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Testing Japan's Convictions: The Lay Judge System and the Rights of Criminal Defendants

Arne F. Soldwedel*

ABSTRACT

Japan has endured considerable international and domestic criticism over the way its criminal justice system treats criminal defendants. The system shows little regard for defendants' constitutional rights, and media reports about forced confessions and wrongful convictions are creating grassroots pressures to uphold the right to counsel, the right to silence, and the presumption of innocence.

Japan has begun to reform its legal system in order to increase public participation in government, and to create more public trust in the justice system. To achieve these aims, Japan will reintroduce jury trials in May of 2009. However, current Japanese justice reforms ignore police practices and specifically reject the promotion of defendants' rights.

As a result, current reforms are unlikely to achieve their ambitious goals. Instead, they may trigger a governmental legitimacy crisis. Japan must modify its criminal procedures so that they agree with the constitutional rights of criminal defendants if it truly hopes to increase participation in government and to instill faith in the justice system.

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Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people.

Constitution of Japan, May 3, 1947, from the Preamble

I. INTRODUCTION

Japan experienced an extended economic downturn in the 1990s that forced the country to implement creative solutions to promote recovery.¹ To meet these economic pressures and the perceived need to “compete internationally,” Japan embarked on a massive program of governmental reform² aimed at streamlining bureaucracy and cutting costs on a grand scale.³ As part of this change, reformers also sought to revise the legal system.⁴ Japan’s legal system has been broadly criticized as an insular bureaucracy that is detached from the needs of the people.⁵ In particular, both foreign and domestic observers have vilified Japanese criminal justice.⁶ The conviction

1. See KENNETH B. PYLE, *JAPAN RISING: THE RESURGENCE OF JAPANESE POWER AND PURPOSE* 363-66 (2007) (providing a general discussion of pressures to reform Japanese government between 1991 and 2006); Setsuo Miyazawa, *Reform in Japanese Legal Education: The Politics of Judicial Reform in Japan: The Rule of Law at Last?*, 2 *ASIAN-PAC. L. & POL’Y J.* 89, 97 (2001); Matthew Wilson, *The Dawn of Criminal Jury Trials in Japan: Success on the Horizon?*, 24 *WISC. INT’L L.J.* 835, 842 (2007).

2. George Schumann, *Beyond Litigation: Legal Education Reform in Japan and What Japan’s New Lawyers Will Do*, 13 *U. MIAMI INT’L & COMP. L. REV.* 475, 479–80 (2006) (noting that a decade of economic woes has driven the Japanese government toward structural reforms of the legal system and the role of lawyers in Japanese society). See also Wilson, *supra* note 1, at 842.

3. Miyazawa, *supra* note 1, at 97–98; The Ministry of Foreign Affairs of Japan, *Gist of the Central Government Reform*, http://www.mofa.go.jp/about/hq/central_gov/gist.html (last visited Oct. 20, 2007); see also Wilson, *supra* note 1, at 842 (noting the amendments of the Commercial Code in 1993, the Administrative Procedure Act in 1994, the Product Liability Act in 1995, the implementation of a new Code of Civil Procedure in 1998, and the revision of the Commercial Code in 2002 as examples of reform).

4. See, e.g., PROMOTION OFFICE OF JUSTICE SYSTEM REFORM, MINISTRY OF JUSTICE OF JAPAN, *JUSTICE SYSTEM REFORM OF JAPAN—FOR A FASTER, FRIENDLIER, AND MORE RELIABLE JUSTICE SYSTEM* (2006), available at <http://www.moj.go.jp/ENGLISH/issues/issues01.html> [hereinafter Justice System Reform Pamphlet]; see also Wilson, *supra* note 1, at 842–43.

5. See Wilson, *supra* note 1, at 835–36.

6. See, e.g., Takeo Ishimatsu, *Are Criminal Defendants in Japan Truly Receiving Trials by Judges?*, translated in 22 *L. JAPAN* 143, 143 (1989) (arguing that criminal trials in Japan are formal ceremonies that exist only as an “empty shell”); see

rate in Japan stands at over 99%,⁷ and some methods of handling and processing the accused have drawn the attention of diverse bodies such as the Japan Federation of Bar Associations,⁸ human rights groups,⁹ and the United Nations.¹⁰ Media reports about wrongful convictions are mobilizing the Japanese citizenry, and public sentiment may also be contributing to the movement to revise the criminal justice system.¹¹

In 1999, the government established the Justice System Reform Council (JSRC) to recommend appropriate modifications of the legal system.¹² The JSRC deliberated for two years and, in June 2001, issued its recommendations to the Cabinet.¹³ The JSRC proposed

also Ryuichi Hirano, *Diagnosis of the Current Criminal Procedure*, translated in 22 L. JAPAN 129, 129 (1989) (arguing that Japan's Code of Criminal Procedure is "diseased," and that Japanese courts do not perform the function of deciding guilt or innocence, but rather "confirm guilt"). Ishimatsu's and Hirano's unapologetic criticisms of the Japanese system are underscored by their professional qualifications. Ishimatsu was a former high court judge with a long career trying many criminal cases, and Hirano was a noted criminal procedure scholar and a former Tokyo University president. Hirano, *supra*, at 129; Ishimatsu, *supra*, at 143; see also Wilson, *supra* note 1, at 835–37 (summarizing the main aspects of the Japanese criminal justice system that various observers have critiqued).

7. J. Mark Ramseyer & Eric B. Rasmusen, *Why is the Japanese Conviction Rate So High?*, 30 J. LEGAL STUD. 53, 55 (2001) (arguing that understaffing and budget constraints among prosecutors impact the cases that are selected for trial).

8. See JAPAN FEDERATION OF BAR ASSOCIATIONS, ABOLISH "DAIYO-KANGOKU—JAPAN POLICE CUSTODY SYSTEM" NOW (1993) [hereinafter ABOLISH DAIYO-KANGOKU].

9. See Jeff Vize, *Torture, Forced Confessions, and Inhuman Punishments: Human Rights Abuses and the Japanese Penal System*, 20 UCLA PAC. BASIN L.J. 329, 371 (2003) (noting that groups such as Human Rights Watch and Amnesty International have criticized Japan for more than ten years).

10. See U.N. Committee Against Torture, *Conclusions and Recommendations of the Committee Against Torture: Japan*, CAT/C/JPN/CO/1 (Aug. 3, 2007); see also Press Release, Japan Federation of Bar Associations, UN Torture Committee: Japan's Substitute Prison System Must Be Reconsidered Immediately Following the Committee's Recommendations (May 30, 2007), available at <http://www.nichibenren.or.jp/en/activities/meetings/070530.html> [hereinafter U.N. Committee Recommendations].

11. Robert M. Bloom, *Jury Trials in Japan*, 28 LOY. L.A. INT'L & COMP. L. REV. 35, 47 (2006) (noting the uproar over the cases of four wrongfully convicted individuals who had been sentenced to death row and who served a combined 130 years of incarceration before their sentences were overturned, and that, as a result, the Chief Justice of the Japanese Supreme Court investigated the idea of re-implementing a jury system in Japan); see also Daniel H. Foote, *From Japan's Death Row to Freedom*, 1 PAC. RIM L. & POL'Y J. 11 (1992) [hereinafter Foote, *Death Row*].

12. Ministry of Justice of Japan, Ensuring that the Results of the Justice System Reform Take Root, <http://www.moj.go.jp/ENGLISH/issues/issues01.html> (last visited Oct. 20, 2008) [hereinafter Ensuring Justice] (discussing that the Diet enacted the Act for the Establishment of the Justice System Reform Council (JSRC) and the JSRC was attached to the Cabinet in 1999).

13. The Justice System Reform Council, *Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21st Century* (2001), reprinted in 2002 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 119, 126, available at <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html> [hereinafter JSRC Recommendations]; see also Ensuring Justice, *supra* note 12.

three main elements to guide Japanese legal reform: construction of a justice system meeting the people's needs, reform of the judicial community, and establishment of a "popular base."¹⁴

More specifically, the first element involved changing the civil procedure system in order to create greater access to the Japanese justice system.¹⁵ The second element focused on modifying the training and education of judges, and it included changes in legal education.¹⁶ The third element of legal reform was the introduction of a lay judge system or *saiban-in seido*, requiring citizen participation in serious criminal trials.¹⁷ The JSRC proposed the lay judge system in order to achieve greater citizen participation in government¹⁸ and to instill faith in the justice system.¹⁹ Public involvement in the adjudication of crime is expected to improve public perceptions of the Japanese criminal justice system's legitimacy.²⁰ Scholars have noted that motives for implementing this new system also include promoting democracy,²¹ and contributing to the perception that disputes in Japan are resolved fairly.²² However, Japan's "specific motives . . . d[id] not include [the] promotion of defendants' rights."²³ Moreover, current reform initiatives do not modify Japanese police procedures, which some observers believe to be the essential element of any true reform.²⁴

To date, the Japanese government has not adopted any reform measures that go substantially beyond those recommended in the

14. JSRC Recommendations, *supra* note 13, at 132.

15. *Id.* at 137.

16. *Id.* at 174–91.

17. *Id.* at 213–20.

18. *Id.* at 211–12.

19. *Id.* at 212.

20. See Kent Anderson & 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*, 37 VAND. J. TRANSNAT'L L. 935, 943 (2004) (noting that the Japanese judiciary is seen as elitist and removed from everyday life and the belief that laypeople, who possess common sense but are without institutional pressures and personal or political stakes in the outcomes of cases, are best suited to temper the insularity and biases of Japanese judges).

21. *Id.*

22. See Bloom, *supra* note 11, at 50–51.

23. Anderson & Nolan, *supra* note 20, at 941 (noting that the JSRC has specifically excluded defendants' rights as a rationale for reform).

24. See, e.g., David T. Johnson, *Justice System Reform in Japan: Where Are the Police and Why Does it Matter?*, at 2, http://www.law.usyd.edu.au/anjel/documents/ResearchPublications/Johnson2004_JusticeSystemReform.pdf (last visited Oct. 20, 2008) [hereinafter Johnson, *Justice System Reform*] (noting that Japanese criminal justice is one of the principal indicators of the character of Japan's democracy, and that the police practices should have been the central focus of criminal justice reform, but that reform officials have neglected to consider the police in the discourse).

JSRC Report,²⁵ and in May 2009, Japan will reintroduce jury trials after a sixty-three-year absence.²⁶ The JSRC Report leaves the impression that Japan is committed to increasing citizen participation.²⁷ Yet because current initiatives do not address defendants' constitutional rights, and because they ignore police practices, Japan may be missing its best opportunity to achieve truly meaningful reform, and the lay judge system may not support the reformers' ambitious goals. Some critics argue that the lay judge system is actually a deliberate obfuscation designed to give the appearance of legitimacy.²⁸ As a result, questions remain about the scope and efficacy of the proposed reforms.

This Article will focus on the implementation of citizen participation through jury trials and on what current Japanese legal reforms will mean for the rights of criminal defendants. Japanese society is becoming more adversarial in nature,²⁹ and as public awareness of current law enforcement practices grows, Japanese people may demand more complete reforms in order to uphold the constitutional rights of criminal defendants. By providing an infrastructure for citizen participation, the new lay judge system could provide a gateway for that to happen. Part II sets forth the basic framework and goals of the proposed lay judge (*saibanin*)³⁰ system. Part III introduces the Japanese approach to criminal

25. Anderson & Nolan, *supra* note 20, at 992 (noting in an addendum to their article that the codification of the recommendations involves only minor changes to the number of jurors).

26. Wilson, *supra* note 1, at 837; see also Joseph J. Kodner, *Re-introducing Lay Participation to Japanese Criminal Cases: An Awkward Yet Necessary Step*, 2 WASH. U. GLOBAL STUD. L. REV. 231, 234–35 (2003) (providing a history of Japan's early experiences with a jury system that had been established between 1928 and 1943 under the 1923 Jury Act).

27. See John D. Jackson & Nikolay P. Kovalev, *Lay Adjudication and Human Rights in Europe*, 13 COLUM. J. EUR. L. 83, 87–91, 155 (2006) (studying forty-six countries in Eastern Europe, the authors note various arguments that lay adjudication can help promote civil and political rights and prevent state repression, and that judges may have little choice to uphold constitutional provisions because they are accountable to the legal system).

28. See, e.g., Colin P.A. Jones, *Prospects for Citizen Participation in Criminal Trials in Japan*, 15 PAC. RIM L. & POL'Y J. 363, 366 (2006) (book review) (citing TAKASHI MARUTA, SAIBAN'IN SEIDO [THE LAY JUDGE SYSTEM] 43 (2004)) (noting that the "real goal" may be to create the appearance of civic participation).

29. See Gordon Van Kessel, *European Trends Toward Adversary Styles in Criminal Procedure and Evidence*, in THE JAPANESE ADVERSARY SYSTEM IN CONTEXT: CONTROVERSIES AND COMPARISONS, at 225, 243 (Malcolm M. Feeley & Setsuo Miyazawa eds., 2002) (noting that Japan is moving toward a more individualistic society with more economic and social competition). *But see* Bloom, *supra* note 11, at 56–57 (noting that the Japanese have a high level of respect for authority, and that the social hierarchy stratifying Japan makes citizen participation less suitable there because Japanese are more comfortable having cases decided by professional judges).

30. The new citizen-judge system (*saibanin seido*) has been translated in various ways, including: "lay judge," "lay jury," or "lay assessor." This Article will use the term "lay judges."

justice, contrasts it with the U.S. approach, and compares Japanese constitutional and procedural protections for criminal defendants with current Japanese law enforcement practices. Part IV addresses the potential impact of recent legal reforms on the Japanese criminal justice system, to assess whether the lay judge system is likely to meet the goals of reform. Part V provides supplemental recommendations to support more extensive and meaningful reform.

II. THE SAIBANIN SYSTEM: DRESSING UP THE WINDOW OR LAYING THE GROUNDWORK FOR REAL REFORM?

There is considerable debate as to what the lay judge system will actually achieve.³¹ On May 28, 2004, the Japanese Diet promulgated the Lay Assessor's Act,³² which codified many of the recommendations of the JSRC Report and set forth the structure of the new system. The lay judge system is heavily modeled on European mixed jury or lay judge systems,³³ which feature private citizens sitting alongside professional judges on adjudicatory panels.³⁴ Panels for contested cases will consist of six lay judges and three professional judges.³⁵ In uncontested cases—cases in which a confession has been obtained—panels will consist of four lay judges and one professional judge.³⁶ Decisions in either situation will require a majority vote that includes the vote of at least one professional judge.³⁷ Lay judges will help to determine not only the guilt or innocence of defendants, but also the sentences of those who are convicted.³⁸ Lay judges will participate in trials featuring serious cases punishable by death, life imprisonment, imprisonment for an indefinite period, and imprisonment with hard labor, as well as trials of crimes involving an intentional act that resulted in the death of a

31. See, e.g., Bloom, *supra* note 11 (arguing that the lay judge system will not meet its stated goals).

32. Saiban'in no Sanka Suru Keiji Saiban ni kansuru Horitsu [Law for Implementation of Lay Judge System in Criminal Court Procedures], Law No. 63 of 2004, translated in Kent Anderson & Emma Saint, *Japan's Quasi-Jury (Saiban-in) Law: An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials*, 6 ASIAN-PAC. L. & POL'Y J. 233, 233 (2005). This law will be referred to as the "Lay Assessor's Act" for the purposes of this article.

33. See Bloom, *supra* note 11, at 42; see also Wilson, *supra* note 1, at 852 (noting the Japanese Supreme Court, an early opponent of the new system, was less opposed to implementing the European-style lay judge system than it was to the adoption of a U.S.-style jury system).

34. Bloom, *supra* note 11, at 39.

35. Anderson & Nolan, *supra* note 20, at 992.

36. *Id.*

37. Anderson & Saint, *supra* note 32, at 234.

38. *Id.* at 240–41.

victim.³⁹ Lay judges will also be able to ask questions of victims directly,⁴⁰ and indirectly of witnesses⁴¹ and defendants at trial.⁴²

Prospective lay judges will be selected from lists of registered voters⁴³ and must undergo questioning by the court as to their capacity for fair decision making and their involvement with the events at issue in the case.⁴⁴ They may be ineligible for various reasons such as advanced age, criminal history, failure to complete mandatory Japanese education, membership in government, mental or physical incapacity, and employment status.⁴⁵ In addition, those with serious illnesses, those who need to care for family members, those who will suffer severe financial difficulty, and those who must attend a family funeral may also be excused from service.⁴⁶

The JSRC Report recommended that lay judges serve in cases involving serious crimes to which heavy statutory penalties apply, because these are the cases “in which the general public has a strong interest and that have a strong impact on society.”⁴⁷ The Lay Assessor’s Act upheld this recommendation by providing that lay judges will consider cases involving grave offenses and the possibility of harsh punishments.⁴⁸ The report also recommended that defendants not be allowed to waive trial by a judicial panel partly comprised of lay judges.⁴⁹ The Lay Assessor’s Act does not specifically uphold this recommendation, but instead provides that

39. *Id.* at 236–37.

40. *Id.* at 268 (stating that under Article 58 of the Lay Assessor’s Act, lay judges may question victims who have stated their opinions during the proceedings in order to clarify the meaning of their testimony.).

41. *Id.* at 267 (stating that under Article 56 of the Lay Assessor’s Act, lay judges may question a witness or other person upon informing the chief judge; and under Article 57, lay judges may attend questioning sessions of witnesses and others that are held outside court and, upon informing the chief judge, may also ask questions on these occasions).

42. *Id.* at 268 (stating that under Article 59 of the Lay Assessor’s Act, upon informing the chief judge, lay judges may question defendants who make voluntary statements).

43. Anderson & Saint, *supra* note 32, at 243 (discussing Article 13 of the Lay Assessor’s Act); *id.* at 249 (discussing Article 21 of the Lay Assessor’s Act).

44. *Id.* at 248 (stating that Article 17 of the Lay Assessor’s Act stipulates reasons for disqualification including those with some relation to the case); *id.* at 256–57 (stating that Article 34 of the Lay Assessor Act provides that the chief judge may ask lay judges questions regarding their suitability for service); Justice System Reform Pamphlet, *supra* note 4, at 14.

45. Wilson, *supra* note 1, at 846 (citing Sup. Ct. of Japan, SAIBANIN SENIN TETSUZUKI NO GAIYO [Outline of Lay Judge Selection Process], available at <http://www.saibanin.courts.go.jp/shiryō/pdf/09.pdf>).

46. Anderson & Saint, *supra* note 32, at 247 (stating that Article 16 of the Lay Assessor’s Act outlines reasons why one may decline service as a lay judge).

47. JSRC Recommendations, *supra* note 13, at 216.

48. Anderson & Saint, *supra* note 32, at 237.

49. JSRC Recommendations, *supra* note 13, at 216 (noting that this policy is consistent with the aim of increasing citizen participation in government—as defendants cannot opt for bench trials, their cases must be heard by lay judges).

professional judges may decide cases where conditions make it difficult to guarantee lay judge participation.⁵⁰ Finally, the current system of *koso* appeals is to remain intact.⁵¹ This means that under the new lay judge system, prosecutors will retain the power to retry individuals they were unable to convict in the court of first instance, despite the Japanese constitution's prohibition on "double jeopardy."⁵² Notably, the JSRC Report shied away from recommending that lay judges also participate in the appeals process,⁵³ and the Lay Assessor's Act did not take up the issue.

The basic structure of the new system appears to support the general goal of increasing public involvement in government affairs. However, the current system falls short of the ambitious aims set forth in the JSRC Report. In recommending a mixed jury system, the JSRC stated that the new system should be flexible,⁵⁴ "constantly monitored and . . . readjusted from a broad viewpoint, as necessary."⁵⁵ Perhaps the JSRC intended the new system to function as a temporary program that will lay the groundwork for more extensive legal reforms. If so, the form this will take remains to be seen, because the government's current approach will not increase faith in the justice system. Some observers argue that Japan should adopt U.S.-style jury trials as a more appropriate vehicle to produce

50. Anderson & Saint, *supra* note 32, at 238 (stating that Article 3 of the Lay Assessor's Act provides for exceptions to the types of cases lay judges will participate in; for example, an exception is provided for cases involving a possibility of violent reprisals against lay judges by elements of organized crime).

51. KEISHOHŌ, Law No. 131 of 1948, arts. 372-404, *translated in* EHS LAW BULL. SER. no. 2600-2601, at 90-95 (2007). It should be noted that the Lay Assessor's Act does not mention the issue of appealing a determination by the lay judges, but the JSRC Report does. *See* JSRC Recommendations, *supra* note 13, at 217 (noting that *koso* appeals are available to both the defense and the prosecution); Supreme Court of Japan, Outline of Criminal Justice in Japan, http://www.courts.go.jp/english/proceedings/criminal_justice.html (last visited Oct. 20, 2008) [hereinafter Outline].

A party who is not content with the judgment of the first instance may file an appeal, which is called a *Koso* appeal . . . alleging an error. Grounds for a *Koso* appeal are: (i) non-compliance with procedural code in the trial proceedings; (ii) an error in the interpretation or application of law in the judgment; (iii) excessive severity or leniency of the sentence; and (iv) an error in fact-finding.

Outline, *supra*.

52. KENPŌ, art. 39 ("No person shall be held criminally liable for an act which was lawful at the time it was committed or for an act of which he has been acquitted, nor shall he be placed in double jeopardy."). While the Constitution, at least on paper, prohibits "double jeopardy," in Japan this right does not attach until the judicial process has achieved a "final" judgment.

53. JSRC Recommendations, *supra* note 13, at 217 ("Further studies are necessary with regard to the composition of the court body for the *koso* appeal, the method of proceedings, etc.).

54. *Id.* at 213.

55. *Id.*

“better justice” and to instill greater faith in the judicial process.⁵⁶ Perhaps the flexibility alluded to in the JSRC Report would eventually permit an U.S.-style jury system. However, the government has not significantly altered criminal procedures, and in implementing the Lay Assessor’s Act, it focused solely on achieving citizen participation in criminal trials.⁵⁷ Neither the report nor the law contemplates a fuller recognition of criminal defendants’ constitutional rights. Some critics argue that because Japanese police practices have not been included in reform proposals,⁵⁸ the lay judge system is actually a meaningless façade that will not significantly change Japanese criminal justice.⁵⁹

The Lay Assessor’s Act was implemented to increase public understanding, trust, and confidence,⁶⁰ but Japanese media reports about wrongful convictions and forced confessions⁶¹ are having the

56. Richard O. Lempert, *Citizen Participation in Judicial Decision Making: Juries, Lay Judges and Japan*, 2001 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 1, 13 (advocating a U.S.-style jury system to facilitate better justice, particularly regarding criminal procedure); see also Lester W. Kiss, *Reviving the Criminal Jury in Japan*, 62 LAW & CONTEMP. PROBS. 261, 283 (1999) (advocating a jury system based on the Anglo-American model).

57. Anderson & Saint, *supra* note 32, at 283. The authors cited *rippō riyū* (legislative reasons) that are not part of the law, but which provide the legislature’s rationale for introducing the legislation:

In light of the fact that having lay assessors selected from among the people participating along with judges in the criminal litigation process will contribute to raising the public’s trust in and increasing their understanding of the judicial system, it is necessary to prescribe special provisions in the Courts Act, Code of Criminal Procedure, and other necessary areas to achieve lay assessors’ participation in criminal trials. Thus, this draft is introduced for these reasons.

Id.

58. See Johnson, *Justice System Reform*, *supra* note 24, at 2 (noting that public discussion about reform is inadequate because it does not consider the role of the police); *id.* at 15 (questioning why deliberations concerning justice system reform are not transparent to the public)

59. *Id.*; see also Jones, *supra* note 28, at 365–66 (noting the skepticism of Professor Takashi Maruta); Norimitsu Onishi, *Japan Learns Dreaded Task of Jury Duty*, N.Y. TIMES, July 16, 2007, at A1, available at <http://www.nytimes.com/2007/07/16/world/asia/16jury.html?ex=1342324800&en=7b98b617do628fea&ei=5124&partne r=permalink&exprod=permalink> (citing Japanese defense attorney Shunkichi Takayama who believes that “the jurors will be ornaments” that are “co-opted by the state”).

60. Anderson & Saint, *supra* note 32, at 236 (stating that Article 1 of the Lay Assessor’s Act sets forth the purpose of the legislation).

61. See, e.g., *Defendant’s Confession Rejected After DVD Viewing*, YOMIURI SHIMBUN (TOKYO), Nov. 16, 2007, at 2 (noting the judge’s determination that a DVD recording of the interrogation of an eighty-eight-year-old murder suspect revealed that the prosecution misled the defendant and that the voluntary nature of the questioning was therefore questionable); see also Kazuaki Nagata, *Ex-Judge Continues to Push to Free Death-Row Inmate He Helped Convict in ‘68*, JAPAN TIMES, Nov. 8, 2007, available at <http://search.japantimes.co.jp/cgi-bin/nn20071108f3.html> (noting the judge’s reservations about the methods police interrogators employed, and a lawyer’s criticism

opposite effect—increasing public awareness of misapplications of justice.⁶² Under the focused lens of public scrutiny, police activities that contradict the Japanese constitution could endanger the reform movement's broad goals and raise questions about the government's legitimacy. Citizens will not be encouraged by a jury trial system that aims to build public approval but which also ignores the Japanese constitution. Unless current law enforcement methods and court proceedings are tempered to accord with the constitution, Japanese citizens may disregard the lay judge system as an unpopular and meaningless distraction. This would decrease, rather than increase, trust in government and would discourage citizen participation in government.

III. JAPAN'S CONSTITUTION AND THE SEARCH FOR "THE TRUTH"

To a Western observer, Japanese criminal justice methods are out of step with the Japanese constitutional rights that exist to protect criminal defendants. Japan's constitution has strong Western influences, yet the country has retained its criminal justice traditions.⁶³ Understanding the cultural and historical underpinnings of the Japanese experience helps to explain the discord. Cultural relativism, however, should not be used to justify inappropriate practices such as coercive interrogations and forced confessions. These practices undermine governmental legitimacy and should be strictly abandoned. The following subparts illustrate how the Japanese criminal justice system routinely disregards the constitutional rights of criminal defendants.

A. *Modern Constitution and the Japanese Concept of Individual Rights*

Japan has a long history, and not surprisingly its traditional notions of the meaning of rights have had a strong impact on its criminal justice system. Much of the tradition was turned on its head in the aftermath of World War II, when General Douglas MacArthur

of the heavy reliance by prosecutors on confessions, regardless of how they are produced); Setsuko Kamiya, *Videotaping Interrogations Worth a Look?*, JAPAN TIMES, Jan. 11, 2007, available at <http://search.japantimes.co.jp/cgi-bin/nn20071011f1.html>.

62. *Amid Calls for Transparency Cops Plan Internal Monitors of Grillings*, JAPAN TIMES, Nov. 2, 2007 [hereinafter *Cops Plan Monitors*], available at <http://search.japantimes.co.jp/cgi-bin/nn20071102a4.html> (noting the effect of media reports of a series of acquittals involving forced confessions).

63. See Rajendra Ramlogan, *The Human Rights Revolution in Japan: A Story of New Wine in Old Skins?*, 8 EMORY INT'L L. REV. 127, 210 (1994) (noting that Japan's culture and traditions are not in harmony with legal norms that govern behavior there, and that human rights are interpreted more in line with Japanese culture and traditions than the Western interpretation of them).

became the chief architect of the reconstruction of Japan and its legal system.⁶⁴ As Supreme Commander of Allied Powers (SCAP), MacArthur sought to impose U.S.-influenced liberal democratic principles on Japan, and these were reflected in Japan's new constitution.⁶⁵ The constitution contains provisions meant to protect the criminally accused, many of which are directly analogous, if not almost identical, to provisions in the U.S. Constitution.⁶⁶ SCAP insisted on the inclusion of these provisions in the Japanese constitution regardless of Japanese legal traditions.⁶⁷ While some critics argue that the current Japanese Constitution is illegitimate because it is not of purely Japanese origin,⁶⁸ it is notable that Japan has never revised its constitution.⁶⁹

The Japanese constitution provides broad protections for those accused of crimes.⁷⁰ Unfortunately, the most striking aspect of these provisions is that they are routinely ignored. Even though the constitution protects rights consistent with U.S. notions of justice, Japan's understanding of individual rights remains distinct from the U.S. understanding.⁷¹ In fact, the term "right" did not even exist in

64. See Wilson, *supra* note 1, at 841.

65. See PYLE, *supra* note 1, at 219 (noting that the occupation forces planted the seeds of Western liberalism wherever they could and sought to implant U.S. values and ideals without understanding Japan's history or culture because they considered U.S. ideals to be universally valid); *id.* at 48 (noting that the United States imposed the 1947 Constitution on the Japanese); see also JOHN W. DOWER, *EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II* 370 (1999) (noting the political idealism of the United States and its influence on the Japanese Constitution).

66. For example, provisions in Chapter III strongly resemble the U.S. Constitution's Fifth, Sixth, and Fourteenth Amendments. Compare KENPŌ, arts. 31–34, 37–39, with U.S. CONST. amends. V, VI, XIV.

67. See Takashi Takano, *The Miranda Experience in Japan, in THE JAPANESE ADVERSARY SYSTEM IN CONTEXT: CONTROVERSIES AND COMPARISONS*, *supra* note 29, at 128, 128–29 (noting safeguards against abuses to individual rights proposed in the GHQ (General Headquarters) draft of the constitution, including one identical to a clause in the U.S. Fifth Amendment; indicating that the second clause to Art. 38 in the GHQ draft was revolutionary at the time because it stipulated that confessions would only be valid if made in the presence of counsel—some twenty years before the landmark *Miranda v. Arizona* decision in the U.S.; noting that the language was altered at the suggestion of General Whitney of the GHQ, who felt it was too broad; and stating that the adopted version omits the presence of counsel requirement).

68. PYLE, *supra* note 1, at 48 (noting the sentiments of Japanese social scientist Yasusuke Murakami, including the observation that, "for their entire modern history the Japanese people have been compelled to live in world where the transcendental, abstract values of Western civilization, rather than the familiar norms of their own value system, ruled").

69. DOWER, *supra* note 65, at 561–62 (noting that since its inception in 1947, Japan's Constitution has never been revised in any way).

70. See Takano, *supra* note 67, at 128.

71. KENNETH L. PORT, *COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN* 32 (2d ed. 2003) (noting that concepts such as "law" and "rights" in Japan gain meaning in a situational context, and that governance in Japan is achieved by setting norms to guide society instead of by establishing universal rules to apply in advance of those situations).

Japan until it was introduced into the Japanese language during the Meiji years as Japan sought to adapt to a new civil code.⁷² In addition to the cultural aspect, Japan's adherence to civil law is another important factor in how rights are viewed in Japan.⁷³ In civil law systems, rights emanate from legal documents and are not universal principles that exist outside the codified law.⁷⁴ For example, Article 11 of the Japanese constitution provides for "fundamental human rights guaranteed to the people by this Constitution" that are to be "conferred to the people."⁷⁵ Under a civil code approach, the codified law is the source of rights, whereas under the U.S. view, rights exist apart from the Constitution.⁷⁶

The incorporation of U.S. ideals into the Japanese constitution has yet to dislodge traditional Japanese notions of rights.⁷⁷ This Japanese view of individual rights helps foreign observers to understand why Japanese law enforcement practices appear to contradict the Japanese constitution. Rights in Japan are a product of Japanese culture and traditions, which have developed over thousands of years of history.⁷⁸ Postwar Japan accepted U.S. principles into its constitution and into its system of government, but implementing these principles has been problematic because Japanese criminal procedures do not wholeheartedly embrace the constitution.⁷⁹ Moreover, while both the U.S. and Japanese criminal

72. *Id.* (noting that the Japanese translator of the French Civil Code had to fashion the term *kenri* for an adequate translation because the historical Japanese view of rights was contextual and situational as distinguished from the Western understanding of rights).

73. *Id.*

74. See Peter G. Stein, *Roman Law, Common Law, and Civil Law*, 66 TUL. L. REV. 1591, 1596 (1992) (noting the "civil law conception of the written law as the sole source of private law"); *id.* at 1598 (noting that "in the civil law rights derive from the substantive law, and wherever that law recognizes a right, the procedural law, being accessory to the substantive law, must provide an appropriate remedy").

75. KENPŌ, art. 11 ("The people shall not be prevented from enjoying any of the fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights.").

76. U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people."). This language implies that U.S. citizens have other rights beyond those guaranteed by the U.S. Constitution.

77. Ramlogan, *supra* note 63, at 210.

78. See Frank Munger, *Constitutional Reform, Legal Consciousness, and Citizen Participation in Thailand*, 40 CORNELL INT'L L.J. 455, 460 (2007) (noting that Asian cultures socialize individuals in different ways than in the West, for cultural reasons and because Asian cultures are "civil societies," and that reconstructing those societies on a Western model may be misguided); see also Ramlogan, *supra* note 63, at 210.

79. Munger, *supra* note 78, at 456 (noting that the transplantation of Western judicial systems in Asian societies has resulted in systems that function quite differently than their Western models).

justice systems exist to control crime, the two systems approach criminal justice in very different ways.

B. Competing Views of Justice

Japan has been characterized as a system of "substantive justice," in contrast with the "procedural justice" system of the United States.⁸⁰ The hallmarks of substantive justice are the pursuit of truth and the achievement of a "just result."⁸¹ Accordingly, Japanese criminal procedures are designed to uncover the truth as a necessary first step in the justice process.⁸² The successes of the Japanese criminal justice system, such as the low crime rate, the high clearance rate of criminal cases, and the relatively small prison population all indicate that the system successfully controls crime.⁸³ This justifies and supports Japanese law enforcement practices as effective measures to combat crime. However, during criminal investigations, police and prosecutors place great importance on the process of obtaining confessions, regardless of whether suspects' rights are violated in the process.⁸⁴ This is a significant problem because sacrificing citizens' individual rights challenges the legitimacy of the Japanese constitution and undermines the very concept of democracy.

At the same time, Japanese criminal justice has also been described as "benevolent" and "paternalistic" because it is geared towards the expeditious reintegration of the guilty back into society.⁸⁵ Under this view, criminal justice is applied on an individual basis rather than as a system of universal legal principles.⁸⁶ Japanese authorities have great discretion in determining which cases to prosecute, and they exercise that discretion by thoroughly examining all of the circumstances surrounding a criminal offense.⁸⁷ Under the

80. Jean Choi DeSombre, *Comparing the Notions of the Japanese and the U.S. Criminal Justice System: An Examination of Pretrial Rights of the Criminally Accused in Japan and the United States*, 14 UCLA PAC. BASIN L.J. 103, 103 (1995).

81. *Id.*

82. *Id.* at 107.

83. *Cf.* Wilson, *supra* note 1, at 836-37 (noting that Japan is proud of its judicial system and that the judiciary does not consider it in need of repair).

84. David A. Seuss, *Paternalism Versus Pugnacity: The Right to Counsel in Japan and the United States*, 72 IND. L.J. 291, 319 (1996); *see also* Choi DeSombre, *supra* note 80, at 103.

85. Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317, 341 (1992) [hereinafter Foote, *Paternalism*] (noting that the Japanese system seeks to adjudicate crime without resorting to imprisoning the defendant or burdening him with the stigma of a conviction or even of an arrest wherever possible).

86. *See* PORT, *supra* note 71, at 32 (stating that Japanese governance tends to impose norms for society, rather than mandating rules that apply in advance).

87. *See* Kenneth L. Port, *The Japanese International Law "Revolution": International Human Rights Law and Its Impact on Japan*, 28 STAN. J. INT'L L. 139,

Code of Criminal Procedure, the government may elect to suspend prosecution⁸⁸ and simply issue a warning to the accused.⁸⁹

Japanese prosecutors may also recommend that criminal sentences be suspended.⁹⁰ Since criminal sentences are relatively short,⁹¹ and because of Japanese prosecutorial discretion,⁹² there is a sound argument that the Japanese system is more benevolent and better for society than systems that place more emphasis on punitive measures. Statistics show that prosecutions are suspended in 39% of cases.⁹³ The main reason for this forbearance is that the imposition of formal charges in Japan carries a serious social stigma that impacts a defendant's life well beyond the adjudication of the underlying crime.⁹⁴ Viewed from this perspective, some observers note that the Japanese system is "uncommonly just."⁹⁵

The downside of the Japanese criminal justice system is the almost unbridled power of the procuracy and the judicial deference courts afford it. Japanese prosecutors rarely go to court without a confession in hand,⁹⁶ and Japanese judges routinely rubber-stamp prosecutors' recommendations.⁹⁷ Some observers argue that Japanese criminal trials are actually decided by prosecutors and police and that the trials are mere formalities.⁹⁸ Because defense lawyers' roles are greatly circumscribed,⁹⁹ and because of the way Japanese criminal justice procedures are carried out, it is very possible that

163 (1991); see also A. Didrick Castberg, *Prosecutorial Independence in Japan*, 16 UCLA PAC. BASIN L.J. 38, 39 (1997) (noting that the Japanese system is geared towards restitution, whereas the U.S. system is geared towards punishment).

88. KEISHOHŌ, art. 248 ("In case it is unnecessary to prosecute according to the character, age and environment of an offender, the weight and conditions of an offense as well as the circumstances after the offense, the public prosecution may not be instituted.").

89. Foote, *Paternalism*, *supra* note 85, at 346–56 (detailing the Japanese focus on specific prevention of crime through the suspension of sentences and prosecutions).

90. *Id.* at 352–54.

91. *Id.* at 354.

92. Seuss, *supra* note 84, at 303–04 (noting that Japanese prosecutors exercise more discretion and control over cases than U.S. prosecutors do, and even more than the law explicitly allows).

93. Ministry of Justice of Japan, Public Prosecutors Office, <http://www.moj.go.jp/ENGLISH/PPO/ppo-01.html> (last visited Oct. 20, 2008) [hereinafter Public Prosecutor's Office].

94. See Foote, *Paternalism*, *supra* note 85, at 344 (noting that arrest records have considerable effect on employment prospects and defendants' reputations).

95. DAVID T. JOHNSON, *THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN* 280 (2002) (noting many problems with Japanese criminal justice but concluding that, in the larger picture, the system works comparatively well with regard to the needs and circumstances of individuals).

96. Hiroshi Matsubara, *Trial by Prosecutor*, LEGAL AFF., Apr. 2003, at 11.

97. See Ishimatsu, *supra* note 6, at 143, 150; see also Susan Maslen, *Japan and the Rule of Law*, 16 UCLA PAC. BASIN L.J. 281, 290 (1998).

98. Ishimatsu, *supra* note 6, at 143; see also Maslen, *supra* note 97, at 290.

99. Foote, *Paternalism*, *supra* note 85, at 338.

constitutional rights can be violated by police or prosecutors. Currently, the Japanese system does not protect an accused individual from the government's search for truth, regardless of what the constitution says.

C. *Rights of the Accused and the Constitution*

The Japanese constitution embraces the concepts of human dignity and human rights in its preamble,¹⁰⁰ and in Chapter III, which sets forth certain "Rights and Duties of the People."¹⁰¹ Many of these provisions protect the rights of criminal suspects. However, Japanese law enforcement practices demonstrate that Japanese authorities do not respect the constitutional rights of criminal defendants.

1. Beatings Will Continue Until Morale Improves: Obtaining Confessions in Japan

The true centerpiece of Japanese criminal justice is the confession, which is considered to be the first step in rehabilitating the criminal and the beginning of the reintegration process.¹⁰² Confessions have been central to Japanese law enforcement practices for hundreds of years, and torture was traditionally seen as an acceptable method of obtaining a full confession.¹⁰³ In the modern era, Article 36 of Japan's constitution specifically prohibits the use of torture by any public officer.¹⁰⁴ Similarly, Article 38 prohibits self-incrimination and compelled confessions.¹⁰⁵ Yet critics argue that the

100. We desire to occupy an honored place . . . striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance We recognize that all peoples of the world have the right to live in peace, free from fear and want.

KENPŌ, pmbi.; see also DOWER, *supra* note 65, at 370 (noting that the preamble bears resemblance to, inter alia, the U.S. Declaration of Independence, the Gettysburg Address, and the U.S. Constitution).

101. KENPŌ, arts. 10–40.

102. Foote, *Paternalism*, *supra* note 85, at 330, 337 (stating that unless confessions are obtained, reintegration of criminal offenders back into society cannot be achieved, because confession is seen as the first step in accepting responsibility for the offense).

103. *Id.* at 328 (noting that torture was an accepted and codified method of obtaining confessions during the Tokugawa era, and that confessions were regarded as the best evidence of the truth).

104. KENPŌ, art. 36 ("The infliction of torture by any public officer and cruel punishments are absolutely forbidden.").

105. (1) No person shall be compelled to testify against himself. (2) Confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence. (3) No

system is abusive and that it contradicts the constitution as well as any concept of human rights.¹⁰⁶ Alternatively, Japanese prosecutors and police argue that without current methods of obtaining confessions, they would not be able to effectively battle crime.¹⁰⁷ Some estimates put the rate of forced confessions as high as fifty percent.¹⁰⁸ Recent statements by Japanese police officials indicate that forced confessions may be the norm rather than the exception when a criminal defendant asserts his innocence but where the authorities believe he is guilty.¹⁰⁹

Examples of documented methods of extracting confessions include slapping; punching, kicking, and generally beating suspects; sleep deprivation; promises of timely release; threatening more stringent punishments;¹¹⁰ isolation or lack of privacy;¹¹¹ questioning from early morning until late at night; binding fingers; making suspects stand in certain positions; shouting in suspects' ears; and offering suspects chances to see loved ones in return for a confession.¹¹² Up to ninety percent of criminal suspects in Japan confess to committing crimes.¹¹³ In one case, a suspect even confessed in order to prove his innocence upon release.¹¹⁴

person shall be convicted or punished in cases where the only proof against him is his own confession.

Id. art. 38.

106. See, e.g., Johnson, *Justice System Reform*, *supra* note 24, at 7–8 (noting police willingness to “overbear the will of criminal suspects” and United Nation’s criticisms of Japan for “violating international protocols”).

107. See Foote, *Paternalism*, *supra* note 85, at 382 (noting that police and prosecutors view defense counsel as obstructing prosecutions and overstepping their bounds); see also Castberg, *supra* note 87, at 47 (noting that prosecutors argue that allowing a detainee unlimited access to defense counsel risks destruction of evidence and leaks to the press).

108. Ramlogan, *supra* note 63, at 200 (citing estimates provided by Professor Toshikuni Murai).

109. See Johnson, *Justice System Reform*, *supra* note 24, at 7 (quoting an executive officer of the National Police Agency at a JSRC meeting as stating that “no real statements will be made by the suspect unless he feels compelled to do so,” and that the “aim of interrogation is to bring this about by any means possible”); see also ABOLISH DAIYO-KANGOKU, *supra* note 8, at 6 (noting that suspects are treated worse if they refuse to confess).

110. JOHNSON, *supra* note 95, at 254–62. The author goes on to indicate that during his one and one half years of research fieldwork in the Kobe District Public Prosecutor’s Office, three egregious cases of brutality came to his attention, all illustrating the zeal with which prosecutors and police in Japan approach the process of extracting confessions from criminal suspects. *Id.* Given that these incidents occurred in an office hosting an official observer, this Author takes interest in the question of how widespread such practices are in the Japanese system overall. See *id.*

111. See Melissa Clack, *Caught Between Hope and Despair: An Analysis of the Japanese Criminal Justice System*, 31 DENV. J. INT’L L. & POL’Y 525, 533 (2003).

112. ABOLISH DAIYO-KANGOKU, *supra* note 8, at 8.

113. Foote, *Paternalism*, *supra* note 85, at 337.

114. See Port, *supra* note 87, at 163.

Because the Japanese system relies so heavily on obtaining confessions, there is great pressure to generate one as the prosecution prepares for trial, and this pressure can lead to overzealous measures.¹¹⁵ Without a confession, and where the case against a suspect is questionable, prosecutors usually do not indict.¹¹⁶ Moreover, because Article 38(3) of the Japanese constitution does not permit a defendant to be convicted solely on the basis of a confession,¹¹⁷ authorities continue to question suspects even after obtaining confessions in order to elicit corroborating evidence.¹¹⁸ The coercive tactics routinely employed in extracting confessions are clearly prohibited by Article 38(2) of the Japanese constitution, but this does not stop Japanese authorities from violating the fundamental rights of criminal defendants.

Some scholars have suggested that confessions in Japan are the functional analogue of plea bargains in the United States, wherein defendants bargain with the government and receive correspondingly lighter sentences.¹¹⁹ Under this view, the Japanese approach seems to balance its lack of procedural protections during interrogation with leniency after confession.¹²⁰ This encourages Japanese defendants to confess. However, this arrangement grants prosecutorial leniency only to those who are actually guilty or who are willing to confess, and it does nothing for the wrongly accused. Japanese interrogations have resulted in some well-publicized wrongful convictions.¹²¹ The system should protect the constitutional rights of innocent defendants at least as much as it provides support for the guilty. Unfortunately, Japan's new criminal justice reforms do not embrace the concept of defendants' rights, and they fail to uphold constitutional prohibitions against self-incrimination, compelled confession, and torture by public officials.

2. Japan Has a Right to Counsel, but What Happens in Detention Stays in Detention

At first glance, Japan appears to have strong constitutional protections against overbearing interrogations. However, the Code of

115. See Johnson, *Justice System Reform*, *supra* note 24, at 7 (“[T]he system’s extreme reliance on confessions leads to extreme efforts to obtain them.”).

116. Ramseyer & Rasmusen, *supra* note 7, at 61–62.

117. KENPŌ, art. 38(3) (“No person shall be convicted or punished in cases where the only proof against him is his own confession.”).

118. See Hirano, *supra* note 6, at 135 (noting that in Japan, confessions must be corroborated so they will hold up at trial); see also Ramlogan, *supra* note 63, at 200 (noting that confessions are also used as corroborative evidence).

119. Ramseyer & Rasmusen, *supra* note 7, at 57.

120. Seuss, *supra* note 84, at 321.

121. See, e.g., Foote, *Death Row*, *supra* note 11; see also Maslen, *supra* note 97, at 289.

Criminal Procedure limits the effect of these constitutional provisions,¹²² rendering many of them meaningless. Article 34 of the constitution provides for a right to counsel.¹²³ Article 37(3) requires the government to provide counsel for those who cannot obtain representation.¹²⁴ Taken together, these provisions require that criminal defendants have access to an attorney in order to protect their rights. Yet these protections do not apply to every defendant.¹²⁵ For indigent defendants, the right to counsel does not attach until after indictment,¹²⁶ and indictments are usually not issued until after a confession has been obtained.¹²⁷ Even for those who can afford to retain counsel, the Japanese system does not allow attorneys to be present at interrogations.¹²⁸

Japanese suspects (*higisha*) are thus at the mercy of police and prosecutors until they are formally charged.¹²⁹ Upon indictment, they become classified as defendants (*hikokunin*), and are then afforded access to counsel.¹³⁰ However, even this level of access is limited, because under Article 39 of the Code of Criminal Procedure, prosecutors can control the scheduling and duration of defense consultations whenever police determine that such meetings would “interfere with an ongoing investigation.”¹³¹ Thus, under the Code of

122. Kuk Cho, *The Japanese “Prosecutorial Justice” and its Limited Exclusionary Rule*, 12 COLUM. J. ASIAN L. 39, 74 (1998).

123. No person shall be arrested or detained without being at once informed of charges against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel.

KENPŌ, art. 34.

124. *Id.* art. 37(3) (“At all times the accused shall have the assistance of competent counsel who shall, if the accused is unable to secure the same by his own efforts, be assigned to use by the State.”).

125. Cho, *supra* note 122, at 58.

126. *Id.*; see also Seuss, *supra* note 84, at 304 (noting that court-appointed counsel are available only after indictment).

127. See Foote, *Paternalism*, *supra* note 85, at 336, 374 (noting that the pre-indictment period is used for “questioning the suspect, demanding a confession, and pursuing other crimes,” and that indictment occurs only after the investigation is largely completed).

128. *Id.* at 338.

129. Cho, *supra* note 122, at 58; see also KAWADA SHOBO SHINSA, JOSHIKI TOSHITE SHITTE OKITAI SAIBAN NO SEKAI [MAKING SENSE OF TRIALS] 44–45 (2007).

130. Cho, *supra* note 122, at 58.

131. KEISHOHŌ, art. 39(3).

A public procurator, a secretary of the public procurator’s office, or policemen (referring to police inspectors or policeman; hereinafter the same), may, in case it is necessary for the investigation, designate the date, place, and time concerning interview or receipt [of documents] . . . only prior to the institution of public prosecution: provided, that such designation shall not unreasonably restrict the rights of the suspect to prepare for defense.

Criminal Procedure, defendants' access to counsel may be limited by the arbitrary determinations of law enforcement officials.

Moreover, Japanese police regularly detain suspects in a police cell instead of in a regular detention center.¹³² This practice, known as *daiyo-kangoku*, increases police access to criminal suspects for questioning purposes, and decreases suspects' access to defense attorneys.¹³³ *Daiyo-kangoku* was originally established in 1908 to ease the shortage of proper detention centers,¹³⁴ but it still exists today as a convenience to the police.¹³⁵ The use of police jail cells to interrogate suspects helps to insulate suspects from the outside world and leaves them particularly vulnerable to coercive pressure. Consultations with defense attorneys are only allowed once every four or five days, and generally last for about fifteen minutes at a time.¹³⁶

Those familiar with the U.S. system may be shocked by the relatively long periods of pretrial detention without counsel in Japan. Before indictment, a suspect can be held for a total of twenty-three days, formulated as follows: the police can hold the suspect for forty-eight hours before deciding whether to release the suspect or transfer him to prosecutors; the prosecutors then have twenty-four hours to decide whether or not to request a ten-day extended detention period; and if a judge grants the extension, the prosecutors may also request a subsequent ten-day detention period.¹³⁷ Statistics indicate that these requests are granted by the courts over 99.7% of the time.¹³⁸ Judges issue detention warrants "when there are reasonable grounds to [believe] that the suspect has committed a crime,"¹³⁹ and where the facts include any of the following circumstances: (1) the suspect has no fixed dwelling; (2) there is sufficient cause to suspect that the suspect will destroy evidence; and (3) there is sufficient cause to suspect that the suspect will attempt to escape.¹⁴⁰ In Japan, this extensive pretrial detention gives the government substantial time to

Id.; Seuss, *supra* note 84, at 305.

132. See ABOLISH DAIYO-KANGOKU, *supra* note 8, at 4 (stating that detention facilities are at a centralized location and *daiyo kangoku* (substitute prisons) are basically holding cells in local police stations). Japan has a nationwide system of *koban* (or neighborhood police boxes manned by several local officers). There are *koban* at virtually every large intersection in urban Japan.

133. Ishimatsu, *supra* note 6, at 148.

134. ABOLISH DAIYO-KANGOKU, *supra* note 8, at 4.

135. *Id.*

136. See Foote, *Paternalism*, *supra* note 85, at 338 ("According to various estimates, meetings with counsel may be limited to fifteen minutes once every four or five days in complex or difficult cases, and a suspect in detention is unlikely to have much more opportunity to meet with counsel until the prosecutors have finalized their case.")

137. KEISHOHŌ, arts. 203–208-2; see also Castberg, *supra* note 87, at 46.

138. Foote, *Paternalism*, *supra* note 85, at 336.

139. Outline, *supra* note 51.

140. KEISHOHŌ, art. 60(1).

interrogate suspects and to develop evidence against them, all without benefit of counsel.

Perhaps a defense attorney's presence would encourage suspects to assert their innocence more vigorously. Certainly, it would create an independent record of the conditions of interrogation. Under the current system, investigators prepare summaries of suspects' confessions—often long afterward—and this becomes part of the dossier on which Japanese courts rely so heavily.¹⁴¹ Since Japanese courts rarely question the documents the prosecution provides, and because investigative dossiers are routinely accepted into evidence,¹⁴² some experts refer to the system as "justice or trial by dossier."¹⁴³ Incredibly, in the process of compiling trial dossiers, investigators often discard evidence that is inconsistent with their theory of the case or that they deem to be unreliable.¹⁴⁴ Moreover, there is no *Brady* rule requiring the prosecution to divulge exculpatory evidence to the defense.¹⁴⁵ In fact, under the Japanese system, the prosecution only needs to disclose evidence it plans to use at trial.¹⁴⁶ The defense may request evidence from prosecutors, but in Japan an adverse party must know what a piece of evidence is before requesting it.¹⁴⁷ Therefore, if the prosecution has discarded exculpatory evidence in assembling its dossier, the defense has no chance of obtaining it through the discovery process, even if it knows what to look for. As a result, the Japanese system relies more heavily on the accuracy of police and prosecutors' memories, as well as on the veracity of their

141. Foote, *Paternalism*, *supra* note 85, at 337; see also Joachim Herrmann, *Models for Reform of the Criminal Trial in Eastern Europe: A Comparative Perspective*, 1996 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 127, 138–39 (noting particular problems with the presentation of investigative dossiers to judges in inquisitorial systems, including: replacing live testimony with written transcripts, and the possibility that judges may be influenced in their approach to the trial by the information in the dossier not only because of psychological reasons, but also because notations of any prior convictions would be found in the dossier).

142. Foote, *Paternalism*, *supra* note 85, at 338–39.

143. Ishimatsu, *supra* note 6, at 146–47 (noting that justice or trial by dossier is conducted by: law enforcement questioning of victims, witnesses, or others; conducting inspections, searches and seizures etc.; developing hunches and opinions, undertaking thorough and time-consuming questioning of suspects (who are almost always physically restrained by arrest or detention) in the pursuit of confessions corresponding to the hunches and opinions they have previously developed, then incorporating the results in accordance with their hunches and opinion into a detailed dossier (*choso*), which the prosecutors use to file an indictment with, and which if accepted into evidence, as it usually is, forms the basis for the guilty verdict).

144. *Id.* at 151 (noting that instead of preserving all the evidence for later review by a judge, the evidence is sifted according to the hunches of the investigators).

145. PORT, *supra* note 71, at 803 (noting that in *Brady v. Maryland*, 373 U.S. 83, 87 (1963) the U.S. Supreme Court held that the prosecution must divulge exculpatory evidence upon request, and that such information, known as *Brady* material is routinely requested and received in U.S. criminal cases).

146. See Castberg, *supra* note 87, at 68.

147. *Id.* at 69.

assertions. In the more adversarial U.S. system, which features procedural protections weighted in the defendant's favor, such faith in the government is almost unheard of.¹⁴⁸

In Japan, law enforcement officials draft the confessions that suspects sign, based on the officials' recollections of what transpired during interrogation.¹⁴⁹ Until recently, recording of interrogations was not permitted, save for the written notations of the law enforcement officials.¹⁵⁰ Initiatives put forward by the Japan Federation of Bar Associations with regard to the videotaping of confessions have been stiffly resisted by the police and prosecutors.¹⁵¹ Authorities argue that videotaping is counterproductive and that it is an unnecessary intrusion into the investigative process.¹⁵² Notably, the JSRC reformers specifically rejected proposals to videotape interrogations.¹⁵³ Instead, they suggested the written notations of interrogation sessions provided by law enforcement authorities are sufficient.¹⁵⁴

While the government has not required procedural change, public pressure has caused the National Police Agency to adopt

148. See Daniel H. Foote, *Reflections on Japan's Cooperative Adversary Process, in THE JAPANESE ADVERSARY SYSTEM IN CONTEXT: CONTROVERSIES AND COMPARISONS*, *supra* note 29, at 29, 32 [hereinafter Foote, *Reflections*] (noting the dominant position of the prosecution in the Japanese system as compared to the United States, and the weaker position of the defense in Japan); see also Herrmann, *supra* note 141, at 140 (noting that prosecutors in adversarial systems are supposed to inform the defense when they learn that a witness's statement is false or when they learn about a witness with information that is favorable to the defendant, and that the position of the defense is much more favorable in adversarial systems because of the structure of trials that allow the defense to present their case).

149. Foote, *Paternalism*, *supra* note 85, at 337.

150. See Maslen, *supra* note 97, at 289.

151. Kamiya, *supra* note 61.

152. *Id.* (noting the statement of a senior official at the Supreme Public Prosecutor's Office, who argues that videotaping interrogations prevents law enforcement from reaching the truth, and noting that the National Police Agency also opposes the idea); *Upper House Backs Bill to Tape Grillings: Police Slam Measure; Ruling Bloc Veto Likely*, JAPAN TIMES, June 4, 2008, available at <http://search.japantimes.co.jp/cgi-bin/nn20080604a1.html> [hereinafter *Upper House*] (citing Justice Minister Kunio Hatoyama, stating that adoption of the bill would turn Japan into a "paradise for criminals," and that "heart to heart exchanges between and investigator and a suspect have helped to delve into the truth behind crimes," and that "a complete recording would make it difficult to establish the facts," and citing the Chairman of the National Public Safety Commission Shinya Izumi who states that his agency cannot accept the bill, and that he questions it by asking "Can it unravel the truth?").

153. JSRC Recommendations, *supra* note 13, at 169.

154. *Id.* ("A system should be introduced that imposes the duty of making a written record, for every occasion of questioning, regarding the process and the circumstances of the questioning, in order to ensure the propriety of questioning suspects.").

oversight measures to guide the interrogation process.¹⁵⁵ New guidelines for monitoring interrogations reflect the public's declining trust in police questioning methods because of media reports about a series of recent acquittals.¹⁵⁶ Under the plan, prefectural police forces will establish monitoring bodies comprised of officers from noninvestigative divisions of the police department, and these officers will ensure that set hours for interrogations are kept by reporting on the times a suspect enters and exits questioning.¹⁵⁷ Suspects will also be able to submit complaints about interrogation procedures to the monitoring body, and members of the monitoring body could also be assigned to interrogation sessions.¹⁵⁸

While this is a step toward greater transparency in the interrogation process,¹⁵⁹ the proposed system does not go far enough, because it leaves the police to monitor themselves. As a result, it remains unclear whether this new plan will truly help to uphold the rights of criminal defendants. While public opinion has caused the police to modify their procedures, the new plan does not go far enough to ensure objectivity in the process by which confessions are obtained; in fact, some observers even see the new plan as an attempt to get ahead of growing public pressure to videotape interrogations in their entirety.¹⁶⁰ In any case, the new police monitoring system will not ensure that the constitutional rights of criminal defendants are recognized or upheld during the interrogation process.

Another recently advanced proposal would leave it to the lay judges to decide whether or not to allow a confession into evidence.¹⁶¹ However, permitting lay judges to determine the admissibility of evidence in a criminal trial is problematic because they may have to address matters of law. Under the new lay judge system, this is a

155. See *Cops Plan Monitors*, *supra* note 62 (noting that public officials stated that new guidelines to monitor interrogation were drawn up because of the effect of media reports of a series of acquittals involving forced confessions, and as a result, public trust in police tactics has been damaged); see also *Police to Film Reading of Interrogation Logs: Lawyers Call for More Transparency and for Recording Entire Process*, JAPAN TIMES, Apr. 4, 2008, available at <http://search.japantimes.co.jp/cgi-bin/nn20080404a4.html> [hereinafter *Police to Film*] (stating that the proposed system has been officially adopted by the National Police Agency and will be implemented beginning in the summer of 2008). Organized crime cases will be excluded because of fears of retaliation. *Id.*

156. *Cops Plan Monitors*, *supra* note 62.

157. *Id.*

158. *Id.*

159. *Id.*

160. See, e.g., Kamiya, *supra* note 61 (noting that partial recording is insufficient).

161. *Lay Judges May Have Power Over Confessions*, JAPAN TIMES, Nov. 13, 2007, at 2, available at <http://search.japantimes.co.jp/cgi-bin/nn20071113a5.html> (noting that the Supreme Court's Legal Research and Training Institution (LRTI) is set to propose letting lay judges determine whether or not to accept confession as evidence at trial under the new lay judge system).

function reserved for professional judges.¹⁶² Tapping lay judges to determine matters that require legal expertise is a misguided proposal that should be avoided.

Pretrial detention can be extended beyond the twenty-three-day limit if Japanese police feel they need more time to investigate.¹⁶³ Japanese police may release a detainee and re-arrest him on another charge—a practice known as *bekken taiho*.¹⁶⁴ Authorities may arrest a suspect and subject him to detention for that offense, while developing evidence about a more serious crime.¹⁶⁵ This pattern of arrests for different offenses allows investigators to keep a suspect in custody and under interrogation well beyond the twenty-three-day limit.¹⁶⁶ In one case, a suspect was arrested for fourteen different crimes, and his detention lasted almost three years.¹⁶⁷ Court challenges to the application of *bekken taiho* have not been successful.¹⁶⁸ Japanese courts consider the practice to be valid unless it can be proven that it was purposely applied with the intention of extracting evidence about the more serious crime.¹⁶⁹ Unfortunately, current criminal justice reform discussions do not contemplate this problem.

Despite the fact that practices such as *daiyo kangoku* and *bekken taiho* abridge defendants' constitutional rights, the JSRC Report specifically rejected proposals that the substitute prison system should be abolished and did not even mention the practice of consecutive arrests.¹⁷⁰ While the report recognized that there are problems with defendants' rights to counsel, it limited its concrete recommendations to the appropriation of a system of public defenders.¹⁷¹ Current reforms under the Lay Assessor's Act do not ensure a full recognition of the constitutional right to counsel.

162. See Anderson & Saint, *supra* note 32, at 240–41 (stating that under Article 6 (2) of the Lay Assessor's Act, professional judges are to make decisions regarding the interpretation of laws and procedure).

163. Castberg, *supra* note 87, at 46.

164. *Id.* (detailing the *bekken taiho* process).

165. *Id.*

166. *Id.*

167. Cho, *supra* note 122, at 55 (citing *Murakami v. Japan*, 17 KEISHŪ 1795 (Sup. Ct., Oct. 17, 1963)).

168. *Id.* at 56 (citing *Hirasawa v. Japan*, 9 KEISHŪ 663 (Sup. Ct., Apr. 6, 1955), *Ishikawa v. Japan*, 31 KEISHŪ 821 (Sup. Ct., Aug. 9, 1977)). Cho notes that in both cases the court's decision was based on whether law enforcement detained the suspects on the lesser charges to intentionally extract information about the main charge for which they sought evidence, and that in both cases, despite consecutive detentions, the Supreme Court held that they did not. *Id.*

169. *Id.*

170. JSRC Recommendations, *supra* note 13, at 168 (noting that changes to the system with regard to the custody of suspects and defendants are "difficult matters" because of "various ways of thinking arising from differences in assessments about the current state of affairs").

171. *Id.* at 165.

3. Japan Has a Right to Silence, but Defendants Are Questioned Anyway

In Japan, the constitutional right to silence is not upheld in any meaningful way. In the United States, the *Miranda* rule requires all police questioning to stop when a suspect invokes the right to remain silent or requests an attorney.¹⁷² Japan has no such rule, but it does have a constitutional provision that lays the foundation for the Japanese right to silence.¹⁷³ Under Article 38(1) of the constitution, all persons are protected from being compelled to testify against themselves.¹⁷⁴ This right should apply to all people regardless of whether they are classified as suspects, under arrest, or in detention. However, Article 198 of Japan's Code of Criminal Procedure limits the scope of this right by allowing police to request that suspects accompany them to the station for questioning.¹⁷⁵ In addition to Article 38(1) of the constitution, Article 198 is supposed to help protect suspects in such voluntary detention by requiring police to inform them that they are not required to make statements unwillingly.¹⁷⁶

Because these provisions apply only to suspects—not to those formally detained or under arrest—Article 198 has been interpreted as providing for a duty by those arrested or in detention to submit to questioning.¹⁷⁷ In theory, suspects do not have to answer questions, but the Japanese right to silence does not free a detainee or arrestee from the rigorous questioning process.¹⁷⁸ Even where a defendant asserts his right to silence, he must still undergo interrogation.¹⁷⁹

While investigators must warn suspects that they have a right to silence before questioning begins,¹⁸⁰ this is not repeated at every

172. *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966).

173. KENPŌ, art. 38(1) (“No person shall be compelled to testify against himself.”).

174. *Id.*

175. A public procurator, a secretary of the public procurator's office, or a policeman may, when it is necessary for conducting an investigation of an offense, call upon the suspect to appear and examine him; provided, that the suspect may, except in such cases as arrested or detained, refuse to appear, or leave at any time after appearance.

KEISHOHŌ, art. 198(1).

176. *Id.* art. 198(2) (“[T]he suspect shall beforehand be notified that he shall not be required to make statement contrary to his will.”).

177. See Choi DeSombre, *supra* note 80, at 110 (describing the process known as *torishirabe junin gimu*, which is interpreted by negative implication to mean that suspects who are arrested or in detention cannot refuse questioning).

178. *Id.*

179. *Id.*; Cho, *supra* note 122, at 57.

180. KEISHOHŌ, art. 198(2); see also Foote, *Paternalism*, *supra* note 85, at 336.

interrogation session.¹⁸¹ Because of the coercive nature of Japanese interrogations, the failure to reiterate the right to silence warning at each installment of the interrogation process dilutes its initial effect.¹⁸² This eviscerates the constitutional right to silence. Forcing a person to endure discomforts and abuses until he gives up his right to silence is more likely to distill an accurate picture of his capacity for silence under duress than it is to elicit credible information about crime. But because confession is ingrained as a central concept in the Japanese criminal justice process, the constitutional right to silence is routinely ignored.¹⁸³ Unfortunately, current reform initiatives do nothing to uphold the constitutional right to silence.

4. Would You Mind Coming with Us?

Because Japanese police can request “voluntary accompaniment,” they can often avoid the requirement of obtaining an arrest warrant.¹⁸⁴ Under Article 33 of the constitution, police need a warrant to make an arrest, except for cases where suspects are caught in the criminal act or where suspects are “flagrant” offenders.¹⁸⁵ However, because the Code of Criminal Procedure allows police to request “voluntary” accompaniment,¹⁸⁶ the police are able to skirt the warrant requirement on a technicality, as there is no formal detention or arrest if a person voluntarily accompanies police. The constitution does not attach to protect a suspect who is not formally detained.¹⁸⁷ There are similar provisions in the Police Duty

181. Cho, *supra* note 122, at 57.

182. Choi DeSombre, *supra* note 80, at 111 (“[T]he right to silence is likely to be undermined by daily questioning over many days.”).

183. See Ishimatsu, *supra* note 6, at 149–50 (noting the routine practices of Japanese criminal judges; in contested proceedings where both sides stick to opposing positions, and where defendants claimed coercive interrogation at the hands of investigators, the great majority of judges assumed that the questioning was voluntary without actually deciding whether the defense or the prosecution was telling the truth, and, as a result, the record of such confessions is regularly admitted into evidence).

184. KENPŌ, art. 33 (“No person shall be apprehended except upon warrant issued by a competent judicial officer which specifies the offense with which the person is charged, unless he is apprehended, the offense being committed.”).

185. KEISHOHŌ, art. 212 (defining flagrant offenders are those being pursued “with hue and cry”; those carrying stolen goods, arms or other objects that appear to have been used in a crime; those whose clothing or body evinces conspicuous traces of the offense; and those who flee when challenged by the police).

186. *Id.* art. 197(1) (providing that police may conduct necessary examination in order to obtain the objectives of the investigation, provided that compulsory measures may not be taken unless stipulated by the Code of Criminal Procedure); *id.* art. 198(1) (providing that when it is necessary for conducting an investigation of an offense, the police may request the suspect to appear and be examined); Cho, *supra* note 122, at 51.

187. Cho, *supra* note 122, at 51 (noting that voluntary accompaniment is not formal detention, so constitutional restrictions do not attach, and even though a suspect is technically free to leave, he may not in practice be able to avoid questioning).

Act.¹⁸⁸ Supposedly one can refuse the questioning, but critics point out that when faced with a request to accompany the police, most Japanese feel duty-bound to comply.¹⁸⁹ Japanese courts interpret voluntary accompaniment loosely, and this affords police the flexibility they need to convince suspects to consent to "voluntary" questioning.¹⁹⁰

Voluntary accompaniment is common in Japan, and it fits into the model of Japan as a paternalistic and benevolent criminal justice system because it helps to avoid mistaken arrests.¹⁹¹ However, it can lead to extended interrogations.¹⁹² Japanese courts have upheld the practice of voluntary accompaniment,¹⁹³ and they have authorized the police to apply force to keep a suspect under questioning.¹⁹⁴ In *Ikuhara v. Japan*, a murder suspect voluntarily accompanied the police and he was interrogated for four days and nights.¹⁹⁵ During his voluntary interrogation he was lodged near the police station at public expense along with several police officers who closely monitored him.¹⁹⁶ The suspect confessed, and in dismissing his

188. *Id.* (stating that under the Police Duty Act the police may stop an individual to question him, and request a detained individual to go to a police station for "voluntary" questioning).

189. See Bloom, *supra* note 11, at 56 (noting that Japanese people have a high respect for authority figures, a characteristic that finds its roots in Confucianism).

190. Cho, *supra* note 122, at 51 (noting that long periods of interrogation have not been invalidated, as has the use of physical force during interrogation).

191. See Satoru Morizane, *Initial Encounters Between Police and Citizens: A Comparative Study of the United States and Japan*, 13 EMORY INT'L L. REV. 561, 593 n.155 (1999) (arguing that the idea behind the practice is to avoid a mistaken arrest and humiliating a suspect in front of his family or in public).

192. See JOHNSON, *supra* note 95, at 257-59 (cataloging the brutality directed at an elderly witness to a corruption investigation in Sendai in 1993). The witness, who was interviewed on a voluntary basis endured one day of mistreatment at the hands of a public prosecutor, and was ordered to return the following day for more mental and physical abuse which prompted him to sign a statement prepared by the prosecutor. *Id.*

193. Cho, *supra* note 122, at 51 (noting cases involving numerous half-day interrogations, and all night non-stop interrogation).

194. *Id.* (noting *Tanahashi v. Japan*, 30 KEISHŪ 187 (Sup. Ct., Mar. 16, 1976)). *But see* Morizane, *supra* note 191, at 590 (construing and discussing *Tanahashi*, 30 KEISHŪ 187). *Tanahashi* was suspected of driving under the influence of alcohol and had voluntarily accompanied police to the station where he refused a breath analysis test. *Id.* *Tanahashi* ran toward the door but was stopped when an officer grabbed his wrist, spurring *Tanahashi* to strike the officer in the face. *Id.* Since *Tanahashi* was under the influence, but had apparently voluntarily accompanied the police, it appears that the distinction between voluntary accompaniment and actual arrest is somewhat unclear. Had the police simply arrested *Tanahashi* the issue would have been moot, as he voluntarily accompanied the police; however, it seems he should have had the right to leave the police station, at least until after he struck the officer.

195. Morizane, *supra* note 191, at 594.

196. *Id.* Morizane, a police superintendent in Gunma Prefecture, points out that *Ikuhara* had requested to be lodged by the police. *Id.* Morizane questions why the suspect would not have simply requested to be allowed to be set free if he were not being officially detained. *Id.* at 595-96.

appeal, the Japanese court noted that there was no proof on record that the suspect had refused interrogation and lodging, and it upheld the interrogation because any potential transgression of the law by the police was consistent with "socially accepted views."¹⁹⁷ The interrogation was ultimately held to have been voluntary in nature.¹⁹⁸

It is perhaps not surprising that the court could find no proof that the suspect had refused interrogation because without a defense attorney present, the only record of what transpired during interrogation would have been supplied by the police. In reaching their ultimate decision, the court noted that the suspect was effectively under arrest at the time he was interrogated.¹⁹⁹ Instead of getting a warrant to legitimize the suspect's detention and questioning, the police didn't need one because the suspect "consented" to the questioning through voluntary accompaniment.²⁰⁰ Japanese courts seem to have difficulty distinguishing between arrest and voluntary accompaniment in this type of case, and they have interpreted the meaning of police compulsion very narrowly.²⁰¹ As a result, voluntary accompaniment is a useful tool that can help the police circumvent the warrant requirement and other protections that should attach for a defendant who is under formal arrest. Voluntary accompaniment also insulates police activities from constitutional and public scrutiny.²⁰² Current reforms do not address the system of voluntary accompaniment and therefore do not uphold the constitutional warrant requirement.

5. Double Jeopardy: If at First You Don't Convict, Try, Try Again!

Japan has adopted the principle of double jeopardy into its legal system, but it applies the concept differently than the United States does. In the U.S., the double jeopardy principle protects those acquitted of crimes from being retried for the same offense.²⁰³ Japan

197. *Id.*

198. *Id.* at 596.

199. *See id.* at 595 ("The Court expressed doubt as to whether the defendant could act at will, because it appeared that the defendant was in a situation where he had no choice but to the prolonged interrogation.").

200. *Id.* at 594-96.

201. *Id.* at 597-98 (noting that the Japanese Supreme Court's view of voluntariness may include some compulsive factors, and that the Court will balance the compulsive factors with the degree of infringement the suspect suffers).

202. *See Seuss, supra* note 84, at 303 (noting that the constitutional right to counsel is triggered upon arrest and therefore does not apply to suspects who voluntarily accompany police).

203. U.S. CONST. amend. V ("No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . .").

accepted this principle into its postwar constitution,²⁰⁴ but applies it more narrowly.²⁰⁵ In Japan, the right does not attach until there have been three levels of review.²⁰⁶

One level of full review of both facts and law is available on motion by either the defendant or the prosecutor.²⁰⁷ This review is called a *koso* appeal.²⁰⁸ *Koso* appeals mainly involve oral arguments presented at trial.²⁰⁹ Appellate courts may either sustain the judgment of the lower court or quash the original judgment and remand the case.²¹⁰ The court may also issue its own judgment based on the record and the proceedings.²¹¹ Where the appeal is filed by the defendant only, a sentence heavier than that imposed by the court of first instance may not be issued.²¹² In effect, the rule gives prosecutors greater incentive to file appeals in cases where they feel that the sentence imposed in the original court was inadequate.

There are at least two more levels of review available. Against the judgment of a *koso* appeal, a defendant may appeal to Japan's Supreme Court for final adjudication.²¹³ This second appeal (known as *jokoku*) is limited to allegations of a violation of the constitution, an error in its interpretation, or an alleged conflict with precedent.²¹⁴ However, the Supreme Court may elect to review either the facts of the case or the law.²¹⁵ In cases where the Supreme Court quashes the original judgment, it may remand the case back to the court of first instance,²¹⁶ or it may enter its own judgment based on the court records and the evidence.²¹⁷ In addition, after the entire appeals process is complete, a convict or his heirs may petition for a new trial.²¹⁸

204. KENPŌ, art. 39 ("No person shall be held criminally liable for an act which was lawful at the time it was committed, or of which he has been acquitted, nor shall he be placed in double jeopardy.").

205. Ramlogan, *supra* note 63, at 209.

206. Foote, *Paternalism*, *supra* note 85, at 340-41.

207. *Id.* at 340.

208. Outline, *supra* note 51.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. See KENPŌ, art. 81. Under this Article, the Supreme Court has the authority to determine the constitutionality of any law, order, regulation or official act. *Id.*

214. Outline, *supra* note 51.

215. Foote, *Paternalism*, *supra* note 85, at 340.

216. Outline, *supra* note 51.

217. *Id.*

218. KEISHOHŌ, arts. 435, 439; see also Foote, *Paternalism*, *supra* note 85, at 340.

The fact that Japanese prosecutors can appeal acquittals²¹⁹ combined with harsh detention and interrogations, and the acceptance of prosecutors' evidence dossiers at trial may contribute strongly to Japan's 99% conviction rate. On the surface, numerous levels of review appear to guarantee that justice is ultimately served. However, the appeals process takes time, and time is an especially precious and nonrenewable resource for the wrongly convicted.²²⁰ Moreover, allowing prosecutors to second-guess the decisions of lay judges under the new system threatens to undermine the validity and goals of the entire process, because it mitigates the value of lay participation in the justice system. Yet the JSRC Report did not recommend eliminating *koso* appeals,²²¹ and the Lay Assessor's Act does not address the issue. Current reform initiatives do not uphold the constitutional right to double jeopardy protection.

6. The Presumption of Innocence

The Japanese criminal justice system does not support the presumption of innocence. The idea of a presumption of innocence is a necessary feature of justice in a democratic society.²²² It requires the government to meet its burden of proof through the use of fair and lawful procedures to ensure that the rights of the accused are not unduly violated. However, under the Japanese criminal justice system, the only people who are detained are those who are already considered to be guilty.²²³ After arrest, police focus on obtaining confessions about facts they believe to be true, based mainly on the hunches developed during their investigations.²²⁴ It seems unlikely that police and prosecutors would interrogate with such documented intensity if they doubted a suspect's guilt.²²⁵ Moreover, because Japanese society generally views criminal suspects as guilty of the

219. See Ramlogan, *supra* note 63, at 209 (citing a judgment of the Japanese Supreme Court for the proposition that double jeopardy as incorporated in Japanese law is interpreted narrowly and more restrictively in Japan than in the Anglo-American tradition).

220. *Id.* at 207 (noting that four wrongfully convicted individuals spent decades on death row before their cases were heard and that they were released on appeal).

221. JSRC Recommendations, *supra* note 13, at 216.

222. See Dina M. Bernardelli, *Russian Rule-ette: Using Khodorkovsky's Criminal Trial to Assess the State of Russia's Judiciary*, 31 B.C. INT'L & COMP. L. REV. 85, 94 (2008) ("The right to a fair trial includes . . . the presumption of innocence.").

223. See Ramlogan, *supra* note 63, at 205 ("The traditions of Japan suggest that only the guilty are arrested.").

224. See *id.* at 200 (noting that Japanese investigators use confessions not only to ascertain culpability but also to obtain corroborative evidence and other information to build their investigative dossier); see also Cho, *supra* note 122, at 44-45 (detailing the importance of confession in the Japanese model); Ishimatsu, *supra* note 6, at 147 (describing police investigations that are driven by police hunches and opinions).

225. See JOHNSON, *supra* note 95, at 254-62.

crimes they are charged with,²²⁶ even acquitted defendants cannot escape from the stigma of criminality.²²⁷ None of these symptoms is conducive to a presumption of innocence.

The role of defense attorneys in the adjudication of criminal matters also challenges the presumption of innocence. Japanese defense attorneys seem less focused on zealous representation than on mitigating their clients' culpability.²²⁸ Japanese defense attorneys mainly encourage clients to apologize so that prosecutors will be more likely to suspend prosecution, and they work to minimize the sentences imposed on their clients after their convictions.²²⁹ This contrasts sharply with the more adversarial U.S. model, which requires zealous advocacy and features a combative relationship between the prosecution and the defense.²³⁰ For these reasons, it is difficult to avoid the conclusion that Japanese defense attorneys have been at least partly co-opted by the procuracy, and that they function more like agents of the government than as advocates of clients' rights.²³¹ Rather than upholding any presumed innocence, Japanese defense attorneys almost seem to assume that their clients are guilty.²³² Perhaps this less adversarial defense role reflects a tacit understanding that the presumption of innocence does not really exist for those who are swept up in the Japanese criminal process.

Comparing the Japanese constitution with Japanese law enforcement practices shows that constitutional rights in Japan do not strictly track their Western interpretations.²³³ Japanese criminal justice is influenced more by thousands of years of cultural and

226. Foote, *Paternalism*, *supra* note 85, at 344 (noting that once suspects are arrested they are widely considered by the media and the public to be guilty as charged).

227. *See id.* (noting that the stigma of arrest is the most severe in the Japanese criminal justice system and that arrested suspects are widely regarded by the public as guilty).

228. *See* Masayuki Murayama, *The Role of the Defense Lawyer in the Japanese Criminal Process*, in *THE JAPANESE ADVERSARY SYSTEM IN CONTEXT: CONTROVERSIES AND COMPARISONS*, *supra* note 29, at 42, 54–55 (noting that Japanese defense lawyers act as “caretakers” in the criminal process by helping clients to tell the truth and obtain more lenient treatment).

229. *See* Seuss, *supra* note 84, at 319–20 (“Defense counsel in Japan may even encourage his client to plead guilty, much as an American attorney would at plea-bargaining stages, which in turn might lead to a reduced sentence or suspension of prosecution.”).

230. *Id.* at 306; *see also* Herrmann, *supra* note 141, at 136 (noting the “sporting theory” of justice and an often times aggressive advocacy in trial proceedings).

231. *See* Seuss, *supra* note 84, at 306 (noting that Japanese defense counsel sometimes resemble advocates for the state).

232. *See* Murayama, *supra* note 228, at 54 (arguing that defense lawyers accept the prosecution’s legal construct of guilt by attempting to mitigate circumstances after the accused has confessed).

233. *See* Ramlogan, *supra* note 63, at 211 (noting that the use of Western language in an Asian constitution does not necessarily guarantee that the concepts will be applied the same way in a different culture).

historical development and its code system of justice than by its modern constitution. Current reform initiatives do not uphold Western interpretations of the constitutional rights of criminal defendants.

D. Japan's Commitment to International Human Rights

The Japanese view of international human rights protection is congruent with the Japanese understanding of the meaning of individual rights. The argument that "Japan's constitution was imposed by the Americans" seems unavailing in this context, because ratifying international human rights instruments is a product of voluntary state action.²³⁴ It would be difficult to argue that Western powers forced Japan to ratify human rights instruments. Yet Japan's treatment of criminal defendants violates provisions of international human rights treaties that it has voluntarily joined.

Japan ratified the International Covenant on Civil and Political Rights (ICCPR)²³⁵ in 1979, and it acceded to the Convention Against Torture (CAT)²³⁶ in 1999. These instruments set forth general rights to be free from torture and other cruel and degrading treatment.²³⁷ Article 98 of Japan's constitution provides that the constitution is the supreme law of Japan and that treaties will be followed.²³⁸

Treaties in Japan are generally self-executing and require no enabling legislation to give rise to individual rights.²³⁹ Certain

234. *Id.* at 155.

235. International Covenant on Civil and Political Rights, G.A. Res 2200 (XXI), Annex, at 52, U.N. GAOR, 21st Sess., 1496th plen. mtg., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR]; *see also* OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES (Jun. 9, 2004), <http://www.unhchr.ch/pdf/report.pdf> [hereinafter STATUS OF RATIFICATIONS] (indicating that Japan ratified the ICCPR on Sept. 21, 1979).

236. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, at 197, U.N. GAOR, 39th Sess., 93rd plen. mtg., Supp. No. 51, U.N. Doc. A/RES/39/46 (Dec. 10, 1984) [hereinafter CAT]; *see also* STATUS OF RATIFICATIONS, *supra* note 235 (indicating that Japan acceded to the CAT on July 29, 1999).

237. *See Vize, supra* note 9, at 351.

238. This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity. 2) The treaties concluded by Japan and established laws of nations shall be faithfully observed.

KENPŌ, art. 98.

239. Port, *supra* note 87, at 152. *But see* Ramlogan, *supra* note 63, at 154 (citing Judgment of Dec. 19, 1984, Osaka Kosai [High Court], 1145 Hanji 3, 22 (Japan) (a judgment of the Osaka High Court that the ICCPR is not self-executing)); *id.* at 153 (noting that Professor Lawrence Repeta has argued that the ICCPR is a self-executing treaty).

provisions of the ICCPR and the CAT apply to the treatment of the criminally accused. For example, the ICCPR contains a provision upholding the right to counsel and a ban on forced confessions under Article 14(3).²⁴⁰ Various other provisions throughout the ICCPR uphold the rights of the criminally accused. Under Article 7 of the ICCPR, “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”²⁴¹ Under Article 9, “[n]o one shall be subjected to arbitrary arrest or detention.”²⁴² Under Article 10, “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”²⁴³ Under Article 14(2), “[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”²⁴⁴

Because of Article 98 of Japan’s constitution, these ICCPR human rights provisions should provide criminal defendants in Japan with the right to counsel; freedom from self-incrimination, forced confession, torture, and other inhuman or degrading treatment and punishment; and the right to be presumed innocent until proven guilty. However, Japanese adherence to the scope of international human rights protections for criminal defendants appears to extend only as far as those rights are given meaning in the Japanese domestic context—if even that far.²⁴⁵

For example, while Article 7 of the ICCPR prohibits torture, it may not be clear exactly what practices constitute torture. Defining torture is particularly difficult in a culture that has historically viewed it as an acceptable method of obtaining confession.²⁴⁶ Under the CAT:

[T]he term torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession . . . when such pain or suffering is inflicted by or at the

240. ICCPR, *supra* note 235, art. 14, ¶ 3(b).

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: . . . (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his choosing; . . . (g) Not to be compelled to testify against himself or to confess guilt.

Id.

241. ICCPR, *supra* note 235, art. 7.

242. *Id.* art. 9, ¶ 1.

243. *Id.* art. 10, ¶ 1.

244. *Id.* art. 14, ¶ 2.

245. See Port, *supra* note 87, at 165–66.

246. See Foote, *Paternalism*, *supra* note 85, at 328.

instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.²⁴⁷

Perhaps Japanese authorities hold a different view of what constitutes torture,²⁴⁸ or don't respect international human rights treaties. Even though Japan has acceded to the CAT, which prohibits exceptions to justify the use of torture for any reason,²⁴⁹ law enforcement authorities continue to violate the rights of the criminally accused, and the courts continue to accept such actions.²⁵⁰ Japan willingly joined these human rights regimes, but it does not apply their provisions domestically.²⁵¹ Japanese authorities give international human rights protections for the criminally accused the same narrow treatment that they give to similar provisions in the constitution.²⁵²

Since Japan cannot plausibly argue that the human rights treaties that it has voluntarily joined were imposed by a Western power, as some have argued regarding the constitution,²⁵³ a question emerges: How does Japan reconcile the ideals of the international

247. CAT, *supra* note 236, art. 1, ¶ 1. It should be noted that while the last sentence of paragraph 1 of the CAT stipulates that torture "does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions," the extraction of a forced confession is not a sanction, but a method under which information is gained in order to convict a suspect. Furthermore, Article 31 of the Japanese Constitution provides that "[n]o person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law." KENPŌ, art. 31. Japan's codified and legally established procedures do not authorize torture. Vize, *supra* note 9, at 351–52.

248. See, e.g., *Cop: Humiliating Man Not a Crime*, JAPAN TIMES, Nov. 23, 2007, available at <http://search.japantimes.co.jp/cgi-bin/nn20071123a3.html> (noting the case of a senior police officer who admitted that he had humiliated a suspect into confessing to a crime he did not commit, but that that the officer also denied that his actions during the interrogation were a crime).

249. CAT, *supra* note 236, art. 2, ¶ 2 ("No exceptional circumstances whatsoever . . . may be invoked as a justification of torture.").

250. See Port, *supra* note 87, at 165 (noting the tension between Japanese criminal law norms and procedures and the country's international human rights commitments, and that in criminal cases Japanese prosecutors and judges overlook or misconstrue the provisions of international human rights treaties).

251. See U.N. Committee Recommendations, *supra* note 10 (noting that the Japan Federation of Bar Association's statement of support for the 2005 United Nations Committee Against Torture report on Japan expressed deep concerns about both the manner of detention and interrogation of Japanese criminal defendants and the insufficiency of procedural mechanisms to preclude the abuse of their rights and supported the principles of presumption of innocence, right to silence and right to defense).

252. See Sylvia Brown Hamano, *Incomplete Revolutions and Not So Alien Transplants: The Japanese Constitution and Human Rights*, 1 U. PA. J. CONST. L. 415, 469 (1999); see also Vize, *supra* note 9, at 357.

253. Kenneth L. Port, *Article 9 of the Japanese Constitution and the Rule of Law*, 13 CARDOZO J. INT'L & COMP. L. 127, 159 (2005) (noting that some of those currently in favor of revising the war-renunciation clause of the Japanese Constitution argue that it was imposed by the Americans).

human rights regimes to which it is a party with its domestic law enforcement practices? This Article argues that it cannot, but that the introduction of the lay judge system could be the first step in a sequence of deeper reforms that would bring the Japanese criminal justice in line with the Japanese constitution and with human rights treaties. Regardless of diverging perspectives about the meaning of rights, the issue that remains is the plight of innocent criminal defendants who are forced to endure coercive interrogation procedures. Current reform plans do not protect innocent defendants, because they do not uphold Japan's constitution or its international human rights commitments.

E. Japan's Approach to Criminal Justice: Rationale or Rationalization, and Does It Matter?

Perhaps Japanese law enforcement practices may only be truly understood by placing them in the context of Asian legal and philosophical traditions. Imposing Western ideals and concepts in a nation with long-standing cultural and historical traditions may not be the simple proposition that the U.S. occupation forces under General MacArthur thought it would be.²⁵⁴ Moreover, because Japan's legal structures are based on a civil code understanding of the meaning of rights,²⁵⁵ wherein recognized rights require procedural codification,²⁵⁶ the constitutional rights of criminal defendants only take legal form as they are applied under the Japanese Code of Criminal Procedure.²⁵⁷ Given that the Japanese Code of Criminal Procedure is rooted in traditions that operate to restrict the system from embracing Western-style rights as set forth in the constitution,²⁵⁸ Japanese criminal justice appears to be at odds with its legal foundations.

Japan's criminal justice might be "benevolent and paternalistic,"²⁵⁹ but the theory underlying the system makes little difference to an innocent person who is being tortured and coerced

254. PYLE, *supra* note 1, at 219 (citing Douglas MacArthur's July 4, 1947 article in *Life* magazine, in which the General opined "that the values and institutions that came out of the U.S. experience 'are no longer peculiarly American, but now belong to the entire human race,'" and noting that the occupation forces in Japan "did not consider [Japan's history and culture] as an insurmountable barrier . . . because they believed that American values and institutions were of universal validity.").

255. See Port, *supra* note 87, at 166 (noting that the word "right" did not exist in Japan until the 1870s when the French Civil Code was translated into Japanese).

256. Stein, *supra* note 74, at 1598.

257. *Id.* (noting that constitutions in civil code countries must be supplemented by codes, which operate as necessary corollaries).

258. See Cho, *supra* note 122, at 61.

259. See generally Foote, *Paternalism*, *supra* note 85.

into giving a confession.²⁶⁰ Publicized cases of forced confessions underscore the dangers of relying on coercive interrogation measures.²⁶¹ For many observers, the system of Japanese criminal justice amounts to Japanese *injustice*,²⁶² because current practices deprive the criminally accused of the right to counsel, the right to silence, the presumption of innocence, and double jeopardy protections.

It seems plausible that a system of reform that is truly geared towards achieving "better justice" would try to address the disconnect between constitutional rights and the practices of Japanese police and prosecutors. Providing remedies to these problems in the process of criminal justice reform would increase confidence and trust in the system, and it would deflect outside criticism. This would help to legitimize the criminal justice process by resolving disputes in a way that commands the respect of the citizenry.²⁶³ However, advancing the constitutional rights of criminal defendants has not been part of the Japanese government's reform plan. In fact, the recognition of defendants' rights does not even seem to be on the government's radar screen.²⁶⁴

Unless some imperative causes the government to give greater consideration to the rights of criminal defendants, current reforms will not advance those rights. However, as the new lay judge system approaches, media pressure to uphold the constitutional rights of criminal defendants is increasing because of news reports about the substitute detention system and the conditions of interrogations.²⁶⁵

260. See Cho, *supra* note 122, at 61 (arguing that the benevolence of the Japanese criminal justice system is reserved to those who do not contest charges against them, and that the Code of Criminal Procedure stands in the way of defendants' rights).

261. Foote, *Death Row*, *supra* note 11, at 12; see also Ramlogan, *supra* note 63, at 200 (noting that seven convictions were overturned in 1988 for coerced confessions, eleven in 1990, and six between 1990 and May 1991).

262. See, e.g., Clack, *supra* note 111, at 525 (noting that the world is beginning to acknowledge that Japanese interrogation procedures violate human rights).

263. See Peter Aranella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 188 (1983) (arguing that by articulating fair process norms, the state can validate use of its coercive power and command the respect of its citizens); see also Seuss, *supra* note 84, at 311 (arguing that extending rights such as the right to counsel performs a legitimizing function by commanding community respect for the fairness of the adjudication process and the reliability of its outcomes).

264. See Jones, *supra* note 28, at 365–66 (noting Professor Maruta's opinion that the lay judge system is designed to minimize any real impact that the citizen participants might have on the outcome of trials, and that the real goal is to give the appearance of legitimacy by having citizens ratify judicially controlled decisions).

265. See Kamiya, *supra* note 61 (detailing the case of a forty-year-old man wrongly convicted of rape in Toyama Prefecture in 2002 who languished in prison for over two years before his conviction was overturned, and citing a 2004 case from Kagoshima Prefecture in which twelve people were wrongly convicted of violating the Public Offices Election Law, and stating that with the lay judge system set to debut in

As human interest stories about wrongful convictions²⁶⁶ and various police scandals²⁶⁷ raise public awareness, trust in the police is declining.²⁶⁸ Public opinion has begun to influence police interrogation policies,²⁶⁹ and it has had a limited impact on the way that capital punishments are carried out by the Ministry of Justice.²⁷⁰ Public pressure for greater transparency in the criminal justice system could also affect the implementation of the new lay judge system.²⁷¹ One way for the new system to meet its goals of restoring

2009, analysts think that increasing civic participation in the judicial system may force changes in the criminal justice system); *see also* Nagata, *supra* note 61. Nagata details comments by former Shizuoka district court judge Norimichi Kumamoto, who doubts the 1968 conviction of a former professional boxer of murder charges. Nagata, *supra* note 61. Judge Kumamoto criticized police interrogation methods, which included twenty straight days of twelve-hour-per-day interrogation sessions without the presence of a lawyer. *Id.* Judge Kumamoto felt, during deliberations on the case, that something was wrong with the confession and was critical of the fact that these methods of interrogation have basically remained unchanged in the last forty years. *Id.*

266. *See* Foote, *Death Row*, *supra* note 11, at 13 (discussing four wrongful convictions that were the results of forced confessions at the hands of police who engaged in overbearing interrogation practices, and noting that the cases instigated a great deal of public and private soul-searching about the Japanese criminal justice system).

267. *See* Johnson, *Justice System Reform*, *supra* note 24, at 6 (noting that the Japanese police have had a major problem with corruption that has lasted decades, and citing examples such as bribe taking and the use of slush funds).

268. Lillian Roe Gilmer, Note, *Japan's Communications Interception Act: Unconstitutional Invasion of Privacy or Necessary Tool?*, 35 VAND. J. TRANSNAT'L L. 893, 919–20 (2002) (noting that a large percentage of the population distrust police because of numerous scandals, cover-ups, leaks of investigative information, and a low number of disciplinary actions imposed upon them); *see also* Johnson, *Justice System Reform*, *supra* note 24, at 5–6 (noting that in a recent survey some 60% of Japanese said their trust in police has declined, and 45% stated that they had no trust in police at all).

269. *Cops Plan Monitors*, *supra* note 62.

270. Fumio Tanaka & Toshimitsu Miyai, *Execution Details Reflect Disclosure Tide; Transparency Trend, Changes to Judicial System Led to Hatoyama's Decision*, YOMIURI SHIMBUN (TOKYO), Dec. 9, 2007 (noting that the Ministry of Justice announced the names of three death row inmates for the first time because of a number of factors that are changing the Japanese judicial system; one such factor was the approaching lay judge system and the trend toward greater transparency); *see also* Jun Hongo, *Three Hanged and Named in Ministry First: Disclosures End Secrecy Policy on Executions*, JAPAN TIMES, Dec. 8, 2007, available at <http://search.japantimes.co.jp/cgi-bin/nn20071208a1.html> (attributing the government's disclosure of the names of those executed as a response to public criticisms of the methods by which the Ministry of Justice has traditionally carried out executions, with involved little notice to the condemned and no notice to the next of kin).

271. *See* Hamano, *supra* note 252, at 419 (noting the tenacity of pro-Japanese Constitution individuals and groups that have litigated for the enforcement of constitutional rights, and for the enforcement of international human rights treaties, and that these efforts have had some positive effects in Japanese lower courts). *But see* Jones, *supra* note 28, at 368 (noting Professor Maruta's opinion that only the implementation of a U.S.-style jury system will uphold basic human rights and guarantees under the Constitution because it would inspire consideration of the way police conduct investigations and compel confessions).

faith and trust in the judicial process would be to ensure that its implementation includes a fuller recognition of defendants' constitutional rights.

IV. THE IMPACT OF JAPANESE JUSTICE REFORM ON DEFENDANTS' RIGHTS

The lay judge system presents Japan with its best chance for meaningful reform in facilitating the recognition of defendants' constitutional rights. However, a government initiative supporting a fuller recognition of those rights does not appear likely unless there is substantial societal pressure for that to occur.²⁷² The Japanese government recognizes that there are problems with the treatment of criminal defendants,²⁷³ but the limited advances set forth in the Lay Assessor's Act do not even reach the recommendations in the JSRC Report and will not significantly impact the treatment of the criminally accused. At the same time, governments can evolve incrementally, and to be fair, the JSRC Report does indicate that its recommendations are only an initial step.²⁷⁴ Unfortunately, the Japanese government has not even taken this step.

If the lay judge system is successful in creating more participation in government, then it could become the vehicle for change that many hope it will be. However, advancing defendants' rights will require more than the imposition of a mixed jury system. The presence of lay judge panels will not by themselves engender meaningful reform for criminal defendants' rights, unless criminal procedures are modified to align with the principles of the constitution. Altering Japanese criminal procedures to uphold constitutional principles such as the right to counsel, the right to

272. See Cho, *supra* note 122, at 74 (noting that the Japanese Constitution provided a vision for the evolution of the traditional criminal procedure system, but that the socio-political force required to propel such change has not yet developed).

273. JSRC Recommendations, *supra* note 13, at 160.

In order to have criminal justice in Japan meet the expectations of the people and secure their trust hereafter, it is necessary to establish an appropriate system, perceiving the demands of the times and society . . . and respecting the ideal of the guarantee of human rights set forth in the Constitution, including the guarantee of the defense rights of the suspects and the defendants.

Id.

274. *Id.* at 213.

Even after its implementation, the initial [lay judge] system should not be regarded as fixed in stone. Rather, the actual circumstances of the system should be constantly monitored and, bearing in mind the importance of establishing the popular base, the system should be flexibly readjusted from a broad viewpoint, as necessary.

Id.

silence, and the presumption of innocence would require a broad rethinking of Japan's restorative model of criminal justice. This is so, because principles which uphold the presumption of innocence necessarily perform a more adversarial function than the Japanese system is currently geared for.²⁷⁵

Because the Japanese system is so dependent upon obtaining confessions as the first step in reintegrating offenders into society,²⁷⁶ the system depends on the defendant's cooperation in order to start the adjudicative process.²⁷⁷ Enforcing constitutional rights to counsel and to silence in the Japanese system would not encourage a defendant to cooperate or to confess, but instead would encourage a defendant to contest the charges against him. In short, none of these constitutional rights seems compatible with a system in which the rehabilitative process begins with confession.²⁷⁸ Instead, because the rights to counsel and to silence assist defendants in maintaining a presumption of innocence, the full application of those rights in Japan would infuse Japanese criminal justice with more adversarialism.²⁷⁹ It is becoming increasingly apparent to the public that Japanese criminal procedures cannot be reconciled with the Japanese constitution. In past years the Japanese may have dutifully ignored the discord between individual rights and police procedures. However, recent trends indicate that Japan is coming to terms with the fact that the police and the criminal are on opposite sides of the criminal justice equation.²⁸⁰

A. Increasing Adversarial Nature of Japanese Criminal Justice

Internationalization and government reforms may be causing Japan to follow the Eastern European trend toward more adversarial

275. Richard A. Leo, Miranda, *Confessions, and Justice: Lessons For Japan?*, in THE JAPANESE ADVERSARY SYSTEM IN CONTEXT: CONTROVERSIES AND COMPARISONS, *supra* note 29, at 200, 212 (noting that Japan does not have an adversarial system of criminal justice).

276. *Id.* at 216 (noting the importance of confessions to police and prosecutors not only for their evidentiary value, but because they are integral to the process of rehabilitation).

277. *Id.* (noting that in Japan an accused suspect is presumed guilty and he is expected to confess and repent).

278. Takano, *supra* note 67, at 137 (noting that Japanese criminal justice could not work if those accused of crimes routinely exercised their constitutional rights).

279. See Leo, *supra* note 275, at 212 (noting that Miranda warnings can only succeed in an adversarial system).

280. See David T. Johnson, *Crime and Punishment in Contemporary Japan*, 36 CRIME & JUST. 371, 412 (2007) [hereinafter Johnson, *Crime and Punishment*] (noting that recent trends in Japanese law enforcement show that Japan is more focused on strengthening its institutions of crime control than in the past, and that Japan is moving away from a rehabilitative system toward a more Western retributive model).

criminal justice.²⁸¹ Because Japan's code-based system resembles developing Continental European systems,²⁸² these nations may be valuable models by which to forecast the direction of reform in Japan. Rising adversarialism is a result of changing cultural attitudes and the influence of international law.²⁸³ As attitudes and values change in societies, they are reflected in changes to domestic laws.²⁸⁴ Declining public confidence in government and changing social attitudes are empowering Eastern Europeans and taking power away from the judiciary.²⁸⁵ These bottom-up developments support individuality and personal autonomy.²⁸⁶ As Japan implements the lay judge system, changing attitudes about the justice system may hasten the movement towards a more adversarial brand of justice.

Public perception is the key to reforming Japanese criminal justice, because perceptions demarcate the parameters that reform initiatives will address. One perception signifying movement in the adversarial direction is the changing view of crime in Japan, and what the government has done in response. One expert argues that statistical increases in the Japanese crime rate between the years 1992 and 2001 are grounded more in changes in police reporting practices than in reality,²⁸⁷ and that police have been using these

281. Van Kessel, *supra* note 29, at 227 (noting criminal justice trends in Europe that show a shift towards a more adversary-style method of adjudication, because of international perspectives about criminal justice and shifting cultural attitudes about the individual's relationship to government and society).

282. *Id.* at 243 (noting that Japan is becoming more open, more competitive, and more individualistic as a society).

283. *Id.* at 225–27, 234 (noting criminal justice trends in Europe that show a shift in emphasis from inquiry-style procedures towards a more adversary-style method of adjudication, characterized by a shift in emphasis from the pretrial to the trial phase, and a decreasing reliance on the accused as a source of testimonial evidence). The author argues that the underlying causes of these trends are economic integration in Europe, international perspectives about criminal justice and shifting cultural attitudes about the individual's relationship to government and society.

284. *Id.* at 235 (noting the cases of Italy and Spain, where domestic legislation authorized a shift towards adversarial justice).

285. *Id.* at 237 (noting that dispersal of authority to the parties is one of the principle characteristics of adversary procedure, and is probably the result of diversity, the realignment of political authority, and an increasingly powerful media).

286. *Id.* (noting that individuality and personal autonomy are two traits that "emphasize competition and accept the notion of winning and losing").

287. Johnson, *Crime and Punishment*, *supra* note 280, at 375–81 (noting the "new view" in Japan that crime is increasing, and that citizens are right to feel insecure and right to demand more enforcement from politicians, but debunking the myth by analyzing homicide, robbery, and larceny and finding that claims of a new crime wave are exaggerated by changes in police reporting practices). *But see Crime Down Nationwide*, YOMIURI SHIMBUN (TOKYO), Dec. 5, 2007 (citing lower crime rates due to stronger police enforcement measures in the areas of street crimes, such as bicycle theft and mugging). Johnson's argument is centered on the notion that Japanese crime rates were artificially inflated to begin with, and that the statistics never reflected reality. In this view, even if crime is falling as a result of upgraded police enforcement initiatives, one might expect the police to use such favorable

statistics as a mandate to increase law enforcement initiatives.²⁸⁸ Police reports have affected public attitudes and politicians have used these perceptions to justify new initiatives in order to deal with the “crime problem.”²⁸⁹ In turn, Japanese perceptions about the “sharp increase in crime” have led to the commercialization²⁹⁰ and politicization²⁹¹ of crime.

1. Fear Factor: The New Orthodoxy

The politicization of crime has fueled anxieties, and it has exacerbated public fears about the crime epidemic.²⁹² Media reports increasingly focus on shocking crimes, and this has contributed to the public discourse about the crime problem.²⁹³ In this environment, Japanese politicians have found that crime is a language that everyone understands and a message that sells well.²⁹⁴ More than fifty Japanese municipalities have expressed interest in having correctional facilities built in their regions, and one observer notes that “prisons in Japan may be on the verge of becoming a growth industry.”²⁹⁵ The politicization of crime has also resulted in more criminalization.²⁹⁶ Also, the transformation of crime victims into a favored constituency in public policy is increasingly visible in the

statistics to justify continued vigilance. Regardless of whether the crime rate has been inflated or whether it has been genuinely decreasing, few if any of the types of crimes discussed in the Yomiuri piece would be affected by increased police surveillance initiatives such as wiretapping suspects' communications, discussed *infra* at notes 287–94 and accompanying text. These initiatives indicate that authorities may indeed be overreacting to the “crime problem.”

288. See Johnson, *Crime and Punishment*, *supra* note 280, at 375 (noting that police reports and public surveys reference young people and foreigners as the source of increased crime in Japan).

289. *Id.* (noting that Japanese politicians are responding to the crime problem with “get tough” campaigns).

290. *Id.* at 397–400 (noting that commercial crime control devices are selling in greater numbers; security systems sales are increasing at 20% annually; that other items such as custom “panic rooms” and robotic sentries are being marketed; that Japanese police are encouraging residents to install surveillance cameras that they can use to access footage of crimes; and that the police use public money to help residents lease these cameras).

291. *Id.* at 411–12 (noting that Japanese officials have exploited specific criminal events to gain more power).

292. *Id.* at 412.

293. *Id.* at 411.

294. *Id.* at 409 (noting politicians “fish in the troubled waters’ of public opinion in an effort to find law-and-order issues that will attract support”).

295. *Id.* at 383 (discussing the situation even further, the author also indicates that Yamaguchi Prefecture elected to install Japan's first semi-private prison in 2007, and that trading companies and securities firms are on board with the idea of private prisons because they are “impervious to economic ups and downs”).

296. See *id.* at 386–90 (noting the expansion of activities classified as crime and stepped up enforcement efforts).

fabric of reform.²⁹⁷ In this view the criminal justice system is being warped to serve victims rather than to serve the public interest,²⁹⁸ and this new mantra resonates with the government because it justifies new initiatives²⁹⁹ and enhances bureaucratic power.

2. The Government Surfs the “New View” of Crime Wave

The Diet has acted on the “new view” of crime by passing legislation such as the Basic Act on Crime Victims in 2004.³⁰⁰ According to this law, everyone in Japan has a higher probability of becoming a crime victim, thus policies should be made from victims’ viewpoints in order to protect their rights.³⁰¹ Under the statute, crime victims are empowered to take part in criminal procedures.³⁰² This law took effect in a June 2007 amendment to the Code of Criminal Procedure that allows crime victims to question criminal defendants at trial under the lay judge system.³⁰³ Critics point out

297. See *id.* at 400 (stating that the new orthodoxy requires police, prosecutors and judges to consider the needs of crime victims more than in the past).

298. See *id.* at 400 (“As victims move closer to center stage in Japan’s criminal process, the system’s other actors are coming to see themselves more as service providers for individual victims rather than as agents of the public interest.”).

299. See, e.g., *LDP to Open Up Closed Juvenile Trials to Include Victims, Bereaved*, MAINICHI NEWS, Nov. 2, 2007, at 2 (on file with author) (noting a Liberal Democratic Party (LDP) plan to allow victims or bereaved family members to attend juvenile trials of teenagers who commit serious crimes as a response to growing demands from victims).

300. Basic Act on Crime Victims, Law No. 161 of 2004, *translation available at* <http://www.cas.go.jp/jp/seisaku/hourei/data/bacv.pdf>; see also Editorial, *Assistance to Crime Victims*, JAPAN TIMES, Dec. 8, 2007, *available at* <http://search.japantimes.co.jp/cgi-bin/ed20071208a2.html> (noting the important role of the National Network for Victim Support, *Zenkoku Higaisha Shien Network*, in enacting the 2004 basic law).

301. Basic Act on Crime Victims, Law No. 161 of 2004, *translation available at* <http://www.cas.go.jp/jp/seisaku/hourei/data/bacv.pdf> (see supplementary provision).

302. See *id.* art. 18 (developing the system to expand participation opportunities).

303. See KEISHOHŌ, art. 292-2. Sections 2 through 9 provide for controls on the statements of victims and witnesses. Section 2 requires that the prosecutor be informed of the proposed statement, and the prosecutor must inform the court. *Id.* art. 292-2(2). Judges, including lay judges, may then question the victim or witness to clarify the statement. *Id.* art. 292-2(3). Persons involved with the case may also question the victim or witness as to the statement after telling the presiding judge. *Id.* art. 292-2(4). The presiding judge may limit victim or witness statements where they duplicate previous statements or concern matters unrelated to the case or are unreasonable. *Id.* art. 292-2(5). The court may opt for a document stating the victim’s or witness’s opinion where circumstances make oral statements untenable. *Id.* art. 292-2(7). When a document is to be utilized instead of an oral statement, the presiding judge must clarify this matter on the date of trial, and if deemed reasonable the presiding judge shall read aloud the statement or explain its meaning. *Id.* art. 292-2(8). The statement or document may not constitute evidence for recognition of a criminal fact. *Id.* art. 292-2(9). Under section 6, provisions 157-2, 157-3, and 157-4(1) apply where the victim or witness “feels extreme anxiety or tension.” *Id.* art. 157-2(1). Under those sections, the victim or witness may be attended to by a suitable person to alleviate such anxiety or

that as the focus shifts away from the rights of defendants, the process of supporting the interests of victims increasingly pits their needs against the rights of the offenders.³⁰⁴ In this vein, support for victims is transforming the Japanese trial process into a win-or-lose proposition in which the competing interests of victim and defendant are increasingly seen as polar opposites.³⁰⁵ The win-or-lose dynamic represents adversarialism and signifies a departure from the win-win concept of rehabilitative justice.

Other legislation has also contributed to the transformation of Japanese justice. In August 1999, Japan passed the Communications Interception Act (CIA),³⁰⁶ which allows investigators to tap electronic communications of criminal suspects.³⁰⁷ The bill was originally intended to help the government battle organized crime, and it arose as one of three bills passed for that purpose in 1999.³⁰⁸ The Act gives the government authority to use wiretaps to investigate illegal firearms, organized murder, and the smuggling of drugs and illegal immigrants into Japan.³⁰⁹ The opposition party resisted the bill³¹⁰ because of concerns that it would legitimize invasions of the right to privacy.³¹¹

Under this statute, law enforcement could use any information obtained in an intercepted communication to detain a suspect and subject him to questioning.³¹² Japan has been characterized as an "eavesdropping paradise," where surreptitious monitoring has been a

tension during the oral statement. *Id.*; see also Press Release, Japan Federation of Bar Associations, New System Allows Crime Victims to Participate in Criminal Trials (July 1, 2007), available at <http://www.nichibenren.or.jp/en/activities/meetings/070701.html> [hereinafter Victims Participate] (noting that this amendment became law, and that crime victims and their bereaved families will be allowed to attend trials, question defendants and witnesses, and demand punishment).

304. Johnson, *Crime and Punishment*, *supra* note 280, at 400.

305. *Id.*

306. Hanzai Sosa no Tame no Tsushin Boju ni kansuru Horitsu [Communications Interception Act], Law No. 137 of 1999, available at http://www.ron.gr.jp/law/law/tu_bouju.htm [hereinafter Wiretap Act].

307. *Id.*; see also Gilmer, *supra* note 268, at 895–96 (noting the passage of the Communications Interception Act, which allowed investigators to wiretap telephone conversations and communications of suspected criminals).

308. See Toshikuni Murai, *Critical Issues in the Lawmaking Policy of Japanese Criminal Procedure: The Wiretap Act and the Adversary System at the Pretrial Stage*, in THE JAPANESE ADVERSARY SYSTEM IN CONTEXT: CONTROVERSIES AND COMPARISONS, *supra* note 29, at 193, 193, 197 (saying that the first bill revised the Criminal Code to encompass money laundering; the second bill extends enforcers' authority to use wiretaps as an investigatory tool; and the third bill provided for the protection of witnesses); see also Gilmer, *supra* note 268, at 897 (discussing Japan's passage of the Communications Interception Act).

309. Gilmer, *supra* note 268, at 899.

310. See *id.* at 895 (noting that the Wiretap Act was "one of the most controversial laws passed by the Diet in recent history").

311. *Id.* at 915.

312. *Id.* at 919.

frequent occurrence,³¹³ and where no legal restrictions existed to protect the public.³¹⁴ Yet, instead of restricting wiretapping, the Act specifically authorizes law enforcement to spy on average citizens and legalizes eavesdropping practices as long as they are carried out by the police.³¹⁵

One concern is that the Act authorizes the police to engage in unconstitutional investigative methods.³¹⁶ Article 35 of Japan's constitution provides for a right to privacy.³¹⁷ Moreover, Article 21 of Japan's constitution provides for freedom of speech and for the right to secrecy of one's communications.³¹⁸ Because Japanese authorities ignore the constitutional rights of criminal defendants under detention and interrogation,³¹⁹ some fear that the Act could result in constitutional violations of the right to privacy³²⁰ and the right to secrecy of one's communications. Skeptics may wonder what would keep the police from violating these rights under the CIA when law enforcement routinely ignores other constitutional protections such as

313. See Hiroshi Matsubara, *Japan an Eavesdropping Paradise*, JAPAN TIMES, July 7, 1999, available at <http://search.japantimes.co.jp/cgi-bin/nn19990707a9.html> (noting that a lack of laws governing eavesdropping devices and their almost ubiquitous existence has made Japan the most extensively bugged country in the world, and that in conjunction with deliberations over the Wiretap Act, the government discussed the notion of cracking down on eavesdropping by citizens as a supplementary measure to the bill).

314. See Murai, *supra* note 308, at 197 (noting that electronic monitoring equipment is readily available in stores and that there are no legal measures to combat eavesdropping).

315. See Gilmer, *supra* note 268, at 919–20 (noting critics' fears that police will use the law as a license to eavesdrop on private citizens as well as suspects).

316. See *id.* at 895 (noting that the Wiretap Act could authorize illegal transgressions of the constitutional right to privacy).

317. The right of all persons to be secure in their homes, papers and effects against entries, searches and seizures shall not be impaired except upon warrant issued for adequate cause and particularly describing the place to be search and the things to be seized . . . (2) Each search or seizure shall be made upon separate warrant issued by a competent judicial officer.

KENPŌ, art. 35.

318. *Id.* art. 21 ("Freedom of assembly and of association as well as speech, press and all other forms of expression are guaranteed. 2) No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.")

319. See *supra* notes 106–18, 121–54, 172–94 and accompanying text (discussing how the treatment of the criminally accused under interrogation and while in detention is at odds with provisions of the Japanese Constitution).

320. See Gilmer, *supra* note 268, at 915–17 (citing the Japanese courts' liberal interpretations of the Police Duties Law that in effect elevate evidence, no matter how obtained, above individual rights). The Police Duties Law authorizes law enforcement to conduct searches when they feel criminal activity may be afoot. *Id.* at 915. Gilmer points to Japanese courts' treatment of the Police Duties Law as support for the idea that courts will not enforce limits on the use of wiretaps under the Wiretap Act. See *id.* at 917.

the right to counsel or the right to silence.³²¹ Under this law, the police could gain access to a private individual's communications, and they could use the information gained to justify extensive questioning.³²² One observer notes that such fears are buttressed by a 1986 case of illegal wiretapping in Kanagawa.³²³ Despite a court ruling awarding damages to the target of the electronic surveillance in that case, the police deny that any wiretapping ever occurred.³²⁴ Essentially, the CIA arms the police with the tools to cast a wider investigative net—potentially invading peoples' privacy and misidentifying innocents who could face inquisition by the procuracy.³²⁵

B. *The Lay Judge System: Gateway to Fuller Reform?*

Bureaucracies tend to grow over time,³²⁶ and as they grow they develop mission creep.³²⁷ The short history of the CIA bears this out. The law's mandate was to aid the government in controlling organized crime.³²⁸ Yet already there are reports of sharp increases in the use of wiretaps in criminal investigations.³²⁹ Rising public awareness about police scandals and media stories about improper police conduct decrease trust in the police.³³⁰ Unpopular laws such as the CIA only exacerbate this problem. As a result, people feel more

321. See *id.* at 918 (asserting that the police have powerful investigatory tools, which have been misused to such a large degree that there is a general feeling of public distrust of the police).

322. *Id.*

323. *Id.* at 920 (saying that the Kanagawa police tapped the phone of Communist Party leader Yasuo Ogata, who was awarded four million yen in damages by the Tokyo High Court); see also Editorial, *Wiretapping Is a Two-Edged Tool*, JAPAN TIMES, May 31, 1999, available at <http://search.japantimes.co.jp/cgi-bin/ed19990531a1.html>.

324. Gilmer, *supra* note 268, at 920.

325. See *id.* at 895 (noting wiretapping is effective in combating organized crime because it allows law enforcement to target those who control organized crime but have remained beyond the reach of the law). The concern is that wiretapping is an equally effective method of intruding into the lives of private persons, whose innocent conversations may be misconstrued by police, or used as a pretext for an investigative "fishing expedition." See generally *id.* at 900–01.

326. See Jones, *supra* note 28, at 364–65 (noting that the Japanese court system is a "highly trained and specialized . . . bureaucracy that is focused on preserving its own authority").

327. "Mission creep" refers to the expansion of bureaucratic authority beyond the institution's original function.

328. Murai, *supra* note 308, at 193.

329. See *Record Number of Wiretaps in 2006*, JAPAN TIMES, Feb. 17, 2007, available at <http://search.japantimes.co.jp/cgi-bin/nn20070217a9.html> (noting that in 2006, police used a record-breaking number of authorized wiretaps).

330. See Gilmer, *supra* note 268, at 919–20 (citing to various police scandals and with a resulting drop in the public's trust of the police, and noting that the police are able to keep their internal affairs secret).

suspicious about the police, and some may view them as adversaries rather than as public servants.

The lay judge system itself signifies heightened adversarialism. By requiring ordinary citizens to sit in judgment, the system will require lay judges to view the prosecution and the defense as opponents on different sides of the justice coin. Japanese criminal trials simply will not be able to maintain their traditional guilt-confirmation function³³¹ without undermining the integrity of the lay judge system. True civic participation will require the active engagement of Japanese citizens in the adjudicatory process, and this will not be accomplished if lay judges do no more than confirm dossier evidence as Japanese judges currently do.³³² Moreover, by increasing public participation in the justice system, the lay judge system will help to educate the general public about criminal justice and about the legal system.³³³ This will energize the citizenry³³⁴ by generating more thought about rights, and by encouraging more media coverage of legal issues. In response to public hysteria about increasing crime, the Japanese government has begun instituting new programs and has passed legislation designed to fight crime. In the process, the character of Japanese criminal justice may be changing.³³⁵

In theory, democracies represent the will of the people through the voting process and through jury service.³³⁶ A democracy's criminal justice system should reflect democratic principles, which

331. See Hirano, *supra* note 6, at 129 (arguing that Japanese courts do not perform the function of deciding guilt or innocence but rather operate to confirm guilt); see also Seuss, *supra* note 84, at 316 (stating that "courts play a guilt-confirmation role rather than a guilt-determination role").

332. See Ishimatsu, *supra* note 6, at 146-47 (detailing the system of justice/trial by dossier).

333. See Hiroshi Fukurai, *The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT'L L.J. 315, 316 (2007) (noting that contrary to past research indicating that Japanese citizens share a strong sense of obedience to legal authority, the experience of civic participation has increased the public's level of legal consciousness and willingness to participate in the legal system).

334. See *id.* (discussing the increased enthusiasm of Japanese citizens to participate in the legal system).

335. See Johnson, *Crime and Punishment*, *supra* note 280, at 400 (suggesting that a decline in Japan's rehabilitative ideal may cause changes in the crime field).

336. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 173 (Knopf 1945) (1835).

[T]he people appoint the legislative and the executive power and furnish the jurors who punish all infractions of the laws. The institutions are democratic, not only in their principle, but in all their consequences; and the people elect their representatives *directly* . . . in order to ensure their dependence. The people are therefore the real directing power.

place power in the hands of the people.³³⁷ Such principles are embodied in the Japanese constitution³³⁸ and are alluded to in the JSRC Report,³³⁹ but Japanese law enforcement authorities routinely violate constitutional principles. If Japan intends to legitimize its justice system by incorporating ordinary citizens into the process of adjudicating crime, the constitutional tension between law enforcement practices and the rights of criminal defendants must be addressed. Ultimately, the Japanese people may demand no less than adherence to the precepts of their constitution.³⁴⁰

As in every well-ordered society, Japanese police represent governmental authority. Yet they employ methods that suppress the constitutional rights of criminal suspects and defendants.³⁴¹ The new lay judge system places Japan's criminal justice system at a crossroads and it challenges the government and the public to respond. Current reform initiatives at best preserve the status quo while paying homage to the grail of reform,³⁴² and at worst ignore the shortcomings and dislocations of the current system that innocent criminal defendants are forced to endure.

Japan's adversarial shift may also be hastened by an increasing supply of lawyers and more use of the courts to resolve disputes.³⁴³ The environment is ripe for change, and the lay judge system will provide the infrastructure for fuller reforms³⁴⁴ if Japanese people are willing to embrace the new system. Pressures from the Japanese public to ensure that criminal justice practices accord with the

337. See *id.* at 282 ("Trial by jury . . . [is] . . . an eminently republican element in the government . . . in that it places the real direction of society in the hands of the governed . . . and not in the government.").

338. KENPŌ, ch. III.

339. See Wilson, *supra* note 1, at 843 (noting that the JSRC Report urges citizens to "break out of the consciousness of being a governed object and . . . become a governing subject, with autonomy and bearing social responsibility" (quoting JSRC Recommendations, *supra* note 13, at 127)).

340. See Leah Ambler, *The People Decide: The Effect of the Introduction of the Quasi-Jury System (Saiban-In Seido) on the Death Penalty in Japan*, 6 NW. U. J. INT'L HUM. RTS. 1, 23 (2007) (arguing that the lay judge system will place capital punishment "squarely within the public domain" and provide the people with the tools to abolish it).

341. See generally Murai, *supra* note 308.

342. See Wilson, *supra* note 1, at 850 (noting the Japanese concepts of *tatemae* and *honne*, two principles that connote the official version of how things are—the desired appearance—and the truth of the situation, respectively).

343. See Schumann, *supra* note 2, at 519 (noting that the increase in the number of lawyers, the fact that more people are willing to use the courts to resolve disputes, and structural changes such as the revised Administrative Procedures Law and the revised Civil Procedure Code, are making Japanese law and society more adversarial in nature).

344. See Herrmann, *supra* note 141, at 132 (noting that lay judges provide democratic legitimization of the criminal justice process and that they guarantee that justice is administered in a way that can be understood by the average citizen).

constitution will either foment changes to Japanese criminal procedure or signal a crisis of governmental legitimacy.

V. SUPPLEMENTS TO REFORM

Under the Lay Assessor's Act, the new lay judge system is set to take effect by May 2009.³⁴⁵ Japan can get ahead of a potential governmental legitimacy crisis by incorporating several proposals to coincide with the launch of the lay judge system or to be applied shortly thereafter. Japan's government should take concrete measures to ensure that the lay judge system will provide more than just the appearance of public participation. The suggestions that follow will do more to increase trust in the legal system and to stimulate participation in government than will current reform initiatives.

A. Videotaping Confessions

One of the best ways to ensure that lay participation in Japanese criminal trials will be valuable and meaningful is to ensure the objectivity of the evidence that lay judges will be asked to evaluate at trial. This will encourage lay judges about the value of their roles in the new system, and it will support their fact-finding function. Because the camera does not lie, all interrogations should be videotaped.

Videotaping interrogations would help achieve the aim of eliciting reliable, truthful confessions because it would provide a reviewable and objective record of criminal interrogations.³⁴⁶ Experts note that this would benefit all parties concerned—police, prosecutors, defendants, lay judges, and the public.³⁴⁷ The JSRC proposal to implement a new system of written records of criminal interrogations³⁴⁸ is insufficient because written records are open to manipulation and human error.³⁴⁹ In addition to creating an

345. See Anderson & Saint, *supra* note 32, at 234 ("The law is to come into force within five years of its enactment, i.e. before June 2009.").

346. Johnson, *Justice System Reform*, *supra* note 24, at 9.

347. See, e.g., Leo, *supra* note 275, at 212 (noting that videotaping is non-adversarial because it does not tip the balance of power in favor of the prosecution or the defense, but merely preserves the truth of the interrogation).

348. JSRC Recommendations, *supra* note 13, at 169 (suggesting that accuracy and objectivity of such records would be achieved if the matters to be recorded are specified on a form and the record is stored safely under a control system that prevents anyone from altering it at a later time).

349. See Johnson, *Justice System Reform*, *supra* note 24, at 8–9 (noting that with no objective records of an interrogation, the police are free to reconstruct what occurred to advance their case-building and conviction goals, a process that leads too often to the fabrication, corruption, and concealment of the truth); see also Gilmer,

objective and reviewable record of interrogations, videotaping interrogations would force authorities to adopt other methods of obtaining confessions or to obtain evidence in a more balanced and fairer way. This would help put an end to coercion and would do more than any other measure to bring Japanese police practices in line with the constitutional rights of defendants.³⁵⁰

In addition, videotaping interrogations would also mean that investigators could no longer discard evidence that does not conform to their theories about the truth of their cases. This would make more exculpatory evidence available to defense counsel, because a videotaped record would help to nullify the negative effect of the Japanese discovery rule that requires an adverse party to know the existence and identity of a piece of evidence before requesting it. Any exculpatory evidence gleaned during interrogation would be instantly "discovered" when the tapes are reviewed by defense counsel. Moreover, videotaping interrogations would preclude any such evidence from being discarded by investigators. Finally, a videotape of the interrogation would cause Japanese courts to either more fully apply the exclusionary rule, or to at least be more skeptical of the prosecution's dossier. Courts would have to think carefully before simply accepting the dossier into evidence.

There may be some positive movement regarding videotaped confessions. The Ministry of Justice has conducted tests on the use of videotaped confessions and portions of interrogations to ensure that any confessions were voluntary.³⁵¹ However, partial videotaping can be misleading because it does not record the entire interrogation. Therefore, partial videotaping cannot provide objective insight as to the conditions under which a confession is obtained. In early 2007, a Tokyo district court judge noted this weakness and expressed doubt about the evidentiary value of a partially videotaped confession during a murder trial.³⁵² Partial recording is insufficient, and it is potentially more dangerous than a written record because such evidence is too misleading to lay judge panels consisting of ordinary

supra note 268, at 919 (discussing that the new wiretap laws allow investigators to act on their hunches).

350. See Leo, *supra* note 275, at 214 (noting that taping interrogations will reign in zealous interrogators and encourage fairer treatment for all suspects during interrogation); *id.* at 212 (noting that videotaping "is a non-adversarial policy reform that, unlike the creation or restriction of constitutional rights, does not structurally alter the balance of advantage between the prosecution and the defense," but instead is a medium for "preserving the truth of the interrogations" and any resulting confessions).

351. Kamiya, *supra* note 61.

352. See Jun Hungo, *Murder-for-Insurance Gets 25 Years, DVD Confession or No*, JAPAN TIMES, Oct. 11, 2007, available at <http://search.japantimes.co.jp/cgi-bin/nn20071011a4html> (noting that the judge argued that the partial tape could only provide evidence supporting the claims of the prosecutors and could not serve as substantial evidence about the underlying crime).

citizens. Lay judges may accept a partially taped interrogation and confession without considering what set of factors caused the individual to confess in the first place. Under the plan adopted by the National Police Agency in April 2008, partial taping is authorized, but its main use is to be for cases where suspects retract their confessions at trial.³⁵³ As a result, the limited videotaping measures adopted by the police help prosecutors get confessions admitted into evidence at trial³⁵⁴ and do little to ensure that the interrogation process is conducted fairly, or that it accords with constitutional rights.

A better proposal is to videotape the entire interrogation of a suspect or a defendant to ensure that the evidence is objective and complete. While it would be overly time-consuming to require lay judges to view every moment of interrogation, the existence of such a record, which could be reviewed by defense counsel, would go a long way in upholding the constitutional rights of those accused of crimes. Moreover, the mere knowledge that interrogations are videotaped would help to deter any physical or mental coercion by police.

A Democratic Party of Japan bill stipulated that all interrogations should be recorded on videotape and that any written statements used against the defendant must be accompanied by video and audio recordings.³⁵⁵ A more recent bill in the House of Councilors that calls for complete recordings of interrogations is unlikely to be enacted because the controlling coalition in the Japanese House of Representatives opposes it.³⁵⁶ Without the clarification that the entire interrogation and confession should be video-recorded to avoid the problem of staged videotaped confessions, Japan is left with a system that carries a strong possibility of misleading lay judges as to the circumstances surrounding a defendant's confession. The presence of counsel during questioning would help to ensure that the video documentation is carried out properly, but under current Japanese procedures, defense attorneys are not allowed to attend interrogations.³⁵⁷

B. *The Right to Counsel Must Be Truly Upheld*

In order to increase trust in the system and to stimulate participation in government, Japan should work to ensure that the

353. *Police to Film*, *supra* note 155 (noting the formalization of the plan and that lawyers criticize the system as not making interrogations more transparent).

354. *See Upper House*, *supra* note 152 (stating that prosecutors' recordings of interrogations will "help establish the credibility of suspects' depositions").

355. *DPJ Submits Bill to Have All Interrogations of Suspects Recorded*, YOMIURI SHIMBUN (TOKYO), Dec. 5, 2007.

356. *Upper House*, *supra* note 152.

357. Foote, *Paternalism*, *supra* note 85, at 338.

constitutional right to counsel is not violated. Ideally, the right should be interpreted in the *Miranda* tradition.³⁵⁸ Implementing a Japanese *Miranda* rule would be extremely problematic for Japanese criminal justice³⁵⁹ because, even though Japan is adapting to a more adversarial justice system, inquisitorial criminal procedures remain unchanged. The Code of Criminal Procedure limits how the constitution applies in the handling of criminal suspects.³⁶⁰

Current methods of compelling confessions from suspects do not reflect a system worthy of a democratic society, and maintaining any such practices will not create more faith in the justice system. Accordingly, practices that preclude or limit a criminal defendant from meeting with defense counsel should be abolished. Practices such as *daiyo kangoku* and *bekken taiho* offend the principle of fairness, and they should play no part in the adjudication of crime in a modern democratic country. Both practices serve either to hinder or to prevent the constitutional right to counsel. Innocent defendants in Japan essentially have no right to counsel because the criminal justice system refuses to enforce it.³⁶¹

The JSRC Report recommends establishing an active defense bar,³⁶² but there are no guidelines setting forth how defense attorneys will be allowed to interact with criminal defendants. There simply is no codified legal apparatus to alter the overwhelming power the government holds over the criminally accused. Moreover, while

358. See *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966) (holding the privilege against self-incrimination so important that procedural safeguards must be employed to protect that privilege).

359. See Leo, *supra* note 275, at 210–12 (arguing that because Japan does not have an adversarial system of criminal justice, applying *Miranda* rights to block confession would be inappropriate because it would be perceived as an impediment to the pursuit of truth and to the moral catharsis of suspects who begin taking responsibility for their crimes by confessing).

360. See generally *Victims Participate*, *supra* note 303 (discussing various safeguards for victims); Murai, *supra* note 308 (discussing the Constitutional protections for wiretapping).

361. See Takano, *supra* note 67, at 137 (recounting that “[n]o system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.” (quoting *Escobedo v. Illinois*, 278 U.S. 478, 490 (1964))).

362. JSRC Recommendations, *supra* note 13, at 165.

In order to ensure the fairness of the criminal justice system, it is critical to properly protect the rights of the suspects and defendants. For that purpose, it is especially important to effectively secure the right to counsel . . . [A] public defense system for suspects should be introduced and a continuous defense structure covering both the suspect stage and the defendant stage should be established.

Japan is beginning to produce more lawyers,³⁶³ it is questionable whether many of the new lawyers will be attracted to criminal defense work.³⁶⁴ The extremely high criminal conviction rate, the limited financial rewards of a career as a defense attorney, and societal disdain for defense attorneys all reduce the chances that new lawyers will be attracted to criminal defense work.³⁶⁵ Going forward, it appears that at least the supply of new lawyers will be sufficient to staff the defense bar system if they choose to engage in that type of work.³⁶⁶ Moreover, a great deal of education and training will be required to bring Japan's lawyers up to the task of representing criminal defendants in adversarial trials.³⁶⁷ Most Japanese defense attorneys lack the oral advocacy and presentation skills to argue cases effectively and in a way that can be easily understood by ordinary citizens who will function as lay judges.³⁶⁸

Without concrete legal provisions regulating the interaction of defense attorneys and criminal defendants in support of the right to counsel, current law enforcement practices that arbitrarily limit and disrupt attorney-client meeting opportunities will not change. If there is no change to the manner in which the right to counsel is

363. See Wilson, *supra* note 1, at 867 (noting that Japan has decided to double the number of lawyers, prosecutors, and judges by 2018, by implementing changes in the bar passage rate and establishing over seventy new U.S.-style professional law schools).

364. *Id.* at 867-68.

365. See Foote, *Reflections, supra* note 148, at 33 (noting the low compensation for defense attorneys in Japan; court appointed counsel normally receive fixed fees of 65,000 yen, or approximately \$500, for a case with three trial sessions); see also Wilson, *supra* note 1, at 867-68 (noting that defense attorneys are viewed as protectors of Japan's public enemies and have a poor reputation because they represent alleged criminals, noting also that they are underpaid).

366. JSRC Recommendations, *supra* note 13, at 165 (suggesting the possibility of hiring full-time lawyers or contracting with individual lawyers or firms).

367. See James R. Maxeiner & Keiichi Yamanaka, *The New Japanese Law Schools: Putting the Professional into Legal Education*, 13 PAC. RIM L. & POL'Y J. 303, 316 (noting that U.S.-style law schools are adapted to a common law adversarial legal system which prizes advocacy, but that Japan has different traditions); see also Miyazawa, *supra* note 1, at 115-16 (noting that some new law graduates are praised by the Japanese media as Japan's brightest stars to lead the country into the future, but have trouble finding books in the law library, and that students view a law degree as a business credential, and are relieved upon graduation because they no longer have to study law); Wilson, *supra* note 1, at 868 (calling for Japan's government to expand legal aid and public defender systems, and for law schools, the Japan Federation of Bar Associations, and the Legal Research and Training Institute to expand practical training activities to increase exposure to trial advocacy and to improve the skills of Japanese lawyers).

368. *Lawyers to Polish Speaking Skills/JFBA Plans Seminar to Learn Defense Skills from U.S. Experts*, YOMIURI SHIMBUN (TOKYO), Dec. 12, 2007 (noting that a defense lawyer skills seminar was planned because of the Japan Federation of Bar Association's recognition that defense attorneys' presentation skills lag behind those of prosecutors and that the government has been conducting practical training seminars for prosecutors since April 2006).

carried out, Japanese law enforcement will remain insulated from the reform process, and in some sense the police will remain above the constitution.³⁶⁹ Maintaining unreviewable police practices undermines the concept of representative government and individual freedom. It also undermines current reform initiatives that are designed to create faith in the system and to improve Japanese democracy, because it leaves great power in the hands of the state, to the detriment of the wrongly accused. Criminal defendants deserve their constitutional right to counsel and democracy demands it.

*C. Victims and Their Families Should Not Be Allowed
to Question Defendants at Trial*

Current proposals to uphold victim's rights undercut the goal of increasing trust in the legal system. Recent concern for victims' rights³⁷⁰ is forcing Japanese criminal justice in the adversarial direction.³⁷¹ Victims' rights will play a part in the lay judge system under provisions in the Basic Act on Crime Victims and under the amended Code of Criminal Procedure.³⁷² However, allowing victims and their families to question defendants at trial is not advisable and the practice should be scrapped before the implementation of the lay judge system.

In the interest of advancing a more complete justice system, it seems fair to take victims' feelings into account. However, the institutionalization of victims' rights as part of the trial process will not serve the system well. Japanese courts have shown a readiness to consider victims' feelings in sentencing decisions,³⁷³ and this is perhaps the appropriate stage for victims and their families to be heard. The Lay Assessor's Act provides that lay judges are

369. Johnson, *Justice System Reform*, *supra* note 24, at 13 (arguing that under current conditions, justice reform will not produce a police force that is governed by the rule of law, as under the present system there are no mechanisms of accountability and transparency to check police activities).

370. Johnson, *Crime and Punishment*, *supra* note 280, at 400.

371. *Id.* at 385 n.19; *see also* Van Kessel, *supra* note 29, at 243 (discussing the change toward a more individualistic society and a more open economy, two factors which form the foundations of the adversary system).

372. *See* KEISHOHŌ, art. 292-2 (noting various provisions); *see also* Victims Participate, *supra* note 303 (noting that the Code of Criminal Procedure provides that victims and their families will have the opportunity to ask questions of criminal defendants at trial).

373. *See, e.g., Court Adds Time to Teen's Murder Rap*, JAPAN TIMES, Oct. 26, 2007, available at <http://search.japantimes.co.jp/cgi-bin/nn20071026a1.html> (noting that in increasing the prison sentence of a teenage murder suspect, the presiding judge made statements indicating that the original sentence was too light because of the nature of the crime and the feelings of the victim's family).

“entrusted to decide freely based on the strength of the evidence.”³⁷⁴ However, including victims’ subjective feelings at trial will not help lay judges reach objective determinations based on evidence. Allowing victims and their families to question defendants at trial threatens to undermine the fairness of the trial proceeding because it could interfere with objective fact-finding and because it could adversely affect the rights of criminal defendants to a fair trial.³⁷⁵ Impressionable lay judges will be hard-pressed to remain objective as they sit alongside professional judges throughout the course of a criminal trial,³⁷⁶ and their judgment should not be clouded by the emotional content that crime victims will bring to the trial proceedings.³⁷⁷

Moreover, the Lay Assessor’s Act provides that the lay judges may question victims after victims have made statements to the court, but there is no language in the statute limiting the types of questions that lay judges can ask those victims.³⁷⁸ Amendments to the Code of Criminal Procedure that provide the court with advance notice of statements made by victims³⁷⁹ will not preclude the prejudicial effect of having lay judges probe victims’ subjective feelings about the crime at trial. Allowing victims to make statements and allowing lay judges to ask questions about those statements during trial presents a real danger of prejudicing criminal defendants.

374. See Anderson & Saint, *supra* note 32, at 268–69 (noting that under Article 62 of the Lay Assessor’s Act, both professional and lay judges are to decide cases based on the strength of the evidence).

375. Victims Participate, *supra* note 303; see also Japan Federation of Bar Associations, Opinions on System for Direct Participation of Crime Victims in Criminal Trials, May 1, 2007, available at <http://www.nichibenren.or.jp/en/activities/statements/070501.html> [hereinafter Opinions on Victims] (noting possible reasons for opposing the system, including “hav[ing] an adverse effect on defense of defendants”).

376. See Wilson, *supra* note 1, at 853 (discussing safeguards to ensure that lay judges are not dominated by the professional judges on the jury panel).

377. See Stuart Biggs, *Critics: Lay Judges May Issue More Death Sentences*, JAPAN TIMES, Sep. 11, 2007, at 3 (noting the comments of anti-death penalty activist Nobuto Hosaka, who argues that “[v]ictims will be able to make emotional pleas to the court, with lay judges thrust into a role of hearing the most heinous crimes,” and noting the results of a June 3, 2007, mock trial in which audience members wanted the accused to receive a longer sentence than was decreed); see also Masami Ito, *Victim Participation in Trials Risky, Experts Say*, JAPAN TIMES, Mar. 30, 2007, available at <http://search.japantimes.co.jp/cgi-bin/nn20070330a3.html>; Opinions on Victims, *supra* note 375.

378. See Anderson & Saint, *supra* note 32, at 267–68 (showing that under Article 58 of the Lay Assessor’s Act, lay judges may question victims about their statements at trial, but there is no provision requiring lay judges to obtain the permission of the chief judge before doing so, as is the case under Articles 56 and 57, which pertain to situations in which lay judges would ask questions of witnesses).

379. See KEISHOHŌ, art. 292-2(2) (providing that victims’ statements will be prefaced by notification to the presiding judge).

The incorporation of this procedure elevates victims in a way that could be detrimental to defendants' rights. Victims' statements may detract from the integrity of trial proceedings by transforming trials into retributive proceedings that champion victims at the expense of criminal defendants' constitutional rights.³⁸⁰ Assuaging victims' emotions may be politically popular, but subjugating the constitutional right to an impartial tribunal for such reasons is misguided. Court procedures should not assist in or otherwise engage in advocacy for either side in a criminal case. Instead, they should reflect a balanced approach to deciding facts. Allowing victims to question defendants mocks the presumption of innocence. Moreover, supporting victims in this way is out of character with Japanese legal traditions because it is a departure from the spirit of benevolent paternalism and the rehabilitative approach to justice. Incredibly, while current government reforms respond to public pressure to support crime victims, government ears remain closed to similar pressures regarding the need to uphold defendants' constitutional rights. If Japanese justice is evolving, it should do so more fully, so that the system works for all parties and not just for a favored constituency.

By incorporating victims' feelings into the trial proceedings, the Lay Assessor's Act threatens to prejudice the rights of criminal defendants and to disrupt the flow of trial proceedings.³⁸¹ Victim participation should be limited to the sentencing phase only, and even then it should be limited to making statements. Any other participation is simply too prejudicial to the rights of the defendant.

D. Acquittals Should Be Final

Maintaining the *koso* appeal is detrimental to the new system because it undermines the authority of the lay judges. Other than voting in public elections, participation in jury trials is probably the single most important way that ordinary citizens participate in the democratic process.³⁸² By ensuring that the decisions of lay judges are respected, Japan would prove its commitment to democracy and elevate its citizens accordingly.³⁸³ However, the current system of

380. KENPŌ, art. 37, para. 1 ("In all criminal cases the accused shall enjoy the right to a speedy and public trial by an impartial tribunal.").

381. See Opinions on Victims, *supra* note 375.

382. See Arthur L. Burnett, Sr., *Jury Reform for the 21st Century: A Judge's Perspective*, 20 CRIM. JUST. 32, 32 (2005) ("[J]ury service in our federal and state judicial systems is absolutely essential to ensure the proper functioning of our democracy, just as important as our voting for elected officials.").

383. See DE TOCQUEVILLE, *supra* note 336, at 283–84 ("Now, the institution of the jury raises the people itself, or at least a class of citizens, to the bench of judges. The institution of the jury consequently invests the people, or that class of citizens with the direction of society."). *But see* Richard O. Lempert, *The Internationalization of Lay*

koso appeals is to remain in place, and this could mitigate the value of having a lay judge system altogether. If the lay judge system is to be taken seriously, then maintaining the *koso* appeal is a mistake, because second-guessing lay judges' determinations threatens to undermine the legitimacy of citizen participation in criminal trials.³⁸⁴

If the government is not capable of proving its case under the current approach, which features a system of dossier justice in which the prosecution holds almost all of the procedural cards,³⁸⁵ it is hard to see why an appeal by the prosecution in the rare event of an acquittal would be necessary. According to the JSRC, "even when *saiban-in* participate, there is a danger of a mistaken verdict or a mistaken judgment with regard to the sentence."³⁸⁶ Since *koso* appeals may be based on the grounds of an error in fact-finding or in sentencing,³⁸⁷ maintaining *koso* appeals signals the government's expectation that lay judges will sometimes make fact-finding errors or impose improper sentences. Current reforms will not balance the power disparity between the government and the accused, and they will not affect the appellate process in any meaningful way.

Simply creating more lawyers and instituting a lay judge system for criminal trials is not going to change the criminal conviction rate because the scope of judicial reform has not included any significant modification of criminal procedures. At the very least, if the government's power to appeal an acquittal is to remain in place, lay judges should be allowed to participate at that level as well.³⁸⁸ This is particularly true where appellate courts opt for *de novo* review. Excluding lay judges from appellate proceedings would signal that

Legal Decision-Making: Jury Resurgence and Jury Research, 40 CORNELL INT'L L.J. 477, 480–81 (2007) (arguing that juries are not essential to democracy, but that juries support democracy because they are not compatible with authoritarian government).

384. See Wilson, *supra* note 1, at 855 (arguing that confidence in lay judges' authority and worth should not be undermined).

385. See Foote, *Reflections*, *supra* note 148, at 32 (noting the broad exceptions to the right to silence and right to access an attorney; the limited recognition that Japanese courts accord to the exclusionary rule; the various exceptions to the hearsay rule; and, the relatively few weapons that Japanese defense lawyers have to confront the procuracy at trial as indications of the prosecution's dominant position in Japanese criminal justice).

386. JSRC Recommendations, *supra* note 13, at 217 (noting that the report called for further studies as to the composition of the judicial body for a *koso* appeal but did not recommend giving the determinations of lay judges the stamp of finality with regard to an acquittal in a criminal case).

387. See Outline, *supra* note 51 (stating that grounds for a *koso* appeal include excessive severity or leniency of the sentence and an error in fact-finding).

388. See Jackson & Kovalev, *supra* note 27, at 117 (noting that if the determinations of lay juries are not respected, the lay function in the legal system—to bring lay insight into the verdict—is undermined, and arguing that the concept of lay participation is not undermined where rights to appeal provide review at another lay tribunal).

the lay judges arrived at the wrong verdict the first time around, and that citizen participation is neither valid nor respected.

The government's power to appeal criminal acquittals plainly undermines the authority of the lay judge system.³⁸⁹ The power to appeal criminal acquittals only enhances the government's power. It also indicates that the government does not trust lay judge panels with the power to render final decisions.³⁹⁰ If citizens see that the government does not respect the lay judge system, then there is little reason for them to conclude that they should respect it either, or that their participation matters in a system that doesn't respect their decisions. The larger question many Japanese might begin to ask is to what extent are the people really represented in a system that does not even respect the determinations of citizen juries?

This outcome would mean that Japan's legal reforms will have failed to achieve their goals, because it would mean that people have less respect for government and less trust in the justice system. Japan should fully consider what implications current reforms will have for democracy and for governmental legitimacy. Japan has jumped in with both feet regarding its jury system, and the system should uphold the decisions of the lay judge panels. The foregoing supplements to the reform agenda will arm Japanese criminal justice with a renewed legitimacy by safeguarding the rights of criminal defendants and reassuring Japanese citizens that the new jury system has been carefully crafted and that its decisions will be respected.

VI. CONCLUSION

The lay judge system highlights the challenges Japan faces as it struggles to reconcile its modern constitution with its cultural and legal traditions. No doubt the system will have a large impact on the course of future reforms to Japanese criminal justice. Implementing the suggestions raised in this Article would help provide Japan with a criminal justice system worthy of its constitution and its democratic form of government. Unfortunately, legal reforms as they are currently structured will not fulfill the goals established by the JSRC.

389. See Wilson, *supra* note 1, at 856 ("If lay jury determinations are consistently challenged and overturned by a panel of career judges, this has the potential of undermining confidence in the jury system and frustrating the public's belief in the value of its service.").

390. See Bloom, *supra* note 11, at 51 (noting that Japan's choice of a mixed jury system indicated an inherent distrust in "the average Japanese citizen's ability to effectively decide legal issues," and that while "Japan wants to make its judicial system more understandable to its citizens, it is not prepared to entrust decisions systems solely to them").

Rising public awareness of the discord between the constitutional rights of criminal defendants and existing criminal procedure could provoke a governmental legitimacy crisis.³⁹¹ It will be important for Japan to prevent that day from arriving by developing and implementing top-down initiatives to manage reforms and to bring Japanese criminal procedure into line with the constitution, because reforms like the lay judge system are going to result in bottom-up pressure to do so. Presently, Japanese criminal justice reform is failing the Japanese people because it does not adequately address the constitutional rights of Japanese citizens.

By empowering the Japanese people, the new system could improve Japanese criminal justice and strengthen Japanese democracy. By exposing the public to the excesses of the current system, the lay judge system will put Japanese criminal procedures in the crosshairs of public and constitutional scrutiny. Once the new system is launched, Japan may face significant public pressure to uphold the constitution and maintain the dignity of its citizens through criminal procedures that accord with individual rights, constitutional principles, and democratic governance.³⁹² However, that degree of change will require a deeper inquiry into the investigative stages of Japanese criminal procedures, and this does not seem to be on the government's reform agenda. Creative law and policy making before the lay judge system is implemented would pave the way for a smoother transition to a system that involves public participation in justice. The burden is ultimately on the Japanese people to ensure that the rule of law finally takes hold in Japan, or to resign themselves to living in a nation in which democracy does not truly exist.

391. See Hamano, *supra* note 252, at 484 (noting that constitutionalism in Japan is fragile and will not withstand an unexpected political crisis).

392. See Johnson, *Justice System Reform*, *supra* note 24, at 14 ("The best comparative research on justice system reform demonstrates that changes are most successful when they are driven from the bottom up by actors in civil society, not when they are top down.").