional requirement for state juries only in 1975.⁴⁹ "Cross-sectional" became the operative word in the jury selection.

Diversity is still an issue in many places in the United States. In Massachusetts, for example, in August 2005, U.S. District Court Judge Nancy Gartner devised a strategy whereby a certain percentage of minorities had to be impaneled in capital cases. According to her plan, when a summons for jury duty is returned as undeliverable, the court should send a new summons to another person in the same ZIP code. This is based on the perspective that flawed residency lists made by cities and towns can cause under-representation of African-Americans in the jury pool. In October 2005, the First Circuit Court of Appeals overturned her decision, ruling that the plan destroys the randomness of jury selection.

In general, courts seem to be very careful about selecting jurors. This is because, if the panel is not satisfactory to counsel on both sides, the selection itself could be cause for an appeal.

⁴⁸See footnote 19.

⁴⁹Taylor v. Louisiana 419 U.S. 522 (1975). The Supreme Court held that the Sixth Amendment Guarantee of trial by an impartial jury required that the jury be drawn from a representative cross section of the population.

There are many precedents in higher courts concerning the impartiality of jury selection, over and above the original question of guilt.

There are several phases in the jury selection process in the United States. First, citizens are summoned to the court for jury pool by mail. In this phase, they are chosen at random based on official state documents, such as voting lists or driver's license records. Second, the individuals who are summoned are divided into groups and sent to various courtrooms for *voir dire*. Prospective jurors have to answer questions from the presiding judge and sometimes both the prosecuting and defense attorneys.

The Summoning Phase – Administrative Initiatives

G. Thomas Munsterman, Director of the Center for Jury Studies of the National Center for State Courts, said, “everybody loves jury duty, but not this week.” This reflects the difficulty for courts in finding prospective jurors who are willing and able to serve.

How can each court achieve a jury that is representative in its jurisdiction? First, it has to make sure that all the people who are summoned indeed come to the court. Some people, however, may not want to comply, and, in some states, high no-show rates are problematic.

In 1996, the Office of Jury Commissioner in Boston, which handles administrative work related to the jury system in Massachusetts, launched a tough approach, named the “Delinquent Juror Prosecution Program,” to track people who fail to respond to a summons for jury duty. It issued a series of warnings. If those who receive such warnings ignore them several times, they can be charged with a criminal offense. The effect was obvious. The delinquency rate dropped from 13.3 percent in 1996 to 6.3 percent in 2003.⁵⁰

⁵⁰Office of Jury Commissioner in Boston, *Annual Report* (Boston: 2003).

Originally, the purpose of this program was to achieve racial diversity on juries. Pamela J. Wood, the jury commissioner of Massachusetts, however, said that bringing criminal charges against prospective jurors cannot be the final solution. Instead, it is indispensable to educate the general public about the importance of jury duty. In practice, the office makes use of meetings in the community to promote jury duty, though they know these efforts may be never-ending. However successfully the participants in such programs grasp the importance of jury duty, they are not necessarily summoned as potential jurors.

The Voir Dire Phase

In this phase, people from the jury pool are questioned by judges and attorneys for each side about their background, experiences, and opinions to determine whether they can treat the evidence fairly and objectively. It is at this stage that prospective jurors can explain their circumstances. Simple reluctance to become a juror is not an acceptable excuse, but prospective jurors have little difficulty in finding reasons to be dismissed.⁵¹

How willingly a judge accepts each excuse is one issue. If a judge excuses many prospective jurors for minor reasons, the citizen participation system will become less burdensome and more convenient. The disadvantage of this is that the system becomes one only for people who have plenty of free time. This is against the concept of the cross-sectional jury.

From the position of prospective jurors, the *voir dire* phase may present a problem with privacy. They are often asked their views on crime in general, their opinions on the case, and their experiences as victims of crime, and this is frequently done in front of other people.

⁵¹Robert W. Balch, Taylor Griffith, Edwin L. Hall, and L. Thomas Winfree, "The Socialization of Jurors: The *Voir Dire* As a Rite of Passage," *The Jury Trial in Criminal Justice*, ed. Douglas D. Koski (Durham, NC: Carolina Press, 2003).

Sometimes, attorneys persist in asking questions that make prospective jurors feel uncomfortable. This conflict is one of the most serious problems that court officers have in common.⁵²

Judge Raymond Brassard of the Suffolk Superior Court in Massachusetts uses “the side bar *voir dire*,” in which he calls each prospective juror to the side bar and questions him or her very closely, but in a way that just both counsels can hear. He had one experience in the *voir dire* in a murder case, allegedly with gang involvement, in which seven people spoke of their prejudices, biases, or experiences as crime victims, insights that they had not shared by writing them down on the advance questionnaire.⁵³ To draw information out of prospective jurors, such as their hardships or biases, is not simple. Thus, innovation in conducting *voir dire* is still ongoing.

Open or Closed? Justification of Peremptory Challenge

Learning from American jury selection, two points should be considered in lay assessor selection in Japan.

The first is whether it is right for the selection proceeding to be closed.

The Japanese Constitution stipulates that trials shall be conducted and judgment declared publicly. Nevertheless, *voir dire* will not be open to the public in the Japanese lay assessor system.⁵⁴ In the jury system in the United States, as a general rule of constitutional law, the public has a right of access to jury trials, and judges have made strenuous efforts to balance the

⁵²When I attended a course on jury management given by the National Center for State Courts in September 2005, one of the concerns most participants from various states shared was how to safeguard the privacy of prospective jurors. Questions are sometimes asked in front of other potential jurors in the courtroom, and this causes annoyance and discomfort.

⁵³Personal communication, November 2005.

⁵⁴See footnote 1. Article 33.

principle of open trials with the privacy of prospective jurors. Sidebar and lobby *voir dire* are alternative ways to respect both interests. As for lobby *voir dire*, Lauriat suggests that, in the absence of compelling circumstances or justification, this method, even though on the record, should be avoided. “Any kind of closed-door proceeding is certain to prompt media and public suspicions.”⁵⁵

In some cases, juries are thought to have been chosen in an inappropriate manner, which can affect the questions of guilt and sentencing in higher court. I suggest that, although assuring the privacy of laypersons is one of the keys to success of the system, shutting the courtroom door and excluding the public is not the answer. The necessity of protecting potential lay assessors from the scrutiny of others and how to do this should be carefully examined on a case-by-case basis.

The second point is the peremptory challenge, which enables both the prosecuting and defense attorneys to reject potential jurors without explanation. The Japanese lay assessor system also allows this peremptory challenge for up to four persons for each side; the necessity of this arrangement, however, should be carefully reviewed after the system goes into effect.

In the United States, the peremptory challenge is applicable to a larger number of potential jurors,⁵⁶ but it has always been controversial. Many scholars suggest that it should be eliminated, as it was in England in 1988.⁵⁷ Because of its very nature, it was criticized for being discriminatory. Peremptory challenge has obviously been used to exclude juror candidates based

⁵⁵Peter M. Lauriat, *Massachusetts Jury Trial Benchbook: Second Edition* (Boston: Franklin N. Flaschner Judicial Institute, 2004).

⁵⁶In Massachusetts, in general, the same number as jurors to be selected, including alternates, can be excused with peremptory challenge. This means that, if there are four alternates, both counsels can use their right of peremptory challenge 16 times.

⁵⁷Stephen J. Adler, *The Jury: Trial and Error in the American Courtroom* (New York: Random House, 1994).

on race or sex, and this is an unconstitutional abuse of power. In his concurring opinion in *Batson v. Kentucky* (1986), which decided that the prosecutor's use of peremptory challenges to exclude African-Americans from juries for an African-American defendant was purposeful discrimination, Justice Thurgood Marshall noted that the only effective way to prevent the use of peremptory challenge in a racially discriminatory would be to abolish the system entirely.⁵⁸

I would like to add a reason why peremptory challenge should be avoided in the lay assessor system from the citizen's viewpoint. The majority of people who join the lay assessor selection process will not to be selected and it will be uncomfortable for them not to know why, in view of the fact that they will likely have gone out of their way to comply with the court's request.

There is concern that it is important for both counsels to be able to exclude persons predisposed to the other side.⁵⁹ This concern is strongly related to the fact that, generally, juries are required to come to unanimous agreement. Both counsels tend to think that having a single juror who is "extremely predisposed" to the opposite side should be avoided. Unlike with the jury system, however, the decisions of the lay assessor system will be made based on a simple majority. Potential jurors who are obviously excessively predisposed should be excused, but given the reason why. If counsel, whether for the prosecution or defense, does not want to disclose the reason, then they should not be entitled to make the challenge.

I think deliberation can transcend the standpoint of different groups, as well as personal dispositions or traits. Even if a layperson who is not favorable to one of sides joins the panel, he

⁵⁸*Batson v. Kentucky* 476 U.S. 79 (1986).

⁵⁹Justice Sandra Day O'Connor mentions this concern in her concurring opinion in *J.E.B v. Alabama* 511 U.S. 127 (1994), which decided that gender is, like race, an unconstitutional feature for juror competence and impartiality. Her suggestion arose mainly from the viewpoint of assuring the defendant's rights.

or she can be satisfied with the conclusion that the panel reaches. The issue that the court and the government should consider is not who is to be picked, but the way of deliberation.

Capital Punishment and Civil Participation

It may seem challenging for Japan to initially adopt the lay assessor system just for serious crimes. As lay assessors have to concern themselves with questions of both guilt and sentencing, they will have a role in sending a person to death row. In other words, ordinary people will be entitled to decide who deserves to die, an issue that has been the exclusive purview of judges for quite some time now.

Although a 2004 public opinion survey by the government shows that 81 percent of Japanese people think that “it is inevitable to have capital punishment based on individual cases,”⁶⁰ the debate over capital punishment in Japan has remained a moral and ethical issue. In the 1980’s, the striking reversals of the convictions of four people on death row encouraged the general public to consider the irreversible nature of the death penalty. And, since 2000, a group of lawmakers has been trying to introduce legislation for a moratorium on executions. There is also international pressure on Japan to abolish the death penalty, because, among developed countries, only Japan and the United States retain it. How, then, should lay assessors be selected for capital cases?

In the United States, the jury’s role is especially important in capital cases, because in most states, no one is sentenced to death unless a jury consents to it. Furthermore, in 2002, the Supreme Court implemented a significant revision, which required jury participation in the death

⁶⁰Cabinet Office. “Public Opinion Survey on the Fundamental Legal System,” 2004.
<<http://www8.cao.go.jp/survey/h16/h16-houseido/index.html>>.

sentence.⁶¹ In *Ring v. Arizona* (2002), the Supreme Court held that a death sentence where the necessary aggravating factors are determined by a judge violates a defendant's constitutional right to a trial by jury. The court noted that 29 of the 38 states in which there is a death penalty generally commit sentencing decisions to juries, and that, other than Arizona, only four states commit both capital sentencing fact-finding and the ultimate sentencing decision entirely to judges. Following this decision, these states were required to change sentencing policies for future cases.

In jury selection for cases that may involve the death penalty, prospective jurors are generally asked questions about their attitude toward the death penalty; these are the so-called "death qualification" questions.

In the past, it was believed to be fair to exclude potential jurors from a capital case if they showed any feelings against the death penalty. In *Witherspoon v. Illinois* (1968), the Supreme Court put the brake on excessively arbitrary exclusion of prospective jurors by the prosecutor based on people's attitudes toward capital punishment.⁶² In this case, *Witherspoon*, who was charged with murder and sentenced to death, had his sentence reduced to life imprisonment because the Supreme Court thought that members of the jury were obviously selected because they were willing to return the death sentence. In *Wainwright v. Witt* in 1985, the Supreme Court cleared up the excludable factors. Under this decision, a potential juror's views about the death penalty may not be the basis for a challenge for cause unless these opinions would "prevent or

⁶¹*Ring V. Arizona* 536 U.S. 584 (2002).

⁶²*Witherspoon v. Illinois* 391 U.S. 510 (1968).

substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.”⁶³

After *Witherspoon*, in case after case, defense attorneys continued to challenge the validity of death qualification procedures.⁶⁴ At the court of appeal level, a court suggested the death qualification was unconstitutional, citing scientific research indicating that death-qualified juries are consistently unrepresentative and conviction-prone.⁶⁵

Given these practices in the United States, two questions can be raised about the lay assessor system. One is how should lay assessors be selected in capital cases. Can or should one be excluded simply because of a belief or feeling about the death penalty? The other is how to make the lay assessor system trustworthy in death sentence cases. If the validity of the selection of the lay assessors is always questioned, their decisions will likewise be suspect, in particular, in matters regarding the defendant’s life.

In connection with the first question, there is no written standard in the Lay Assessor Act specifically for capital cases.⁶⁶ It is basically up to the discretion of the presiding judge in the selection. It is possible that some prospective jurors even hope to decline their duty to serve because of their belief or feelings against the death penalty.

I suggest that those with a variety of thoughts about the death penalty should stay on the panel, as long as they can evaluate the evidence fairly and objectively – putting aside their opinion on the death penalty – and neither counsel should stick to death-qualified questions. In

⁶³*Wainwright v. Witt* 469 U.S. 412 (1985).

⁶⁴*Hans and Vidmar*.

⁶⁵*Grigsby v. Mabry* 569 F. supp. 1273 (1985).

⁶⁶See footnote 1. Article 18 of the Lay Assessor Act about disqualification mentions that “persons who the court recognizes might not be able to act fairly in a trial” cannot become lay assessors.

order to make deliberations in capital cases as thoughtful and prudent as possible, it is desirable to scrutinize the case from the different standpoints. This approach is appropriate to the concept of the collaboration between citizens without specific knowledge about the law and judges.

As for the death penalty, Japan is in a different situation from the United States. Execution in Japan is peculiarly carried out in secret on an arbitrary basis. The Ministry of Justice never discloses when, where, or who has been executed. Little information is offered by the government, and few ordinary people have had sufficient occasion to consider the death penalty specifically. What is more, it takes several years – sometimes even more than a decade – after the death sentence is handed down for the Ministry of Justice to carry out the execution. Thus, people have not paid much attention to executions or been aware of the media coverage of them. Given these circumstances, having a rationale for the death penalty in general and sentencing a person to death as a lay assessor may be quite a different thing.

The fact that citizens will participate in trials for very serious cases, those in which capital punishment is applicable, will affect not only lay assessors in the case, but also the general public, encouraging them to think about the meaning of the death penalty or many decades of imprisonment. These matters are exactly what most Japanese have missed by entrusting them to the nation's judges.

Lay Assessors and the Obligation to Maintain Confidentiality

In the process of creating the Lay Assessors Act, one of the contentious issues in the Diet was whether the obligation to maintain confidentiality should be applied to the assessors even after they had discharged their duties. In other words, unlike with American jurors, Japanese lay

assessors are never allowed to disclose what they observed in the deliberations. The punishment for violating this statute is up to six months' imprisonment and/or a fine of as much as ¥500,000.

The government insists that people who have fulfilled their lay assessor duty may talk about their feelings generally, but cannot specifically discuss what they experienced in the deliberation room. The border between whether or not lay assessors may talk about their deliberations after the verdict, however, is not clear. The Lay Assessors Act stipulates that what ex-lay assessors cannot disclose are: 1) empanelled judges' or the lay assessors' opinions about the question of guilt and sentencing, and 2) the number of panel members who held specific opinions, even if the each member's name is not disclosed; in other words, ex-lay assessors cannot say "it was a unanimous decision" or "the opinion was 5 to 9."

In the government's view, the purpose of these regulations is to ensure that all members of the panel can freely express themselves during deliberations, without any concern about their opinions being revealed to the public. From this standpoint, if the fact that the panel decided unanimously is made known, every member's opinion will be disclosed.

Considering the importance of both the confidentiality in the process and the citizen participation system itself, I will suggest three problems with this restriction for ex-lay assessors.

First, the secrecy of deliberations is somewhat in conflict with the defendant's right to a speedy and public trial by an impartial tribunal as outlined in Article 37 of the Japanese Constitution. My concern is that, under the secrecy of deliberation required by the Lay Assessor Act, when the deliberation is not conducted impartially, no lay assessor can appeal it outside the court for fear of being penalized. If, for example, a judge in the panel tries to lead lay assessors excessively in a specific direction, the lay assessors may hesitate to express their opinions freely. The point is that lay assessors should be guaranteed the means to legitimately raise an objection

if the problem is not solved inside the deliberation room. This would be a safety net to avoid arbitrary deliberations.

In the United States, there is a tension between the secrecy of jury deliberations and the Eighth Amendment against “the arbitrary and capricious imposition of the death penalty” in capital cases.⁶⁷ Of course, in the United States, jurors can say anything about the deliberation after the verdict, but even so, it is sometimes difficult for a defense attorney contact ex-jurors. Professor Janet C. Hoeffel of Tulane University claims that there is no way to scrutinize how juries reach the death sentence and goes so far as to say that post-trial interviews of the jurors by the defense attorney outside the courthouse should be introduced to ascertain whether there is evidence that exposes arbitrariness in such decisions.⁶⁸

Second, a strict obligation of confidentiality is in conflict with freedom of speech. The Japanese government is worried that disclosing inside stories about the deliberations will damage the dignity of the court. In fact, in the United States, where jurors are excused from the confidentiality obligation after the verdict, there is strong criticism against the trend for jurors to “sell” their experiences in high-profile cases such as those involving celebrities like O.J. Simpson and Michael Jackson. CNN anchorperson Nancy Grace calls this “juror greed.”⁶⁹

Nonetheless, neither courts nor legislation in the United States attempt to impose silence on jurors who have discharged their duties. This is because the First Amendment guarantees individuals the right to speak out.

⁶⁷Gregg v. Georgia 428 U.S. 153, 188 (1976).

⁶⁸Janet C. Hoeffel, “Risking the Eighth Amendment: Arbitrariness, Juries, and Discretion in Capital Cases.” *Boston College Law Review* 46 (2005).

⁶⁹Nancy Grace, *Objection!* (New York: Hyperion, 2005).

Professor Marcy Strauss of Loyola Law School finds that it is possible for “juror journalism” to threaten a fair trial.⁷⁰ In her view, jurors may be reluctant to express minority or unpopular views if they think that such opinions will be aired to the public after they return the verdict. Strauss points out that juror journalism also jeopardizes the appearance of fairness in the justice system by creating the public perception that jurors are profiting from their jury service and distorting the truth-finding process.

On the other hand, she refers to the upside of juror speech. It serves democracy by revealing flaws, inconsistencies, or unfairness in the judicial process. Besides, it can teach the public about the functioning of one of the most important institutions in the United States and help lawyers and laypersons in understanding the judicial process. Strauss concludes that banning all discussion by jurors of their service, paid or unpaid, would prohibit large areas of speech: “Government regulation that risks chilling juror speech is too high a price to pay.”

My third point is that restricting speech by those who serve as lay assessors will likely weaken the educational effect of the system. Ex-lay assessors may feel pressure not to share their experiences with others because of the restriction on speech, and this may marginalize the system itself. If jurors are instructed by the judge about how or how not to use information and their experiences, rather than being prohibited from talking, they can be good educators in society about the judicial system.

In fact, Princeton University historian Graham Burnett wrote a book on his experience as a jury foreperson in a criminal trial, and it has been used as a textbook in law school. It teaches

⁷⁰Marcy Strauss, “Juror Journalism,” *Yale Law & Policy Review* 12 (1994).

about weighing evidence, deliberation, and reaching a verdict understandably in a closed deliberation room.⁷¹

Brassard, as mentioned above, usually stops by the jury room right after the verdict is returned and expresses his gratitude to the jurors.⁷² At that time, he mentions that they can tell their families, friends, or anyone else about their jury duty and just reminds them of the sensitiveness of what each juror said during the closed deliberations. This is not a formal jury instruction, however, and through this kind of communication with judges, citizens can acquire knowledge so as to reflect on their experiences and render what they have learned to the society.

Is It Worth Serving?

In order for the lay assessor system to become established in Japanese society, it needs public support and trust. As I mentioned in Chapter 1, the system suddenly fell from the sky onto the general public as a new civil obligation. Compared to the great controversy and discussion in the past that accompanied, for example, the introduction of the consumption tax and the elderly care insurance system, both of which represented new burdens on the general public, the discussion of the lay assessor system was not so serious, or rather it was not given great attention, though, once the lay assessor system goes into effect, the impact on daily life may be huge.

The most important thing is to implant the notion that citizen participation in the system itself is a requirement: Lay assessors should not be “ornaments” in a trial. To this end: 1) the decision-making rule should be reviewed; 2) the appeal system should be revised; and 3) the management should be made user-friendly.

⁷¹D. Graham Burnett, *A Trial by Jury* (New York: Random House, 2001).

⁷²Personal communication, November 2005.

As for the first point, the lay assessor system adopts a simple majority as the decision-making rule. Compared to the unanimous rule, which most state and federal courts in the United States require, a simple majority might be better in that a person who has an extreme opinion does not have an excessive influence on the deliberations. Practically, the Supreme Court in the United States does not require unanimity.^{73, 74} The results of empirical research in the United States, however, make it clear that the deliberations are influenced by the decision rule. Psychologist Reid Hastie et al. conducted an experiment in which groups of 12 jurors reached verdicts either under unanimous or majority rule – 10 of 12 or eight of 12. Unanimous-rule groups deliberated more than majority-rule groups, putting emphasis on the evidence and the law. And interestingly enough, jurors in non-unanimous rule groups viewed their deliberations as less thorough and less serious than those in the unanimous-rule groups.⁷⁵

According to the decision rule of the lay assessor system, the consent of five of them, including at least one judge and one lay assessor, is sufficient to return a verdict. Just to reach a verdict, they do not necessarily have to consider the case from the minority's point of view, and it is much quicker and easier this way. But there might be a question from the lay assessors as to whether conviction with the consent of five out of nine is "beyond reasonable doubt."

For satisfactory deliberations, the attitude of the presiding judge is important. It is the judge's task to allow the lay assessors to express their opinions freely without diffidence and make a strenuous effort to reach a unanimous verdict, even though it is not mandatory.

⁷³Apodaca v. Oregon 406 U.S. 404 (1972).

⁷⁴Johnson v. Louisiana.

⁷⁵Reid Hastie, Steven D. Penrod, and Nancy Pennington, *Inside the Jury* (Cambridge, MA: Harvard University Press, 1983).

On the second point, unlike the American system, the prosecutor can appeal to the high court if the panel acquits the defendant. The high court, which is composed exclusively of three judges, could overturn the decision made by the panel in the lay assessor system. If, under the new system, decisions are reversed again and again, people will start to question the meaning of the system. From the viewpoint of citizen participation, it will be abortive if, however seriously they devote themselves to their duties as lay assessors, a different panel of judges can simply overturn their decisions.

Massachusetts Jury Commissioner Wood, who has been mentioned above, refers to such a situation in Massachusetts. In 1997, a superior court judge reduced a jury's verdict against a British au pair from second-degree murder to involuntary manslaughter.⁷⁶ The case, which was about the death of an eight-month-old boy, was widely covered in the media. The Office of Jury Commissioner, thus, had difficulty in coping with a woman who was summoned, but refused to go to court for a jury pool because she thought jury duty was meaningless and not worth her time. It appeared to the general public that the fact that a judge had changed a verdict showed that he – and the system – undervalued the jury. In the case of the recalcitrant prospective juror, the officer had no choice other than to tell her to show up in court and ask to be excused.

Regarding the third point, it is important that the system be user-friendly. From a practical standpoint, the facilities at the court, such as waiting areas and parking spaces, as well as childcare, will be reflected in the satisfaction of those who participate in the process. Considering the effect of getting a diversity of potential laypersons and obtaining their satisfaction, the costs of providing these facilities and services cannot be said to be exorbitant.

⁷⁶Eileen McNamara, "Reduced Sentence Stuns Eappens," *Boston Globe* 11 November 1997.

CONCLUSION

It will be a great challenge for Japan to introduce the lay assessor system, which calls for citizen participation in criminal trials in 2009 – for the first time after World War II. Without any kind of practical participation in the judicial field to date, Japanese people are thoroughly used to trials in which judges decide the question of guilt and sentencing: They have entrusted criminal justice to the courts and the government, which are regarded as institutions composed of specialists.

Introducing the lay assessor system involves the possibility of transforming the Japanese public's mind-set from being passive players in a democratic society into a perception that they are actual participants with sovereignty. At the very least, Japanese people cannot help but speculate about crime, punishment, ethics, and justice in grappling with the case or in just thinking that their peers do it. This is because most adults will be prospective lay assessors in charge of deciding the defendants' fates, even their life when the case could involve capital punishment.

In the United States, opinions about the jury system are ambivalent. There have been criticisms, particularly in high-profile cases, concerning incompetence and capriciousness among members of the jury. Nonetheless, adopted at an early state in the nation's history, the jury system – along with the vote – has been regarded a crucial institution of democracy. Public opinion surveys show that the jury system has strong support among Americans, in spite of the alleged downsides.

On the contrary, the survey in 2005 about the Japanese attitudes toward civil participation clearly reveals their hesitance and uncertainty about the upcoming system. Whether the lay assessor system will become established in Japanese society or not depends on how lay assessors

can literally participate in the system. As future issues, ways to properly reflect citizens' opinions about the judgment and the tension between the obligation of confidentiality for ex-lay assessors and free speech should be examined.

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