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Early Returns from Japan's New Criminal Trials

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On August 3, 2009, Japan began a new trial system in which ordinary citizens sit with professional judges in order to adjudicate guilt and determine sentence in serious criminal cases. This change injects a meaningful dose of lay participation into Japanese criminal trials for the first time in 66 years. Japan had a jury system of sorts from 1928 to 1943, but it was suspended during the Pacific War for various reasons: because defendants who chose a jury trial had to give up rights to appeal; because the jury only answered a set of interrogatories framed by a judge who could reject its findings of fact; because jury trials were expensive and difficult to administer; and because (some analysts claim) a Japanese cultural preference for hierarchy caused defendants to prefer judgment by professionals rather than peers. Notably, the old jury system generated much higher acquittal rates than those that prevailed before or since—15 percent for the nation as a whole, and more than 60 percent in some cities—leading some prosecutors and judges to welcome the demise of an institution that made it more difficult for the state to convict.[1]

The lay judge system

Whatever caused the fall of Japan's old jury system, the rise of the new lay judge system was part of a package of changes produced by a justice system reform movement that introduced sweeping reforms into many sectors of Japanese law, from legal education and access to legal services to civil procedure and administrative litigation.[2] In 2004, the enabling legislation for the lay judge reform passed both chambers of the Japanese Diet with only two negative votes, but in the years before the trials actually started there emerged resistance from many quarters. As of April 2009, 79 percent of Japanese adults said they did not want to be involved in trials as lay judges. The same month, 20 members of parliament tried to delay the start of the new trials on the grounds that society was not ready for the change, and 12 different bar associations expressed opposition to moving forward with the reform.[3]

Despite this opposition, the reform did take effect. I was in Japan when the first two lay judge trials took place: one in Tokyo (August 3-6), and the other in Saitama (August 10-12). Although I lost in the lotteries that determined who could observe these trials in person (demand for seats in the Tokyo trial exceeded supply by a ratio of 30 to 1, while the ratio in Saitama was 15 to 1), I was able to follow the extensive coverage of the trials in the Japanese media, and I also interviewed nearly two dozen Japanese legal professionals, scholars, and journalists about a reform that is widely regarded as historic. This article summarizes some of my impressions. It focuses on phenomena in the criminal justice system, not on the broader implications of the new system for Japanese society or democracy, and it is organized in five sections: the rules for the new trials; the first two trials; judges; prosecutors and police; and defense lawyers.

The Rules

The Lay Judge Act establishes the ground rules by which Japan's new criminal trials are to proceed.[4] Two categories of serious crime are to be adjudicated in the new trials: offenses punishable by death or imprisonment for an indefinite period or with hard labor, and offenses in which the victim has died because of an intentional crime. The law does not give defendants the right to waive a lay judge panel (this is a sore point with some opponents of the new system who note that criminal defendants in America can waive their right to trial by jury), but it does grant discretion to the court to determine that a case which qualifies for a lay judge trial may nonetheless be heard by a traditional panel of three professional judges, as when privacy issues arise in a sex offense case, or the defendant is a gangster who might intimidate lay judges.

Since lay judges are randomly selected from electoral rolls, the sole positive criterion for becoming a lay judge is eligibility to vote in Diet elections, for which Japanese citizens must be at least 20 years old. Prospective lay judges first receive a summons in the mail, and then on the first day of duty they fill out a questionnaire and are interviewed by the professional judges and by the prosecution and defense.

The law also contains a limited voir dire procedure that enables both the prosecution and defense to excuse up to four people without giving reasons.

The Lay Judge Act provides for panels of either three professional judges and six lay judges or of one professional judge and four lay judges. The full panels are the default option and were used in Tokyo and Saitama, while the smaller panels may be used when the facts and issues identified in pre-trial procedures are undisputed, as when the defendant confesses.

The Lay Judge Act stipulates that the mixed panel must reach a verdict based on its recognition of the facts and application of the laws and if the verdict is "guilty" it must then sentence accordingly. Thus, lay judges help both to find the facts and to decide the sentence. Only professional judges are authorized to interpret the law and make decisions about litigation procedure, but lay judges are allowed to comment on such issues. During trial, lay judges may also question witnesses, victims, and defendants, though the law provides little guidance about how lay and professional judges are supposed to interact during their deliberations.[5] One frequently expressed concern about the new system is that it will lead to excessive deference by lay judges toward their professional counterparts, in part because the former only adjudicate a single case. It is difficult to tell whether this fear is well founded. In many of the mock trials that were staged before the new trials started, professional judges were careful to ensure that lay judges spoke first during deliberations,[6] only then offering their own views about the case. Similarly, in press conferences held after the Tokyo and Saitama trials, many lay judges said they felt free to express their uninhibited opinions during deliberations. On the other hand, research shows that in the German system of mixed tribunals (which resembles the new Japanese system in some respects, although German lay judges serve for a longer term), professional judges tend to dominate the deliberative proceedings.[7]

Ultimately, decisions in Japan's new criminal trials are based on the majority opinion of the members of the mixed panel, but at least one judge and one lay judge must subscribe to the majority view. In small panels, this "mixed majority rule" means that one professional judge can shift the views of four lay judges, while in large panels it means that professional-lay splits will be pushed towards the position preferred by the professionals.

Finally, the law holds lay judges criminally liable for leaking secrets, making false statements during voir dire or other legal proceedings, and failing to appear at trial. Some observers believe the secrecy provisions will make it difficult to address the problem of "vicarious traumatization" that some lay judges may experience in trials with graphic evidence, while at the same time making it harder than it should be to expose and prevent judicial misconduct and to promote public understanding of how the new system is actually working.[8]

The Trials

Japan's first two lay judge trials were relatively simple affairs because both defendants confessed during interrogation and neither challenged his confession at trial (this is the same pattern that prevailed in more than 90 percent of criminal trials under the previous system). In the Tokyo trial, 72-year-old Fujii Katsuyoshi pled guilty to murdering his neighbor, a 66-year-old woman of Korean ethnicity named Mun Chun Ja (Kojima Chie), by stabbing her several times with a survival knife.

More than two thousand people line up for the 58 seats in the courtroom in the trial of Fujii Katsuyoshi

The only real contested question in the trial was Fujii's state of mind at the time of the murder. According to news reports, he and Mun had been feuding for years, and the precipitating cause of the killing was a verbal altercation arising out of Fujii's frustration over the way Mun parked her bicycles in the crowded quarters where they lived in Tokyo's Adachi Ward. (The bikes apparently knocked over bottles of water that

Fujii had strategically placed in order to keep stray cats away.) The septuagenarian defendant had a long criminal history, including a conviction 45 years earlier for bodily injury resulting in death—for killing a friend while the two drunken men were imitating pro wrestlers they were watching on TV. At the conclusion of Fujii's four-day trial the prosecution requested a sentence of 16 years, while the victim's lawyer asked the court to imprison him for 20. The actual sentence was 15 years, which many observers deemed harsher than the going rate had been in similar cases under the previous system.[9] It is difficult to discern why this sentence was so heavy. On the one hand, Fujii's demeanor in court may have displayed too much swagger and too little contrition to make an appealing case for leniency. On the other, a Victim Participation Law that took effect at the end of 2008 gives victims and survivors of crime more voice at trial than they previously possessed, including the right to request a specific sentence for the offender.[10]

In the Saitama trial, a 35-year-old demolition worker named Miyake Shigeyuki pled guilty to the attempted murder (by kitchen knife) of a 35-year-old male acquaintance who had loaned Miyake money and was pressing him for repayment. The victim's injuries took one month to heal. Newspapers wrote little about the victim, but persons who attended the trial said he was either a gangster (yakuza) or else unusually familiar with the underworld, as Miyake's defense lawyer revealed through a line of questioning that exposed the victim's comfort level in visiting a gang's headquarters (by himself) and the existence of a tattoo on his back. In this three-day trial, the victim was the only witness to testify, and the core issue was how to punish the penitent offender, who had turned himself in to police shortly after the slashing. The victim said he wanted Miyake put in prison for life, while the prosecutor sought a six-year sentence. The panel of judges actually imposed a sentence of four years and six months, which Miyake's defense lawyer accepted as consistent with the going rate for this kind of offense under the preceding system, but which some other analysts regarded as more severe than the old system would have delivered and more severe than expected given the circumstances of this case.[11]

Lay judges at a press conference following the verdict in the Miyake attempted murder trial

The Judges

Before these lay judge trials started, some observers wondered whether there would be sufficient citizen cooperation to make the new trials work.[12] On the morning of the Tokyo trial, several opponents of the new system took turns holding a microphone and broadcasting their views on the sidewalk in front of the Tokyo District Court. Their complaints ranged from "the new system is unconstitutional" and "it will lead to sloppy decisions" to "it will lead to public lynchings" and "it is mere window dressing." At the same time, some 300 people from across Japan marched around the courthouse while blowing whistles, beating drums, distributing fliers, and shouting "Stop the lay judge system." I interviewed three of these protesters, and though I am agnostic about the long-term effects of this reform (research shows that academic "experts" are about as good at predicting the future as are dart-throwing monkeys),[13] I do need to report that some of their criticisms of the new system are rooted in major misunderstandings about how American juries work. Among other misperceptions, two of the interviewees insisted that American juries do not participate in capital sentencing decisions even though the truth is just the opposite: juries are required to make the life or death decision in American capital trials.

300 people protest the lay judge system

In any event, concerns about citizen resistance proved to be unfounded in the first two trials. Of the 49 persons summoned for lay judge service in Tokyo, 47 reported for duty, while in Saitama the proportion was 41 out of 44.[14] This 95 percent turnout rate is not only much higher than the rate at which Japanese citizens said they would participate before the reform took effect, it is more than double the national turnout rate of 45 percent for American jury trials.[15]

Some analysts also supposed that Japanese lay judges would be reluctant to question witnesses at trial and to actively participate with professional judges in deliberations over guilt and sentence. But lay judges showed little reluctance to talk in the first two trials. In Tokyo, no lay judge asked any questions during the first day of the trial, but in the days that followed everyone asked questions, and some asked a lot. In Saitama as well, four of the six lay judges asked questions during day one of the trial, and the rest spoke up on the following day. Once these trials concluded, most of the lay judges offered their impressions at press conferences, and many expressed surprise and satisfaction over how easy it had been to speak in both the public trial sessions and the backstage deliberations. Several even praised the professional judges for creating an atmosphere that enabled their voices to be heard.[16]

Of the various comments the lay judges made to the Japanese press, two seem especially telling. One lay judge said that the night before the final day of the Tokyo trial, he wept while sipping sake and reflecting on his duty to decide Fujii's fate. "The defendant is only about ten years older than me and has lived an extremely luckless life," this man observed. "The world can be a very difficult place."[17] After Fujii was sentenced to 15 years, another lay judge on the same panel said that "even now at the end of the trial, I am not sure if the sentence we selected is correct. We did the best we could, but to tell you the truth, I felt some really difficult things during this trial."[18]

These comments are significant because they suggest how seriously citizens took their responsibility to decide the fate of a fellow human being.[19] If it were me in the dock, I would want my future to be determined with the same combination of moral seriousness and self doubt that are reflected in their statements. I also would want to be treated as an individual, not as one link in an endless chain of defendants paraded before a professional tribunal that has "seen it all" many times before. The fresh eyes of the amateur are important because, often, in law as in life, the more one looks at a thing, the less one sees it. As the English writer G. K. Chesterton observed a century ago:

> *"It is a terrible business to mark a man out for the vengeance of men. But it is a thing to which a man can grow accustomed, as he can to other terrible things…The horrible thing about all legal officials—even the best—about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), and not that they are stupid (several of them are quite intelligent). It is simply that they have got used to it. Strictly, they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they only see their own workshop."* [20]

There is considerable good will and intelligence among Japan's professional judges, but in a criminal justice system in which the conviction rate is only a little less than 100 percent, some of them have grown too used to supposing that "the usual man in the usual place" is, as usual, guilty.[21] If the infusion of fresh perspectives from ordinary citizens helps curb the professional tendency to see "the awful court of judgment" as one's own familiar workshop, it will be a major achievement. The early returns from Tokyo and Saitama suggest there is room for optimism on this score.

Prosecutors and Police

The participation of citizens as lay judges will also affect the pre-trial process and the prosecutors and police who control the inputs into Japan's criminal justice system.[22] Three effects are especially worth watching: on charging policy, on the place of "truth" in the criminal process, and on the practice of interrogation.

As noted above, professional judges sometimes tilt toward the state in their decision-making, but the main reason for Japan's high conviction rate is the cautious charging policy of prosecutors (who monopolize the power to charge) and the organizational reluctance of the procuracy to bring cases to trial unless there is a confession and a minimal risk of acquittal.[23] One central question, therefore, is what effect the new trial system will have on the officials who make the all-important decisions about whether and what to charge.

In the shadow cast by Japan's lay judge law, prosecutors seem to be proceeding with an extra measure of caution. One year before the new trial system started, the Ministry of Justice said it expected there to be about 3600 lay judge trials in the first year of the new system (300 per month), and in the five years before indictments began under the new system (2004-2009), prosecutors charged a monthly average of 258 persons who would have been eligible for lay judge trial if the new system had been operating. By contrast, in the first two months after the Lay Judge Act took effect (May 21 to July 21, 2009), prosecutors charged an average of only 138 cases per month—about half as many as officials and prior practice predicted.[24] The impression of prosecutor caution is more than merely statistical, for many defense lawyers have noted that prosecutors are using their discretion to charge cases less severely than they used to do under the old system. It is difficult to predict how long the new charging policies will last, but prosecutors' efforts to avoid lay judge trials seem to arise from three motivations: a desire to avoid the uncertainties of the new trial system (prosecutors everywhere prefer predictability); the need to allocate resources efficiently (at the start of a new trial system, it is difficult to predict how much work an individual trial will take); and a commitment to maintaining the procuracy's high conviction rate (considered by most insiders and some outsiders to be a sign of prosecutors' prudence and professionalism). As prosecutors become more familiar with how the new system works, they may become more willing to send cases to lay judge trial.

Yet some observers are not so sanguine. In a blog entry that asks "Are Japanese Prosecutors Pusillanimous?", Takashi Takano, the founder of Japan's Miranda Association and one of Tokyo's most prominent defense attorneys, argues that prosecutor-gatekeepers have become so selective about sending cases to lay judge trial that they are divesting citizens of their authority to decide questions of criminal responsibility and thereby undermining the integrity of the new system.[25] But as Takano himself acknowledges, reality is not simple. The systemic consequences of reducing charges so as to avoid lay judge trials may be as he describes, but the effect for individual defendants—less severe punishment—is welcomed by most criminal defendants and their attorneys.

The second effect of the lay judge system on the criminal process concerns the place of "truth" in Japanese criminal justice. For many years, "uncovering and clarifying the truth" has been the cardinal objective of the Japanese police and prosecutors who investigate allegations of criminal conduct and construct the state's case for conviction.[26] In any criminal justice system, truth—or a reasonable approximation to it—is a necessary condition for making just decisions. Without it, justice is an accident. But different systems attach different weights to this task, and Japan's system—and the prosecutor especially—seems to invest it with special significance. Many of the country's criminal justice achievements are premised on a faith that facts can be explicated and evidence organized so as to say with precision who did what to whom,

and why.

The advent of lay judges into criminal trials may reduce the importance that was attached to truth in the previous system by shifting the focus of the criminal process away from pretrial investigation and by increasing the need for the prosecution and defense to make emotional connections with lay judges who are not only inexperienced but who also may be easily bored, confused, or distracted. After watching the trial in Saitama, one former prosecutor and professor summed up this concern by saying that prosecution and defense attempts to connect with lay judges by presenting them with easy-to-digest evidence reflected "too much consciousness of outward appearances" and too little attention to the "essential matters" of factual accuracy and gradations of guilt.[27] Other observers expressed a similar concern that criminal trials should not be "shows" in which rhetoric triumphs over truth. As a professor of criminal law put it, "The Tokyo trial should have been conducted more slowly and comfortably. The new system is only starting, so maybe it cannot be helped, but I feel that this trial went too fast and too much according to the professional judges' prearranged script."[28]

By American sensibilities, this perception may seem a little peculiar, because Fujii confessed to most of the facts alleged in the indictment and yet his trial still took four days to complete. A more "comfortable" trial pace might be possible, but it may also create incentives for the repeat players—prosecutors, professional judges, and defense lawyers—to conserve their scarce resources by pursuing alternatives to adjudication through a lay judge panel. That, anyway, is sometimes what happens in other legal systems, where the more time-consuming and cumbersome the trial process becomes, the more alternative mechanisms of dispute resolution (such as plea bargaining) are created and used.[29] This potential problem is magnified in the Japanese context because plea bargaining remains illegal there, while disposing of cases through simplified "summary procedure" (a purely paper procedure) seems unlikely to serve the value of "truth" that some critics of "too much efficiency" are trying to defend.[30]

While charging policies and the salience of "truth" will be shaped by Japan's lay judge reform, the most important consequences of this change probably concern interrogation. In Japan, confessions have long been considered the "king of evidence," and the interrogation room—one of the most closed and secretive spaces in Japanese society—is where police and prosecutors try to elicit them.[31] Many of the most disturbing events in Japanese criminal justice (including the wrongful conviction of Sugaya Toshikazu, who was exonerated by DNA evidence earlier this year after serving 17 years in prison for a murder he did not commit)[32] stem from two related facts: the system's over-dependence on confessions, and the absence of checks on police and prosecutor power in the interrogation room. Since lay judges do not have time to read long written reports at home (as professional judges do), the new system should make criminal trials less reliant on the paper dossier that police and prosecutors have long produced in abundance during their investigations, and it should also make trials more reliant on oral arguments made in open court. That, anyway, is what happened in Tokyo and Saitama, causing one observer to conclude that criminal trials in Japan have finally taken on their "original and intended form."[33]

More importantly, the passage of the Lay Judge Act has generated momentum for a reform that is widely regarded as the most effective safeguard against the dangers of false and coerced confessions: the electronic recording of interrogations. After that legislation was enacted —and in anticipation of new requirements for presenting evidence to lay judges—prosecutors began partially videotaping the interrogation of some criminal suspects in August 2006, and police started to follow suit two years later.[34] Both offices still have a long way to go in order to conform to best practice—the complete recording of all interrogations in their entirety—but some progress has been made. In the long run, police and prosecutors will probably be forced to fully record interrogations because recording serves the core values that are supposed to animate Japanese criminal justice—the discovery of truth and the delivery of justice—and because recording is rapidly becoming an international norm. But sooner is better than later for this crucial reform, and the imperatives of the new trial system are causing recording to start earlier than it otherwise would have. During the campaign that culminated in the landslide victory of the Democratic Party of Japan in the national election of August 2009, the DPJ promised to make the recording of criminal interrogations a legal obligation. If that happens, Japan's new trial system can be thanked for helping nudge open a door that has been closed for as long as anyone can remember.[35]

Defense Lawyers

Several years ago I wrote the following about Japan's criminal defense lawyers:

> *"Japan does not have an organized criminal defense bar composed of lawyers who specialize solely or mostly in criminal defense work. With few exceptions, all of the country's attorneys earn the bulk of their income from civil cases. Lawyers who do criminal work tend to dabble in it, except for a small group consisting largely of (to be blunt) old, languid lawyers…Young and middle-aged lawyers find criminal work unattractive because law and prosecutors do not allow them to vigorously defend their clients; because despite their youth they subscribe to traditional attitudes about the defense attorney's role, which prescribes a 'go along' instead of a 'go for it' style; and because defending criminal cases pays less than other work. On the other hand, older lawyers are attracted to criminal defense work because that is where their comparative advantage lies. In most criminal cases they can do about as much for the accused as can their more energetic, mentally agile juniors. Which is to say, not much."*[36]

In the years since that was written there have been a few changes. More law students and attorneys are trained in the techniques of trial advocacy. More criminal suspects have access to defense counsel before the critical indictment decision is made. More defense lawyers counsel their clients not to confess. And more defense lawyers engage in vigorous adversarial defense of their clients' interests.[37] But in the main the old patterns remain: few attorneys specialize in defense work, and not very many engage in what American, British, or Australian attorneys would recognize as aggressive contestation of the state's case.[38]

Some supporters of the lay judge reform believe that by shifting the focus of Japan's criminal process from a pretrial investigation stage that is dominated by police and prosecutors to the presentation of oral evidence in open court, the new lay judge system will empower Japanese defense attorneys, infuse Japanese criminal justice with a badly needed dose of adversarialism, and rectify an imbalance of advantage in Japanese criminal procedure that has long tilted toward state interests.[39] The lay judge reform may ultimately produce those effects, but in order for that to happen Japanese defense attorneys will need to solve three practical problems: how to organize their own individual workloads; how to organize themselves collectively so as to respond to the formidable organizational capacity of the procuracy; and how to obtain sufficient payment for doing defense work.

The first challenge concerns how lawyers will organize their work under the new system. In the past, criminal trials proceeded discontinuously, with court sessions held once every month or two until a verdict was reached. Under that system, it was not unusual for trials to last a year or more, and attorneys could use the time in between trial sessions to concentrate on other cases. In lay judge trials, courtroom proceedings will

be concentrated in a much shorter period, requiring defense lawyers to be continuously available for however long a trial takes: three or four days in simple cases (as in Tokyo and Saitama), and two weeks or more in complicated ones. The new trial system will thus require major adjustments in the way Japanese attorneys organize their work. For some attorneys in a society that hardly has a surplus of decent defense lawyering, the demands of the new system may create incentives to avoid criminal defense work altogether.

Date Shunji, who was Fujii's defense lawyer in the Tokyo trial, told journalists on several occasions that preparing for this trial—and for his oral presentations in particular—was such arduous work that it required him to spend much more time than he used to spend on cases of a similar kind.[40] Notwithstanding his hard work, the court-watchers were not kind to him. One professor summarized many observers' perceptions when she praised prosecutors and judges for their in-court performance but criticized the defense for being "unprepared" and "incomplete." She averred: "In a case involving the loss of a human life, there should not be a difference in the degree of preparation between prosecutors, judges, and defense attorneys." That there was a significant difference shows that "bar associations need to design organizational countermeasures to respond to the challenges of the new lay judge system."[41]

As the professor's remarks suggest, the second practical problem that Japanese defense lawyers must confront is organizational. Having passed one of the most difficult credentialing exams in the world, individual Japanese attorneys do not lack talent or intelligence. But collectively, Japanese bar associations might be no match for the solidarity and singularity of purpose that characterize the procuracy.[42] As lay judge trials continue, one leading indicator of the new system's success will be how effectively private attorneys—individually *and* organizationally—respond to the imperatives of the new system. Left to their own devices, even the most highly motivated attorneys (like Date Shunji) may discover that the demands of lay judge trials leave them lagging behind prosecutors in their capacity to affect the verdicts and sentences that will define Japanese criminal justice in the years to come.

The third challenge for Japanese lawyers is how to obtain sufficient financial compensation for doing defense work. About two-thirds of criminal defendants in Japan are represented by state-appointed attorneys (kokusen bengonin). The Japan Federation of Bar Associations has issued guidelines calling for them to be paid 365,800 yen ($3700) for defending someone in a lay judge trial requiring two pretrial hearings and seven hours of trial work spread out over three days in court (this is about what it took in the Saitama case). The same guidelines call for 457,000 yen ($4600) for three pre-trial hearings and 10 hours of trial time over three days in court, and 773,000 ($7700) for five pre-trial hearings and 20 hours of trial time over five days in court.[43] These amounts are considerably higher than the fees that are paid to state-appointed attorneys in Japan's non-lay judge criminal trials, but when the total amount of time worked is taken into account—in pre-trial hearings, at trial, and preparing for those proceedings—the compensation remains lower as an hourly rate (perhaps $100 per hour or so) than is the hourly rate that Japanese attorneys charge their private clients for criminal defense work.[44] What is more, for most Japanese attorneys, doing criminal defense is not at all lucrative compared with other work opportunities, and even the new fee structure for state-appointed attorneys may well be inadequate for maintaining a law office.[45] If money matters when attorneys are deciding what kinds of cases to take and how much time to invest in any single defendant—and surely it does—then questions about defense lawyer compensation should be a central focus of study for future students of Japan's lay judge reform.

Conclusion

Criminal proceedings in which an individual may lose life, liberty, or reputation constitute one of the principal indicators of the character of a society. Japan's new lay judge system is part of a larger set of legal reforms reflecting changes in Japanese society that belie claims the country is stagnating. Some Japanese observers are even calling for the introduction of lay participation into administrative trials so that the conduct of state agencies can be assessed with the fresh perspective of the amateur.[46] Expansions of lay participation in criminal trials are also occurring in China and South Korea, and persons in those countries are watching Japan's experiment unfold in order to see whether it might have lessons for their own legal systems.[47]

Japan's new trial system will likely reshape many aspects of the criminal process—though in ways which seem difficult to predict. Some scholars contend that the new trial system started to transform Japan's pretrial criminal process even before the first lay judges convened, and they believe much deeper changes are on the way.[48] Others think the new system consists of little more than "half-measures" that evince little "trust in the citizenry," and so "the prospects for citizen impact, either immediately or over time, seem exceedingly small."[49] Still others split the difference by arguing that the reform provides ample opportunity for laypersons to meaningfully participate in important decisions, but without sacrificing the "consistency, predictability, and elite notions of justice" that long have characterized Japan's approach to the criminal process.[50] The most pessimistic observers are persons like those who protested at the Tokyo court on August 3rd, for they insist that lay judge trials should be scrapped immediately, without waiting for the formal review of the system that is scheduled for 2012.[51]

Of course, two cases is too small a basis for responsible speculation about how Japanese criminal justice will work under the new trial system. Among other information problems, Japan's lay judge panels have yet to encounter any case in which a defendant denies the prosecutor's core charge or in which the prosecutor seeks a death sentence. It is precisely in cases of denial and potential death that the lay judge system has the greatest potential to produce verdicts and sentences that deviate from the patterns—perennially high conviction rates, and a rising tide of death and other harsh sentences over the past decade—previously generated by Japanese criminal justice.[52]

For now, anyway, the early returns from Tokyo and Saitama suggest several opportunities for the betterment of Japanese criminal justice—in defense lawyering, in the interrogation room, and in the fresh perspectives that ordinary citizens bring to "the awful court of judgment." There will also be many hard challenges. Arnold Toynbee once observed that civilization is "a movement and not a condition, a voyage and not a harbor," and yet one must also acknowledge truth in H. L. Mencken's quip that "change is not progress."[53]Time and more lay judge trials will help tell how much mere change and how much real progress are stimulated by Japan's new criminal trials.

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Notes

[1] For a brief summary of the rise and demise of Japan's prewar jury, see David T. Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (New York: Oxford University Press, 2002), pp.42-43; and Masahiro Hayashi, *"Sendai no Baishin Saiban ni Tsuite," Hanrei Taimuzu*, 1987, pp.17-24. In the 1990s and 2000s, Japan's acquittal rate in contested cases has been about 3 percent—one-fifth as high as the acquittal rate under the prewar jury system. In the United States, too, juries are more likely to acquit than professional judges are; the classic study is Harry Kalven Jr. and Hans Zeisel, *The American Jury* (Boston: Little, Brown, & Co., 1966). Russia reintroduced jury trials in 1993, but research showing that juries were nine times more likely to acquit than judges sitting alone led to a decision to revert to non-jury trials for all cases except murder. In South Korea as well, the jury trials that started in 2008 have led to an increase in acquittals; see *The Economist*, "The Jury Is Out," February 14, 2009, p.70.

[2] Daniel H. Foote, "Introduction and Overview: Japanese Law at a Turning Point," in Daniel H. Foote, editor, *Law in Japan: A Turning Point* (Seattle: University of Washington Press, 2007), p.xx.

[3] Daily Yomiuri, "Start of Lay Judge System: Candidates Anxious Over Dispensing Justice," May 21, 2009; and Norimitsu Onishi, "Japan Learns Dreaded Task of Jury Duty," *New York Times*, July 16, 2007.

[4] In many particulars, the Japanese lay judge system differs from the forms of lay participation practiced in the United States and Europe, leading some analysts to describe it as "a new species" that is "as isolated as the Galapagos"; see *Asahi Shimbun/International Herald Tribune*, "Editorial: Citizen Judges in Action: System Should Change the Way Trials Are Conducted," August 5, 2009, p.5. For a more detailed description of the rules of Japan's new trial system, see Kent Anderson and David T. Johnson, "Japan's New Criminal Trials: Origins, Operations, and Implications," in Andrew Harding and Penelope Nicholson, editors, New Courts in Asia (London: RoutledgeCurzon, forthcoming); and Kent Anderson and Emma Saint, "Japan's Quasi-Jury (Saiban-in) Law: An Annotated Translation of the *Act Concerning Participation of Lay Assessors in Criminal Trials," Asian-Pacific Law & Policy Journal*, Vol.6, Issue 1 (Winter 2005), pp.233-283.

[5] Article 66 of the Lay Judge Act says that in deliberations, "the chief judge shall consider matters such as conscientiously explaining the necessary laws or ordinances to the lay judges, making arrangements so that deliberations are easily understandable for the lay judges, providing sufficient opportunity for the lay judges to voice their opinions, and so forth, so that lay judges are sufficiently able to execute their duties." See Kent Anderson and Emma Saint, "Japan's Quasi-Jury (Saiban-in) Law: An Annotated Translation of the *Act Concerning Participation of Lay Assessors in Criminal Trials," Asian-Pacific Law & Policy Journal*, Vol.6, Issue 1 (Winter 2005), p. 273.

[6] *Asahi Shimbun*, "Hyogi 'Iken Iiyasukatta'; Ryokei 'Kore de Yokatta no ka,'" August 7, 2009, p.1.

[7] Stephen Landsman and Jing Zhang, "A Tale of Two Juries: Lay Participation Comes to Japanese and Chinese Courts," *UCLA Pacific Basin Law Journal*, Vol.25 (Spring), 2008, p.194.

[8] Mark Levin and Virginia Tice, "Japan's New Citizen Judges: How Secrecy Imperils Judicial Reform," *The Asia-Pacific Journal*, Vol. 19-6-09, May 9, 2009.

[9] Kamiya Setsuko, "First Lay Judge Trial Kicks Off In Tokyo," *The Japan Times*, August 4, 2009, p.1; Kiyotaka Iwata, "Citizen Judge Sentence 'Somewhat Harsh,'" *The Asahi Shimbun/International Herald Tribune*, August 8-9, 2009, p.21; and *Mainichi Shimbun*, "'Yoso yori Omoi' 15nen," August 7, 2009, p.3.

[10] Saeki Masahiko, "Hanzai Higaisha ni yoru Iken Chinjutsu ga Ryokei ni Oyobosu Eikyo: Jissho Kenkyu no Rebyu to Kongo no Kadai." Master's Thesis, Tokyo University Faculty of Law, December 2008, pp.1-97.

[11] *The Japan Times*, "Saitama Lay Judges Hear Attempted Murder Plea," August 11, 2009, p.1; and The Japan Times, "Lay Judges Rule after Victim Testifies," August 13, 2009, p.1.

[12] Takayama Shunkichi, *Saibanin Seido wa Iranai* (Tokyo: Kodansha, 2006).

[13] Philip E. Tetlock, *Expert Political Judgment: How Good Is It? How Can We Know?* (Princeton: Princeton University Press, 2005); and Nassim Nicholas Taleb, *The Black Swan: The Impact of the Highly Improbable* (New York: Random House, 2007).

[14] *The Asahi Shimbun/International Herald Tribune*, "Citizen Judges Hear Their 1st Case," August 4, 2009, p.19.

[15] Kamiya Setsuko, "Foreigners Size Up Lay Judge System," *The Japan Times*, August 16, 2009. In some American jurisdictions, "as many as two-thirds of the people who receive jury-related notices simply ignore them"; see Stephen J. Adler, *The Jury: Trial and Error in the American Courtroom* (New York: Times Books, 1994), p.220. Japanese lay judges are paid better than some of their juror counterparts in America. In Japan, lay judges receive 8000 yen (about $80) for each day of duty preceding the start of trial (for lay judge selection and the like), and 10,000 yen ($100) for each day of service at trial. In Orange County, Florida (where the city of Orlando is located), jurors make $15 a day for the first three days of service and $30 thereafter, while in Manhattan the daily check is $40. See John Schwartz, "Call to Jury Duty Strikes New Fear: Financial Ruin," *New York Times*, September 2, 2009.

[16] Yomiuri Shimbun, "Saibanin Kisha Kaiken no Shoho: Shinri Wakariyasukatta," August 13, 2009, p.31. Citizens who observed the Tokyo and Saitama trials "with great interest and anxiety" also reported that "watching the new system in action helped alleviate some of their concerns." See Setsuko Kamiya, "Citizens Find Their Place on the Bench: Lay Judge Duties Weigh on Candidates," *Japan Times*, September 3, 2009.

[17] *Mainichi Shimbun*, "Tainin Hatashi Ando," August 7, 2009, p.31; The Daily Yomiuri, "Lay Judge Felt Burden of Duty," August 10, p.2; and *International Herald Tribune*, "Citizen Judge System: The Lay Judges Took Their Work Seriously," August 8-9, 2009, p.22.

[18] *Mainichi Shimbun*, "Saibanin Saiban Saishujitsu: Hotei-Kaiken Shoho," August 7, 2009, p.28; and *Asahi Shimbun*, "Hyogi 'Iken Iiyasukatta'; Ryokei 'Kore de Yokatta no ka,'" August 7, 2009, p.1.

[19] For similar statements from the Saitama lay judges, see Yamamoto Ryosuke, Ichikawa Miako, and Numata Chikako, "Trial Weighs Heavily on Citizen Judges," *Asahi Shimbun/International Herald Tribune*, August 14, p.19.

[20] G. K. Chesterton, "The Twelve Men," in *Tremendous Trifles*, 1909. Reprinted as "G. K. Chesterton Empanels a Jury," in *Lapham's Quarterly*, June 5, 2009.

[21] David T. Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (New York: Oxford University Press, 2002), p.242.

[22] Shinomiya Satoru, "Saibaninho wa Keiji Jitsumu no Genba ni Nani o Motarashite Iru ka," *Hogaku Semina*, No.644 (2008), pp.1-3.

[23] David T. Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (New York: Oxford University Press, 2002), p.218.

[24] *Toyo Shimbun* [Aomori edition], "Taisho Jiken: Kiso ga Ohaba Gen," July 24, 2009, p.1.

[25] Takano Takashi, "Nihon no Kensatsu wa Hetare na no ka," in *Keiji Saiban o Kangaeru*: Takano Takashi@burogu, June 14 and June 23, 2009.

[26] David T. Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (New York: Oxford University Press, 2002), p.98.

[27] Tsuchimoto Takeshi, "'Saiban Sho' no Insho Nuguezu," *Mainichi Shimbun*, August 12, 2009, p.25.

[28] Email from a Japanese professor of criminal law (name withheld), August 7, 2009.

[29] John H. Langbein, "Torture and Plea Bargaining," *The University of Chicago Law Review*, Vol.46 (1978), pp.1-22.

[30] David T. Johnson, "Plea Bargaining in Japan," in Malcolm M. Feeley and Setsuo Miyazawa, editors, *The Japanese Adversary System in Context: Controversies and Comparisons* (New York: Palgrave Macmillan, 2002), pp.140-172.

[31] David T. Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (New York: Oxford University Press, 2002), pp.243-275.

[32] *Japan Times*, "Lifer's DNA Retested, Erasing Link to Girl Slain in '90," April 22, 2009.

[33] Shinomiya Satoru, "'Hotei de Shinsho' Honrai no Sugata ni," *Mainichi Shimbun,* August 11, 2009, p.23.

[34] *Japan Times*, "Stronger Case for Videotaping," August 8, 2009, p.13.

[35] On lessons from the United States and South Korea for recording interrogations in Japan, see David T. Johnson, "Kazemuki o Shiru no ni Otenki Kyasta wa Iranai: Nihon ni okeru Torishirabe Rokuon-Rokuga ni tsuite Gasshukoku to Kankoku kara Manabu koto," *Ho to Shinri*, Vol.5, No.1 (August 2006), pp.57-83. Some Japanese observers believe that with the election of the DPJ, the question will shift from whether interrogations will be recorded to what "gifts"—such as the legal authority to plea bargain and offer immunity—will be given to police and prosecutors in exchange for imposing the recording obligation on them (author's interviews with Japanese legal professionals, August 2009).

[36] A more colorful way of saying something similar was expressed by a criminal suspect from New Zealand who told me that his own attorney in a hashish possession case—one of the most respected defense lawyers in a major Japanese city—was "as good as tits on a bull." See David T. Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (New York: Oxford University Press, 2002), pp.72-73, 77.

[37] Shinomiya Satoru, "Saibaninho wa Keiji Jitsumu no Genba ni Nani o Motarashite Iru ka," *Hogaku Semina*, No.644 (2008), pp.1-3.

[38] Author's interviews with Japanese attorneys, August 2009.

[39] Malcolm M. Feeley and Setsuo Miyazawa, editors, *The Japanese Adversary System in Context: Controversies and Comparisons* (New York: Palgrave Macmillan, 2002).

[40] *Japan Times,* "Language in Court to be Simple," August 4, 2009, p.2.

[41] Nonami Asa, "Taion ga Kanjirareta Hotei," *Mainichi Shimbun*, August 6, 2009, p.1.

[42] David T. Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (New York: Oxford University Press, 2002), pp.119-143.

[43] See *Jiyu to Seigi*, May 2009, and the "Bengoshi to Tatakau" blog, May 18, 2009.

[44] A typical law office in Tokyo charges low-income clients 315,000 yen ($3200) as a retainer fee in addition to a contingency fee that depends on the outcome of the case, and 26,250 yen ($260) per hour of work for moderate or high-income clients (author's interview, September 2, 2009). On the economics of criminal defense in Japan before the lay judge system started, see David T. Johnson, The *Japanese Way of Justice: Prosecuting Crime in Japan* (New York: Oxford University Press, 2002), pp.79-82.

[45] Of course, to point out these potential problems in the Japanese system for compensating state-appointed attorneys is not to say that the American system of indigent defense is much better. Unlike Japan, America has an active defense bar and organized public defender offices, but in many American jurisdictions defense attorneys are grossly underpaid and overworked. See, for example, David Feige, *Indefensible: One Lawyer's Journey Into the Inferno of American Justice* (New York: Little, Brown, and Company, 2006); and Alisa Chang, "Not Enough Money or Time to Defend Detroit's Poor," National Public Radio's "All Things Considered," August 17, 2009; available here.

[46] Nonami Asa, "Taion ga Kanjirareta Hotei," *Mainichi Shimbun*, August 6, 2009, p.1.

47 Su-Hyun Lee, "Justice Is Swift for Novice Korean Jurors," *New York Times*, July 17, 2008; and Stephan Landsman and Jing Zhang, "A Tale of Two Juries: Lay Participation Comes to Japanese and Chinese Courts," *UCLA Pacific Basin Law Journal*, Vol.25 (Spring 2008), pp.197-216.

[48] Shinomiya Satoru, "Saibaninho wa Keiji Jitsumu no Genba ni Nani o Motarashite Iru ka," *Hogaku Semina*, No.644 (2008), pp.1-3; Katayama Yoshihiro, Kuniya Hiroko, and Shinomiya Satoru, *Koko dake wa Kiite Okitai: Saibanin Saiban 31 no Gimon ni Kotaeru* (Tokyo: Nihon Hyoronsha, 2009); and *Asahi Shimbun/International Herald Tribune*, "Editorial: Citizen Judges in Action: System Should Change Way Trials Are Conducted," August 5, 2009, p.20.

[49] Stephen Landsman and Jing Zhang, "A Tale of Two Juries: Lay Participation Comes to Japanese and Chinese Courts," *UCLA Pacific Basin Law Journal*, Vol.25 (Spring), 2008, p.220.

[50] Ingram Weber, "The New Japanese Jury System: Empowering the Public, Preserving Continental Justice," *East Asia Law Review*, Vol.4, Issue 1 (2009), p.125.

[51] Takayama Shunkichi, *Saibanin Seido wa Iranai* (Tokyo: Kodansha, 2006); Hirano Keiji, "Lay Judge System Rife With Problems: Opponents," *Japan Times*, July 28, 2007; and Colin P. A. Jones, "Big Winners in 'Jury' System May Be Judges, Bureaucrats," *Japan Times*, March 10, 2009.

[52] David T. Johnson and Franklin E. Zimring, *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia* (New York: Oxford University Press, 2009), pp.45-101.

[53] David T. Johnson, "Criminal Justice in Japan," in Daniel H. Foote, editor, *Law in Japan: A Turning Point* (Seattle: University of Washington Press, 2007), pp.343-383.