

The Slow Birth of Japan's Quasi-Jury System (*Saiban-in Seido*): Interim Report on the Road to Commencement

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I. INTRODUCTION

In May 2004 the Japanese Diet created a new quasi-jury system but gave the courts five years before they had to host the first trial with lay people.¹ The lay assessor system or *saiban-in seido* is a unique cross between a common law jury and a European mixed court. As an untested hybrid, many questions arise regarding how the system will in fact

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1 For a full translation see, K. ANDERSON / E. SAINT, Japan's Quasi-Jury (*Saiban-in*) Law: An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials, in: *Asian-Pacific Law & Policy Journal* 6 (2003) 233.

operate. It is because of these questions that the legislature granted the judicial system such a long window to prepare both itself and the general public for their new roles.

This article briefly introduces the enacted law and reports on the various activities that have been undertaken to prepare for the lay assessor system. Our aim is chiefly informative, however, we also flag some of the more important questions yet to be resolved. We critique the new system predominately from a comparative perspective, but we also apply an historical standard. As developed earlier by Anderson, Japanese historical experience suggests: (1) that broad lay participation systems, such as Japan's former jury system, were marginalised by non-use and (2) that narrow lay participation systems, such as non-professional judges, have been captured by *de facto* lawyers.²

This article is organised as follows. First, we review the lobbying and political deals in early 2004 that produced the consensus to pass the Lay Assessor Bill. Second, we outline the chief elements of the enacted *saiban-in seido*, particularly looking back to the identified historical lessons to consider whether the traditional impediments have been structurally avoided. Third, we suggest the importance of the yet-to-be-drafted Supreme Court Rules on Lay Assessor Trials noting those areas that need to be most closely studied in the rollout of the lay assessor system. Fourth, we conclude by positively assessing the preparations made by the public, Ministry of Justice, Supreme Court, and Japan Federation of Bar Associations, but note caution regarding the apparent lack of engagement by the defence bar. Taken together this is a cautiously optimistic estimate of the system's likelihood of improving justice and democratic involvement in Japan.

II. THE POLITICAL BACKGROUND TO THE ADOPTION OF THE LAW

In earlier articles, Anderson examined the theoretical rationale relied upon by advocates of a lay assessor system in Japan and other countries.³ He summarised the arguments in favour of lay participation in Japan, stating that such arguments centre on promises that it brings about (1) better justice by injecting common reason and limiting elite bias and (2) more democracy by educating the public about the justice system and encouraging civic engagement.⁴ Here, without delving deeply into the developments that spurred the

2 K. ANDERSON / M. 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, in: *Vanderbilt Journal of Transnational Law* 37 (2004) 935, 973; K. ANDERSON, *Gaikoku no jōshiki kara mita saiban-in seido* [The Lay Assessor System as Viewed by Foreign Common Reason], in: *Hōritsu Jihō* 940 (2004) 37, 40.

3 ANDERSON / NOLAN, *supra* note 2, 941-46; ANDERSON, *supra* note 2, 37-38.

4 Regarding the democratic and civil engagements of lay participation see, also, J. GASTIL / E.P. DEESS / P.J. WEISER, Civic awakening in the jury room: A test of the connection between jury deliberation and political participation, in: *Journal of Politics* 64 (2002) 585-595.

greater law system reform movement (*shihô seido kaikaku*) at the turn of the century,⁵ we briefly consider the political dynamics that resulted in the passage of the Lay Assessor Act.

A. *The Seed of an Idea: The Judicial Reform Council*

While focusing on documenting the so-called logrolling, or political compromises, that resulted in the proposal becoming law, we also examine briefly who are the institutional winners and losers with the passage of the new law. As with any law reform that alters existing relational dynamics there are those who benefit from the change and those who fared better under the status quo. At first blush, judges and prosecutors appear to have done better under the previous system. For example, with the introduction of the new *saiban-in* system judges will lose their monopoly on delivering judgments, including sentences. The new system also means prosecutors will inevitably have to change their current methods – including pre-charging, pre-trial, and courtroom advocacy practices – that have resulted in a nearly perfect conviction rate.⁶ Accordingly, the defence bar, defendants, and progressive reformers cursorily appear to be the winners under the new system. The defence bar is hoping that the change will increase the currently nearly nonexistent chance for acquittal, not to mention the opportunity to play out long suppressed Perry Mason fantasies. Defendants – particularly those in the so-called ‘innocent prisoner’s conundrum’⁷ and possibly those subject to the death penalty⁸ –

5 See, e.g., S. MIYAZAWA, *The Politics of Judicial Reform in Japan: The Rule of Law at Last?*, in: W.P. Alford (ed.), *Raising the Bar: The Emerging Legal Profession in East Asia* (Harvard 2006) (discussing the politics of the larger judicial reform movement). T. KITAGAWA / L.R. NOTTAGE, *Globalization of Japanese Corporations and the Development of Corporate Legal Departments: Problems and Prospects*, in: W.P. Alford (ed.), *Raising the Bar: The Emerging Legal Profession in East Asia* (Harvard 2006) (emphasising the business and Liberal Democratic Party motivations).

6 D.T. JOHNSON, *The Japanese Way of Justice: Prosecuting Crime in Japan* (Oxford 2002) 215.

7 The innocent prisoner’s conundrum is my own term for the dilemma defendants face, particularly innocent ones, choosing between not confessing and being subject to the harsh edge of Japanese justice, or confessing and receiving the paternal benevolence of the system. See, e.g., JOHNSON, *supra* note 6, 199-201 (explaining the harsh and benevolent streams of Japanese justice); D.H. FOOTE, *The Benevolent Paternalism of Japanese Criminal Justice*, in: *California Law Review* 80(2) (1992) 317-390.

8 It is purely speculative, but while lay participation in sentencing tends towards more punitive judgments, it is conceivable that lay assessor panels will personally be less willing to impose death sentences than professional judges who are shielded by ‘precise’ precedents that, in part, lift the sense of personal responsibility for death sentences. Regarding the death penalty in Japan, see P. SCHMIDT, *Capital Punishment in Japan* (Leiden 2002); D.T. JOHNSON, *The Death Penalty in Japan: Secrecy, Silence and Salience*, in: A. Sarat / C. Boulanger (eds.), *The Cultural Lives of Capital Punishment: Comparative Perspectives* (Stanford 2005); L. AMBLER, *The People Decide: The Effect of the Introduction of the Quasi-Jury System (Saiban-in Seido) on the Death Penalty in Japan* (2006) (unpublished manuscript on file with authors).

also stand to gain from the change along with the bar. As for reformers, the law is a double victory by being one more step in dismantling the allegedly entrenched interests that previously made up the controlling elite and by replacing them with a more populist institution.⁹

The Act Concerning Participation of Lay Assessors in Criminal Trials ('Lay Assessor Act')¹⁰ is the end result of one of the ten branches of a legal reform tree proposed by the Prime Minister's Judicial Reform Council (JRC) in 2001.¹¹ The call for a new lay participation scheme surprised most in 1999 when it was included in the JRC's interim report. Reintroduction of a jury system had been raised on the fringes repeatedly since the old jury was suspended in 1943, but it had never received serious consideration.¹² Inclusion in the JRC's report, which was later ratified by the Prime Minister and his Cabinet¹³ and the Diet,¹⁴ moved the idea of a mainstream lay participation scheme from the periphery to a nearly foregone conclusion with little public debate or political involvement.

The JRC Report and its codifying Justice System Reform Promotion Act¹⁵ did not, however, proscribe the specific contents of the lay assessor system. Indeed, the report defined the newly mandated system more by what it was not – not a jury and not a mixed court – than what it exactly was. Thus, following the adoption of the JRC Report on 12 June 2001 and until the automatic sunset of the Office for Promotion of Justice System Reform (Reform Office or *Shihô seido kaikaku suishin honbu*) in December 2004, a window of time opened for all of the interested parties to lobby regarding the content of the lay assessor system. Within this lobbying period, it was also possible that no consensus would develop before the sunset date and, as a result, no new scheme would emerge.

9 Regarding the law reforms at the turn of the 21st century, see generally J. KINGSTON, *Japan's Quiet Transformation: Social Change & Civil Society in the 21st Century* (London et al. 2004).

10 *Saiban'in no sanku suru keiji saiban ni kan suru hôritsu*, Law No. 63/2004; Engl. Transl.: *supra* note 1 [hereinafter Lay Assessor Act].

11 JUDICIAL SYSTEM REFORM COUNCIL, *Recommendations of the Justice System Reform Council for a Justice System to Support Japan in the 21st Century* (12 June 2001) Chapter IV, Part 1(1), at <<http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>>.

12 See L.W. KISS, *Reviving the Criminal Jury in Japan*, in: *Law and Contemporary Problems* 62 (1999) 261.

13 See JUDICIAL SYSTEM REFORM COUNCIL, *supra* note 11.

14 By passing the Judicial Reform Promotions Office Ordinance, [*Shihô seido kaikaku suishin honbu-rei*], Government Ordinance No. 372/2001.

15 *Shihô seido kaikaku suishin-hô* [Justice System Reform Promotion Act], Law No. 119/2001.

B. *The Great Debate: The Ministry of Justice, Supreme Court, and Japanese Federation of Bar Associations*

At this stage the stakeholders in the criminal justice system each quickly defined their position regarding the issue. The practicing defence bar, represented by the Japanese Federation of Bar Associations (JFBA),¹⁶ advocated the most liberal model. The JFBA promoted the idea that the lay assessor panel should be composed of one professional judge and nine lay people chosen from all eligible voters.¹⁷ The JFBA argued that to encourage citizens to participate actively in the justice system it was important to empower them to the fullest extent possible within the government's mandate.¹⁸

In contrast, the Supreme Court, in its role as administrator of the judicial system, stood for the most conservative model. At the preliminary stage, the court emphasised the problems with a jury procedure and stated that if a system based on lay participation had to be introduced, a non-binding advisory mixed-court was preferred.¹⁹ Once the discussion progressed to models for lay participation, the Supreme Court supported a mixed system with three judges and only three lay persons.²⁰

The Office of the Prosecutor, represented by the Ministry of Justice, sat between these poles. The Ministry began with the noncommittal, platitudinal position that both juries and mixed courts should be further studied as they each had their merits and demerits.²¹ Eventually this compromise position evolved into a consensus-seeking model proposed by Professor Masahito Inoue. Professor Inoue, a criminal procedure expert and Dean of the Tokyo University Law School, chaired the Lay Assessor/Penal Matters Study Investigation Committee (Investigation Committee or *saiban-in keiji kentô-kai*) which was charged with drafting the specifics of the proposal.²² His proposition called for three professional judges and anywhere from four to six lay participants.²³

16 *Nihon bengoshi rengô-kai (Nichibenren)*, at <<http://www.nichibenren.or.jp>>.

17 See JFBA, *Saiban-in seido 'tatakidai' ni tai suru iken* [Opinion regarding the 'sounding board' on the lay assessor system] (30 May 2003), at <http://www.nichibenren.or.jp/ja/opinion/report/data/2003_23.pdf>.

18 See A. GOTÔ / S. SHINOMIYA / T. NISHIMURA / M. KUDÔ, *Jitsumu-ka no tame no saiban'in-hô nyûmon* [A Practitioner's Introduction to the Lay Assessor Act] (Tokyo 2004) 2.

19 *Ibid.*

20 *Ibid.*, 6.

21 *Ibid.*, 2.

22 Details of the Investigation Committee are available on its website, *Saiban-in seido keiji kentô-kai* [Lay Assessor/Penal Matters Study Investigation Committee], <<http://www.kantei.go.jp/jp/singi/sihou/kentoukai/06saibanin.html>>, at 2 April 2006.

The Investigation Committee consisted of 11 members (listed with title and occupation current at the time of their membership): Chairperson Masahito Inoue (Tokyo University Professor), Justice Osamu Ikeda (Chief Justice of the Maebashi District Court), Professor Yoshitomi Ôde (Kyushu University Professor), Professor Keiko Kiyohara (Tokyo Engineering University Professor), Professor Tadashi Sakamaki (Kyoto University Professor), Mr. Satoru Shinomiya (Lawyer), Mr. Yasuyuki Takai (Lawyer), Mr. Yoshiaki Tsuchiya (Kyôdô News Editorialist), Mr. Tateshi Higuchi (Head of Investigative Planning Division,

Not surprisingly, two interested parties not directly represented at the drafting table were the general public, that is, future lay assessors, and defendants. These voices might arguably have contributed to the vetting process through a series of regional public hearings on the proposed introduction of a lay assessor system in Osaka, Fukuoka, Tokyo, and Sapporo. However, commentators at the meetings were limited to a handful of representatives, from whom a total of over 40% preferred an active jury system.²⁴ Written submissions were also taken totalling 916 submissions, though 50 of these were group statements.²⁵ The groups present at the public hearings ranged from issue-specific committees such as the Committee Against the Lay Assessor System (*Saiban-in seido ni hantai suru kai*) and the Citizens Committee for Creation of a Lay Assessor System (*Shimin no saiban-in seido tsukurô kai*); to traditional voices such as historical consumer advocacy groups like the Housewives League (*Shufu rengô-kai*) and the National Consumers Federation (*Zenkoku shôhi-sha dantai renraku-kai*); and other common submitters such as the Japanese Trade Union Confederation (*Nihon rôdô kumiai sô-rengô-kai*), Japanese Newspaper Association (*Nihon shinbun kyôkai henshû i'in-kai*), and Buraku Liberation League (*Buraku kaihô dômei chûô honbu*).²⁶ However, the overwhelmingly dominant and already represented group was the legal profession, namely lawyers with ten local bar associations and another seven legal professional groups making submissions.²⁷

The conflicting positions of the stakeholders left the framing at an impasse in late 2003. With concern that a bill had to be submitted before the sunset provision for the Reform Office took effect,²⁸ Professor Inoue circulated the above mentioned compromise proposal. This proposition largely sought to find the middle ground between the liberal and conservative positions, rather than advocate for one side or the other based on the merits of the idea or the strength of support for it.

Criminal Affairs Bureau, National Police Agency), Professor Tokio Hiraragi (Keiô University Professor) and Mr. Morihiro Honda (Chief Public Prosecutor, Miyazaki Public Prosecutors' Office).

23 INVESTIGATION COMMITTEE, *Saiban-in seido ni tsuite* [Concerning the Lay Assessor System] (March 11 2003), at <<http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai13/13siryou1.pdf>> 1(1)(a)(A an).

24 GOTÔ / SHINOMIYA / NISHIMURA / KUDÔ, *supra* note 18, 3.

25 *Ibid.*

26 INVESTIGATION COMMITTEE, *Saiban-in seido, keiji saiban no jûjitsu/jinsoku-ka oyobi kensatsu shinsa-kai seido ni kan suru iken boshû no kekka gaiyô* [Summary of results from an opinion survey in relation to the lay assessor system, the enhancement and acceleration of criminal justice and the prosecutorial investigation committee system] (18 November 2003), at <<http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai31/31siryou4.pdf>>.

27 *Ibid.*

28 The Reform Office law was passed with an automatic termination date of 31 December 2004, see *Shihô seido kaikaku suishin-hô* [Judicial Reform Promotion Act], Law No. 119/2001, Art. 16.

C. *The Final Verdict: The Liberal Democratic Party, New Komeito, and the Democrats*

In early 2004 the drafting group passed the matter to the political parties and politicians to resolve, having failed to reach a solution. The political parties had been looking at the issue simultaneously with the drafting group. The Liberal Democratic Party (*Jiyū minshu-tō* or LDP) was advocating a conservative model, similar to that endorsed by the Ministry of Justice and Supreme Court, of three professional judges and four lay assessors.²⁹ New Komeito (*Kōmeitō*) was promoting a moderate model of two judges and seven lay assessors.³⁰ The Democrats (*Minshu-tō*) were lobbying for a liberal model of one judge and ten lay assessors, much like that advocated by the private lawyers.³¹

Eventually on 26 January 2004, the Coalition government parties – the LDP and New Komeito – announced a compromise position of three judges and six lay assessors for cases in controversy and one judge and four lay assessors for cases where there was nothing in dispute.³² The drafting group immediately incorporated this model into its proposed bill. The Cabinet endorsed the proposed bill on 2 March and it was introduced into the Lower House on 16 March.³³ The Lower House approved it unanimously without debate on 23 April and it was endorsed by the Upper House by a vote of 180 to 2 on 21 May.³⁴ It was officially proclaimed on 28 May 2005.³⁵

Importantly, the enacted law provides that it will “be enforced from a date prescribed by Cabinet Order within a period not to exceed five years”.³⁶ That is, the *saiban-in* system will take effect sometime before the end of May 2009. Interestingly, the old jury act also involved a five year preparatory period before its commencement,³⁷ but this amount of lead time is unprecedented in the post-war era. The law also requires the government and Supreme Court to undertake measures during this build-up period (1) to make the new system operate smoothly within the existing framework and (2) to explain the duties of lay assessors to the public and encourage the people to affirmatively undertake this new duty.³⁸ In other words, the Supreme Court is charged with drafting Court Rules necessary to regulate lay assessor trial procedures and

29 GOTÔ / SHINOMIYA / NISHIMURA / KUDÔ, *supra* note 18, 9.

30 *Ibid.*

31 *Ibid.*

32 “Three Judges, Six Lay Assessors Deliberation: Coalition Party Reaches Agreement on System Design”, *Asahi Shinbun*, 27 January 2004; “Lay Judges Accord a Compromise”, *Yomiuri Shinbun*, 28 January 2004.

33 Japan’s Cabinet Approves Overhaul of Judiciary, in: Agence France Presse, 2 March 2004.

34 See *Kokkai kaigi-roku kensaku shisutemu* [Diet minutes search system], (23 April 2004, 21 May 2004), at <<http://kokkai.ndl.go.jp>>.

35 See Lay Assessor Act, *supra* note 10.

36 Lay Assessor Act, *supra* note 10, Supplementary Provisions, Art. 1 [Enforcement Date].

37 ANDERSON / NOLAN, *supra* note 2, 962.

38 Lay Assessor Act, *supra* note 10, Supplementary Provisions, Arts. 2 [Pre-Enforcement Measures] and 3 [Environmental Adjustments].

deliberations within the existing judicial framework. And, the government is charged with trying to promote the new system among the people.

III. THE LAY ASSESSOR ACT: A SUMMARY

Before considering the interim activities required under the law, the next section introduces the basic elements of the enacted Lay Assessor Act. The law has been translated elsewhere³⁹ and as already noted much is left to the yet-to-be-drafted Supreme Court Rules; therefore, this description is brief but uses the historical lessons noted above as a point of reference.

A. *Cases Heard by Lay Assessors*

The Lay Assessor Act sets out the subject cases for mixed panels in Article 2. Namely, two general categories of serious crimes are covered: those punishable by death or imprisonment for an indefinite period or with hard labour,⁴⁰ and those in which the victim has died due to an intentional criminal act.⁴¹ The law does not provide the defendant with the right to waive a lay assessor panel.⁴² The Act grants discretion to the Court, however, to determine that despite qualifying as a *saiban-in* panel case a matter might nonetheless be heard by a judicial panel.⁴³ This discretion is to be exercised upon application by the prosecutor, defendant, defence counsel or *sua sponte*⁴⁴ and is not to be exercised by a judge who has participated in the initial hearing of the case.⁴⁵ When asked, the various stakeholders suggest that the judges will be extremely hesitant to grant these requests for fear of undermining the system. When a defendant is charged with crimes both within the *saiban-in* gamut and outside it, the matters may be heard

39 See ANDERSON / SAINT, *supra* note 1.

40 Lay Assessor Act, *supra* note 10, Art. 2(i) [Subject Cases and Composition of a Judicial Panel]. The law covers cases listed in Art. 26(2)(ii) of the Courts Act, namely crimes punishable by death, indefinite imprisonment, penalties of minimum of one year imprisonment and above, hard labour. For example, this would cover murder, arson of an inhabited structure, destruction by explosives, etc. See Penal Code [*Keihō*], Law No. 45/1907, Arts. 199, 108, 117.

41 For example, this would cover inflicting bodily harm resulting in death, dangerous driving resulting in death, robbery or assault resulting in death. See S. SHINOMIYA / T. NISHIMURA / M. KUDŌ, *Moshimo saiban-in ni erabaretara: Saiban-in Handobukku* [What if you were chosen to be a Lay Assessor: The Lay Assessor Handbook] (Tokyo 2005) 30.

42 This is a crucial distinction from the pre-war jury system where it is argued that that system was undermined by the vast majority of defendants currying the favour of the court by exercising their right to waive a jury. See ANDERSON / NOLAN, *supra* note 2, 963.

43 Lay Assessor Act, *supra* note 10, Art. 3(1) [Exceptions from the Subject Cases].

44 *Ibid.*

45 *Ibid.*, Art. 3(2) [Exceptions from the Subject Cases].

together by a *saiban-in* panel.⁴⁶ Thus, lay assessors will occasionally be asked to rule on matters outside the strict definition of applicable crimes.

Based on the definition of crimes justiciable by *saiban-in* and 2004 figures, the Ministry of Justice is expecting 3,308 cases a year.⁴⁷ For comparison, in 1999 Australian courts heard approximately 889 jury trials⁴⁸ while U.S. federal court juries entertained approximately 3,000 criminal trials.⁴⁹ Thus, this definition likely means that the historical problem of marginalisation seen in past Japanese lay systems such as the old jury system and the Prosecutorial Review Commissions (*Kensatsu shinsa-kai*)⁵⁰ has been avoided. However, prosecutorial discretion regarding the flow of bringing applicable cases to trial before a *saiban-in* panel will be essential.

B. Selection of Lay Assessors

Lay assessors are to be randomly selected from those listed on electoral rolls within the municipal jurisdictional divisions.⁵¹ Therefore, the single positive criterion for lay assessors is eligibility to vote in Diet elections – *i.e.*, they must be at least 20 years of age.⁵² This definition of eligible lay assessors also means that permanent residents in Japan, including the large minorities of Korean and Chinese descendents will not be eligible to serve.⁵³ From those eligible, a number of people are excluded. First, those who have not completed compulsory education through Year 9; those who have been subject to imprisonment; and those who would be significantly burdened in their execution of lay assessor duties are not qualified.⁵⁴ Second, to avoid the historical capture problem seen in selection of summary court judges,⁵⁵ almost all lawyers, so-called

46 *Ibid.*, Art. 4 [Handling of Concurrently Pled Cases]. In addition, if the prosecutors change the charges to a non-*saiban-in* offence after a *saiban-in* panel is underway, the lay assessor panel, at the court's discretion, may still determine the issue. *Ibid.* Art. 5 [Handling of Cases Following Changes in the Criminal Charges].

47 See SUPREME COURT, *Saiban-in seido no taishô to naru jiken* [Subject cases of the Lay Assessor System], at <<http://www.saibanin.courts.go.jp/introduction/event.html>>, at 2 April 2006.

48 Based on 1999 data, D. BROWN et al., *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Sydney 2001) 259.

49 M. GALANTER, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, Working Paper for the American Bar Association Section of Litigation Symposium on the Vanishing Trial (2003) 50.

50 See ANDERSON / NOLAN, *supra* note 2, 965.

51 Lay Assessor Act, *supra* note 10, Arts. 20 [Notice and Allocation of the Number of Lay Assessor Candidates]; 21 [Preparation of the Proposed List of Lay Assessor Candidates].

52 *Kôshoku senkyo-hô* [Public Election Act], Law No. 100/1950, Art. 9.

53 See M. ITO, *Lay Judgment in Practice*, in: *The Japan Times*, 27 February 2005, at <<http://search.japantimes.co.jp/print/features/life2005/fl20050227x2.htm>>.

54 Lay Assessor Act, *supra* note 10, Art. 14 [Reasons for Disqualification].

55 See ANDERSON / NOLAN, *supra* note 2, 967.

quasi-lawyers, and politicians are excluded from service.⁵⁶ Third, people aged 70 years or older, currently enrolled students, and people who have served as a lay assessor or the like in the past five years are free to decline service.⁵⁷

The court also will apply two flexible exclusions to exempt individuals from service. First, the court has a broad discretion to disqualify persons whom it deems might not be able to act fairly in a trial.⁵⁸ Second and more likely to be used affirmatively, the court may excuse a person on the basis of serious illness or injury; family childcare or nursing commitments; important work obligations; or unavoidable social obligations such as attendance at a parent's funeral. The open-ended nature of this exemption raises concerns of *saiban-in* panels taking on a less representative nature if many exemptions are granted, as has been seen in the United States.⁵⁹ Court officials, however, assure that the exception will be used sparingly.

The Act also contains a limited U.S.-style *voir dire* procedure.⁶⁰ This procedure enables the prosecutor, defendant, or defence counsel to request that the court dismiss a lay assessor. The request may be made on procedural grounds such as the lay assessor failing to respond or responding falsely to the selection questions; failing to take the oath; or failing to attend the trial or deliberations.⁶¹ It may also be made on more substantive grounds, namely failing to state an opinion during deliberations or in cases where there is a fear that the lay assessor would conduct the trial unfairly. The substantive category of requests raises certain concerns. Given that deliberations are to be conducted in secret,⁶² a request for dismissal on the basis of failing to express an opinion would arguably be futile for the prosecutor, defendant, or defence counsel who could not know whether any given lay assessor had expressed an opinion or not. Furthermore, the allowance of requests for dismissal based on fears that a lay assessor would conduct a trial unfairly is a very broad category, depending on the creativity of the requesting counsel. For example, will the requesting party need to adduce 'real evidence' to support its request or will mere assertion or some middle ground be sufficient? Without parameters set down in the Supreme Court rules, this ground for dismissal could result in American-style 'jury stacking' threatening the credibility of the system.

Effectively, all parties involved in the new lay assessor system will be able, in some way, to influence the composition of the lay assessor panel: Lay assessor candidates by resorting to exemptions from service; judges by exercising their discretion to disqualify

56 Lay Assessor Act, *supra* note 10, Art. 15.

57 *Ibid.*, Art. 16 [Reasons to Decline].

58 It is not fully clear what would satisfy this test, but it is assumed that this is related to individuals with strong personal beliefs that would preclude them from being objective.

59 See, e.g., J. ABRAMSON, *We, the Jury* (New York 1994) Chapter 3 (discussing problems of lack of representativeness in United States lay participation).

60 *Ibid.*, Art. 41 [Dismissal of Lay Assessors upon Request].

61 *Ibid.*, Arts. 41(viii), (i), (ii).

62 *Ibid.*, Art. 70 [Deliberation Secrecy].

candidates; and defendants and prosecutors by way of the voir dire procedure. How these procedures will be applied in practice and who will clear the gauntlet for lay assessor empanelment, will only become clear once the system is put into practice.

C. *Composition of Mixed Panels*

The Lay Assessor Act provides for either panels of three judges and six lay assessors, or panels of one judge and four lay assessors.⁶³ The full panels are supposed to be the default option, while the smaller panels are to be used where the facts at trial as established by the evidence and the issues identified by pre-trial procedure are undisputed.⁶⁴ Given the historical concerns of marginalisation and the 92% rate of confessions in Japan,⁶⁵ it will be crucial to see if prosecutors, defendants, and defence counsel will seek the smaller panels. When questioned, various stakeholders suggest that the courts will not freely grant requests for the smaller panels. Given the clearance-rate efficiency concerns that plague most courts in Japan,⁶⁶ it will be somewhat surprising if this is indeed the case.

D. *Powers and Duties of Lay Assessors*

The Act stipulates that judges and lay assessors are to reach a verdict on the basis of recognition of the facts of the case and application of relevant laws and ordinances, and then sentence accordingly.⁶⁷ However, only the empanelled judges are to interpret the law and make decisions on litigation procedure, though uniquely lay assessors may comment on such issues.⁶⁸ Also distinctive is that lay assessors may question witnesses,⁶⁹ victims,⁷⁰ and the defendant.⁷¹

E. *Method of Deciding Verdicts*

Some of the most interesting questions about how the lay assessor system will operate in practice are not addressed by the law itself. For example, one of the major criticisms of a mixed court proposal in Japan was that it would lead to undue deference by lay participants to professional judges during deliberations.⁷² Thus, the structure, rules, and

63 *Ibid.*, Art. 2(2) [Subject Cases and Composition of a Judicial Panel].

64 *Ibid.*, Art. 2(3) [Subject Cases and Composition of a Judicial Panel].

65 JOHNSON, *supra* note 6, 75.

66 See, e.g., J.M. RAMSEYER / E.B. RASMUSEN, *Measuring Judicial Independence: The Political Economy of Judging in Japan* (Chicago 2003) 76 note 13.

67 Lay Assessor Act, *supra* note 10, Art. 6(1) [Powers of Judges and Lay Assessors].

68 *Ibid.*, Art. 6(2) [Powers of Judges and Lay Assessors].

69 *Ibid.*, Arts. 56 [Questioning of Witnesses], 57 [Witness Questioning Outside the Court].

70 *Ibid.*, Art. 58 [Questioning of Victims].

71 *Ibid.*, Art. 59 [Questioning of the Defendant].

72 See, e.g., KISS, *supra* note 12; R.M. BLOOM, *Jury Trials in Japan* (2005), available at

procedure for deliberation among the judges and lay participants would seem to be overwhelmingly important in creating a positive deliberation dynamic. Nevertheless, the law is silent on the issue and it is still unclear how detailed the Supreme Court Rules will be.

The one area in which the law is clear on deliberation proceedings is relating to the majority formula for determining verdict. The traditional concept of unanimous consent has been abandoned in the new Japanese system, and a complex formula based on a simple majority has taken its place. Article 67 stipulates, in the most convoluted way, that decisions are to be on the basis of a majority opinion of the members of the panel, including both a judge and a lay assessor holding that opinion. This does create the situation in small *saiban-in* panels that the professional judge holds a veto. However, because matters referred to the small panel will likely only cover cases where there is nothing in controversy, this is not expected to be problematic. For decisions regarding sentencing, in the event that a majority cannot be reached, the opinions in favour of the harshest sentence are to be added to those for the next harshest option, until the requisite majority is attained.⁷³ Needless to say, who and what determines which option is the harshest sentence and how the votes are counted is a crucial issue that awaits clarification.

F. *Protections and Penalties*

Lay assessors are granted specific protection under Chapter 5 of the Act from things such as adverse treatment in their employment due to service,⁷⁴ disclosure of information about them individually,⁷⁵ and being contacted about the trial by outsiders.⁷⁶ Further protecting the lay assessors, the Act provides criminal penalties against those who solicit,⁷⁷ threaten,⁷⁸ or leak information about lay assessors.⁷⁹ On the other hand, lay assessors themselves may be held criminally liable for leaking secrets,⁸⁰ making false statements during voir dire or otherwise,⁸¹ or failing to appear at trial.⁸² Researchers and mass media outlets are particularly concerned regarding how strictly these rules will be interpreted.

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=688185.

73 Lay Assessor Act, *supra* note 10, Art. 67(2) [Verdict].

74 *Ibid.*, Art. 71 [Prohibition of Adverse Treatment].

75 *Ibid.*, Art. 72 [Treatment of Information that is Sufficient to Identify Lay Assessors].

76 *Ibid.*, Art. 73 [Regulating Contact with Lay Assessors].

77 *Ibid.*, Art. 77 [Crime of Soliciting Lay Assessors].

78 *Ibid.*, Art. 78 [Crimes of Threatening Lay Assessors].

79 *Ibid.*, Art. 80 [Crimes of Leaking Lay Assessors' Identity].

80 *Ibid.*, Art. 79 [Crimes of Lay Assessors Leaking Secrets].

81 *Ibid.*, Art. 82 [Penalties for Fraudulent Statements by Lay Assessor Candidates].

82 *Ibid.*, Art. 83 [Penalties for Non-Appearance by Lay Assessor Candidates].

IV. THE DEVIL IS IN THE DETAILS – DRAFTING THE COURT RULES

As noted already, the Supreme Court Rules have yet to be drafted. Obviously, what these rules provide will be hugely important in understanding how the system will operate on a day-to-day basis. In this part we raise potential areas of interest in the pending Supreme Court Rules, but do not speculate on the likely contents of the rules.

In light of the historical concerns about marginalisation of lay participation, the rules governing the discretion of judges to determine when subject cases should be heard by a full *saiban-in* panel, the smaller *saiban-in* panel, or a professional bench will be immensely important. This is especially true given Japan's 92% confession rate.⁸³ In light of that, it is foreseeable that the vast majority of cases might be directed to the abbreviated panel, specifically created to handle matters where nothing is in controversy. However, in conversations with individuals in the Ministry of Justice, Supreme Court, and the private bar, all say that even where there is a confession and the defence and prosecutors agree to send the matter to the smaller panel; to ensure the democratic ideals of the new system, the courts will exercise their discretion to deny reference of serious matters such as murder to the abbreviated procedure in favour of having them heard by a full panel.

In response to the historical concerns about capture, the rules that allow the courts to tailor who exactly will be the members of the panel will be crucial. First, it is important to note that institutionally much of this problem has been avoided in the Act itself by the long list of quasi-lawyers excluded from service.⁸⁴ Nevertheless, the courts' approach – guided by the Supreme Court Rules – to the various exclusionary rules will be critical. For example, there are two flexible options that appear to allow exemptions for people allegedly too busy to serve.⁸⁵ Similarly, the courts will indirectly be able to mould the panel depending upon what questions it demands answered in the lay assessor questionnaire⁸⁶ and how it runs *voir dire*.⁸⁷ Any of these means, if over-used, will rob the procedure of 'representativeness', as seen in the US,⁸⁸ and allow capture by the dominant professional judges.

Finally and again with concerns of capture in mind, the most important rules will be those that guide judges in how to approach facilitating deliberations among the lay assessors and professional judges. Unless these discussions are carefully managed, the professional judges may capture the procedure by dominating the lay assessors through their knowledge of the law and familiarity with procedure.⁸⁹ There are obviously many

83 JOHNSON, *supra* note 6, 75.

84 Lay Assessor Act, *supra* note 10, Art. 15 [Reasons Prohibiting Undertaking the Position].

85 *Ibid.*, Arts. 15 [Reasons Prohibiting Undertaking the Position], 16 [Reasons to Decline].

86 *Ibid.*, Art. 30(4) [Questionnaires].

87 *Ibid.*, Art. 34 [Questions for Lay Assessor Candidates].

88 See, e.g., ABRAMSON, *supra* note 59.

89 See ANDERSON / NOLAN, *supra* note 2, 984-85.

other considerations to be had in relation to the cultural and socio-economic dynamics of the deliberation room, making this one of the most vital areas to monitor in the drafting of the Rules.

The more immediate importance of the yet-to-be-drafted Supreme Court Rules relates to the implementation period, or five years' grace, provided for in the Act.⁹⁰ Only once the roles and responsibilities of each of the parties involved in a lay assessor trial are clearly defined in the Rules can the government and Supreme Court truly discharge their duty of explaining the new system and making realistic procedural and logistical plans. The following section examines the implementation measures that have been put in place thus far and the general response to the introduction of the Lay Assessor System.

V. IMPLEMENTATION

The Ministry of Justice, Supreme Court, and JFBA, both collectively and individually, have undertaken extensive publicity activities promoting the new *saiban-in* system through a range of mediums. In this part we outline some of the activities, from the banal to the bizarre, that have been conducted to date.

A. *Mandate and Infrastructure:*

The Act's Supplementary Provisions and the Promotions Office

As noted above, the Lay Assessor Act requires the government and Supreme Court to explain and promote the lay assessor system.⁹¹ The Act even mandates the Japanese people to participate actively in this educational phase and ensure the system's smooth operation.⁹² To this end, on 3 August 2004, the Lay Assessor Promotions Office ('Promotions Office', *Saiban-in seido kôhō suishin kyôgi-kai*) was created as a joint-venture among the Ministry of Justice, Supreme Court, and JFBA. The aim of the Promotions Office, staffed by nine lawyers from the Ministry of Justice, is to plan public relations activities focused on the dissemination of information about the *saiban-in seido*.⁹³ Activities proposed at the time the office was created included filming a public relations motivated television drama, conducting mock trials in various regions, and making promotional posters representing each of the three parties comprising the legal profession in Japan.⁹⁴

90 *Ibid.*, Supplementary Provisions, Art. 1 [Enforcement Date].

91 *Ibid.*, Supplementary Provisions, Art. 2 [[Pre-enforcement Measures].

92 *Ibid.*, Supplementary Provisions, Art. 3 [Environmental Adjustments]. As an aside, it is interesting to query the enforceability of what must be a hortatory provision.

93 CHIEKO NÔNO, Minister of Justice (Transcript, Press Conference after the Ministerial Cabinet Meeting, 5 August 2004), at <<http://www.moj.go.jp/SPEECH/POINT/sp040805-01.html>>.

94 *Ibid.*

B. Investigation: Public Opinion Surveys

The Promotions Office, staffed by lawyers rather than public relations or marketing professionals, has come up with a variety of ways to get the Japanese people to embrace the system. Firstly, the office conducted public opinion surveys to gauge the public awareness of and attitude towards the new system.⁹⁵ From the results, the first goal of publicising the new process has been successful with a Cabinet Office survey showing that over 70% of citizens know that a system of lay participation in criminal trials has been introduced in Japan.⁹⁶ The second goal of getting the public to affirmatively embrace their civic duty as lay assessors has been more difficult. The same survey resulted in 70% of people indicating that they do not want to serve on a lay assessor panel.⁹⁷ The figures were slightly higher for females (75%) than for males (64%). The reasons behind this reluctance to participate included a perception of difficulty in judging someone guilty or innocent, and not wanting to judge people at all.⁹⁸ A more recent survey conducted by the Supreme Court revealed that those who were caring for children or elderly family members were particularly reluctant to serve as lay assessors.⁹⁹

C. Consultation: Town Meetings

In response to the negative results of these surveys, the Promotions Office held Town Meetings on the Justice System Reforms in general, but particularly concerning the promotion of the *saiban-in seido*. To date, meetings have been held in Tokyo,¹⁰⁰ Takamatsu,¹⁰¹ Utsunomiya,¹⁰² Kanazawa,¹⁰³ Naha¹⁰⁴ and Miyazaki.¹⁰⁵

95 See, e.g., GOVERNMENT PUBLICATIONS OFFICE, DEPARTMENT OF THE MINISTER FOR THE CABINET OFFICE, *Saiban-in seido ni kan suru yoron chōsa* [Public opinion poll in relation to the Lay Assessor System] (February 2005), at <<http://www8.cao.go.jp/survey/h16/h16-saiban/>>.

96 *Ibid.*, Part 2, Question 2: Knowledge of the Lay Assessor System.

97 *Ibid.*, Part 2, Question 5: Awareness of Participation in Criminal Trials under the Lay Assessor System.

98 “70% don’t want to serve on juries in new system”, *The Japan Times*, 17 April 2005, at <<http://search.japantimes.co.jp/print/news/nn04-2005/nn20050417a3.htm>>.

99 “Caregivers reluctant to be lay judges”, *The Daily Yomiuri*, *The Yomiuri Shinbun*, 23 March 2006, at <<http://www.yomiuri.co.jp/dy/national/20060323TDY02002.htm>>.

100 KOIZUMI CABINET, *Shihō seido kaikaku: Taun mîtingu in Tôkyô* [Justice System Reform: Town Meeting in Tokyo] (18 December 2004), at <<http://www8.cao.go.jp/town/tokyo/161218/index.html>>. The Minister of Justice Chieko Nôno, Chairman of the Justice Reform Promotions Office Advisory Council Kôji Satô, and lawyer Hiroko Sumita presided over the meeting.

101 KOIZUMI CABINET, *Shihō seido kaikaku: Taun mîtingu in Takamatsu* [Justice System Reform: Town Meeting in Takamatsu] (15 January 2005), at <<http://www8.cao.go.jp/town/takamatsu170115/index.html>>. The Minister of Justice Chieko Nôno, Chairman of the

The public present expressed diverse opinions which might be summarized as follows:

- (1) Criticisms of the system as unnecessary, inappropriate in modern Japan, and as a premature reform;
- (2) Concerns about the system in terms of the risk of mistakes, prejudice, bias, lack of specialist knowledge on the part of lay assessors, appropriateness of random selection of lay assessors, risk of negative effects similar to the American jury system, lack of support for the system, participation as a lay assessor in trials in small communities where everybody knows everybody, participation in trials for murder and other heinous crimes, handing down the death penalty, and the apathy of the younger generation;
- (3) Administrative questions about measures in place for appeals, sentencing guidelines, scope of trials that will come under the lay assessor system, education about the system, facilities for carers and the disabled, measures in place to prevent adverse treatment to employees called to serve as lay assessors, protection of lay assessors, counselling support for lay assessors, and penalties for leaking secrets.¹⁰⁶

Justice Reform Promotions Office Advisory Council Kôji Satô, and lawyer Hiroko Sumita presided over the meeting.

- 102 KOIZUMI CABINET, *Shihô seido kaikaku: Taun mîtingu in Utsunomiya* [Justice System Reform: Town Meeting in Utsunomiya] (17 April 2005), at <<http://www8.cao.go.jp/town/utsunomiya170417/index.html>>. The Minister of Justice Chieko Nôno, the Chairman of the Justice Reform Promotions Office Advisory Council Kôji Satô, and Waseda University Professor and lawyer Satoru Shinomiya presided over the meeting.
- 103 KOIZUMI CABINET, *Shihô seido kaikaku: Town Meeting in Kanazawa* [Justice System Reform: Town Meeting in Kanazawa] (25 June 2005), at <<http://www8.cao.go.jp/town/kanazawa170625/index.html>>. The Minister of Justice Chieko Nôno, Chairman of the Justice Reform Promotions Office Criminal Investigation Council Masahito Inoue, and Waseda University Professor and lawyer Satoru Shinomiya presided over the meeting.
- 104 KOIZUMI CABINET, *Shihô seido kaikaku: Taun mîtingu in Naha* [Justice System Reform: Town Meeting in Naha] (23 October 2005), at <<http://www8.cao.go.jp/town/naha171023/index.html>>. The Minister of Justice Chieko Nôno, Chairman of the Justice Reform Promotions Office Criminal Investigation Council Masahito Inoue, and Waseda University Professor and lawyer Satoru Shinomiya presided over the meeting.
- 105 KOIZUMI CABINET, *Shihô seido kaikaku: Taun mîtingu in Miyazaki* [Justice System Reform: Town Meeting in Miyazaki] (25 March 2006), at <<http://www8.cao.go.jp/town/miyazaki180325/index.html>>. The Minister of Justice Seiken Sugiura, Member of the Justice Reform Promotions Office Criminal Investigation Council and Professor at the Graduate School of Law at Keiô University Tokyo Hiraragi, and Committee Member of the Ministry of Justice Educational Development Council and Assistant City Editor for the Kyôdô News Yumiko Iida presided over the meeting.
- 106 See Town Meeting Minutes, *supra* notes 100-105.

D. Promotion and Information Dissemination

(a) Websites

Within their domains, the Ministry of Justice,¹⁰⁷ Supreme Court,¹⁰⁸ and JFBA¹⁰⁹ have each established interlinked websites on the *saiban-in* system. These are regularly updated and provide information about future events along with an online registration system for those interested in period updates. The sites cover topics such as the Ministry of Justice's "You too will be a lay assessor",¹¹⁰ the Supreme Court's "Saiban-in System Q&A",¹¹¹ and the JFBA's "Starting by 2009! The Lay Assessor System".¹¹² The Prime Minister's Office as well has created a "Kid's Room" explaining the system to children¹¹³ and an interactive manga-cartoon explaining the process from being called as a lay assessor candidate through to verdict.¹¹⁴ In short, if one is interested in the new system and has internet access, more than enough information is readily available.

(b) Newsletters, posters and flyers

The interested parties are also producing general newsletters, posters and flyers. For example, the Ministry of Justice, Supreme Court, and JFBA are co-producing in both English and Japanese posters, a newsletter, "Saiban-in News", and an informative booklet, "Start of the Saiban-in System: By May 2009".¹¹⁵

To provide some marketing gloss to these otherwise dry informational circulars, a catch phrase contest was run and a sophisticated logo designed. The Promotions Office revealed the logo on 29 June 2005, and it has already been incorporated into posters,

107 MINISTRY OF JUSTICE, *Anata mo Saiban-in!!* [You too will be a lay assessor!!], at <<http://www.moj.go.jp/SAIBANIN/>>, at 2 April 2006.

108 SUPREME COURT, *Saiban-in Seido* [The Lay Assessor System], at <<http://www.saibanin.courts.go.jp/>>, at 2 April 2006.

109 JAPAN FEDERATION OF BAR ASSOCIATIONS, *Saiban-in Seido* [The Lay Assessor System], at <http://www.nichibenren.or.jp/ja/citizen_judge/index.html>, at 2 April 2006.

110 See MINISTRY OF JUSTICE, *supra* note 107.

111 SUPREME COURT, *Saiban-in Seido Q&A*, at <<http://www.saibanin.courts.go.jp/qa/>>, at 2 April 2006.

112 JAPAN FEDERATION OF BAR ASSOCIATIONS, *2009nen made ni sutaato! Saiban-in seido* [Starting by 2009! The Lay Assessor System], at <<http://www.nichibenren.or.jp/jp/katsudo/shihokai/kadai/saibaninseido/index.html>>, at 2 April 2006.

113 OFFICE OF THE PRIME MINISTER OF JAPAN, *Kidzu Rûmu*, at <http://www.kantei.go.jp/jp/kids/magazine/0407/6_0_index.html>, at 2 April 2006.

114 *Shiritai! Manabitai! Saiban-in seido* [I want to know! I want to learn! The Lay Assessor System], at <http://www.gov-online.go.jp/movie/mv_group/saibaninseido.html>, at 2 April 2006.

115 See, e.g., JAPAN FEDERATION OF BAR ASSOCIATIONS, *Saiban-in Nyûsu*, Volume 1 (1 March 2005), at <http://www.nichibenren.or.jp/ja/citizen_judge/data/1.pdf>; Volume 2 (1 June 2005), at <http://www.nichibenren.or.jp/ja/citizen_judge/data/2.pdf>; Volume 3 (1 December 2005), at <http://www.nichibenren.or.jp/ja/citizen_judge/data/3_000.pdf>.

pamphlets, and even the business cards of most judges and prosecutors. The logo design involves two circles, representing the judges and lay assessors. The circles are linked to portray the co-operative approach to justice that is to be taken under the new system. The circles are also in the shape of the infinity symbol (∞), representing the immeasurable results to be gained from co-operation between judges, the legal masters, and *saiban-in*, the representatives of the people. They are also in the shape of an ‘S’ for ‘*Saiban-in*’. The colours chosen were friendly pastels: the red-coloured circle symbolises liveliness and enthusiasm, while the blue-coloured circle signifies level-headed judgment. Neither colour is assigned to the judges or lay assessors specifically.¹¹⁶



Figure 1: Logo for the Lay Assessor System ¹¹⁷

The Promotions Office announced the winning catch phrase on 1 September 2005. From 16,000 entries, the winning phrase was “*Watashi no shiten, watashi no kankaku, watashi no kotoba de sanko shimasu*” (I will participate through my own observations, my own perceptions, and my own words), submitted by Hitomi Fujita from Tottori Prefecture.¹¹⁸

116 SUPREME COURT, *Shinboru mâku no imi* [Meaning of the Logo], at <http://www.saibanin.courts.go.jp/topics/symbol_meaning.html>, at 2 April 2006.

117 SUPREME COURT, *Saiban-in seido no shinboru mâku* [Logo of the Lay Assessor System], at <<http://www.saibanin.courts.go.jp/news/symbol.html>>, at 2 April 2006.

118 SUPREME COURT, *Kyatchifurêsu*, at <<http://www.saibanin.courts.go.jp/topics/catchphrase.html>>, at 2 April 2006.

The logo and winning catch phrase have been combined in a much stylised publicity campaign featuring actress and model Kyôko Hasekawa who has become the face of the *saiban-in seido*. The campaign is widely seen around Japan in all courts, government buildings, train and subway stations, and glossy magazines. It remains completely unclear why Hasekawa, in particular, was chosen for the role, having no specific ties or stated interest in the introduction of the new lay assessor system.¹¹⁹



Figure 2: Catchphrase *saiban-in* promotion poster ¹²⁰

A second, more traditional ad campaign using a *haiku*-like phrase is also widespread though not as pervasive as the Hasekawa one. In the traditional poster, Japanese calligraphy asks “*Sono toki, jibun naraba, dôsuru*” (At that time, if it’s you, what will you do?).

119 Somewhat frivolously but also seriously to a degree, we conducted an informal survey of colleagues who could not read Japanese regarding what they thought the Hasekawa advertisement was selling. None of the answers were even closely related; they included: constipation medicine, feminine hygiene products, high technology, and most frequently hair products.

120 See SUPREME COURT, *supra* note 108, at 1 March 2006.

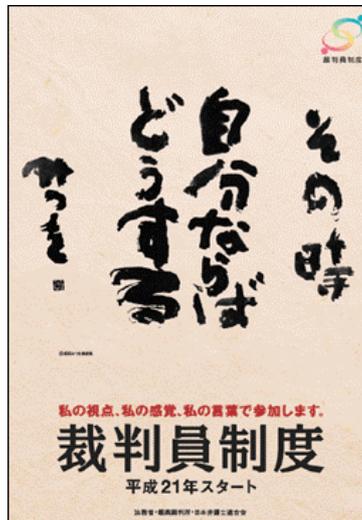


Figure 3: *Haiku-like saiban-in* promotion poster with catchphrase ¹²¹

(c) *Television and video programs*

In the realm of visual media, a plethora of organisations have sponsored various videos and television programmes about the new system. The national broadcaster NHK produced a television drama and discussion show, “*Anata wa hito wo sabakemasu ka?*” (Can you judge people?), shown in two parts on 12 and 13 February 2005 at 9.00-10.14 pm.¹²² Despite the prime time viewing slot, the program failed to make the top-ten rankings as a news, drama, education, or information show for that week.¹²³ There have also been segments on regional television about the *saiban-in seido* such as a “*Nyûsu no hatena*”, broadcast in the Nagano area on 29 November 2004 about mock trials run at a local junior high schools.¹²⁴ Another children’s show, “*Nattoku teishoku*”

121 See MINISTRY OF JUSTICE, *supra* note 107, at 1 March 2006.

122 *Anata wa hito wo sabakemasuka?* [Can you judge people?] (12 February 2005), at <<http://www.nhk.or.jp/special/libraly/05/10002/10212.html>>.

123 VIDEO RESEARCH LTD., *Shumoku-betsu kô-seitai shichô-ritsu bangumi 10* [Top-10 household viewed programs by category] (7-13 February 2005), at <<http://www.videor.co.jp/data/ratedata/backnum/2005/vol7.htm>>.

124 *Ibuningu Shinshû, Nyûsu no hatena* [News Topics] (29 November 2004), at <<http://www.nhk.or.jp/nagano/eve/hatena/041129.html>>.

of NHK's Children's News joined the bandwagon creating "*Saiban-in tte nani?*" (What is a Lay Assessor?),¹²⁵ which compared the new lay assessor system with the American jury system (against the background of the Michael Jackson trial).¹²⁶ In response to all of the exposure NHK has given the new system, it conducted a viewers' poll in January 2005 which found: 5% of respondents definitely wanted to participate as a lay assessor, 26% would not mind participating, 42% said that if possible they would not participate, 23% answered that they definitely did not want to participate, and 5% was undecided regarding participation.¹²⁷ The interested parties have not left the movie production to the experts and the Ministry of Justice, Supreme Court, and JFBA have each produced their own films. The JFBA-funded DVD and video: "*Saiban-in: kimeru no wa anata*" ("Lay Assessor: You Decide") had an opening night on 15 December 2004 sponsored by Ministry of Justice and is now available for retail sale at a price of 5,250 yen.¹²⁸ The Ministry of Justice's 58-minute video "*Saiban-in seido: moshimo anata ga erabaretara*" ("The Lay Assessor System: What if you are chosen?") is unique in using both famous movie stars and former Ministry officials as actors. It appears that it is not only Hollywood that loves the video drama of a criminal court case decided by lay people.

(d) *Miscellaneous*

In addition to all of the typical PR activities, the Promotions Office has carried out various novel events. For example, at the 2004 Edo Festival the Promotions Office secured a booth where in addition to passing out information it ran a quiz contest and showed a projector presentation for the approximately 200,000 members of the public attending. The then Minister of Justice Nōno and her predecessor Minister Nozawa, dressed in a Santa Claus outfit, acted as Masters of Ceremony for the event.¹²⁹ The Promotions Office has run a variety of courses on the system to both the young (at Tokyo's Ochanomizu Junior High School for students who would be eligible as lay assessors in

125 *Nattoku Teishoku: Saiban-in tte nani?* [Understanding on the menu: What is a Lay Assessor?] (18 October 2003), at NHK Online <http://www.nhk.or.jp/kdns/_nattoku/03/1018.html>.

126 *Konshū no dai hatena: Baishin-in tte donna hito?* [The week's big topic: What sort of people are jurors?] (18 June 2004), at NHK Online <http://www.nhk.or.jp/kdns/_hatena/05/0618.html>.

127 *Keiji saiban no kaikaku to kadai: shihō seido kaikaku ni kan suru yoron chōsa kara* [Reform of criminal trials: issues from the public opinion poll in relation to justice system reform] (April 2005), at NHK Online <http://www.nhk.or.jp/bunken/book/geppo_sum05040104.html>.

128 JIKKYŌ SHUPPAN CO., LTD., *DVD Saiban-in: Kimeru no wa anata* [DVD Lay Assessor: You Decide] (15 December 2004), at <www.jikkyo.co.jp/search/detail.jsp?book_id=47905>.

129 MINISTRY OF JUSTICE, "*Edo Fesutibaru*" ni okeru saiban-in seido no PR katsudō ni tsuite [Regarding the PR activities for the lay assessor system at the Edo Festival] (13-14 November 2004), at <<http://www.moj.go.jp/SAIBANIN/saibanin01.html>>.

2009)¹³⁰ and the old (at the Satô Community Centre for senior citizens attended by the Hiroshima District Prosecutors Office).¹³¹ Finally, the Promotions Office sponsored an announcement and display about the new system at the 2005 All-Stars Baseball game in Osaka's Seibu Dome Stadium.¹³² While some of the promotions appear amateurish at best, other aspects such as the highly visible campaign with Ms Hasekawa obviously originate from a highly polished professional organization.

E. Understanding and Refinement

Beyond all of the frivolity, in preparation for the first *saiban-in* trials the triumvirate of the legal profession (Ministry of Justice, Supreme Court, and JFBA) has been sending its representatives around the world to study various lay participation systems. The Ministry of Justice and Supreme Court have also dispatched personnel to be trained in how to advocate in and conduct jury trials.¹³³

(a) Mock trials

These groups along with a number of universities, local bar associations, and general community organisations have also been sponsoring and conducting mock trials throughout the country. For example, the Osaka Bar Association conducted a large and complex mock trial on 18 May 2002 using actual lawyers, judges, and general citizens.¹³⁴ The only two remaining jury court rooms in Japan at Ritsumeikan University¹³⁵ and Tôin Yokohama University have been busy hosting a variety of mock

130 "Schools in Saiban-in Front Line", The Japan Times, 27 February 2005, at <<http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?f120050227x5.htm>>.

131 MINISTRY OF JUSTICE, "Satô Daigaku" ni okeru saiban-in seido ni tsuite no kôen [Lecture on the lay assessor system at Satô University] (18 November 2004), at <<http://www.moj.go.jp/SAIBANIN/saibanin02.html>>.

132 MINISTRY OF JUSTICE, *Puro-yakyû ôrusutâ gêmu ni okeru saiban-in seido no oshirase* [Announcement about the lay assessor system at the Pro-Baseball Allstars Game] (22-23 July 2005), at <<http://www.moj.go.jp/SAIBANIN/saibanin04.html>>.

133 For example, the Australian Network for Japanese Law (ANJeL) and ANU College of Law have hosted multiple prosecutors, judges and practitioners investigating the Australian approach to lay participation. In this regard, we would like to thank personally Rudy Monteleone, Victoria Juries Commissioner, and many other Australian judges, prosecutors, court officials, and criminal justice workers for their kind assistance in meeting with innumerable Japanese visitors.

134 OSAKA BAR ASSOCIATION, *Sanka-sha zen'in ga saiban-in/baishin-in wo mogi taiken!* [All participants have experience as a mock lay assessor/juror!] (18 May 2002), at <http://www.osakaben.or.jp/main/backnumber/01_topics/2002/20020403-1.html>.

135 KYOTO BAR ASSOCIATION, *Mogi "saiban-in" saiban kikareru* [You can attend a mock lay assessor trial], at <<http://www.kyotoben.or.jp/siritai/shihou/1.html>>, at 2 April 2006.

saiban-in exercises.¹³⁶ Waseda, Nagoya, and Okayama Universities are just three of the many law schools that have conducted mock *saiban-in* trials for its students and outsiders.¹³⁷ Even those not eligible for the new system have been getting involved with children's mock trials in the Osaka High Court and District Court,¹³⁸ along with the Ministry of Justice sponsored junior high school mock trials mentioned above.

Mock trials have been the most successful strategy in converting the public from being sceptical about the system to becoming advocates.¹³⁹ Therefore, the mock trials play an enormously important role in the run up to the implementation of the act. Unfortunately, however, in the organisers' enthusiasm to get the people excited about the system, they have not designed or implemented the mock trials in a way so that they could also serve as a valuable research experiment. The added scrutiny and design necessary to make the mock trials satisfy basic scientific scrutiny is minimal, so we hope this will be added in the future to bolster the fledging research on the new system.

(b) *Research*

In the realm of *saiban-in seido* research, the academic environment is nascent but a significant amount of work and energy is beginning to be dedicated to the issue. Criminal law academics are looking at the procedures to see if they will speed up the system;¹⁴⁰ practicing lawyers are looking at the law itself to see how it will operate;¹⁴¹ and psychology academics are looking at how the group dynamics will

136 Tôin Yokohama University Memorial Academium, at <<http://www.cc.toin.ac.jp/MA/main/index.htm>>; Tôin Yokohama University Memorial Academium, Event Calendar, at <<http://www.cc.toin.ac.jp/MA/main/ivent/ivent.htm>>, at 2 April 2006.

137 WASEDA UNIVERSITY, *Kaitei mogi saiban: Anata mo saiban-in* [Open mock trial: You too can be a saiban-in] (27 November 2005), at <<http://www.waseda.jp/law-school/topics/mogisaiban/20051027.htm>>; *Bokô no meiyô kake mogi saiban: Nagoya, Okayama no hôka dai'in-sei* [Mock lay assessor trial in battle for the honour of the alma mater: Postgraduate law students at Nagoya and Okayama Universities] (10 March 2006), at Kyôdô News <<http://headlines.yahoo.co.jp/hl?a=20060310-00000221-kyodo-soci>>.

138 OSAKA HIGH COURT, *Kodomo no mogi saiban: Saiban no shikumi wo shirô* [Children's mock trials: let's learn how a trial works] (10-11 August 2005), at <[http://courtdomino2.courts.go.jp/K_oshirase.nsf/\\$DefaultView/0D9C79B3C4A7F6FF492570A400090A90?OpenDocument](http://courtdomino2.courts.go.jp/K_oshirase.nsf/$DefaultView/0D9C79B3C4A7F6FF492570A400090A90?OpenDocument)>.

139 See, e.g., M. FUJITA, Can Japanese Citizens Play Active Roles in "Saiban-in Seido" (Japanese New Mixed Jury System)?: Survey Research with Mock Mixed Juries, poster presented at the Psychology and Law International Interdisciplinary Conference, Edinburgh, 7-12 July 2003.

140 See, e.g., OFFICE FOR THE IMPLEMENTATION OF THE LAY ASSESSOR SYSTEM, JAPAN FEDERATION OF BAR ASSOCIATIONS, *Kôhan mae seiri tetsuzuki wo ikasu – aratana tetsuzuki no moto de no bengo jitsumu* [Making the most of pre-trial arrangement procedure – defence practice under the new procedure] (Tokyo 2005).

141 See, e.g., GOTÔ / SHINOMIYA / NISHIMURA / KUDÔ, *supra* note 18.

develop.¹⁴² Furthermore, Japanese academics are showing interest in foreign jury and mixed court systems and how they approach similar problems. The untrampled ground will make this area a fertile research field for many years to come.

VI. CONCLUSIONS, OR WHERE TO NEXT?

So where does that leave us writing in 2006, less than three years from implementation of the *saiban-in seido*? The publicity and emerging research is interesting and important, but the next watershed event will be the release of the draft Supreme Court Rules. An internal document of the Supreme Court suggests the rules will be finished sometime between mid-2007 and mid-2008.¹⁴³ From these rules we will be able to see whether the potential for capture of the lay assessors or marginalisation of the system has been avoided and whether the structure can be used to realise community endorsed participatory justice.

We remain cautiously optimistic at this stage. Despite opinion polls' suggestion that the public is reluctant to be selected, historical experience and recent mock trialing indicate that once empanelled, far from withdrawing from the task, the general public is engaged in fulfilling its role.¹⁴⁴ The Supreme Court for its part is aware of the potential difficulties, including the risk of capture by overbearing judges in deliberation. Conversations with both the judicial administrators and rank-and-file judges suggest a sincere desire to have meaningful participation from the public. The Ministry of Justice is also actively considering the issue. Indeed, by housing and staffing the collaborative Promotions Office, the Ministry of Justice is deeply engaged with the variety of issues raised by the new system including everything from investigating whether day care services may be provided in the district courts for lay assessors, to how to ensure that the public actively participates once called upon. Conversations with both the Promotions Office and individual prosecutors suggests that at this stage they have not considered the crucial role that the Prosecutors Office has in maintaining the appropriate flow of cases to the new system, but this may not be resolved until the system is in place and the trials of defendants begin. The private bar, as represented by the JFBA, remains interested and has sponsored a number of promotional events.¹⁴⁵

142 See, e.g., TOKYO BAR ASSOCIATION HÔYÛ-KAI, *Tettei fûron: Saiban-in seido – shimin sanko no aru beki sugata wo tenbô shite* [In-depth discussion: The lay assessor system – foreseeing the way in which the general public should participate] (Tokyo 2003).

143 SUPREME COURT, *Saiban-in seido shikô made no sukejûru no imeji* [Image of the schedule until enactment of the saiban-in system], at <<http://www.saibanin.courts.go.jp/shiryô/pdf/17.pdf>>, at 2 April 2006.

144 ANDERSON / NOLAN, *supra* note 2, 907, 982-987; ANDERSON, *supra* note 2, 40.

145 See, e.g., JFBA, *supra* note 109; JFBA, *supra* note 112; OSAKA BAR ASSOCIATION, *supra* note 134; KYOTO BAR ASSOCIATION, *supra* note 135.

Apart from a handful of extremely energetic idealist lawyers, however, the defence bar appears to be the least prepared interested party. This is understandable since the structure of Japan's defence bar does not leave it with the resources to undertake preparation like the Ministry of Justice.¹⁴⁶ Nevertheless, this is extremely problematic since a vigorous defence of the individuals standing before the new panels is equally necessary for the system's successful implementation.¹⁴⁷ Our own research at this stage marks this as the area for greatest concern.

Of course, whether the experiment eventually succeeds or fails, will not be tested by the law or the rules alone, but will be tested in the court rooms; that is, by the law in practice. For that all we can do is to wait for 2009.

146 See JOHNSON, *supra* note 6, 72-85.

147 Perhaps, obviously, the advocacy skills to persuade unknown lay people are not the same as those required to persuade judges with whom one shares training and social beliefs.

ZUSAMMENFASSUNG

Im Mai 2004 wurde vom japanischen Parlament ein neues System der Laienbeteiligung verabschiedet, das Ähnlichkeiten sowohl mit der angloamerikanischen Jury als auch mit den kontinentaleuropäischen Geschworenengerichten aufweist. Es wurde jedoch eine Frist von fünf Jahren bis zum ersten Prozeß unter der Beteiligung von Laien festgesetzt. Der Artikel untersucht zuerst die politischen Hintergründe, die zur Einführung des Laienrichtersystems oder saiban-in seido in dieser Form führten. Danach wird das neue System in Grundzügen dargestellt. Wie in der angloamerikanischen Jury werden den saiban-in Senaten sechs (bzw. vier) Laien angehören, die zufällig aus den Wählerlisten ausgewählt werden. Wie in europäischen Geschworenensenaten werden die Laienrichter zusammen mit drei (bzw. einem) Berufsrichter beraten. Laien- und Berufsrichter zusammen werden sowohl über die Schuldfrage als auch über die Strafzumessung entscheiden. Der Artikel geht in weiterer Folge auf die noch auszuarbeitenden Regeln des Obersten Gerichtshofs für saiban-in Prozesse ein, die erst eine wirklich Beurteilung der Funktionsfähigkeit des neuen Systems erlauben werden. Dabei werden jedoch keine Spekulationen über den möglichen Inhalt dieser Regeln angestellt. Der Schwerpunkt dieses Artikels liegt auf der Untersuchung der Aktivitäten, die vom japanischen Justizministerium, dem Obersten Gerichtshof und der Anwaltschaft zur Vorbereitung des neuen Systems gesetzt wurden. Diese umfassen unter anderen die Schaffung eines PR-Büros, das von mehreren Seiten finanziert wird; die Durchführung von Umfragen zum Kenntnisstand über das neue System in der Öffentlichkeit sowie zur Bereitschaft, am neuen System mitzuwirken; die Bewerbung der Laienbeteiligung durch verschiedene konventionelle und unkonventionelle Mittel und schließlich Maßnahmen zur Ausbildung und zur Förderung der wissenschaftlichen Beschäftigung mit dem neuen Laienbeteiligungssystem. Bei der Bewertung der Entwicklung, der gesetzlichen Regelung und der Förderungsmaßnahmen hinsichtlich des saiban-in-Systems wird ein historischer Maßstab angelegt, um zu sehen, ob die Marginalisierung, die japanischen Systemen der Laienbeteiligung in der Vergangenheit widerfuhr, vermieden wurde. Schließlich erfolgt eine vorsichtig optimistische Bewertung der Möglichkeiten, die das neue System zur Verbesserung der Strafjustiz und der Bürgerbeteiligung in Japan bietet, unter besonderer Berücksichtigung der Bemühungen des Justizministeriums, des Obersten Gerichtshofs und der Japanischen Anwaltskammer, wobei jedoch auch auf die mangelhafte Vorbereitung seitens der Strafverteidiger hingewiesen wird.

(Übersetzung durch die Red.)