

REVIVING THE CRIMINAL JURY IN JAPAN

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I

INTRODUCTION

The last decade has spawned a reexamination of the effectiveness of the jury system in the United States.¹ Jury verdicts rendered in certain highly publicized trials have shocked the public and caused journalists and scholars alike to criticize juries as ill-equipped to handle the cases before them.² Some critics have even questioned the basic role of the jury as an instrument of democracy and a form of sovereignty of the people.³ To counter this criticism, others argue that the intense attack on the jury system by scholars and journalists is a result of disgust with unexpected verdicts and is not based on empirical evidence about the system, which shows that juries reach a defensible decision most of the time.⁴

Despite the ongoing debate about the effectiveness of the American jury, several countries have recently adopted or are seriously considering adopting their own jury systems.⁵ One of the more heated debates about adopting a jury

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1. See, e.g., STEPHEN J. ALDER, *THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM* (1994) (contending that a jury system that works as badly as our system should not and will not survive); Marcus A. Brown, *Commentary: Trial by Jury—An Obsolete Concept*, 49 CONSUMER FIN. L.Q. REP. 109 (Winter 1995) (arguing that jury trial should be eliminated in criminal cases and reduced in civil cases in the interests of time, cost, and justice); Tamar Jacoby & Tim Padgett, *Waking up the Jury Box*, NEWSWEEK, Aug. 7, 1989, at 51, 51 (“A growing number of legal scholars think the [jury] reforms will make for more reliable, accurate verdicts.”).

2. See, e.g., Steven I. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U. L. REV. 190 (1990); see also ALDER, *supra* note 1; Brown, *supra* note 1.

3. See, e.g., Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 927 (1994) (“Only a shadow of this communitarian institution [the jury] has survived into the urbanized America of the late twentieth century.”).

4. For representative research bearing on criminal juries, see JOHN BALDWIN & MICHAEL MCCONVILLE, *JURY TRIALS* (1979); HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966); Neil Vidmar et al., *Should We Rush to Reform the Criminal Jury?*, 80 JUDICATURE 286 (1997). Research on civil juries has produced some of the most solid data indicating that juries do their jobs reliably and responsibly, even in complex cases. See, e.g., NEIL VIDMAR, *MEDICAL MALPRACTICE AND THE AMERICAN JURY* (1995); Richard Lempert, *Civil Juries and Complex Cases: Taking Stock After Twelve Years*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 181 (Robert E. Litan ed., 1993).

5. Spain and Russia are among the countries that recently adopted a jury system. See Stephen C. Thaman, *Europe's New Jury Systems: The Cases of Spain and Russia*, 62 LAW & CONTEMP. PROBS. 233 (Spring 1999). See also generally *Advertising Campaign Used to Introduce Jury Trials to Spain*, EUROMARKETING, Oct. 31, 1995, available in 1995 WL 11652377; Hon. Steven R. Plotkin, *The Jury*

system is occurring in Japan.⁶ Because Japan actually used a jury system for criminal trials from 1928 to 1943,⁷ the present-day debate focuses mainly on re-adopting the jury for criminal cases only.⁸

The purpose of this article is to analyze whether the re-adoption of criminal jury trials in present-day Japan would be feasible from cultural, societal, and legal viewpoints in light of Japan's prior experience with a jury system. Part II of the article briefly considers why reversion to trial by jury is being considered by Japanese lawyers and judges. Part III describes the jury system used in Japan from 1928 to 1943 and the problems with the system that caused its suspension. Part IV examines the two main types of layperson juries used in other countries. Part V considers the broad question of whether the adoption of one of the jury systems examined in Part IV would be feasible in Japan from cultural, societal, and legal viewpoints.

II

WHY THE DEBATE ABOUT TRIAL BY JURY?

Just as in the United States, where certain seemingly outrageous jury verdicts have fueled the fire of criticism of the jury system, a similar phenomenon has occurred in Japan regarding its judge-based system. Examples of such highly publicized verdicts by judges include the acquittals of four death row inmates who were imprisoned for over twenty-five years before obtaining new trials.⁹

Two of these controversial cases are *Government v. Akabori* (the Shimada Case)¹⁰ and *Government v. Menda* (the Menda Case).¹¹ In the Shimada case,

Trial in Russia, 2 TUL. J. INT'L & COMP. L. 1 (1994); Stephen C. Thaman, *The Resurrection of Trial by Jury in Russia*, 31 STAN. J. INT'L L. 61 (1995); Tunku Varadarajan, *A Jury System Under Question*, TIMES (LONDON), Mar. 18, 1997, at 43. Japan is considering re-adopting its jury system for criminal trials. See Richard Lempert, *A Jury for Japan?*, 40 AM. J. COMP. L. 37, 38-39 (1992).

6. See, e.g., Kaneyoshi Hagiwara, *Sueiden keisanshin o kangaeru* [Considering the Criminal Assessor System of Sweden], 48 JIYU TO SEIGI [Liberty and Justice] 114 (1997); Takeshi Nishimura, *Keiji baishin saiban—200X nen, nihon de* [Criminal Jury Trials—in Japan in the Year 200X?], 48 JIYU TO SEIGI [Liberty and Justice] 92 (1997); Hiroshi Sato, *Naze nihon ni sanshinsei o ka* [Why Should Japan Adopt the Assessor System?], 48 JIYU TO SEIGI [Liberty and Justice] 108 (1997); Satoru Shinomiya, *Naze nihon ni baishinsei o ka* [Why Should Japan Adopt the Jury System?], 48 JIYU TO SEIGI [Liberty and Justice] 102 (1997).

7. See Baishinho [Jury Act], Law No. 50 of 1923; Baishinho no Teishi ni Kansuru Horitsu [An Act to Suspend the Jury Act], Law No. 88 of 1943.

8. However, some scholars have examined the possibility of adopting the jury system for civil cases. See, e.g., Ichiro Kato, *The Concerns of Japanese Tort Law Today*, 1 LAW IN JAPAN: AN ANNUAL 65, 91 (1967); Lempert, *supra* note 4, at 37.

9. See Daniel H. Foote, *From Japan's Death Row to Freedom*, 1 PAC. RIM L. & POL'Y J. 11-13 (1992); Toyoji Saito, "Substitute Prison": A Hotbed of False Criminal Charges in Japan, in COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN 507, 508-09 (Kenneth L. Port ed., 1996).

10. *Government v. Akabori* (the Shimada Case), 1316 HANREI JIHO 21 (Shizuoka Dist. Ct., Jan. 31, 1989). The description of this case is based on the district court decision and Professor Foote's detailed English-language account of the court's decision. See Foote, *supra* note 9, at 50-63.

11. *Government v. Menda* (the Menda Case), 1090 HANREI JIHO 21 (Kumamoto Dist. Ct., July 15, 1983). For an in-depth account of this case, see Foote, *supra* note 9, at 14-19.

Masao Akabori was arrested in May 1954 for the rape and murder of a school-girl in Shimada City, Shizuoka Prefecture.¹² After intense questioning by the police, Akabori confessed to the rape and murder.¹³ After a four-year trial, Akabori was convicted and sentenced to death in May 1958.¹⁴ His direct appeals to the Tokyo High Court¹⁵ and Supreme Court¹⁶ were fruitless. Twenty-five years later, the Tokyo High Court overturned the Shizuoka District Court ruling rejecting a retrial request and remanded the case to the district court.¹⁷ The district court granted a new trial on May 29, 1986.¹⁸ After nearly a two-year trial, the Shizuoka District Court acquitted Akabori on January 31, 1989.¹⁹ The district court acquitted on the ground that there was no evidence linking Akabori to the crime other than his own confessions, which were shown to be of little reliability.²⁰

In the Menda case, Sakae Menda was charged with the hatchet murder of a seventy-six-year old prayer reader and his wife in Hitoyoshi City, Kumamoto Prefecture.²¹ Menda confessed to the crime a few days later after detailed questioning.²² After a year-long trial in the Kumamoto District Court, Menda was found guilty of the murders and sentenced to death on March 23, 1950.²³ The Fukuoka High Court²⁴ and the Supreme Court²⁵ upheld the verdict on direct appeal. In 1975, after numerous failed attempts at obtaining a retrial, Menda was successful when the Fukuoka High Court granted his request.²⁶ The Kumamoto District Court acquitted Menda of both murders on July 15, 1983, ap-

12. See 1316 HANREI JIHO at 31.

13. See *id.*

14. See Foote, *supra* note 9, at 55-56 (citing Government v. Akabori (the Shimada Incident), (Shizuoka Dist. Ct., May 23, 1958), *reprinted in* Keiji saishin seido kenkyukai [Study Group on the Criminal Retrial System], Chomei saishin jiken mikokan saibanreishu daiishu [Unpublished Court Decisions in Famous Retrial Cases] at 133 [hereinafter Mikokan saibanreishu]).

15. *Id.* (citing Government v. Akabori (the Shimada Incident), (Tokyo High Ct., Feb. 16, 1960), *reprinted in* Mikokan saibanreishu, *supra* note 14, at 144).

16. *Id.* (citing Government v. Akabori (The Shimada Incident), (Sup. Ct., Dec. 15, 1960), *reprinted in* Mikokan saibanreishu, *supra* note 14, at 151).

17. 1316 HANREI JIHO at 26.

18. Government v. Akabori (the Shimada Incident), 1193 HANREI JIHO 31 (Shizuoka Dist. Ct., May 29, 1986).

19. See 1316 HANREI JIHO 21.

20. See *id.* at 51.

21. See Government v. Menda (the Menda Case), 1090 HANREI JIHO 21 (Kumamoto Dist. Ct., July 15, 1983).

22. See *id.* at 85.

23. See Foote, *supra* note 9, at 19-21 (citing Government v. Menda (the Menda Incident), (Kumamoto Dist. Ct., Yatsuhiko Div., Mar. 23, 1950), *reprinted in* Mikokan saibanreishu, *supra* note 14, at 1).

24. See *id.* (citing Government v. Menda (the Menda Incident), (Fukuoka High Ct., Mar. 19, 1951), *reprinted in* Mikokan saibanreishu, *supra* note 14, at 3).

25. See *id.* (citing Government v. Menda (the Menda Incident), (Sup. Ct., Dec. 25, 1951), *reprinted in* Mikokan saibanreishu, *supra* note 14, at 5).

26. See *id.* at 22.

proximately thirty-three years after he was convicted.²⁷ In its ruling, the court rejected Menda's confessions because it found them to be unreliable.²⁸

The roots of the debate on the readoption of the jury trial, however, go far deeper than a mere reaction to erroneous verdicts by judges. Although, in theory, the Japanese criminal justice system provides criminal defendants a wide set of legal protections,²⁹ in reality, these protections are diminished by the practices of judges and prosecutors. In particular, there are questions as to whether judges are effective finders of fact.³⁰ Proponents of the jury system argue that, in reality, criminal defendants are convicted before the trial even begins.³¹ Prosecutors conduct the factfinding and draw legal conclusions, and judges simply "rubber stamp" their results.³² A jury would be a better finder of fact because juries, unlike judges, do not hear cases on a daily basis and would not simply accept the decision of the prosecutor. Theoretically, juries would be more inclined than a judge would be to listen to the evidence and deliver a fair verdict.³³

An area that illustrates the poor factfinding that can occur in a Japanese courtroom is the judges' ready acceptance of "voluntary confessions"³⁴ of criminal defendants. It is doubtful whether such confessions, which occur with great frequency, are truly voluntary.³⁵ Under the Japanese system, police often have unrestricted power to interrogate a suspect, and many cases of abuse have

27. See 1090 HANREI JIHO at 21.

28. See *id.* at 63.

29. See Jean Choi Desombre, *Comparing the Notions of the Japanese and the U.S. Criminal Justice System: An Examination of Pre-Trial Rights of the Criminally Accused in Japan and the United States*, 14 UCLA PAC. BASIN L.J. 103, 107-08 (1995); B.J. George, Jr., *Rights of the Criminally Accused*, 53 LAW & CONTEMP. PROBS. 71, 71 (Spring 1990).

30. See Takeo Ishimatsu, *Can Criminal Judges Be Said to Be Judging?*, 22 LAW IN JAPAN: AN ANNUAL 143 (1989).

31. See *id.*

32. See Lempert, *supra* note 4, at 39. Support put forth for this theory usually begins with the statement that the conviction rate in Japan is about 99.8%. See Foote, *supra* note 9, at 81. This unusually high rate of conviction demonstrates that prosecutors must have an extremely high level of suspicion to indict, a suspicion so high that they are certain that the defendant is guilty. See *id.* at 76. Such a practice can only encourage judges to presume guilt when the case finally gets to trial, countering the presumption of innocence embodied in Japanese law. See *id.* at 81. Professor Foote quotes one former judge as stating,

In general, there is a feeling from the outset that the defendant is guilty. On top of that, when there is a long trial focusing on whether or not the defendant is guilty, it's troublesome for judges, who face demands to dispose of cases promptly. . . . Moreover, when a judge issues an acquittal, the faces of his superiors and the displeased faces of prosecutors with whom he's become friendly will appear in his mind.

Id. The term "prosecutor justice" (*kensatsukan shiho*), which is often seen in the literature, stems from this theory. See Ryuichi Hirano, *Diagnosis of the Current Code of Criminal Procedure*, 22 LAW IN JAPAN: AN ANNUAL 129, 131 (1989).

33. During the period when Japan had a jury system, the acquittal rate was 15.4% for defendants who chose jury trial as compared to rates between 1.3% and 3.7% for those who chose bench trials. See Foote, *supra* note 9, at 84.

34. According to Professor Foote, "[a]n emphasis on obtaining confessions remains at the heart of Japan's criminal justice system." *Id.* at 86.

35. See Hirano, *supra* note 32, at 137.

been reported.³⁶ Japanese authorities often demand detailed, corroborated confessions.³⁷ Such confessions may then be presented at trial,³⁸ and although they may be attacked by the defendant and defense counsel in court, their corroboration gives judges a basis to accept them even if they are procedurally questionable.³⁹

One reason for such easy acceptance of confessions by judges is a peculiarity of trial practice in Japan called "trial by dossier."⁴⁰ The confession is submitted to the court in the form of a confession statement which becomes part of a dossier. Judges then read the dossiers and often form factual conclusions in their chambers or homes rather than in open court after having heard witnesses.⁴¹ This practice is problematic because the manner of speech and demeanor of witnesses and of the defendant can have a strong influence on the finder of fact;⁴² if these elements are not fully considered, the defendant may not be receiving a fair trial. Proponents of the jury system argue that because there is little hope of judges agreeing to eliminate trial by dossier, the only solution is a switch to an American-style jury system where factual conclusions are formed only after testimony in open court.⁴³

Also inhibiting effective factfinding by the Japanese judiciary is that most judges are career judges with little experience in the outside world.⁴⁴ One can become a judge after passing the extremely rigorous National Legal Examination (*shiho shiken*), followed by two years of practical training.⁴⁵ The person then has the choice of becoming either a judge, a prosecutor, or an attorney.⁴⁶

36. See Saito, *supra* note 9, at 508. Such abuse usually comes in the form of indirect techniques and psychological pressure rather than direct physical violence. See Hirano, *supra* note 32, at 137. For example, in the Menda Case, prosecutors questioned Menda for almost 80 hours and did not allow him to sleep. See Foote, *supra* note 9, at 65. In the Shimada Case, Akabori was questioned from dawn to dusk for a number of days. See *id.* at 53.

37. See Hirano, *supra* note 32, at 135. In contrast to the Japanese case, in the United States, in most cases, simple confessions that only summarize the facts of a crime will suffice. See *id.* The problem with requiring detailed confessions is that it forces Japanese prosecutors to conduct lengthy interrogations. See *id.*

38. See *id.*

39. See *id.*

40. See *id.* at 138.

41. See *id.*

42. See *id.*

43. See *id.* at 142.

44. See Takeshi Kojima, *Japanese Civil Procedure in a Comparative Law Perspective*, 46 U. KAN. L. REV. 687 n.12 (1998).

45. See Edward I. Chen, *The National Law Examination of Japan*, 39 J. LEGAL EDUC. 1, 1 (1989). The practical training occurs at the Legal Training and Research Institute, which limits the number of successful applicants to approximately 500. See *id.* at 7. In recent years, less than three percent of those who took the National Legal Examination passed. See Mark A. Behrens & Daniel H. Raddock, *Japan's New Product Liability Law: The Citadel of Strict Liability Falls, but Access to Recovery Is Limited by Formidable Barriers*, 16 U. PA. J. INT'L BUS. L. 669, 677-78 (1995). Only summary court judges and five of 15 Supreme Court Justices are appointed without first being qualified for admission to the bar. See Mamoru Urabe, *Wagakuni ni okeru baishin sai ban no kenkyu* [A Study on Trial by Jury in Japan], in *THE JAPANESE LEGAL SYSTEM* 482, 482 (Hideo Tanaka ed., 1976).

46. See Chen, *supra* note 45, at 1.

The result is a highly educated, well-trained elite group of jurists who may have attitudes and experiences quite different from those of the general public.⁴⁷ This limited range of life experience may negatively affect the factfinding abilities of these judges.

The idea of readopting the jury system has come to the forefront of possible reforms of the criminal justice system in Japan. Japanese organizations have already conducted in-depth studies of foreign jury systems. For example, a subcommittee of the Osaka Bar Association's Committee for Judicial System Reform toured the United States, Great Britain, and Germany to study citizen participation in the trial process,⁴⁸ and the Supreme Court of Japan sent several judges to the United States, United Kingdom, Germany, and France to study juries.⁴⁹

III

THE JURY SYSTEM IN JAPAN FROM 1928 TO 1943

Japan adopted a jury system on April 18, 1923.⁵⁰ Although enacted in 1923, the law did not take effect until 1928, and it stayed in effect for fifteen years until it was suspended on April 1, 1943.⁵¹

Before devising a jury system appropriate for Japan, the Japanese government investigated trial systems in France, Germany, England, and the United States.⁵² The result was a uniquely Japanese jury system complementing an otherwise Continental European system of criminal procedure.⁵³ Therefore, although the Japanese system was influenced by the Anglo-American model of jury trial, it differed in many important respects.

First, not all defendants were entitled to a jury trial. The only cases for which a jury trial was guaranteed were those in which the maximum penalty was death or imprisonment for life⁵⁴ or where the maximum penalty was imprisonment for greater than three years and the minimum penalty was imprisonment for not less than one year.⁵⁵ In death penalty or life imprisonment cases, the law provided trial by jury unless waived by the accused.⁵⁶ In all other eligible cases, the law provided for trial by jury only if the accused specifically

47. See Lempert, *supra* note 4, at 48.

48. See *id.* at 38.

49. See *id.* at 38-39. The Supreme Court of Japan has also published a book entitled WAGAKUNI DE OKONOWARETA BAISHIN SEIDO [The Old Jury System in Japan], which is a compilation of works on the jury system used in Japan from 1928-43.

50. See Baishinho [Jury Act], Law No. 50 of 1923.

51. See Baishinho no Teishi ni Kansuru Horitsu [An Act to Suspend the Jury Act], Law No. 88 of 1943.

52. See Lempert, *supra* note 4, at 37 n.1.

53. See Urabe, *supra* note 45, at 483. More specifically, the Japanese laws in 1923 were based on the German civil law and a constitution modeled after the Prussian Constitution. See Behrens & Raddock, *supra* note 45, at 673-74.

54. See Baishinho [Jury Act], Law No. 50 of 1923, art. 2.

55. See *id.* art. 3.

56. See *id.*

requested a jury trial.⁵⁷ Furthermore, the law provided that certain crimes were not triable by jury.⁵⁸ These crimes included crimes against a member of the imperial family, riot with the purpose of overthrowing the government, violation of the Peace Preservation Act (*Chian Iji-ho*), espionage, and violation of laws concerning the election of public officials.⁵⁹

Second, the Japanese jury did not return a general verdict of “guilty” or “not guilty.” Instead, it responded to questions submitted by the judge (*toshin*) and related to the existence of facts.⁶⁰ These answers were based on the views of a majority of the requisite twelve jurors.⁶¹

Third, the jurors’ responses were not binding.⁶² The court, upon finding the jury’s answer unwarranted, could disregard it, call another jury, and submit the case anew.⁶³

Jury selection resembled the jury selection methods used in the Anglo-American system at that time. The pool of prospective jurors included “male citizens over thirty years of age who had resided in the same city, town or village for two years or longer, who paid not less than three yen in national direct tax for the preceding two consecutive years, and who were literate.”⁶⁴

The number of jury trials in Japan decreased drastically from 1928 to 1943.⁶⁵ The annual number of cases tried by jury was greatest in 1929, when 143 cases were put to juries.⁶⁶ The number dropped to sixty-six the next year and decreased annually until, in 1942, only two jury trials were held.⁶⁷ A total of 611 defendants chose jury trials during the fifteen years the system operated.⁶⁸ Of these, ninety-four were acquitted.⁶⁹ Why did the use of the jury system decline so precipitously during its lifetime?

One reason put forth for the decline of the jury system over this period was the political climate in the late 1920s to 1943.⁷⁰ The Jury Act was enacted in 1923 during the period known as “Taisho Democracy.”⁷¹ It was primarily be-

57. *See id.* Note that a jury trial was not available for crimes such as simple theft, embezzlement, gambling, adultery, and obscenity because the punishment for these crimes did not fall within the parameters set out in the Act. *See* Urabe, *supra* note 45, at 484 n.h.

58. *See* Urabe, *supra* note 45, at 484.

59. *See id.* (citing Baishinho [Jury Act], Law No. 50 of 1923, art. 4).

60. *See* Baishinho [Jury Act], Law No. 50 of 1923, art. 88.

61. *See id.* art. 91.

62. *See id.* art. 95.

63. *See id.* In the United States, a judge in a civil trial can overrule the jury’s verdict and grant a motion for a “judgment notwithstanding the verdict” regardless of the jury’s verdict; however, in a criminal trial, the judge can only enter a judgment notwithstanding the verdict in favor of acquittal, thereby reversing the jury’s conviction. *Compare* FED. R. CIV. P. 50, *with* FED. R. CRIM. P. 29(c).

64. Urabe, *supra* note 45, at 484 (citing Baishinho [Jury Act], Law No. 50 of 1923, arts. 12, 23, 27).

65. *See id.* at 485.

66. *See id.*

67. *See id.*

68. *See* Foote, *supra* note 9, at 84.

69. *See id.*

70. *See* Urabe, *supra* note 45, at 487 (citing Nobuyoshi Toshitani, *Minshu to Horitsuka* [The Populace and Lawyers], in 6 GENDAI NO HORISUKA [Contemporary Lawyers] 387-89 (1966)).

71. *See id.*

cause of this nationwide movement toward democracy that Premier Takashi Hara was able to sponsor the Act successfully and allow Japanese citizens an opportunity to participate directly in the justice system.⁷² However, by the time the jury system was first used in 1928, the political climate in Japan was moving toward fascism.⁷³ By 1928, a great number of the members of the Communist Party were arrested, and by 1935 the basic “organ theory of the Emperor” (*Tenno Kikan-setsu*) was suppressed.⁷⁴

This political and cultural environment of rising militarism and fascism countered the rise of the jury system because it encouraged the *bourgeoisie* to waive the right to trial by jury⁷⁵ and prohibited access to trial by jury to those who most needed it: criminal defendants who adhered to communist and socialist ideologies.⁷⁶ Both of the main classes of society, therefore, had no concern about the fate of the jury system because they either did not care to use it or were not permitted to use it. Hence, any possible strengths of the jury system were lost under the “fierce storm of fascism.”⁷⁷

Another reason put forth for the decline of the jury system in Japan was the content of the Jury Act itself. Many Japanese scholars observe that it is not surprising that the jury system failed in Japan because the drafters of the Act seemed to have built in various devices to prevent the smooth working of the system.⁷⁸ The most important of these is the judge’s ability to disregard the jury’s answers, seat a new jury, and try the case *de novo*.⁷⁹ The drafters of the Act may have included this provision because they believed that it would be contrary to the judge’s responsibility to decide each case if he or she had to give binding effect to the jury’s answers.⁸⁰ This provision effectively undermined any true power of the jury system and allowed judges to continue to make the final decisions on guilt and innocence. Criminal defendants quickly learned that acquittal by a jury had little meaning, and they would often waive their

72. *See id.* at 483.

73. *See id.* at 487 (citing Toshitani, *supra* note 70).

74. *See id.* Urabe explains that the “organ theory of the Emperor” was a constitutional theory under which sovereignty resided in the nation, and the Meiji Emperor was an organ of this sovereign body exercising state powers. The suppression of this theory is an example of the move toward fascism. *See id.*

75. *See id.* The *bourgeoisie* waived trial by jury because they feared their unpopularity would work against them through the jury. *See id.*

76. *See id.* Trial by jury was not available in these cases, known as *shiso jiken* (thought cases) because no crime of a political nature could be tried by jury. *See* Baishinho [Jury Act], Law No. 50 of 1923, art. 4.

77. *See* Urabe, *supra* note 45, at 487-88 (citing Toshitani, *supra* note 70).

78. *See id.* (stating that one should not feel surprised at the failure of the jury system but rather by the remarkable success of various devices which were built into the system to prevent the smooth working of trial by jury in Japan); Kitaro Saito, *Baishin* [Jury], in *KEIJI HOGAKU JITEN* [Dictionary of Criminal Law] 62 (Y. Takigawa ed., 1957) (stating that if the framer of the Jury Act had respected trial by jury, he would have provided that almost all criminal cases were to be tried by jury).

79. *See* Baishinho [Jury Act], Law No. 50 of 1923, art. 91.

80. *See* Urabe, *supra* note 45, at 490.

right to a jury trial from the start or simply not elect trial by jury if given the choice.⁸¹

Jury trials also cost criminal defendants more money and deprived them of the possibility of bringing a *koso* appeal on points of fact.⁸² Because the sentence of a convicted criminal was usually mitigated upon appeal, criminal defense attorneys understandably would encourage their defendants to preserve the right to this appeal, even if it meant waiving the right to jury trial.⁸³

Furthermore, public prosecutors could avoid any request by the accused for a jury trial because the law provided that jury trial was available only if the case underwent a "preliminary investigation" (*yoshin*).⁸⁴

Finally, the Jury Act did not allow objections to the judge's instructions to the jury.⁸⁵ Attorneys and public prosecutors often criticized the instructions given by the judge as "soliciting answers which would lead to the guilt of the accused."⁸⁶ Even if the jury did return its special verdicts to the effect that the defendant was not guilty, there was still a great chance that the judge would call for a new trial. Such obstacles frustrated attorneys, sometimes to the point where they would prefer to waive jury trial as a way of expressing piety to the authority of the judge in hopes of leniency in sentencing.⁸⁷

The final factor considered to have led to the unpopularity of the Japanese jury is Japanese culture. Japanese society is often described as "vertical" or "hierarchical," meaning that social relationships are governed by the relative "status" of the parties. This "status" is often determined by, among other factors, age and occupation. The hierarchy that exists in Japanese society is evidenced by the Japanese language,⁸⁸ by the act of bowing that occurs between persons just introduced,⁸⁹ and by the seating at formal occasions.

Many scholars are convinced that as a result of the hierarchy in Japanese society, the Japanese people prefer trial by "those above the people" rather than by "their fellows," and that this caused the Japanese to distrust juries from the beginning.⁹⁰ People trust judges because they have a special sense of responsibility when adjudicating cases and try to keep their moral standards high

81. See Saito, *supra* note 78.

82. See *id.* However, such a defendant was entitled to bring a *jokoku* appeal on points of law to the highest court. See Urabe, *supra* note 45, at 491.

83. See *id.*

84. See H. Kikuchi, *Baishin Seido ni Tsuite* [On the Jury System], 14 NIHON HORITSUKA KYOKAI Series 57 (1959).

85. See Baishinho [Jury Act], Law No. 50 of 1923, art. 78.

86. See Urabe, *supra* note 45, at 490.

87. See *id.* at 488.

88. The Japanese language has formal and informal forms for all verbs and certain nouns. When speaking to a "superior," a Japanese will resort to the formal form, generally called *keigo*.

89. The "inferior" person should bow lower. "Inferiority" is determined by factors such as age, rank, and occupation.

90. Ryuichi Hirano, *Shokugyo Saibankan to Shioto Saibankan* [Professional Judges and Lay Judges], 29 HORITSU JIHO 435, 437 (1957); see also Christopher A. Ford, *The Indigenization of Constitutionalism in the Japanese Experience*, 28 CASE W. RES. J. INT'L L. 3, 62 n. 159 (1996).

in order to ensure impartial trials.⁹¹ Therefore, citizen participation in the judicial process is ultimately not suitable for the Japanese people because citizens would simply prefer to have a judge decide their case rather than their fellow citizens. Scholars disagree on exactly how much weight should be given to the cultural aspect of the failure of the jury system in Japan, but most agree culture played some part.

The failure of the jury system in Japan can be attributed to numerous factors. First, the fascist political climate that arose in Japan just as the jury system began to be used caused many of those charged with political crimes to desire a trial by jury, but did not allow them to have it. Second, inherent defects in the Jury Act prevented the jury system from gaining respect. Finally, Japanese respect for authority caused the Japanese people to prefer trial by experienced and honest judges rather than trial by their peers.

IV

TYPES OF JURY SYSTEMS

If Japan decided to reintroduce a jury system, it would have to ensure that the new system avoided the systemic defects of the old. This would entail making jury verdicts binding, allowing defendants who elect jury trial to appeal just as if they had elected nonjury trial, ensuring that election of trial by jury would not be more expensive for the defendant, and allowing defendants to object to the trial judge's jury instructions.

Once these basic facets of any serious jury system were adopted, the Japanese would have to decide exactly what form the new jury system would take. The old system could serve as a template; juries could be composed of twelve private citizens who rendered majority special verdicts. However, because of the negative aspects associated with the previous jury system, the Japanese are examining all possibilities, including the mixed court system of laypersons and professional judges.⁹² This section examines the two models of jury systems that could be implemented in Japan: the Anglo-American jury composed completely of laypersons, and the Continental mixed court composed of both judges and laypersons.

A. The Anglo-American Jury System

A criminal jury in the Anglo-American system is composed of six to twelve jurors selected at random from the local population.⁹³ Such a jury can convict

91. See Hirano, *supra* note 90, at 437.

92. See Sato, *supra* note 6.

93. In the U.S. system, the Supreme Court in *Williams v. Florida*, 399 U.S. 78 (1970), held that a six-person jury in a state criminal case did not violate the Sixth Amendment right to trial by jury. Most states, however, provide 12-person juries in capital cases. See RICHARDSON R. LYNN, *JURY TRIAL LAW AND PRACTICE* 15 (1986). The sources for the jury pool include public documents such as phone books and voter registration lists. See *id.* at 41.

or acquit based on either majority or unanimous verdicts.⁹⁴ Although the goals of the jury system are numerous, one goal seems to be most important: “The power to condemn citizens to criminal sanctions is potentially so dangerous that it ought not to be left entirely to the hirelings of the state.”⁹⁵ As Justice White wrote in *Duncan v. Louisiana*,

[t]hose who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary, but insisted upon further protection against arbitrary action.⁹⁶

Other purposes behind the Anglo-American jury system are to ensure fairness through group decisionmaking, to promote simplicity and better factfinding through lay reasoning and skills, and to allow criminal defendants to be judged by their peers.⁹⁷ Unlike judges, laymen have no connection to the criminal justice system other than the fact that they are serving as jurors and therefore lack incentive to abuse their power or misuse the system.⁹⁸

B. The Continental Mixed Court

The second version of the jury system being considered by the Japanese is the mixed court system, in which laypersons and professional judges sit together in a single panel that deliberates and decides on all issues of verdict and sentence. This mixed court system is widespread in Europe for cases of serious crime.⁹⁹ Because the system has been most widely employed in Germany, the rest of this section will look specifically at the German system.

There are two kinds of mixed courts in modern German practice.¹⁰⁰ For more serious crimes, the mixed court consists of five “judges”—two lay and three professional (“two-three court”).¹⁰¹ For less serious crimes, the court consists of three “judges”—two lay and one professional (“two-one court”).¹⁰² Any decision that disadvantages the accused requires a two-thirds majority vote.¹⁰³ This means that in the two-three court, four of the five judges must agree on a verdict of conviction,¹⁰⁴ giving the two laymen a veto power if they act to-

94. While unanimous verdicts are still required in federal courts, states are permitted to utilize nonunanimous verdicts. See *Apodaca v. Oregon*, 406 U.S. 404 (1974) (holding that neither the Sixth nor the Fourteenth Amendment imposes on the states the requirement of unanimous criminal verdicts).

95. See John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 1981 AM. B. FOUND. RES. J. 195, 209.

96. 391 U.S. 145, 156 (1968).

97. See Langbein, *supra* note 95, at 209.

98. See *id.*

99. See *id.* at 195.

100. See *id.* at 198.

101. See *id.*

102. See *id.* at 198-99.

103. See *id.* at 199 (citing § 263(1) of the German Code of Criminal Procedure).

104. See *id.*

gether.¹⁰⁵ In the two-one court, the two-thirds voting rule allows the two laymen either to convict or acquit over the opposition of the professional.¹⁰⁶ Thus, depending on whether the trial is for a serious or minor crime, laymen will have varying power in the decisionmaking process.

When the trial is over, the mixed court begins deliberations. However, unlike the Anglo-American jury, "the presiding judge (the only professional in the two-one court and the senior professional in the two-three court) 'leads' these *in camera* proceedings and 'puts the questions and takes the votes.'"¹⁰⁷ This safeguards against the laymen making decisions based on ignorance or bias.

The mixed court system has safeguards against the inexperience of the laypersons. The selection of lay judges is much less random than the selection of jurors in the Anglo-American system. Lay judges are selected for four-year terms, and the selection process is divided into a nomination and a selection phase.¹⁰⁸ German studies on the nomination practices of local authorities have revealed wide variations in practice.¹⁰⁹ Some authorities compile random lists of residents, others delegate the task to the political parties represented on the city council, and still others vigorously seek out volunteers.¹¹⁰ Some authorities even allow the police to exercise a veto power over the provisional list.¹¹¹ In the selection phase, a "selection commission" chooses the new lay judges from the pool of nominees.¹¹² The number chosen varies from year to year depending on the expected caseload. Considerable variation exists in the functioning of these commissions, and in many cases political parties have a large influence in the process.¹¹³ While it is clear that a goal of the system is for the list of nominees to be representative of "all groups in the population,"¹¹⁴ neither the statutory procedures nor the practices of the local authorities and commissions bears this out.¹¹⁵ The end result is that lay judges often have educational and social backgrounds more similar to professional judges, which may diminish the effectiveness of the lay role in the mixed court system.

105. *See id.*

106. *See id.* at 200-01.

107. *Id.* at 200 (citing § 194(1) of the German Code of Criminal Procedure).

108. *See id.* at 206.

109. *See id.* (citing EKKEHARD KLAUSA, EHRENAMTLICHE RICHTER: IHRE AUSWAHL UND FUNKTION, EMPIRISCH UNTERSUCHT 23-46 (1972)).

110. *See id.*

111. *See id.*

112. *See id.* at 207. Langbein explains that "[t]he selection commission is chaired by a judge and contains, in addition to an administrator from the state government, ten citizens chosen by the elected local governments within the judicial district." *Id.*

113. *See id.*

114. *Id.* at 208 (citing § 36(2) of the German Code of Criminal Procedure).

115. *See id.*

V

WOULD A JURY SYSTEM WORK IN JAPAN FROM A CULTURAL, SOCIETAL,
AND LEGAL VIEWPOINT?

A. Japanese Culture

“Culture” is defined as “the customary beliefs, social norms, and material traits of a racial, religious, or social group.”¹¹⁶ By definition, therefore, culture is a generalization of the beliefs, social norms, and traits of most members of a certain group. When discussing Japanese culture, one must remember that not every Japanese person will act in accordance with the cultural traits described.¹¹⁷ A generalization of Japanese behavior patterns based on sociological evidence can nevertheless serve as a useful tool in analyzing the probable success of a jury system in Japan.

The hierarchical nature of Japanese society is difficult to miss. The language and behavior one Japanese person exhibits when meeting another for the first time is largely governed by the place each has in Japanese society.¹¹⁸ This is true both in the business and personal contexts. In the business context, once business cards are exchanged and each person has determined the status of the other, each person can adapt his language and behavior to the situation. For example, if person A is a department head while person B is a new employee, person A would speak in neutral Japanese while person B would speak in extremely polite Japanese.¹¹⁹ Similarly, in the personal context, a student would use honorific Japanese toward a professor, and a younger person would use similar honorific language toward an elder. In every personal interaction, therefore, the relative status of the participants influences how they behave.

Many scholars have pointed out that the Japanese have a higher level of trust for authority figures than do other societies. Such scholars often state as a basis of this trust the Confucian tradition in Japan.¹²⁰ They argue that this trust of authority is exemplified by the average Japanese citizen’s lack of interest in politics and by his apathy for provoking change in a system with which he is frustrated.

The *shudan-ishiki*, or “group consciousness,” of the Japanese is also a cultural trait that could have profound effects on the actual functioning of the jury

116. MERRIAM WEBSTER DICTIONARY 191 (New ed. 1994).

117. This is especially true of younger generations of Japanese, many of whom have lived abroad and have adopted elements of foreign cultures into their own lives.

118. To determine this hierarchy, the Japanese often exchange *meshi* (business cards) or explain their position when meeting each other.

119. Almost all verbs in Japanese can be transformed into the humble form, the polite form, or the neutral form. One of the most difficult aspects of learning Japanese for Americans is that the type of Japanese used must always be adjusted according to the identity of the listener.

120. See Dan Fenno Henderson, *Security Markets in the United States and Japan: Distinctive Aspects Molded by Cultural, Social, Economic, and Political Differences*, 14 HASTINGS INT’L & COMP. L. REV. 263, 295 (1991).

system in Japan. Chie Nakane is a leading scholar on the issue of Japanese group consciousness, and her framework for discussing this issue is useful. Nakane uses two basic criteria to define group consciousness—"frame" and "attribute."¹²¹ Frame is "a locality, an institution, or a particular relationship which binds a set of individuals into one group; in all cases it indicates a criterion which sets out a boundary and gives a common basis to a set of individuals who are located or involved in it."¹²² Attribute is a personal characteristic such as a descent group or caste that can define a group.¹²³ According to Nakane, Japanese group consciousness is based more on frame than attribute. For example, when a Japanese confronts another person and affixes some position to himself socially, he is inclined to give precedence to institution over kind of occupation;¹²⁴ "rather than saying 'I am a type-setter' or 'I am a publisher,' he is likely to say, 'I am from B Publishing Group.'"¹²⁵ Nakane concludes that the criterion by which Japanese classify individuals socially tends to be that of particular institution rather than that of universal attribute.¹²⁶ The institution to which one belongs, therefore, becomes almost the sole criterion for defining one's group. This is why accounts of Japanese companies building towns for their employees, organizing group vacations for their employees, and in extreme cases, having common graves for their employees, have been prevalent in the literature.¹²⁷

Maintenance of harmony in the group is another important aspect of Japanese culture. Scholars such as Takeyoshi Kawashima believe that Japanese society functions effectively only because of the high degree of interpersonal harmony maintained therein.¹²⁸ A natural result is that strong, contradictory personal opinions by inferiors are not voiced. Nakane describes such a phenomenon in the Japanese family "group":

[I]n the ideal traditional household in Japan, opinions of the members of the household should always be held unanimously regardless of the issue, and this normally meant that all members accepted the opinion of the household head, without even discussing the issue. An expression of a contradictory opinion contrary to the head was considered a sign of misbehavior, disturbing the harmony of the group order.¹²⁹

It is difficult to say just how true Nakane's statement would be if applied outside of the family context. However, a family is similar to any other type of

121. CHIE NAKANE, *JAPANESE SOCIETY* (1970), reprinted in *JAPANESE CULTURE AND BEHAVIOR: SELECTED READINGS* 155 (Takie Sigiyama Lebra & William P. Lebra eds., 1974).

122. *Id.*

123. *See id.*

124. *See id.* at 156.

125. *Id.*

126. *See id.*

127. *See id.* at 163.

128. *See* Takeyoshi Kawashima, *Nihonjin no Hoishiki* [The Legal Consciousness of the Japanese] (1967); *see also* Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan*, in *LAW IN JAPAN* 41 (A. Von Mehren ed., 1963).

129. NAKANE, *supra* note 121, reprinted in *JAPANESE CULTURE AND BEHAVIOR: SELECTED READINGS*, *supra* note 121, at 165.

closely knit group, and the goal of maintaining harmony in both could have the same effect.

1. *Mixed Court Proposal.* The adoption of a mixed court in Japan is problematic. First, because of the hierarchical nature of Japanese society and the Japanese respect for authority, the danger exists that the professional judge or judges would have more than simply their intended "guiding" influence over the laypersons. Certainly, laypersons in any country are respectful of those above them,¹³⁰ but respecting a higher authority does not mean subordinating one's views to please that authority. In Japanese culture, however, respect for higher authority combined with a desire to maintain harmony and avoid confrontation may result in listening and adopting for oneself what that authority has to say.¹³¹ Because of this, the layperson juror in a mixed court system in Japan may have difficulty voicing any personal beliefs about the case.¹³² Also because a mixed court system contains at least one professional judge, overcoming this problem requires limiting the participation of the judge, which would lead to the Anglo-American jury system.

Furthermore, even if the laypersons were told that they should speak their minds and independently determine the outcome of the case, there is no way of knowing whether a conscious decision to abandon one's cultural instincts could be effective. For example, because it is impolite in Japanese culture to blatantly disagree with a superior (on the principle of maintenance of harmony), how far would a layperson go in voicing disagreement with a professional judge's opinion even after being told he must do so? The layperson would possibly speak up once or twice, but if the judge did not somehow reinforce the viewpoint, only a courageous Japanese juror would press the issue. For these reasons, the adoption of a mixed court system in Japan seems to be undesirable compared to the adoption of a modified Anglo-American jury system.

2. *Anglo-American Proposal.* The adoption of an all-layperson jury system modeled on that in the United States would be preferable in Japan because it would create the largest chance for full participation of all jurors. Although the cultural concepts of hierarchy and respect for authority would still play a role in the jury's decisionmaking, there would be more leeway to work around these concepts if no legal authority figures such as professional judges were present. The hierarchical difference between, for example, a policeman and a university professor seems to be much less than that between a policeman and a professional judge, meaning that the policeman may be more candid in expressing his opinion to the professor than to the judge.

130. See Comment, *The Great Democratizing Principle: The Effect on South Africa of Planning a Democracy Without a Jury System*, 11 TEMP. INT'L & COMP. L.J. 107, 126-27 (1997).

131. See *id.* (citing Koshi Morita, *Lawyers Seek Return of Juries*, THE DAILY YOMIURI, Nov. 25, 1992, at 3).

132. See *id.*

The all-layperson system would not be without problems, however. To examine the degree to which an all-layperson system would work in Japanese culture, it is useful to first look at the ideals of the jury system in the United States.¹³³ According to Samuel Kassin and Lawrence Wrightsman, there are three ideals behind the idea of jury deliberation in the United States. The first ideal is that of independence and equality.¹³⁴ "No juror's vote should count more than any other juror's vote,"¹³⁵ and each person contributes his or her personal opinion.¹³⁶ The second ideal is an openness to be influenced by information. Jurors must debate with an open mind and withhold judgment until full deliberation by all of the jurors.¹³⁷ "Jurors should scrutinize their own views, be receptive to others', and allow themselves to be persuaded by rational argument."¹³⁸ The third ideal is that jurors should not be persuaded by irrational pressures. "No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict."¹³⁹ The reasoning behind this is simple: If a juror changes his vote just to comply with the majority and not because of rational persuasion by new information, his final vote will not reflect his true beliefs.

Scholars do not agree on whether these ideals are properly achieved in juries in the United States. In one study done by social psychologist Solomon Asch, American subjects were asked to sit around a table and orally give their opinions on various subjects, one after the other.¹⁴⁰ Asch instructed the first five people at the table, who worked for him but acted as subjects, to give an opinion that clearly seemed wrong based on the facts.¹⁴¹ "Much to Asch's surprise, the sixth person (and real subject) conformed with the incorrect majority 37 percent of the time."¹⁴² There could be two reasons for this result. First, the subject could have publicly voted with the majority because he felt pressure to conform, even though he privately continued to disagree. And, second, the subject could have reevaluated the evidence, truly changed his mind, and voted in accordance with his conscience. The first is a danger to the ideals of the jury

133. I am assuming that in adopting an all-layperson jury system, the Japanese would want to maintain these same general ideals.

134. See SAMUEL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 172 (1988).

135. *Id.*

136. See *id.* Ideally, the jury is structured to maximize equal participation. Verdicts are to be rendered based only on the evidence before them, and jurors are discouraged from basing their arguments on private or outside sources of knowledge. To further promote equality, courts often exclude from service those who might exert undue influence over other jurors, such as lawyers. See *id.*

137. See *id.*

138. *Id.*

139. *Id.* (citing AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, *STANDARDS RELATING TO TRIAL BY JURY* § 5.4 (1968)).

140. See *id.* at 174.

141. See *id.*

142. *Id.* "Only when this person had an ally were subjects able to resist the pressure to conform." *Id.* (citing SOLOMON ASCH, *SOCIAL PSYCHOLOGY* (1952)).

system because it could mean that criminals are being convicted by nonunanimous juries.¹⁴³ Even in the United States, which has had over 200 years of experience with the jury system, and which is not known as a culture that values "harmony," there is a danger that jurors are not expressing their true opinions in an effort to avoid confrontation.

Nor are jury deliberations in the United States free from hierarchical influences. Many trial attorneys believe that most juries consist of "one or two strong personalities with the rest more or less being followers."¹⁴⁴ The empirical literature on small group discussions supports this assertion: "[P]articipation by the individuals is very uneven, and a few people dominate."¹⁴⁵ Many scholars conclude, therefore, that the ideals are seldom ever realized because of these differences.¹⁴⁶

Could Japanese society support the three ideals of the Anglo-American jury system? First, to what degree does the hierarchical nature of Japanese culture allow the Japanese juror to maintain his independence and equality and to make an informed and rational decision? Because of the lack of empirical evidence, this question is difficult to answer.

American jurors often lose their independence and acquiesce to the views of the majority even though they privately feel otherwise. Because of the greater importance of hierarchy in Japanese society, this could be a greater problem in the Japanese jury. For example, in the United States, those that "acquiesce" to the opinions of others do so not because American culture dictates that they do so, but because they are shy, have little interest in spending more time in the jury room, have weak personalities, or for other reasons. In Japan, a juror could acquiesce for these very same reasons. However, on top of these noncultural reasons, Japanese culture dictates that one should not contradict his superiors. Therefore, a Japanese juror might adopt a superior's opinion because this would be the acceptable behavior in Japanese culture. Hence, a greater degree of frustration would exist with the ideals of independence and equality among jurors.

In contrast, Japanese "group consciousness" and the desire of Japanese to maintain "harmony" may have less of an effect on the Japanese jury than one would assume. Although it is clear that Japanese culture tends to be more group-oriented than individualistic cultures such as in the United States, the

143. A vivid example of this is the result of a jury trial of a narcotics case in Miami in 1981. In this case, four defendants were on trial for allegedly having purchased drugs from undercover agents. During deliberations, the jurors reported they were deadlocked, and the judge instructed them to try further to reach agreement. Three hours later, they returned with verdicts. The judge then polled them in open court about whether they agreed in conscience with their decisions. The very first juror said "no." After being sent back to the jury room twice, the jurors returned with the same verdicts. It turned out that some jurors had been pressuring others to agree with them so the jury would reach a unanimous verdict and allow certain jurors to go on vacation. *See id.* at 176.

144. *Id.* at 177.

145. *Id.* (citing F. Stephan & E. Mishler, *The Distribution of Participation in Small Groups: An Exponential Approximation*, 17 AM. SOC. REV. 598 (1952)).

146. *See id.* at 180.

jury may not fit the definition of a "group" as this word is used in the literature discussing Japanese culture. A jury composed of twelve randomly selected individuals, although a group temporarily, is by no means an institution or even a relationship that binds people together. A Japanese would most likely not identify himself as being part of the group that is the jury because he knows that once the case is over, the jury will break up and no longer exist. Therefore, although much literature exists describing the behavior of Japanese when interacting with members of a "group," it is important to keep in mind that because the jury does not seem to qualify as a typical group, Japanese members of the jury may behave more individualistically. "Group consciousness" may not be a threat at all to the effective functioning of the all-layperson jury system in Japan.

The desire to maintain harmony, unlike Japanese group consciousness, is a cultural attribute that could strongly influence jury deliberations. A heated issue at present is whether the desire to maintain harmony in Japan extends past the boundaries of one's immediate group to Japanese society in general.¹⁴⁷ If we assume that the cultural trait of maintaining harmony would continue to exist in the jury room, this could undermine the ideals of independence and equality, openness to be influenced by information, and persuasion only by the substance of arguments. In an effort to maintain harmony, jurors might be willing to give up their personal beliefs and be persuaded for reasons other than substantive reasons. However, the desire to maintain harmony may be thrust aside by Japanese jurors, especially if the judge instructs them to do so, and an open debate could occur where each juror votes his independent mind. Without empirical evidence, it is difficult to say just what part this aspect of Japanese culture would play inside the four walls of the jury room.

B. Japanese Society

Culture is not the only consideration when discussing whether a jury system should be introduced into a society. One must also look at societal factors such as level of education, race, citizen participation, and other factors to determine whether a jury system could function effectively. J.H. Jearey argues that three conditions are necessary for a jury system to function effectively.¹⁴⁸ First, the society in which it operates must be for the most part racially, culturally, linguistically, and religiously homogeneous.¹⁴⁹ Second, the members of the society must be sufficiently educated to understand their responsibilities as jurors and understand that they must set aside private prejudices when fulfilling these re-

147. Many scholars claim that the latter is true, and it is for this reason that the rate of litigation in Japan is so low. However, John Haley, in his piece *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359 (1978), claims that it is not a desire to maintain harmony that keeps Japanese from suing, but various logistical factors such as economics and access to courts and lawyers.

148. See J.H. Jearey, *Trial by Jury and Trial with the Aid of Assessors in the Superior Courts of British African Territories: I*, 4 J. AFR. L. 133, 143 (1960). Jearey uses these conditions to assess the reason why the jury system plays such a small part in the African territories under discussion.

149. See *id.* at 136, 138.

sponsibilities.¹⁵⁰ Third, the members of the society must generally agree with the laws which, as jurors, they are required to enforce.¹⁵¹

The reasoning behind Jearey's list of conditions is clear. First, the more socially homogeneous a society, the less chance there will be that jurors from that society will base their decisions on racial, religious, or ethnic bias.¹⁵² Second, the more educationally advanced a society becomes, the more jurors will be able to understand their roles and put aside personal views on an issue not based on the facts and law. Furthermore, better educated juries will be able to comprehend more complex evidence used at trial directly, rather than through the statements of a zealous attorney or expert.¹⁵³ Finally, if jurors do not agree fundamentally with the laws on which they are supposed to base their decision, jury verdicts may be primarily based on factors other than the law, frustrating the concept of rule of law.

Because all three of these conditions are present in Japanese society, it seems that from a societal perspective, Japan is ripe for the reintroduction of the jury system. First, Japan is overall one of the most socially homogeneous societies in the world. Unlike in the United States, where citizenship is determined by place of birth, in Japan, citizenship is determined by the nationality of one's parents.¹⁵⁴ As a result, except in a few specific instances,¹⁵⁵ almost all Japanese citizens have the same ethnic and historical background. Also, although most Japanese claim to practice Shinto, Buddhism, or both,¹⁵⁶ few are serious about religion. Religion neither unifies nor divides the Japanese people—it simply exists neutrally. Finally, Japan has as little linguistic diversity as can be found in countries in Europe or in different regions of the United States. Japanese is spoken throughout Japan, with variations in dialect in the North and the South. Japan is also one of the most educationally advanced countries in the world. With a literacy rate of close to ninety-nine percent and a rate of

150. *See id.* at 141.

151. *See id.* at 135-36.

152. One of the biggest problems with the jury system in the United States is the well-documented racism of juries. *See* Nathaniel R. Jones, *Race and American Juries—The Long View*, 30 CREIGHTON L. REV. 271, 273 (1997) (“[I]ncreasingly, jury watchers are concluding that . . . race plays a far more significant role in jury verdicts than many people involved in the justice system prefer to acknowledge.”); Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 66 (1993) (arguing that the influence of jury race discrimination on jury decisions is real and can be measured by judges in certain circumstances).

153. *See* Comment, *supra* note 130, at 125 (stating that one reason mitigating against adopting the jury system in South Africa is that jurors are not considered knowledgeable enough to decide complex cases).

154. *See* Onuma Yasuaki, *Interplay Between Human Rights Activities and Legal Standards of Human Rights: A Case Study on the Korean Minority in Japan*, 25 CORNELL INT’L L.J. 515, 515 n.3 (1992).

155. These include the case of later generations of North and South Koreans whose parents were brought to Japan against their will during the Japanese occupation of Korea and who were naturalized. *See* Comment, *Local Public Employment Discrimination Against Korean Permanent Residents in Japan: A U.S. Perspective*, 7 PAC. RIM L. & POL. J. 197, 201-02 (1998).

156. The total number of adherents to “religion” in Japan in 1993 was 219,723,000. This figure exceeds the total population of Japan because most people belong to both Shintoism and Buddhism. *See* STATISTICS BUREAU, GOVERNMENT OF JAPAN, 1998 JAPAN STATISTICAL YEARBOOK 743, tbl. 21-17 (1998) (noting statistics on religious bodies, clergymen, and adherents).

advancement to universities and junior colleges of over thirty-seven percent,¹⁵⁷ the pool of jurors in Japan would allow for well-educated juries. And because over ninety percent of Japanese view themselves as members of the middle class, criminal defendants would, most of the time, truly be receiving a trial by their peers. Finally, because Japan follows the rule of law and the Japanese Constitution puts the power in the hands of the people, Japanese are in basic agreement with the laws they are required to enforce. If this were not so, these laws could be changed by democratic means.

A fourth factor that Jearey does not mention that could affect the success of a jury system is the degree to which a society has allowed or is willing to allow citizen participation in the system. In countries that have had no experience at all with citizen participation in the legal system, a switch to either an all-layperson jury system or a mixed court system could be difficult. On the other hand, societies that have a history of citizen participation in the legal system may be more welcoming of either type of jury system. Traditionally, Japan did not offer laypersons an opportunity to participate in the criminal adjudication process. However, laypersons did have the opportunity to participate in civil conciliation proceedings (*chotei*) during the Tokugawa period,¹⁵⁸ and they were able to participate on juries during the years 1928 to 1943.¹⁵⁹ During the Allied Occupation, prosecution review commissions (*kensatsu shinsakai*) were created to allow public participation of Japanese citizens to control abuses of prosecutorial discretion.¹⁶⁰ There are also various other areas where layperson participation in Japan exists. For example, "laypersons may participate in quasi-judicial affairs as civil liberties commissioners (*jinken yogo iin*), local administrative counselors (*gyosei sodan iin*), welfare commissioners (*min'ei iin*), conciliation commissioners, expert commissioners, judicial commissioners, probation officers, and family court counselors."¹⁶¹

Furthermore, certain scholars have noted a change in "law consciousness" of the Japanese from the 1950s to today.¹⁶² This change is simply that more Japanese are willing today to bring their disputes to court than in the 1950s,

157. See Japan Information Network, *Rate of Advancement to Universities* (visited June 30, 1999) <<http://jin.jcic.or.jp/stat/stats/16EDU72.html>> (citing Minister of Education, Science, & Culture, The Research and Statistics Planning Division, School Basic Survey (Dec. 21, 1998) (university advancement rates); U.S. Dep't of State, Bureau of East Asian & Pacific Affairs, *Background Notes: Japan, March 1999* (visited June 30, 1999) <http://www.state.gov/www/background_notes/japan_0399_bgn.html> (literacy rate); see also 5 HISTORICAL STATISTICS OF JAPAN 260 (Japan Statistical Ass'n, 1987) (giving comparable statistics from 1985).

158. See Mark D. West, *Prosecutorial Review Commissions: Japan's Answer to the Problem of Prosecutorial Discretion*, 92 COLUM. L. REV. 684, 695 (1992) (citing 1 Dan Fenno Henderson, *CONCILIATION AND JAPANESE LAW: TOKUGAWA AND MODERN* (1965)).

159. See *supra* text accompanying notes 64-72.

160. Prosecution review commissions are lay advisory bodies that review a public prosecutor's exercise of discretion not to prosecute. They are composed of 11 members who are chosen at random from voting lists. See West, *supra* note 158, at 694-98.

161. *Id.* at 695 (citing LAWRENCE WARD BEER, *FREEDOM OF EXPRESSION IN JAPAN* 140 (1984)).

162. See, e.g., Hideo Tanaka, *The Role of Law in Japanese Society: Comparisons with the West*, 19 U.B.C. L. REV. 375, 384 (1985).

signaling a more active role for citizens in the system.¹⁶³ The formation of popular movements, the use of prosecution review commissions in certain highly publicized cases, and the increase in academic writings and programs concerning forms of citizen participation evidence the citizen participation that is currently occurring.¹⁶⁴

Japan's recent history with layperson participation in the judicial system will make it easier for the country to readopt a jury system for two reasons. First, the basic idea of layperson participation in the judicial system is already accepted in Japanese society, and calling citizens to serve on a jury would not be a foreign idea. Second, because Japan had a jury from 1928 to 1943, many of the facilities for jury trial still exist in the old courtrooms. Japan need not go further than these courtrooms for an example on which to base the design of new courtrooms.

C. Japanese Legal System

There is no technical legal barrier preventing Japan from readopting the jury system. The Jury Act was never repealed; rather, it was suspended until World War II was over.¹⁶⁵ The Japanese Diet could either repeal the Act to Suspend the Jury Act or enact a new law altogether establishing jury trial for criminal cases.

From a practitioner's perspective, the reintroduction of the jury system would change life drastically. One significant change would be that of timing. Under the present system, a long trial is not conducted in one continuous sitting.¹⁶⁶ Rather, the case is tried in short sessions, usually for a few hours each month.¹⁶⁷ The introduction of juries would require cases to be tried in one continuous time period, certainly changing the method of preparation of the attorneys.¹⁶⁸

Another significant change would be that a trial by dossier would be replaced by bouts of live witness testimony.¹⁶⁹ The predictability of the old system would be gone. Japanese attorneys would have to learn the art of trying a case in front of laypersons rather than experienced career judges. The focus will be shifted from the papers to the live witnesses testifying.¹⁷⁰

163. *See id.* Professor Tanaka points to large pollution cases in the 1970s as an example. *See id.*

164. *See West, supra* note 158, at 715.

165. The Act to Suspend the Jury Act states that "[t]he jury system will be reinforced when the war is over." *Baishinho no Teishi ni Kansuru Horitsu* [An Act to Suspend the Jury Act], Law No. 88 of 1943.

166. *See Foote, supra* note 9, at 84 (describing this phenomenon in the criminal context); Glenn Theodore Melchinger, *For the Collective Benefit: Why Japan's New Strict Product Liability Law Is "Strictly Business,"* 19 U. HAW. L. REV. 879, 940 n.11 (1997) (stating that civil trials in Japan are composed of monthly meetings rather than one continuous trial).

167. *See Foote, supra* note 9, at 84.

168. *See Lempert, supra* note 4, at 67.

169. *See Foote, supra* note 9, at 84.

170. *See id.*

Adoption of a jury system would also certainly affect the appellate system in Japan. Presently, a defendant may appeal both factual and legal findings to the first level of appeal (*koso* appeal).¹⁷¹ The Jury Act of 1923 abolished the *koso* appeal for jury trials on points of fact.¹⁷² Any law readopting the jury system would probably do the same, or risk undermining the factual determinations of the jury. As Professor Lempert states, this “[c]ould fundamentally alter the power relationship between trial and appellate courts, and the rules of first level review might be similar to the rules that confine the Japanese Supreme Court to questions of law when it reviews intermediate court decisions.”¹⁷³ For defense attorneys, the primary effect would be to curtail opportunities for appeal or post-conviction review on factual grounds. However, presumably the better factfinding by juries would make up for this.

It is also likely that, through the adoption of a jury system in Japan, the near 100% conviction rate would decline.¹⁷⁴ Prosecutors may also push for the adoption of a U.S.-like plea bargaining system,¹⁷⁵ which could be used to save the courts time by preventing many cases from reaching the jury.¹⁷⁶

Also, from a purely practical perspective, although some Japanese courtrooms continue to have jury boxes and jury rooms, the great majority do not. Certainly the cost and effort of adding such necessities for jury trials, in addition to juror wages and travel, are factors to be considered in how smoothly a jury system could be adopted in Japan.¹⁷⁷

Thus, although there is no legal obstacle preventing Japan from bringing back the jury in criminal trials, reintroduction of the jury system would take time and effort on the part of both the Japanese government and attorneys. At least one commentator has stated that the need for such efforts, in addition to skepticism about the jury system, may be enough to prevent adoption of the jury system in Japan in the near future.¹⁷⁸

171. *See id.* at 85.

172. *See* Baishinho [Jury Act], Law. No. 50 of 1923, art. 101.

173. Lempert, *supra* note 4, at 68.

174. *See id.* at 67. As discussed *supra* text accompanying notes 30-33, laypersons may be able to avoid biases of experienced career judges concerning the presumption of innocence and correctness of prosecutors.

175. Presently, the Japanese criminal justice system does not allow for plea bargaining. *See* Desombre, *supra* note 29, at 123-24. Prosecutors have discretion whether to prosecute based on the evidence gathered. *See id.*

176. *See* Lempert, *supra* note 4, at 67.

177. *See* Marshall S. Huebner, *Who Decides? Restructuring Criminal Justice for a Democratic South Africa*, 102 YALE L.J. 961, 975 (1993) (discussing administrative costs such as construction of jury boxes and deliberation rooms, and juror stipends and travel, in the context of whether South Africa should adopt the jury system).

178. *See* Foote, *supra* note 9, at 85:

[I]n view of all the other elements of the criminal justice system that would be affected by reintroduction of the jury system, not to mention widespread skepticism of the jury among judges and prosecutors (as well as some segments of the defense bar), it seems unlikely that any jury system will be adopted in Japan in the near future.

VI

CONCLUSION

Japanese jurists and scholars are presently studying various forms of the jury system around the world to determine which would be most suitable if Japan were to decide to readopt such a system for criminal trials. The probable success of a jury system in Japanese culture and society would depend entirely on the details of the system adopted. Obviously, it is necessary to avoid the many pitfalls of the original jury system used in Japan from 1928 to 1943, such as nonbinding verdicts and prohibition of objections to the jury instructions. Factors such as these served to delegitimize the jury system at that time and greatly contributed to its failure.

Assuming that a legitimate and binding system were adopted, the all-layperson Anglo-American jury system, as opposed to the German mixed court system, seems most suited for Japanese culture.¹⁷⁹ Japanese cultural characteristics such as the hierarchical nature of Japanese society, the high level of trust for authority figures in Japanese society, Japanese group consciousness, and the desire to maintain harmony would make it difficult for a mixed court system to function effectively. If the mixed court system were adopted in Japan, there is a fear that the laypersons would always defer to the opinions of the judges, even if not rationally persuaded, thus defeating their purpose. Certainly, the same cultural factors come into play in an all-layperson jury as well. However, there is a large difference between disagreeing with a professional judge and disagreeing with a fellow citizen. In the latter case, a deference to authority may still exist (such as if the other layperson is much older), but it would be less pronounced. Therefore, an all-layperson jury would be more successful than a mixed court in Japan.

From a cultural perspective, therefore, a jury system could be successful in Japan. None of the cultural attributes serves as a complete bar to the functioning of a jury system. Just as in the United States, the system will not function completely in line with its ideals, but it would still be able to function effectively. Likewise, Japan is ripe for the reintroduction of the jury system from a societal perspective. Japanese society is, for the most part, well educated, homogeneous, and middle class. These factors would facilitate the functioning and goals of a jury system in Japan. From a legal perspective, there is no barrier *per se* preventing Japan from reintroducing the jury system. However, it may be difficult to convince judges and prosecutors to change the status quo. Therefore, although it is presently unclear whether the Japanese will reintroduce a jury system in criminal cases, Japanese culture and society, as well as the Japanese legal system, would be conducive to a jury system, preferably one based on the Anglo-American model.

179. It is important to note that the cultural characteristics come into play mostly in the deliberation phase of a jury trial, and it is from this perspective that I have formed these conclusions.