

TRUST THE PEOPLE OR BUSINESS AS USUAL? AN EXAMINATION OF LAY PARTICIPATION IN THE JAPANESE CRIMINAL JUSTICE SYSTEM

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This article discusses the two pillars of lay participation in the Japanese criminal justice system – the Prosecution Review Commission (Kensatsu Shinsakai) and the Lay Assessor’s System (Saiban-in). The author analyses these to examine whether these have indeed resulted in true lay participation in the criminal justice system. The article concludes that due to the structural limitations of the Prosecution Review Commission (Kensatsu Shinsakai) and the Lay Assessor’s System (Saiban-in), true lay participation in the criminal justice system is somewhat limited.

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I INTRODUCTION

There are two crucial points in time in the life cycle of the criminal justice system. The first is at the point of indictment, where charges are brought against the accused. The second is at the point of conviction, where a court makes a determination of guilt or innocence on the crime that the accused is alleged to have committed. Given the importance of these two crucial points in the criminal justice system, what safeguards are in place to ensure sufficient accountability, fairness and scrutiny?

In Japan, the Prosecution Review Commission (*Kensatsu Shinsakai*) and the Lay Assessor's System (*Saiban-in*) have been introduced as twin pillars of public participation and oversight in these two crucial points of the criminal justice system. At first blush, it would appear that the Japanese have placed their faith in the hands of the public, heralding an age of democratic engagement in civil society. However, as this article will show, legal education and training in Japan is an elite realm, offered only to a select few. As such, drawing arguments from the elite management school of thought, the two systems of lay participation may merely give the appearance of democratic participation but maintain the reality of the status quo.

For the purposes of this paper, the term 'JPL Professional' refers to a judge, prosecutor or a lawyer (*bengoshi*) who has passed the Japanese National Bar Examinations, completed the apprenticeship period by the Legal Training & Research Institute and has embarked on a career as a judge, prosecutor or *bengoshi-lawyer*. In the judicial sphere, the term 'career judge' refers to a judge who is appointed as a career judge, whether or not legally trained,¹ and the term 'lay judge' refers to a non-legally trained citizen judge appointed under the lay assessor (*saiban-in*) system.

II THE TWIN SYSTEM OF LAY PARTICIPATION

A *The Lay Assessor's System (Saiban-in)*

On 4 Aug 2009, the murder trial of Katsoyoshi Fujii commenced in the Tokyo District Courthouse.² Katsoyoshi Fujii, a seventy-two-year-old male, was accused of fatally stabbing his elderly neighbour.³ The trial commenced with

¹ Noting that Summary Court Judges and Supreme Court Justices need not complete the National Bar Examinations and training stint at the Legal Research & Training Institute.

² Zachary Corey and Valerie Hans, 'Japan's New Lay Judge System: Deliberative Democracy in Action?' (2010) 12 *Asian-Pacific Law & Policy Journal* 73.

³ *Ibid.*

great fanfare and attracted much of the media's attention – as murder trials do – but also because this trial saw Japan's first Lay Assessor's System (*Saiban-in*) ('LAS') in action.⁴ Comprising 3 career judges and 6 lay judges, it heralded a brave new world of citizen engagement in the criminal justice system in Japan.

Starting in the 1980s, the Japanese criminal legal landscape underwent a series of reviews.⁵ Stemming from a series of wrongful convictions, limited checks-and-balances and bureaucracy, the Japanese Federation of Bar Associations advocated for an all-citizen jury system to overhaul the judicial system.⁶ The term 'saiban-in', literally translating as lay judges, was first raised by Professor Masahito Inouye in 2001.⁷ Inouye recommended the saiban-in seido, or Lay Assessor System and a committee was formed to implement the recommendations.⁸ In 2004, the final recommendations of the LAS were sent to the Cabinet Office. The proposal was sent to the Diet (the Japanese Parliament) that same year and the Act was passed, with LAS trials to commence in 2009.

Under the LAS, it is this mixed panel of 9 (3 career judges and 6 lay judges) who shall determine the guilt of an accused person. Where the defence is not objecting to the prosecution's case, a reduced panel comprising 1 career judge and 4 lay judges may sit with the consent of both parties. The 3 career judges are drawn from the ranks of the Japanese professional judiciary and are full time career judges. The 6 lay judges however, are drawn by lots from the ranks of citizens who have voting rights in the Diet.⁹ Some categories of persons are excluded from service. These include persons who have not completed compulsory education under the Schools Education Act, persons who have been subject to imprisonment, persons with physical or mental incapacities, for whom the LAS duties would be a significant burden, Ministers, Members of the Diet as well as certain categories of public servants.¹⁰ It should be noted that JPL professionals, quasi-legal professionals and persons qualified to be a JPL

⁴ Makoto Ibusuku, 'Quo Vadis? First Year Inspection of Japanese Mixed-Jury Trials' (2010) 12 *Asian-Pacific Law and Policy Journal* 25, 25.

⁵ See Hiroshi Fukurai, 'People's Panels vs Imperial Hegemony: Japan's Twin Lay Justice Systems and the Future of American Military Bases in Japan' (2010) 12 *Asian-Pacific Law & Policy Journal* 95 for further details.

⁶ Fukurai, above n 5, 104

⁷ *Ibid.*, 108.

⁸ *Ibid.*

⁹ Kent Anderson and David Johnson, 'Japan's new criminal trials: Origins, operations and implications' in Andrew Harding & Penelope Nicholson (eds) *New Courts in Asia* (Routledge, 2011) 371, 380. See Art 13 of the Lay Assessor's Act ('LAS Act') as translated in Kent Anderson and Emma Saint, 'Japan's Quasi-Jury (saiban-in) Law: An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials' (2005) 6 *Asian-Pacific Law and Policy Journal* 233.

¹⁰ Art 14 & 15 LAS Act.

professional are also excluded.¹¹ Those who have previously served as a lay assessor or on the Prosecution Review Commission may also decline service. There is also discretion for Lay Assessors to be dismissed under Articles 41-44 of the LAS Act.¹²

The entire panel deliberates together and while only the career judges are authorized to interpret the law and make decisions on procedure, the lay judges are permitted to be heard on such matters.¹³ The lay judges may also directly question witnesses, victims and defendants.¹⁴ Decisions are made by majority vote, although there must be at least one career judge and one lay judge in the majority view.¹⁵

B *The Prosecution Review Commission (Kensatsu Shinsakai)*

In Australia and most commonwealth jurisdictions, the exercise of prosecutorial discretion is dominated and jealously guarded by the state.¹⁶ There is little recourse for the aggrieved victim to challenge a prosecutor's decision not to charge a potential offender. Such was also the case in Japan until the inception of the Prosecution Review Commission ('PRC'). The PRC has been likened to an American-style grand jury system.¹⁷ This is unsurprising given the influence of US military forces which gave rise to the PRC's inception in Japan. Conceived by General Douglas McArthur of the Allied Forces in Japan post-World War II, the PRC incepted in 1984 was seen as a democratic institution for engaging the people.¹⁸

The PRC's principal purpose is to empanel a group of 11 randomly selected Japanese citizens to review the Japanese prosecutor's decision not to charge potential violators of the law.¹⁹ Similar to the LAS, those who perform vital political and criminal justice functions are excluded from serving.²⁰ Unlike the

¹¹ Art 15 LAS Act.

¹² Art 41-44 LAS Act.

¹³ Art 66 LAS Act.

¹⁴ Art 56, 58, 59 LAS Act.

¹⁵ Art 67 LAS Act.

¹⁶ The Director of Public Prosecutions (of each State and Territory) is usually charged with the day to day conduct of prosecutions with the Attorney-General retaining residual power as the 'First Law Officer'.

¹⁷ Hiroshi Fukurai, 'Japan's Prosecutorial Review Commissions: Lay Oversight of the Government's Discretion of Prosecution' (2011) 6 *University of Pennsylvania East Asia Law Review* 1, 5.

¹⁸ Fukurai above n 5, 102.

¹⁹ Hiroshi Fukurai, 'Japan's Quasi-Jury and Grand Jury System' (2011) 86 *Chicago-Kent Law Review* 790, 790, 801

²⁰ Hiroshi Fukurai, 'Japan's Prosecutorial Review Commissions: Lay Oversight of the Government's Discretion of Prosecution' (2011) 6 *University of Pennsylvania East Asia Law Review* 2, 14.

LAS however, the PRC serves for a term of 6 months, with ¼ of members being replaced every three months.²¹

The process is initiated when a complaint has been filed against a prosecutor's decision not to charge a potential offender.²² The PRC has the power to question prosecutors, request additional information, summon witnesses and consult an expert in coming to their determination.²³

After its review, the PRC makes one of the following 3 recommendations:²⁴

- (1) Non-indictment is proper
- (2) Non-indictment is improper
- (3) Indictment is proper

A simple majority is required for (1) and (2) while a supermajority of 8 out of the 11 votes is required to pass (3).²⁵ Prior to the 2004 amendments, these recommendations were merely advisory and thus not binding on the prosecutor. The Japanese Federation of Bar Associations have long recommended that the PRC's recommendations be made binding on the prosecutor and that the prosecutor be made to explain reasons for deviating from the PRC's recommendations. There was some debate regarding the effectiveness, or lack thereof of the PRC if the prosecutor can simply ignore its recommendations. The 2004 revisions therefore saw amendments to the PRC Act. As a result, the position is now as follows:²⁶ when a prosecutor make a decision not to indict in a case and if the PRC decides that indictment is proper, the prosecutor is obliged to re-consider the non-indictment decision, taking into consideration the PRC's opinion. If, upon reconsideration, the prosecutor still takes the view that non-indictment is proper, the prosecutor will be asked to explain the basis of this decision to the PRC. The PRC will then review the matter for a second time and can accept the prosecutor's reasoning or issue a second recommendation to indict, which is then binding on the prosecutor.

The Asashi Stampede Incident and the Fukuchisen Derailment Incident are two examples of the PRC importance. In the Asashi Stampede Incident, a Deputy Chief Officer was alleged to be professionally negligent and thus responsible for

²¹ Ibid 13.

²² Fukurai, above n 17, footnote 138 citing Art 30 PRC Law Act.

²³ Ibid footnote 137 citing Art 38 PRC Law Act. ,

²⁴ There is of course some debate as to the difference between 'indictment is proper' and 'non-indictment is improper' – the Japanese Federation of Bar Associations has essentially taken the view that these are of the same legal status

²⁵ Ibid 8.

²⁶ For details on the 2004 amendments, see Fukurak, above n 17, 9-12.

the injuries of 247 persons and the death of 11 people, after a bridge collapsed during a stampede. It was discovered that the police were forewarned of the risk but failed to take precautionary measures. However, no prosecution was initiated. Indeed, prosecutors had twice refused to indict despite an advisory recommendation to do so (before the PRC Act stipulating binding recommendations came into force). The victims' families and public were outraged and It was only in 2009, when the new PRC Act came into force that the prosecution was obliged to initiate prosecution.

In the Fukuchisen Derailment Incident in 2005, a JR West train derailed and injured 555 people while killing 107 individuals. It was reported that a major factor in the accident was JR's management policies placed profits and not safety as its top priority.²⁷ JR's then-President was indicted, though the prosecution stopped short of indicting 8 former JR West executives in charge of safety measures. The victims submitted a complaint to the PRC. Three former JR West executives were eventually also indicted as a result of the PRC's recommendations.

There is thus great potential for the PRC to increase civic participation and the rule of law in Japan. The PRC can help expose the fortified terrain of special protection and immunity given by the Japanese government to influential political heavyweights, high-ranking bureaucrats, and business elites.²⁸

III THE LEGAL EDUCATION LANDSCAPE OF JAPAN

While the two systems illustrated above attempt to be inclusive in allowing lay participants in the legal sphere, the legal education and training landscape of Japan is an elite, highly exclusive club requiring a lengthy education system capped by an extremely competitive national examination.

To be a JPL professional under the pre-2004 system, one had to pass the National Legal Examination, which was open even to those without a college education.²⁹ Under this system, about 1-3% of candidates passed the Bar examinations.³⁰ In April 2004, the new graduate Law School system emerged and

²⁷ Fukurai, above n 17, 18.

²⁸ Fukurai, above n 17, 4.

²⁹ Masaki Abe and Luke Nottage, 'Japanese Law: An Overview' in Jan Smits (ed), *Encyclopaedia of Comparative Law* (Elgar, 2012) 472.

³⁰ Kent Anderson and Trevor Ryan, 'Gatekeepers: A Comparative Critique of Admission to the Legal Profession and Japan's new Law Schools' in Stacey, Keele, Tarlor (eds) *Legal Education in Asia: Globalisation, Change and Context* (2010) 52; Takahiro Saito, 'The Tragedy of Japanese Legal

to be a JPL professional under this new system, one must first complete a first degree,³¹ embark on a 2-3 year graduate Law School (*hōka daigaku-in*) degree, pass the National Bar Examinations. The pass rate for the current National Bar Examinations ranges at about 20-25%.³² There is also a 3-strike rule and a candidate must pass the Bar exams in 3 attempts or less within 5 years of graduation.³³ JPL candidates then undergo 1 year apprenticeship at the Legal Training & Research Institute in attachments with the courts, prosecutor's office and private practice. At the conclusion of the attachment stint, there is another exam and virtually all will pass.³⁴ JPL candidates then move to one of the 3 tracks – Prosecutor, Judge or Lawyer-Bengoshi.³⁵

While the current 20-25% pass rate can be argued to be high when compared to the pre-2004 1-3% pass rate, it should be noted that in the United States, it is typical for 60% of candidates to pass the Bar examinations.³⁶ Even the New York Bar Examinations, often seen as a national and international benchmark of quality, had a pass rate of 73% in 2014.³⁷

Essentially to be a JPL professional in Japan today, one would have 3-4 years of an undergraduate degree, followed by 2-3 years of a graduate Law School degree, the National Bar Examinations, and followed by the 1 year Legal Training and Research Institute (*shiho kenshujo*) apprenticeship. An JPL professional would thus have approximately 7-8 years of legal education and training and would arguably have been in the top 20% of his/her cohort, having passed 'one of the most exacting and difficult tests'.³⁸ Judges and prosecutors in particular, remain very much an 'exclusive class of bureaucrats'.³⁹

Education: Japanese "American" Law Schools' (2006-2007) 24(1) *Wisconsin International Law Journal* 197, 199, Footnote 9.

³¹ Up to 25% of students opt for an undergraduate degree with a major in law at the hogakubu faculties. A student from a hogakubu undergraduate law school only has to complete 2 years at the graduate Law School. See Carl Goodman, *Rule of Law in Japan: A Comparative Analysis* (2012) 203.

³² Debra Weiss, 'Think the Bar Exam Is Tough? Be Thankful You Don't Live in Japan', *ABA Journal* (online) 11 Jul 2011 <http://www.abajournal.com/news/article/think_the_bar_exam_is_tough_be_thankful_you_dont_live_in_japan>

³³ Colin Jones, 'Japan's New Law Schools: The Story So Far' (2008) 14(27) *Journal of Japanese Law* 248, 249.

³⁴ Goodman, above n 31, 199.

³⁵ Abe and Nottage, above n 29, 472.

³⁶ Goodman, above n 31, 199.

³⁷ The New York Bar Examinations, *New York Bar Exam Pass Rates 2010-2014* <http://www.nybarexam.org/ExamStats/NYBarExam_PassRates%20_2010-2014.pdf>

³⁸ Goodman, above n 31, 196.

³⁹ Fukurai, above n 5, 105.

IV THE NEED FOR PUBLIC ACCOUNTABILITY AND PARTICIPATION

As articulated, that the Japanese JPL professional is among the best educated, having overcome many hurdles to the profession. With such a professional, one would imagine that any society would be satisfied in leaving the substantive decision making of indictment and conviction – to such a professional.

A *A Judges and Prosecutors in Ivory Towers (or Government Housing)*

Ironically, the elite nature of the JPL professional could be one argument against them exercising unfettered and unsupervised discretion in the criminal justice system. As explained earlier, the JPL professional route is such that upon completion of the 1 year training stint with the Legal Training and Institute, the JPL professional embarks on 1 of 3 tracks – Judge, Prosecutor or Lawyer-Bengoshi.

Unlike the traditional common law system, these routes are generally linear and there is little permeability between these tracks. In order to become a Judge or Prosecutor, one must be selected by the government. 7% of the JPL candidates are appointed as Judges and 3% as Prosecutors.⁴⁰ The remaining 90% go on to private practice.⁴¹ Generally, grades at the National Bar Examinations feature prominently in determining these tracks and only JPL candidates with the better grades of the cohort are selected as Judges and Prosecutors. As West notes, Prosecutors are considered elite bureaucrats in Japan and only students with high grades make the cut.⁴² Prosecutors are also generally prosecutors for life.⁴³

Likewise, grades and personality in the Bar Examinations matter significantly in judicial selection.⁴⁴ As West puts it, while lawyers elsewhere might become judges later in life through demonstrated work experience, the Japanese judicial selection is so early on in their legal life that grades are likely the foremost criteria.⁴⁵ After appointment to the bench, West illustrates the life of a Japanese judge through the fictional Judge Tanaka.⁴⁶ Tanaka achieves excellent grades in High School and then attends one of Japan's elite universities.⁴⁷ He later passes the Bar exams, completes his training at the Legal Training and Research

⁴⁰ Abe and Nottage, above n 29, 473.

⁴¹ Ibid.

⁴² Mark West, *Secrets, Sex and Spectacle: The Rules of Scandal in Japan and the United States* (University of Chicago, 2008) 35.

⁴³ Ibid 38.

⁴⁴ Mark West, *Lovesick Japan: Sex, Marriage, Romance, Law* (Cornell University, 2011) 16.

⁴⁵ Ibid 16.

⁴⁶ Ibid 14.

⁴⁷ Under the pre-2004 system.

Institute and is appointed as an Assistant Judge. He is promoted to a full judge in 10 years.⁴⁸ As an elite bureaucrat, he will likely marry someone of the appropriate social standing – like the daughter of a judge-instructor of the Legal Training and Research Institute.⁴⁹ Tanaka resides in government provided judicial housing, where 60% of fellow judges live.⁵⁰ He develops relationships with other judges and his wife gets to know the wives of other judges.⁵¹ After a number of transfers to courts throughout Japan and a relatively illustrious career, he retires at age 65.⁵²

It can be argued then that Japanese judges and prosecutors are very similar to Judge Tanaka – they are homogenous lot, having been cut from similar cloth, attending the same schools,⁵³ undergoing the same experience and training, perhaps even living in the same buildings and interacting with the same people and are out of touch with the ordinary person. They may also be pro-state.⁵⁴ Some commentators opine that lay participation may be a way to temper this.⁵⁵ Accordingly, it may be necessary to insert into the system an element of lay oversight, through a regime to ensure that the important discretion exercised by the prosecutor and judge are not made in a vacuum, from ivory towers (or government housing).

B *Scrutinizing Japan's Crime Control Model*

Japan is one of the few developed countries to retain the death penalty. With a conviction rate of more than 99%,⁵⁶ a confession rate of 92%⁵⁷ and a pre-indictment detention period of up to 23 days,⁵⁸ Japan may be said to be a country

⁴⁸ Abe and Nottage, above n 29, 474.

⁴⁹ West, above n 44, 19

⁵⁰ Ibid 19.

⁵¹ Ibid 20.

⁵² Ibid 21.

⁵³ Ramseyer notes that the courts seem to favour University of Tokyo graduates – J Ramseyer, 'Do School Cliques Dominate Japanese Bureaucracies?: Evidence from Supreme Court Appointments' (2011) 88 *Washington University Law Review* 1681; Another study notes that 73% of department chiefs or higher in the civil service were University of Tokyo graduates – see Tom Ginsburg, 'Transforming Legal Education in Japan and Korea' (2004) 22 *Pennsylvania State International Law Review* 433.

⁵⁴ Mark Ramseyer and Eric Rasmusen, *Measuring Judicial Independence: The Political Economy of Judging in Japan* (2003), as cited in Anderson and Johnson above n 9, 375. It has been argued for example, that the Supreme Court Secretariat maintains control over judicial postings and promotions and this has hampered judicial independence.

⁵⁵ Ibid.

⁵⁶ Arne Soldwedel, 'Testing Japan's Convictions: the Lay Judge System and the Rights of Criminal Defendants' (2008) 41 *Vanderbilt Journal of Transnational Law* 1417, 1446; David Johnson, 'The Japanese Way of Justice : Prosecuting Crime in Japan' (2002)215.

⁵⁷ Daijiro Yasuda, 'One Aspect of Criminal Justice in Japan: Confessions' (Paper presented at the Australia Network for Japanese Law Conference, Sydney, 23 Feb 2005).

⁵⁸ See Art 60 of the Code of Criminal Procedure in Kazuko Ito, 'Wrongful Convictions and Recent Criminal Justice Reform in Japan' (2013) 80 *University of Cincinnati Law Review* 1245, 1249; United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, *Criminal Justice in Japan*, 17 available at <www.unafei.or.jp/english/pdf/PDFcrimjust/chapter1.pdf>.

of the 'Crime Control model' espoused by Professor Herbert Packer.⁵⁹ Some argue that the high conviction and confession rate is nothing more efficient policing and prosecution,⁶⁰ and a genuinely remorseful accused.⁶¹ The sceptics, however, allege that there must be something more sinister at play.

Critics point to the 23 day period as too long and indeed,⁶² during that time, access to counsel may be limited. One lawyer stated that in the 16 days his client was detained, he met his client 7 times for 20-30 minutes each time, totalling 3 hours 15 minutes.⁶³ The prosecution on the other hand, interrogated his client for 161 hours and 17 minutes.⁶⁴ The argument is that 23 days is plenty of time for an accused to be pressured, coerced, deceived, intimidated, and threatened such that any confession is likely involuntary or worse, false.⁶⁵ Amnesty International has highlighted the case of Sugaya Toshikazu, who 'confessed' to murders and spent 17 years in prison.⁶⁶ DNA evidence later exculpated him.⁶⁷

Sugaya was 'fortunate' in that he was not given the death penalty. After 17 years thus, he was finally acquitted and released in 2010.⁶⁸ Those sentenced to death may not have that chance. The high conviction rate coupled with the death penalty has critics concerned about the possibility of a wrong conviction. As expressed by the United Nations Commissioner for Human Rights, Navi Pillay, in 2010:⁶⁹

As a judge on the UN Rwanda Tribunal, I sentenced a number of people who had been found guilty of genocide to life imprisonment, and I firmly believe this is a suitably severe punishment, but – importantly – it is also one that can be rectified or compensated, if it turns out the person in question was wrongly convicted. I would warmly welcome steps towards the abolition of the death penalty in Japan...

⁵⁹ Herbert Packer, 'Two Models of Criminal Process' (1964) 113 *University of Pennsylvania Law Review* 1.

⁶⁰ Johnson, above n 56, 215.

⁶¹ Yasuda, above n 57.

⁶² Amnesty International, *Amnesty International Report 2014/2015* (2015) at <<https://www.amnesty.org/en/countries/asia-and-the-pacific/japan/report-japan/>>.

⁶³ Ouno Masao & Yasuo Watanabe, *Shine and Shadow of Criminal Justice* (1989) as cited in Kazuko Ito, 'Wrongful Convictions and Recent Criminal Justice Reform in Japan' (2013) 80 *University of Cincinnati Law Review* 1245, 1249.

⁶⁴ Ibid.

⁶⁵ Kazuko Ito, 'Wrongful Convictions and Recent Criminal Justice Reform in Japan' (2013) 80 *University of Cincinnati Law Review* 1245, 1250-1251.

⁶⁶ Amnesty International, *Japan: Briefing to the UN Committee Against Torture* (2013) 6.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ United Nations Office of the Commissioner for Human Rights, 'Leader wanted: Japan's agenda on Human Rights' (12 May 2010) at

<<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10040&LangID=E>>.

Amnesty International has also deplored Japan's death penalty regime.⁷⁰ It highlights that the process is shrouded in secrecy and indeed, those on death row are not informed of the time of their execution until hours before the event.⁷¹ Families are only informed after the fact.⁷²

As can be seen, the homogenous nature of the judge and prosecutor, coupled with the 'crime control mode' of a high conviction rate, a high confession rate, a lengthy pre-indictment detention period and the death penalty can be ammunition for critics to use in justifying that public oversight in the Japanese criminal justice system is necessary.

V TRUST THE PEOPLE?

A *A Motivations for Maintaining the Status Quo*

On the other hand, there are also strong motivations for maintaining the status quo. Japanese society can be said to be hierarchical, with a high level of trust placed in authority figures.⁷³ This article has already outlined the rigorous process one must go through to be a JPL professional. In Japan, judges and prosecutors are seen as elite bureaucrats⁷⁴ and lawyer-bengoshis are conferred the honorific 'sensei'.⁷⁵ In light of the high training, prestige and trust in the JPL professional, it seems odd for such a society to then entrust similar responsibilities to any person off the street.

Indeed, in neighbouring Asian countries, the historical trend has been to move away from lay participation. Malaysia has abolished jury trials in 1995.⁷⁶ Brunei has also done so in 1988.⁷⁷ In Singapore, former Prime Minister Lee Kuan Yew, a lawyer himself by training abolished the jury system in Singapore.⁷⁸ In his first case as defence lawyer, Lee had secured the acquittal of four men, employing 'the simple tricks of advocacy'.⁷⁹ Upon acquittal by the jury, Lee noted that the judge looked disgusted.⁸⁰ Lee himself 'felt sick'⁸¹ though he had discharged his

⁷⁰ Amnesty International, *Japan: Briefing to the UN Committee Against Torture* (2013) 8.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ Anderson and Johnson above n 9, 383.

⁷⁴ West, above n 42.

⁷⁵ Goodman, above n 31, 196.

⁷⁶ Neil Vidmar, *World Jury Systems* (Oxford University, 2000) 447, as cited in Anderson and Johnson above n 9, 383.

⁷⁷ Anderson and Johnson above n 9, 383.

⁷⁸ Lee Kuan Yew, *Third World to First: The Singapore Story* (HarperCollins, 2000) Vol II.

⁷⁹ Lee Kuan Yew, *The Singapore Story: Memoirs of Lee Kuan Yew* (Times, 1998) 144.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

duty. The acquittal led to him having ‘grave doubts about the practical value of the jury system’.⁸² While these comments are made in the context of lay participation at the conviction stage, they are arguably applicable also to lay participation in the indictment process. The argument is that lay participants, are ill equipped to deal with these crucial decision making affecting life and liberty. Such tasks are best left to the professionals, with the necessary education, training and temperament.

Notably, the current players in the system stand to lose the most in a truly ‘democratic’ criminal justice system. With lay participation, prosecutors would have to deal with unpredictable adjudication by lay judges.⁸³ They would also lose prosecutorial discretion in the indictment process. Similarly, career judges who have long had the final say in the Japanese trials would have now have to share their bench with lay judges.⁸⁴ There is a strong disincentive for the judge and prosecutor, with some of the brightest minds in society, who have worked so long and so hard to get to their positions, to now share their role with lay participants.

B *True Lay Participation?*

The players in the criminal justice system must thus balance maintaining the status quo and the pressure for public accountability and participation. One possible route is to maintain the status quo and do so loudly and unapologetically. However, this route may lead to increased external scrutiny and international criticism. Commentators have noted that efforts to create participatory institutions including their own equitable judicial systems, might be one way to resist the influence and criticisms.⁸⁵ Another possible route thus, might be to engage in wholesale and genuine reform. However, this comes with the risk of the loss of control. One other route is to allow some semblance of public participation in the system but maintaining overall control such that any true change to the status quo is minimal, or none at all.

At first blush, the LAS and PRC might appear to herald a brave new world of public participation. However, upon closer examination, it would appear that the structural limitations and lack of knowledge on part of the lay participant

⁸² Lee, above n 78.

⁸³ Johnson, above n 56, 377.

⁸⁴ Ibid.

⁸⁵ Hiroshi Fukurai, Kay-Wah Chan, Setsuo Miyazawa, ‘The Resurgence of Lay Adjudicatory Systems in East Asia’ (2010) 12 *Asian-Pacific Law and Policy Journal* 1. 7.

effectively results in the judge and prosecutor effectively maintaining control of proceedings.

1 *Structural Limitations*

The first limitation of the Lay Assessor's System is its limited jurisdiction. It covers cases:⁸⁶

- (1) involving crimes punishable by death or by imprisonment for an indefinite period or by imprisonment with hard labour;
- (2) involving crimes in which the victim has died due to an intentional criminal act

Notably, the system extends to offences with the death penalty. With this, Japan is then able to now, to some extent at least, deflect criticisms on the fear of irreversible wrongful convictions. However, these offences are likely to constitute only a fraction of the criminal case load and in reality, the bulk of matters will be disposed of without lay judges.

The PRC's limitation is that it only addresses a claim that a prosecution was improperly dropped.⁸⁷ In this regard, it provides the aggrieved victim with legal recourse through the PRC, who may then compel the prosecution to commence criminal proceedings. It does not provide recourse to an accused person who feels prosecution has been wrongly commenced against him/her.⁸⁸ An aggrieved accused's only avenue of redress is through the courts. The PRC also appears to have no jurisdiction over the investigation and interrogation process,⁸⁹ of which much of the criticisms are targeted.

The PRC also does not appear to be able to give directions as to the appropriate charge that should be preferred. The prosecution can thus easily bypass the jurisdiction of the LAS by exercising their prosecutorial discretion charging a crime outside of the LAS Act's mandate.⁹⁰ Similarly, prosecutors may also simply appeal the acquittal if necessary. By allowing 'two bites of the cherry', an appeal may create the possibility of career judges overruling a lay

⁸⁶ See Art 2 of the LAS Act, as translated in Anderson and Saint, above n 3.

⁸⁷ Marcia Goodman, 'The Exercise and Control of Prosecutorial Discretion in Japan' (1986) 5 *University of California Pacific Basin Law Journal* 16, 55.

⁸⁸ *Ibid.*

⁸⁹ Japanese prosecutors are actively involved in investigation and interrogation.

⁹⁰ Douglas Levin, 'Saiban-in-seido: Lost in Translation? How the Source of Power Underlying Japan's Proposed Lay Assessor System May Determine Its Fate' (2008) 10 *Asian-Pacific Law and Policy Journal* 199, 211.

assessor panel's decision based on the lack of expertise.⁹¹ There is currently no appellate Lay Assessor's System and no appellate PRC review. As such, there is no lay oversight of the decision to appeal and the appeal itself.

2 'Guiding' the Lay Participant

The expertise of the PRC in determining a case can also be questioned. During the review, the PRC it has the powers to call on witnesses, question prosecutors and seek expert advice.⁹² However, as the lay participants are not legally trained, they may rely on the prosecution for 'guidance'.⁹³ The PRC regime also allows for a lawyer to act as legal advisor to the PRC.⁹⁴ This legal advisor's assists to help the PRC in determinations on law and legal processes. As illustrated above, in the scenario where the PRC has issued a first recommendation to indict, against the prosecutor's initial decision not to do so, the prosecutor is summoned before the PRC to explain the basis for the decision not to indict. Here, the prosecutor may rely on legal arguments (such as the insufficiency of evidence to make out a charge) to defend the initial decision. The PRC's legal advisor is crucial at this juncture to properly advise the PRC. It is unclear what measures are in place to ensure the legal advisor's independence and frankness in advising the PRC. It is also questionable, given the knowledge imbalance between the PRC, the legal advisor and prosecutor,⁹⁵ how much deference is given to their opinions in the process.⁹⁶ As such, one may question the true nature of the lay participant's engagement in the PRC.

In the common law world, the lay judge plays a different and distinct role from the career judge. The lay judge sits on the lay jury, with the career judge presiding over proceedings.⁹⁷ It is usually the lay jury thus that makes the final determination on fact. The Supreme Court and the Ministry for Justice (the

⁹¹ Kent Anderson and Mark Nolan, 'Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (saiban-in seido) from Domestic Historical and International Psychological Perspectives' (2004) 37 *Vanderbilt Journal of Transnational Law* 935, 957.

⁹² Art 35-38 PRC Law; Fukurai, above n 9, 6- 8

⁹³ Fukurai notes that similar to the LAS, those who perform vital political and criminal justice functions are excluded from participating in the PRC in Fukurai, above n 12, 14.

⁹⁴ Hiroshi Fukurai and Zhuoyu Wang, 'People's Grand Jury Panels and the State's Inquisitorial Institutions: Prosecution Review Commissions in Japan and People's Supervisors in China' (2014) 37 *Fordham International Law Journal* 929, 939 citing Art 41(1) PRC Act. Note also Art 38 PRC Act.

⁹⁵ Anderson and Johnson above n 3, 383; Goodman, above n 20.

⁹⁶ One author notes a reluctance to question the prosecution services in William Clifford, *Crime Control in Japan* (1976) 103.

⁹⁷ As is the case in the US, Canada, the UK, Hong Kong and Australia - Antoinette Plogstedt, 'Citizen Judges in Japan: A Report Card for the Initial Three Years' (2013) 23 *Indiana International and Comparative Law Review* 371.

organisation that oversees the prosecution in Japan) were against the idea of a US styled jury, preferring for career judges and prosecutors to maintain control.⁹⁸ The saiban-in system can thus be said to be a compromise of sorts. Lay citizen judges thus sit with career judges – the lay and learned collectively make a determination on the case. Not only is it therefore possible that the lay judges seek the expertise of the career judges in their deliberations but the Act specifically empowers the chief judge (of the panel), who is inevitably a career judge, to explain the necessary laws to the lay judges and to provide opportunity for them to voice their views.⁹⁹

However, the extent of the opportunity to provide genuine views is questionable.¹⁰⁰ The lay judge may well defer to the career judge, perhaps not because of deference, but because of the lack of legal knowledge and experience.¹⁰¹ Unlike the German lay jury,¹⁰² which is appointed for a number of years, the Japanese lay judge is appointed as a one-off. This does not give any lay judge experience to accumulate knowledge or experience as a judge.¹⁰³ Inevitably, the lay judges must rely on the experience and knowledge of the career judges. There is thus the potential for the career judges to influence judges, which have caused some concern.¹⁰⁴ In the common law world, while the career judge may give instructions or directions to the lay jury, this is made in open court, before the accused person and counsels and open to scrutiny (and indeed often forms the grounds of an appeal). Indeed, research in other lay tribunals have shown that lay judges rarely vote against career judges – the majority of mixed tribunal verdicts are unanimous.¹⁰⁵

Public opinion polls have also shown that the majority of the Japanese community have indicated a reluctance to serving on the jury, citing reasons such as their inadequacy in making decisions on legal matters and being too busy to serve.¹⁰⁶ This *laissez-faire* attitude has also been documented in other research in

⁹⁸Ibid 389.

⁹⁹ Art 66 LAS Act.

¹⁰⁰ Levin, above n 90.

¹⁰¹ Anderson and Nolan, above n 91.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Plogstedt, above n 97, 401.

¹⁰⁵ See Sanja Kutnjak Ivković, 'Exploring Lay Participation in Legal Decision Making: Lessons from Mixed Tribunals' (2007) 40 *Cornell International Law Journal* 429, 431. In Croatia, lay judges rarely disagree with the career judges. In Germany, while the lay judges may disagree with the career judges, this rarely translates into an outright vote against the career judges.

¹⁰⁶ Hiroshi Fukurai & Richard Krooth, 'What Brings People to the Courtroom? Comparative Analysis of People's Willingness to Serve as Jurors in Japan and the U.S.', 38 *International Journal of Law and Justice* 198, 201-204; Akira Goto, 'Citizen Participation in Criminal trials in Japan' (2013) 41 *International Journal of Law, Crime and Justice* 1, 9.

lay tribunals elsewhere. A study in Poland found that only one in eleven lay judges had read the case file.¹⁰⁷ In another study in Croatia, research showed that the lay judges only asked questions infrequently and were not active during trials and deliberations – even when they were, their contributions were noted as not particularly significant.¹⁰⁸ This combination of a reluctance to serve and a lack of knowledge combine to potentially allow for the career judges to dominate proceedings. However, it is difficult to examine the extent of career judge's opinions on the lay jury in the Japanese model, as strict secrecy laws have ensured saiban-in deliberations remain confidential and isolated from any real public scrutiny.¹⁰⁹

The career judge thus has an advantage and has the potential to 'persuade lay judges and gently guide them towards making the preferred decision'.¹¹⁰ If 'guiding' the lay judges towards making the right decision still does not achieve the required result, the saiban-in system effectively give the career judges a potential veto in the case. Unlike the common law jury, where unanimity (or at least near unanimity) is generally required,¹¹¹ Japanese verdicts only require a majority, with at least one career judge.¹¹² The career judges thus have a veto and indeed, if united, only require (and convince) 2 of the 6 lay judges to join their views for verdict to be rendered. As the Russians say, the lay judges are nothing more than 'body guards for the professional judge'.¹¹³

3 *Secrecy & the Unknown*

Japan maintains strict secrecy laws for lay judges of saiban-in. They are not permitted to reveal deliberations of the saiban-in.¹¹⁴ Contravention can result in a fine of up to Y500,000 and/or imprisonment of up to 6 months.¹¹⁵ In contrast to

¹⁰⁷ See Ivković, above n 105, 440-452. In Hungary and Poland, the situation is similar but this is due to procedural hurdles in allowing lay judges access to the files, rather than any reluctance on part of the lay judges.

¹⁰⁸ Ibid 448.

¹⁰⁹ Art 79 LAS Act.

¹¹⁰ As phrased aptly by Ivkovic, above n 105, 440.

¹¹¹ In Canada, New Zealand, US federal courts and almost all US state courts, unanimous verdicts are required. The US states of Oregon and Louisiana permit all majority verdicts in Plogstedt, above n 87. Although the US Supreme Court has held that the Constitution does not require unanimity in most state criminal proceedings, it has consistently defended the fundamental importance of unanimity – see Levin, above n 90.

¹¹² Art 67 LAS Act.

¹¹³ This colourful descriptive is borrowed from Ivković, above n 105, which also sets out other equally descriptive phrasing across various jurisdictions, including 'puppets with strings in the hands of the professional judges' (Germany), 'ears of the deaf – like the furniture or decoration' (China), 'two heads of cabbage behind which is hidden the professional judge' (Croatia).

¹¹⁴ Plogstedt, above n 97, 399; Art 79 LAS Act.

¹¹⁵ Plogstedt, above n 97, 399; Art 79 LAS Act.

this, US jurors are free to write ‘tell all’ books for commercial publication and profits and can disclose the communications and voting preferences of the other jurors in the case.¹¹⁶ Australia adopts a middle ground and allows disclosure but not for remuneration.¹¹⁷ While secrecy during proceedings is understandable, continued secrecy post-proceedings is more contentious.¹¹⁸ The public is unable to discern the precise voting breakdown in the saiban-in decision. It is also difficult to examine the dynamics of deliberations to determine if the lay judges are influenced by the career judges’ ‘guidance’ and if so, to what extent.

The PRC suffers from the same secrecy restrictions as the saiban-in. Fukurai notes that the PRC regime follows the LAS in imposing strict confidentiality requirements on the lay participants.¹¹⁹ While one argument may be that this allows the lay participants to make their decisions without fear or favour, it also makes it difficult to peer into the nuances of the PRC’s decision making process, including how much influence the prosecutor and legal advisor have in the overall regime. The PRC regime is thus not well known in Japanese communities. Ironically, this democratic system that reflects the popular will is hardly popular. Critics have noted that it is seldom used.¹²⁰ In a poll conducted by the Japanese Cabinet, the majority of respondents had no knowledge of the PRC system.¹²¹ This ignorance extends to jurists as well as lay-persons.¹²² One law Professor at Tokyo University acknowledged this ignorance.¹²³ In a more startling illustration, a woman in a Nagasaki Prefecture committed suicide after receiving a summons to sit on the PRC, assuming the worse given that the summons had come from the prosecutor’s office.¹²⁴

C *Business as Usual*

¹¹⁶ Plogstedt, above n 97, 402.

¹¹⁷ Michael Chesterman, ‘Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy’ (1999) 62 *Law and Contemporary Problems* 69, 101.

¹¹⁸ Mark Levin and Virginia Tice, *Japan’s New Citizens: How Secrecy Imperils Judicial Reform*, The Asia Pacific Journal: Japan Focus <<http://www.japanfocus.org/-Mark-Levin/3141>>.

¹¹⁹ Fukurai, above n 17, 28.

¹²⁰ Setsuko Kamiya, ‘Inquest fuels ardour for democracy’, Japan Times, 27 Feb 2005 .

¹²¹ Japanese Cabinet Office, Public Relations, Public Opinion Poll on the PRC System (1990), available at cited in Hiroshu Fukurai, ‘Japan’s Prosecution Review Commissions: Lay Oversight of the Government’s Discretion of Prosecution’ (2011) 6 *University of Pennsylvania East Asia Law Review* 1, 8; Mark West, ‘Prosecution Review Commissions: Japan’s Answer to the Problem of Prosecutorial Discretion’ (1992) 92 *Columbia Law Review* 684.

¹²² See Nobuyoshi Toshitani, Are You Familiar With Prosecution Review Commissions? cited in Mark West, ‘Prosecution Review Commissions: Japan’s Answer to the Problem of Prosecutorial Discretion’ (1992) 92 *Columbia Law Review* 684, 700.

¹²³ See Nobuyoshi Toshitani, Are You Familiar With Prosecution Review Commissions? cited in Mark West, ‘Prosecution Review Commissions: Japan’s Answer to the Problem of Prosecutorial Discretion’ (1992) 92 *Columbia Law Review* 684, 700.

¹²⁴ Hiroshu Fukurai, ‘Japan’s Prosecution Review Commissions: Lay Oversight of the Government’s Discretion of Prosecution’ (2011) 6 *University of Pennsylvania East Asia Law Review* 1, 11.

In light of the aforementioned limitations of the LAS and PRC, the status quo has arguably remained unchanged and it is business as usual for the players of the criminal justice system. If anything, the LAS and PRC may lead to notional public participation and oversight, giving ammunition to rebut criticisms. However, the true extent of lay participation, if any, is limited. The social management school of thought would argue that these limitations to lay participation in the criminal justice system are deliberate institutional barriers enacted by social elites to maintain the status quo.¹²⁵

While the PRC has seen a few high profile cases, such as the Akashi stampede incident and the Fukuchisen Derailment Incident, these are few and far in between and the PRC's impact on the daily work of the prosecutor is minimal. Of the few cases brought, only in 5.5 percent did Commissions recommend that prosecutors reconsider or indict, and in only thirty four percent of these cases did prosecutors take that advice.¹²⁶ In other words, the Prosecutorial Review Commissions directly affect less than four cases for every 100,000 non-indictments.¹²⁷ Of course, since 2004, the PRC's recommendations are now binding on the prosecution. However, this does not detract from the fact that the PRC is a seldom used mechanism.¹²⁸

The criminal conviction rate has also remains relatively unchanged. In the first year since the LAS, there were no acquittals at all.¹²⁹ At the three year mark, the overall conviction rate still remains close to 100%.¹³⁰ As such, while one of the limitations of the LAS is that prosecutors can still bypass the regime with an appeal, the negligible difference in conviction rates pre and post LAS means that the prosecutor would rarely have to do so. Indeed, in the first year of the LAS, only 1 in 444 saiban-in cases were appealed.¹³¹

A possible concern might have also been that cases would have to slow down as a result of lay participation, resulting in an overall less effective criminal process. However, fortunately or unfortunately, the LAS does not appear to have resulted in slower or less effective trials. A typical jury trial takes on average

¹²⁵ Abe and Nottage, above n 29, 472.

¹²⁶ Anderson and Nolan, above n 91, 965-966.

¹²⁷ Ibid.

¹²⁸ Setsuko Kamiya, 'Inquest fuels ardour for democracy', *Japan Times* (online), 27 Feb 2005 <<http://www.japantimes.co.jp/life/2005/02/27/to-be-sorted/inquest-service-fuels-ardor-for-democracy>>.

¹²⁹ Ibusuki, above n 4, 54.

¹³⁰ Ibid

¹³¹ Ibid.

three to four days to complete and 6 months from indictment to judgment.¹³² This time frame is not significantly longer than a trial before career judges.¹³³

As such, in so far as the JPL professional is concerned, much has remained unchanged and it is business as usual. The players in the criminal justice system can still look forward to a predictable outcome and there has been no discernable delay in matters. What has happened is that the criminal justice system has gained increased public trust and confidence. Prosecutors have also succeeded in garnering public support by deliberately excluding controversial cases from saiban-in trials.¹³⁴ The judiciary also benefits from an increase in legitimacy.¹³⁵ PRC participants feel sense of confidence in criminal justice system.¹³⁶ As Jones notes, the LAS features have been designed for the incumbent players to retain control, while diminishing responsibility.¹³⁷ The same can be said for the PRC regime. Confidence in the system is increased, but nothing much has changed. As such, perhaps the real winners of the system may in fact be the judges, legal bureaucrats¹³⁸ and prosecutors.¹³⁹

VI CONCLUSION

The PRC and LAS have been heralded as the twin pillars of lay participation, allowing for public engagement and oversight at the two most crucial points in the criminal justice system. However, as outlined above, it is illogical for a country which makes it so difficult to be admitted into the legal profession to then place such trust in the hands of lay participants. Indeed, there are strong motivations to maintain the status quo. Both regimes suffer from structural limitations, 'guidance' and secrecy. Indeed, it may be argued that there has been no substantial difference in the outcome of cases since the implementation of the PRC and LAS. The criminal justice system is still 'predictable', offering a 'correct' outcome with efficiency, perhaps an intended effect to the benefit of the incumbent players. The only effect of the token lay participation is that it provides ammunition for the incumbents to deflect criticism. As such, for all the fanfare and claims of lay participation, it is business as usual in the criminal justice system in Japan.

¹³² Plogstedt, above n 97, 415.

¹³³ Ibid.

¹³⁴ Ibusuki, above n 4, 54.

¹³⁵ Plogstedt, above n 97 423.

¹³⁶ Fukurai, above n 17, 20.

¹³⁷ Colin Jones, 'Big winners in "jury" system may be judges, bureaucrats', *Japan times (online)* 10 Mar 2009 <<http://www.japantimes.co.jp/community/2009/03/10/issues/big-winners-in-jury-system-may-be-judges-bureaucrats/#.VOWljuaUf-U>>.

¹³⁸ Ibid.

¹³⁹ Ibusuki, above n 4, 54.