BENEFITS OF ADOPTING CIVIL JURY TRIALS IN JAPAN AND LESSONS FROM THE UNITED STATES

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Systems that incorporate citizen participation into the legal decision-making process, such as all-citizen juries or mixed tribunals, can significantly impact a country's political system and political culture.[1] Such systems can also influence society in many ways. Randomly selected bodies of citizens have the potential to function as powerful vehicles in educating, ensuring justice, and enhancing the credibility of the judiciary.[2] They also provide a valuable civic engagement tool that enables self-governance and facilitates checks on individuals, industry, and government.[3]

As societies around the world face rapid change and related challenges, many nations are searching for potential solutions. Many civic reformers view jury systems, broadly defined to encompass traditional juries consisting of only laypersons or mixed tribunals of laypersons and professional judges, both as a solution in part and means of compelling positive political, economic, and even social change. In fact, the major players in Asia and several other countries around the world have recently integrated lay participation into the administration of justice in an effort to effect change, advance public policymaking, and manifest popular sovereignty.[4] These bold and innovative moves stand in stark contrast to other parts of the world where established jury systems and lay participation in the judicial process have been criticized, attacked, and even face diminished use. In light of these emerging global trends and the diverse views on lay participation in the administration of justice, it is valuable to closely examine the experience of one major newcomer to the citizen participation club—Japan.

For over sixty years, Japan lagged in terms of citizen participation in the judicial process.[5] In fact, it was the only G-8 nation without a citizen participation system in

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[1] Iwao Sato, *Emergence of Citizen Participation in Trials in Japan: Background and Issues*, 43 SOC. SCI. IN JAPAN 3 (Sept. 2010); *see also generally* Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 Ala. L. Rev. 441 (1997).

[2] John Gastil, Colin J. Lingle & Eugene Deess, *Deliberation and Global Criminal Justice: Juries in the International Criminal Court*, 24 ETHICS & INT'L AFFAIRS 1 (2010).

[3] *Id.*

[4] Japan, South Korea, China, Kazakhstan, Mexico, and Crotia are several of the nations that have recently adopted lay participation. *See* Ryan Park, *The Globalizing Jury Trial: Lesson and Insights from Korea*, 58 Am. J. Comp. L. 525, 534-36 (2010); Sanja Kutnjak Ivkovic, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, 40 CORNELL INT'L L.J. 429, 430-32 (2007); *see also* Hiroshi Fukurai & Richard Krooth, *The Establishment of All-Citizen Juries as a Key Component of Mexico's Judicial Reform: Cross-National Analysis of Lay Judge Participation and Search for Mexico's Judicial Sovereignty*, 16 Tex. HISP. J.L. & POL'Y 37, 54 (2010).

[5] Although Japan did not have a jury system, some of its citizens were involved in the criminal justice system on a limited scale for over sixty years in the form of Prosecutorial Review Commissions (PRC) or *Kensatsu Shinsakai*. Hiroshi Fukurai, *The Re-birth of Japan's Petit Lay judge and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT'L L. J. 315, 323-28 (2007); *Kensatsu Shinsakai* (Prosecution Review Commission Law), Law No 147 of 1948. The PRC essentially reviewed prosecutorial decisions not to charge suspects.

either criminal or civil trials.[6] As part of a historic internal transformation of Japan's legal system, however, this drastically changed on May 21, 2009, as Japan revived citizen participation in certain criminal trials pursuant to the "*Saiban-in ho"* or Act Concerning Participation of Lay Assessors in Criminal Trials (the "Lay Judge Act").[7] As part of its new *"saiban-in seido"* or lay judge system,[8] Japan now conscripts registered voters to serve on mixed criminal tribunals comprised of lay citizen and professional judges. By design, the Lay Judge Act purposefully limits lay participation in its new quasi-jury system to involvement in certain serious criminal cases only.

Now that lay participation in serious criminal trials has apparently taken root in Japanese society, it is an ideal time to expand lay participation into the civil realm. By implementing jury trials in select contexts involving civil and administrative litigation, Japan can foster more accountability, enhance democratic engagement, generate positive change in society, and fully achieve the objectives of its recent monumental legal reforms. To better examine the idea of lay participation in certain civil disputes, this paper is separated into three sections. First, Part I details the underpinnings of Japan's new lay judge system and examines its triumphs and shortcomings. Second, Part II outlines the American experience with civil jury trials and explores potential lessons that can be learned from this experience. Finally, Part III suggests that Japan should seriously consider expanding the use of citizen judges beyond serious criminal trials and into the civil realm while addressing the merits of potential expansion and examining possible drawbacks to lay participation in certain civil trials.

I. MONUMENTAL LEGAL REFORMS AND INCREASED CITIZEN PARTICIPATION

Traditionally, citizen participation in Japan's justice system has been limited. During the fifteen-year period immediately preceding World War II, Japan briefly experimented with jury trials in criminal matters.[9] After the war, discussions about

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Id. at 323-24. If a victim or party of interest requested PRC review and the PRC disagreed with the prosecutor's inaction, it would make a non-binding recommendation that the prosecutor's office reconsider its determination. *Id.* PRC recommendations were largely ineffective as prosecutors decided to rarely prosecute. *Id. at* 325. On May 28, 2004, the Diet of Japan (Japanese legislature) enacted the Act to Revise the Code of Criminal Procedure that empowered PRC to compel prosecutions. *Id.* at 327.

[6] *Lay Judge System Starts in Japan Amid Lingering Concerns*, KYODO NEWS, May 20, 2009.

[7] *Saiban-in no Sanka Suru Keiji Saiban ni Kansuru Horitsu* [*Act Concerning Participation of Lay Assessors in Criminal Trials*], Law No. 63 of 2004, translated in Kent Anderson & Emma Saint, *Japan's Quasi Jury (Saiban-in) Law: An Annotated Translation of the Action Concerning Participation of Lay Assessors in Criminal Trials*, 6 ASIAN-PAC. L. & POL'Y J. 233 (2005) [hereinafter the "*Lay Judge Act*"].

[8] "*Saiban-in seido*" translates as "lay assessor system" or "lay judge system." It has also been referred to as Japan's quasi-jury trial system or simply as the *saiban-in seido*. For purposes of consistency, this Article will simply use the "lay judge system" terminology.

[9] Before World War II, Japan operated a jury system for certain criminal cases pursuant to the Jury Act. *Baishin ho* [Jury Act], Law No. 50 of 1923 (Japan). Between 1928 and 1943, Japan conducted 480 criminal jury trials. Saikō Saibansho [Sup. Ct.] Nov. 16, 2011, Case No. 2010 (A) No. 1196, 65 Keishu 8, Nov. 16, 2011; *see generally* Takuya Katsuta, *Japan's Rejection of the American Criminal Jury,* 58 AMER. J. COMP. L. 497, 503-506 (2010); Dimitri Vanoverbeke, *The Taisho Jury System: A Didactic Experience*, 43 SOC. SCI. IN JAPAN 23 (Sept. 2010). With the rise of militarism and the government's need to control criminal justice, the Jury Act was suspended in 1943. *Baishinho no Teishi ni Kansuru Horistu* [Act Concerning the Suspension of the Jury Act], Law No. 88 of 1943 (Japan). There were also a host of other

reinstituting jury trials were not embraced.[10] Over time, a handful of groups periodically advocated more public involvement in the justice process albeit without success. The landscape changed in 2009, however, when Japan finally held its first trial involving citizen judges as part of its new lay judge system.[11] Japan's new lay judge system was not a solitary reform. Rather, it was one piece of sweeping reforms to the entire justice system that included new professional law schools designed to facilitate a larger and even stronger lawyer population; criminal justice reforms such as streamlined pretrial proceedings and a modified court-appointed defense counsel system; civil litigation reforms intended to accelerate civil cases and improve procedural issues; and substantial modifications to the dispute resolution system including the creation of a specialized intellectual property court and modified alternative dispute resolution mechanisms. [12]

The genesis of these reforms, including citizen participation, was neither public pressure nor concerns about a broken justice system.[13] Facing enormous financial deficits, economic difficulties, and challenging social issues, Japan felt compelled to confront the twenty-first century with major legal reforms.[14] Established in June 1999, the *Shiho Seido Kaikaku Shingikai*, or Justice System Reform Council ("JSRC"), was a thirteen-person body created to conduct detailed, high-level discussions about potential civic, legal, and judicial reforms.[15] Sensing a major economic crisis, the JSRC noted that Japan had embarked on a course of structural reform including "political reform, administrative reform, [and the] promotion of decentralization and deregulation" to

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factors that contributed to the demise of this system. *See generally* Jon P. McClanahan, *Citizen Participation in Japanese Criminal Trials: Reimagining the Right to Trial By Jury in the United States,* 27 N.C.J. INT'L L & COM. REG. 725, 748 (2012); Sato, *supra* note 1, at 3.

[10] Katsuta, *supra* note 9, at 499-500.

[11] *See Hanging in the Balance,* THE ECONOMIST, Aug. 6, 2009, *available at* http://www.economist.com/node/14191260; *First Japanese Jury Trial for 66 Years Convicts Man of Neighbour's Murder*, THE GUARDIAN, Aug. 6, 2009, *available at* http://www.guardian.co.uk/world/2009/aug/06/japan-jury-trial-murder/. Although the system was implemented in May 2009, it took several months for the first qualifying lay judge trial to occur. *Id.*

[12] Mikio Kawai, *The Impact of the Lay Judge System on Japanese Criminal Justice,* 43 SOC. SCI. IN JAPAN 18 (Sept. 2010); *see also* Luke Nottage & Stephen Green, *Who Defends Japan?: Government Lawyers and Judicial System in Reform in Japan,* 13 ASIAN-PACIFIC L. & POL'Y 129, 130-134 (2011); Matthew J. Wilson, *Japan's New Criminal Jury Trial System: In Need of More Transparency, More Access, and More Time*, 33 FORDHAM INT'L L. J. 487, 511-13 (2010) [hereinafter Wilson, *Japan's New Criminal Jury*].

[13] Although a few civic and legal groups (including the Japan Federation of Bar Associations) advocated civic participation in the judicial process based on wrongful convictions and other shortcomings of the judicial system, the general public did not support the adoption of jury trials. *See* Makoto Ibusuki, *Quo Vadis? First Year Inspection to Mixed Jury Trial*, 12 ASIAN-PAC. L. & POL. J. 24, 27 (2010). Conversely, most observers have concluded that these internally generated legal reforms constitute responses to economic and social pressures from globalization and the world economy. Kawai, *supra* note 12, at 21.

[14] *The Points at Issue in the Judicial Reform*, JUDICIAL REFORM COUNCIL, II.2 (Dec. 21, 1999), http://www.kantei.go.jp/foreign/judiciary/0620reform.html [hereinafter *The Points at Issue*].

[15] Sato, *supra* note 1, at 3. The JSRC was composed of thirteen individuals from various sectors in society including three attorneys, two law school professors, three college administrators, two businesspersons, an author, and the president of the Japan Housewives Association. *See* Katsuta, *supra* note 9, at 512; Hiroshi Fukurai, *People's Panels vs. Imperial Hegemony: Japan's Twin Lay Justice Systems and the Future of American Military Bases in Japan*, 12 ASIAN-PAC. L. & POL'Y J. 95 (2010).

enable Japan to recover its "creativity and vitality."[16] In its own words, these reforms were intended to further economic development and ensure that every person would "participate in making a free and fair society" as a governing subject instead of a governed object.[17]

A. Implementation of Lay Judge Trials

On June 21, 2001, the JSRC set forth wide-sweeping recommendations for revamping the judicial system.[18] The underlying goals targeted three pillars of fundamental reform: (i) a justice system that is "easier to use, easier to understand, and more reliable;" (ii) a legal profession "rich both in quality and quantity;" and (iii) a popular base in which citizens' trust in the legal system is enhanced through their participation in legal proceedings.[19] The reformers viewed the judicial system as an engine for propelling fundamental societal change. In turn, it was believed that lay judge participation would essentially function as one of the pistons in the engine. The JSRC envisioned that the judicial system and citizen involvement through the lay judge system would assume an enhanced role to shift Japan away from its traditional model of centralized control and bureaucratic regulation.[20] The suggested major changes were consistent with the perceived need for Japanese citizens to not only break away from excessive dependency on the government, but also to develop greater civic consciousness and become more actively involved in public affairs. Moreover, the JSRC felt that jury service would be an effective means of introducing community values into the justice system.

Based on the JSRC's recommendations, the Diet passed the Lay Judge Act on May 21, 2004, and announced that the first quasi-jury trial would occur five years later.[21] Japan's lay judge system is a unique hybrid, which integrates elements of the common law jury and European mixed court systems.[22] After some debate within the JSRC about whether to adopt an all-citizen jury model typical in common law jurisdictions such as

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[16] *The Points at Issue*, *supra* note 14, at II. 2.

[17] *Id.*

[18] *Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21st Century*, JUSTICE SYS. REFORM COUNCIL, June 12, 2001, http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html [hereinafter "*JSRC Recommendations*"].

[19] *Id.*; *see also Ensuring that the Results of the Justice System Reform Take Root*, MINISTRY OF JUSTICE OF JAPAN, http://www.moj.go.jp/ENGLISH/issues/issues01.html (last visited Apr. 29, 2012) [hereinafter "*Results of the Justice System Reform*"].

[20] *See id.*; *see also The Points at Issue*, *supra* note 14.

[21] *Lay Judge Act*, *supra* note 7; *see also* Hiroshi Fukurai, *Symposium on Comparative Jury Systems: Japan's Quasi-Jury and Grand Jury Systems as Deliberative Agents of Social Change: De-Colonial Strategies and Deliberative Participatory Democracy*, 86 CHI-KENT L. REV. 789, 806 (2011); Meryll Dean, *Legal Transplants and Jury Trial in Japan*, 31 LEGAL STUDIES 570, 581 (2011).

[22] Wilson, *Japan's New Criminal Jury*, *supra* note 12, at 513-14. The lay judge system resembles common law jury systems in that citizen judges are randomly selected from voter lists and participation is limited to a single case. *Id.* Unless excused by the court or excluded by peremptory challenge, participation is compulsory. *Id.* at 514. "[T]he system also mirrors civil law systems, such as the *schoffe* lay judge system in Germany or the *echevin* system in France, in which citizens participate in trials as lay judges alongside professional judges." *Id.; see also* Dean, *supra* note 21, at 581.

the United States or a mixed tribunal model common in continental civil law jurisdictions,[23] Japan settled on a hybrid tribunal that combines elements of both systems to adjudicate serious criminal cases.[24] The JSRC emphasized that the new system should enable the public to "cooperate with judges by sharing responsibilities, and to participate autonomously and meaningfully in deciding trials."[25] The system was adopted based on Japan's modern needs and not necessarily upon the experiences of other countries. Also, it was constructed to facilitate active participation and cooperation. Essentially, the mixed tribunal would reach judicial determinations through mutual communication and the sharing of ideas between the professional judges and lay judges. To create a recipe for fair and just results, the professional judges would contribute their legal expertise and the lay judges would share their respective knowledge and experience.[26]

The Lay Judge Act sets forth the features of the lay judge system. In contested cases, the Act requires that six *saiban-in* or lay judges chosen from among eligible voters join with three professional judges for a single "qualifying" criminal trial and sentencing.[27] A qualifying trial involves certain serious crimes enumerated in the Lay Judge Act.[28] In uncontested serious criminal cases, four lay judges and one professional judge will handle the matter.[29] In short, the lay judge panel, including professional judges, will determine guilt and decide sentences upon conviction.[30] To reach a verdict, the Lay Judge Act requires only a majority vote with the qualification that at least one professional judge and one lay judge must concur in the majority's conclusion.[31]

In theory, the rights and responsibilities of the lay judges and professional judges are equivalent.[32] This includes the ability of lay judges to actively question witnesses, victims, and defendants.[33] In comparison with jurors in the United States and other common law jurisdictions, this gives Japanese lay judges more direct, hands-on

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[23] *See generally* Katsuta, *supra* note 9.

[24] Ibusuki, *supra* note 13, at 27-28.

[25] *JSRC Recommendations*, *supra* note 18, at Chp. IV, Part. 1(1).

[26] *Id.* at Chp. IV, Part. 1(1)(a).

[27] *Lay Judge Act*, *supra* note 7, at Art. 2, 9, 13; *See also* Sato, *supra* note 1, at 3; Ibusuki, *supra* note 13, at 29.

[28] *Lay Judge Act*, *supra* note 7, at Art. 2(3). The qualifying serious crimes enumerated in the Act include homicide, robbery resulting in bodily injury or death, bodily injury resulting in death, unsafe driving resulting in death, arson of an inhabited building, kidnapping for ransom, abandonment of parental responsibilities resulting in the death of a child, as well as certain rape, drug, and counterfeiting offenses.

[29] *Lay Judge Act*, *supra* note 7, at Art. 2(3).

[30] *Id.* at Art. 6.

[31] *Id.* at Art. 67; *see also* Dean, *supra* note 21, at 584. Even in cases involving the death penalty, unanimous verdicts are not required. Accordingly, the Japan Federation of Bar Associations and others have been urging that a unanimity rule should be imposed for death penalty cases. *See* Keiji Hirano, *Lay Judge Death Sentences Must Be Unanimous: JFBA,* JAPAN TIMES (Mar. 25, 2012), http://www.japantimes.co.jp/text/nn20120325a5.html.

[32] *The Japanese Judicial System and Judicial Reform,* JAPAN FED'N OF BAR ASS'NS http://www.nichibenren.or.jp/en/about/judicial_system.html (last visited Mar. 14, 2013).

[33] *Lay Judge Act*, *supra* note 7, at Art. 56-59; *see also* Dean, *supra* note 21, at 584; Zachary Corey & Valerie Hans, *Japan's New Lay Judge System: Deliberative Democracy in Action?* 12 ASIAN-PACIFIC L. & POL'Y J. 72, 91 (2010).

participation in the trial process.[34] Notwithstanding, one significant distinction between the lay and professional judges is that the professionals are solely responsible for interpreting legal and procedural matters.[35] This is necessitated by the lay judges' lack of formal legal training. Another difference is that the professional judges, together with the prosecutors and defense counsel, have the duty to make trials quick and easy to understand so as to minimize the burden placed upon the lay judges and enable these citizens to sufficiently perform their duties.[36]

B. Substantial Progress, Changed Attitudes, and Promising Outlook

Japan's lay judge system has realized substantial progress, altered attitudes, and exudes a promising outlook. Before adoption, some members of the public and Japanese legal community predicted quick failure based on the perceived incompetence of lay judges and public hostility to the idea of jury participation.[37] Public opinion polls preceding the implementation of the system exhibited this disdain.[38] Other predictions voiced fears that lay judges would lack training, suffer from insufficient knowledge, and rely too heavily on emotion and bias. Opponents also noted the decline of juries in other countries and questioned why Japan would adopt a judicial mechanism that was apparently dying in other countries.

Although the current system has weaknesses and faces ongoing challenges, the system has largely been quite effective. It has also seemingly gained acceptance and recognition from both the government and public.[39] Moreover, the objectives underlying Japan's ongoing judicial reforms and its recent movement towards more civic engagement place it in a different position than other common law countries. Accordingly, Japan appears well suited for lay participation in the judicial process.

1. Progress of the lay judge system has been significant

Japan's lay judge system has made substantial strides since its inception. From its start through the end of February 2013, a total of 4,988 charged defendants were involved in lay judge trials.[40] Among these defendants, there were 4,886 brought to verdict

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[34] *See generally* Ivkovic, *supra* note 4, at 435.

[35] *Lay Judge Act*, *supra* note 7, at Art. 51.

[36] *Id.* at Art. 6.

[37] Satoru Shinomiya, *Defying Experts Predictions, Identifying Themselves as Sovereign: Citizens' Responses to Their Service as Lay Judges in Japan*, 43 SOC. SCI, IN JAPAN 8, 8-9 (Sept. 2010).

[38] Wilson, *Japan's New Criminal Jury*, *supra* note 12, at 495; *see also* McClanahan, *supra* note 9, at 770.

[39] Naturally, it is still early in the process and further examination of the system is required. However, the societal acceptance of the concept, high participation rates, changed attitudes, and educational value of the system have been heralded. *See generally* Shinomiya, *supra* note 37, at 8-9; Julia Marsh, *Juries an Essential Part of U.S. Legal System*, YOMIURI SHIMBUN [DAILY YOMIURI] (May 22, 2010); Ibusuki, *supra* note 13, at 26-27.

[40] *Saiban-in Seido no Jisshi Joutai Ni Tsuite* (*Seido Jisshi-2.28.2013–Sokuho*) [*State of Implementation of Lay Judge System from Inception through February 28, 2013*], *available at* http://www.saibanin.courts.go.jp/topics/pdf/09_12_05-10jissi_jyoukyou/h25_2_sokuhou.pdf (last visited May 12, 2013) [hereinafter "*State of Implementation*"]. Among the defendants tried via lay judge trials,

including 4,843 who were convicted, 26 who were found not guilty, 13 who were found guilty on some charges and not guilty on others, and 4 defendants whose cases were remanded to the family court.[41] To adjudicate these cases, 28,229 citizens were selected to potentially serve as lay judges and 9,722 others were designated as potential alternates.[42] For each lay judge trial, approximately 87.8 lay judges were selected for possible service, among which 58.1% were excused prior to jury selection.[43] On average, approximately 30 lay judges appeared at court for the actual selection process itself.[44] Over 78% of those citizens called for potential selection as lay judges actually appeared in court when summoned.[45] This means that the turnout rate in Japan has been much higher than other nations. The length of lay judge trials has varied, but the average length was 6.2 days.[46] In sum, 62.7% of all trials were completed in less than five days, and there were 13 trials that took more than 40 days to resolve.[47] The longest trial lasted 100 days.[48] The mixed professional and lay judge panels deliberated on average for 9.33 hours to reach the verdict.[49]

The lay judge trial process itself appears to be succeeding on many levels. Professional judges educate citizen judges about the relevant law while deliberating alongside them to reach collective decisions about verdicts and sentences. Trial attorneys have settled into their new roles as advocates in the courtroom, public resistance has decreased, and citizen participation in trials has become an integral part of the Japanese justice system.[50] The trial process itself has moved from a lengthy, disjointed, and largely opaque system conducted primarily based on written documents over the course of several months (if not years), to a more transparent and cohesive trial system focusing

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1,140 defendants were tried for theft-related crimes; 1,109 for murder; 461 for injuries causing death; 460 for arson-related crimes; 448 for drug distribution; and the remainder were tried for other serious crimes. *Id.* at pg. 4.

[41] *Id.* One hundred and two other defendants were not brought to verdict. *Id.* at 5. Among these defendants, there were 2,877 who confessed and 1,999 who pleaded not guilty. *Id.* at 9.

[42] *Id.* Among those selected for potential jury duty, 55.4% of the citizens were full-time workers, 14.4% were part-time or temporary workers, 9.90% were stay-at-home mothers or fathers; and 7.3% were self-employed. *Id.*

[43] *Id.*

[44] *Id.*

[45] Setsuko Kamiya, *Lay judges convict 99%; few shirk duty*, JAPAN TIMES (Aug. 2, 2011); *see also* Corey & Hans, *supra* note 33, at 91.

[46] *State of Implementation*, *supra* note 40, at 10 (noting that trials where the defendant had confessed took 4.5 days on average and those in which the defendant had pleaded not guilty took 8.6 days on average).

[47] *Id.* The breakdown of timing is: 1.1% of trials lasted two days, 27.9% lasted three days, 34.8% lasted four days, 16.4% lasted 5 days, and 19.8% lasted 6 days for more. *Id.*

[48] *Death sentence after 100-day trial*, JAPAN TIMES (Apr. 20, 2012), *available at* http://www.japantimes.co.jp/opinion/2012/04/20/editorials/death-sentence-after-100-day-trial/#.UUJjQqWhD0c. There have been several other long trials as well including a sixty-day arson trial in the Osaka District Court. *Man pleads guilty to deadly 2009 arson attack at Osaka pachinko parlor*, JAPAN TIMES (Sep. 7, 2011), *available at* http://www.japantimes.co.jp/news/2011/09/07/national/man-pleads-guilty-to-deadly-2009-arson-attack-at-osaka-pachinko-parlor/#.UUJjeKWhD0c.

[49] *State of Implementation*, *supra* note 40, at 10.

[50] Ibusuki, *supra* note 13, at 25; *see also* McClanahan, *supra* note 9, at 771-72.

on oral testimony taken on consecutive days whenever possible.[51] Both prosecutors and defense attorneys have engaged in trial advocacy training.[52] Defendants have also benefited from a more translucent environment, in which prosecutors disclose more information in advance of trial in comparison with past practice. Although some argue that the disclosures are still insufficient, prosecutors must now disclose additional evidence to defendants during pre-trial hearings due to lay participation.[53]

2. Positive experiences have changed attitudes

Although it is still early in the process, citizen participation has consistently changed attitudes. Lay judges have deemed their deliberative experience to be very valuable.[54] Of those citizens who have participated in trials, over half approached their selection with the feeling that they did not want to serve.[55] By the end of the process though, over 95% of all citizen judges felt that their overall experience was either positive or extremely positive.[56] Even more significantly, many individuals felt that their civic service provided an unmatched chance to ponder and seriously think about society as a whole.[57] These positive experiences have reduced the initially negative public perceptions about the system and alleviated many public concerns.[58]

It appears that the lay judge system's initial impact has also facilitated meaningful civic participation in the democratic process and increased public comprehension of the system.[59] Anecdotal evidence seems to indicate that lay judges are active in their participation.[60] They also consistently assert that they have been able to relate to both the victims and the accused.[61] In addition, lay judges have observed that their experience

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[51] Corey & Hans, *supra* note 33, at 73; Shinomiya, *supra* note 37, at 10-11. Before the lay judge system, criminal trials could take years as hearings often were only conducted once or twice per month. *See id.*

[52] The Japan Federation of Bar Associations ("JFBA") and Ministry of Justice expended significant sums on training attorneys about the art of trial advocacy. In fact, the author conducted and participated in many training exercises for the JFBA, including serving as a member of the Jury Project Team. *See also* Ibusuki, *supra* note 13, at 47.

[53] Shinomiya, *supra* note 37, at 10-11.

[54] *See generally* Setsuko Kamiya, *Lay Judges Present Ideas to Make System Better*, JAPAN TIMES (Jan. 21, 2012), *available at* http://www.japantimes.co.jp/text/nn20120121f2.html; *see also* Fukurai, *supra* note 21, at 817-18 [hereinafter Kamiya, *Lay Judges Present Ideas to Make System Better*].

[55] *State of Implementation*, *supra* note 40. Among respondents, 7.7% of lay judges really wanted to participate, 23.8% wanted to participate, 15% had not thought about it, 33.6% probably did not want to participate, 19.2% did not want to participate, and 0.7% did not respond. *Id.*

[56] *Id.* Among those who responded, 61.9% felt that the proceedings were easy to understand, 29.6% felt they were average, 7.1% thought that the trials were difficult to understanding, while 1.4% did not respond. *Id.;* s*ee also* Shinomiya, *supra* note 37, at 9.

[57] Fukurai, *supra* note 21, at 817-18; Shinomiya, *supra* note 37, at 11.

[58] McClanahan, *supra* note 9, at 771-73.

[59] *Id.* at 748.

[60] *Id.* at 773.

[61] *See generally Seido Suta-to 3nen Housou3sha to Hajime no Iken Koukan* [*First Exchange of Opinions Among Three Branches Three Years After Start of System*], YOMIURI SHIMBUN [DAILY YOMIURI]

caused them to seriously consider important societal issues such as whether incarceration can rehabilitate criminals and whether societal repatriation is advisable. Even citizens not selected to serve as lay judges have taken a new or renewed interest in the justice system. In addition to increased media coverage of trials, some citizens have willingly participated in mock trial sessions conducted by lawyers and other organizations to teach the public about the justice system.[62] Although attendance has dropped, many citizens attended actual court sessions. Some have even been willing to pay lawyers for post-hearing review sessions.[63] After attending court, these citizen observers have visited a lawyer's office to learn about and discuss what they saw in court. Before the implementation of the lay judge system, such interest and activities were unthinkable.

From a procedural standpoint, the system appears to be functioning quite well. Inviting citizens to serve as lay judges in serious criminal trials has facilitated understanding, expedited cases, and improved transparency.[64] Supreme Court surveys confirm that over ninety-percent of lay judges felt that their respective trials were either easy or normal to understand.[65] Many lay judges commented that not only did they feel comfortable asking questions of witnesses, but they could also participate in deliberations without hesitation.[66] Most lay judges felt like they had sufficient time to deliberate in order to find the truth.[67] Also, citizen judges have been able to adequately digest technical information and make impartial judgments in high profile cases involving intense media pressure. For example, in a criminal case involving a famous Japanese actor associated with illegal drug use and the death of another, Japanese legal experts were impressed by the lay judges' ability to weather the two-week storm of intense publicity and scrutiny without giving deference to the celebrity status of the actor.[68] Additionally, they were encouraged by the lay judges' ability to assess the complex medical expert testimony proffered during the trial.

3. Governmental acceptance of the lay judge system has been evident

Other indicators that the lay judge system has been successfully integrated into society and the legal system have arisen from within the government itself. First and foremost, the Supreme Court of Japan has resolved any doubts about the effect of the lay judge system. In response to an attack on the constitutionality of a conviction based on the involvement of citizens in the adjudication process, all fifteen Supreme Court judges

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(Apr. 25, 2012), *available at* http://www.yomiuri.co.jp/e-japan/shimane/news/20120424-OYT8T01148.htm.

[62] *Lawyers guide court-watchers / Lay judge system sparks fresh public interest in observing trials*, YOMIURI SHIMBUN [DAILY YOMIURI] (May 16, 2010), *available at* http://www.yomiuri.co.jp/dy/national/T100515001687.htm

[63] *Id.*

[64] Shinomiya, *supra* note 37, at 8-9.

[65] *State of Implementation*, *supra* note 40.

[66] Corey & Hans, *supra* note 33, at 92.

[67] *State of Implementation*, *supra* note 40. About 72% of respondents felt that they had sufficient time, while 19.8% were unsure, 7.2% thought that they had insufficient time, and 1.4% did not answer. *Id.*

[68] Setsuko Kamiya, *Lay Judges Handle Pressure of Oshio Trial*, JAPAN TIMES (Sept. 19, 2010).

voted unanimously that the lay judge system was constitutional.[69] The Supreme Court held that it is possible "to fully harmonize citizens' participation in judicial proceedings with the principles provided for realizing fair criminal trials."[70] The Court deemed citizen participation to be completely acceptable because the lay judge system guarantees that trials will be fairly carried out based on law and evidence presented in court.[71] It also emphasized that the lay judge system has the advantage of integrating the "viewpoints and senses" of the general public with the expertise of professional judges.[72]

Additionally, the Supreme Court of Japan and many High Courts have been protective of verdicts issued by lay judge panels despite government prosecutors' inclination to appeal when dissatisfied with lay judge trial verdicts.[73] In February 2012, the Supreme Court addressed this proclivity to appeal in ruling that, barring a blatant misapplication of law, verdicts issued by the lay judge tribunals must be respected.[74] To reverse a lay judge trial acquittal on grounds of factual error, a High Court must have concrete proof that the lay judge ruling was irrational in terms of logical consistency and common sense.[75] Absent such proof, the appellate courts should respect the verdicts reached by the lay judge panels.

Finally, even bureaucrats have recognized the value of citizen participation by using lay judge verdicts to justify governmental policy and actions. By way of illustration, then Justice Minister Toshio Ogawa approved the execution of three death row inmates in late March 2012. In so doing, he based his decision at least in part on the justification that lay judge trials have supported the death penalty—therefore, this form of punishment is justified because it is based on "a judgment made by a nation."[76]

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[69] Saikō Saibansho [Sup. Ct.] Nov. 16, 2011, Case No. 2010 (A) No. 1196, 65 Keishu 8 (noting that the concept of lay participation in the trial process is consistent with the legislative history surrounding the Constitution); *see also Supreme Court Ruling Helps Lay Judge System Take Firm Root*, YOMIURI SHIMBUN [DAILY YOMIURI] (Nov. 17, 2011), *available at* http://www.yomiuri.co.jp/dy/editorial/T111117004418.htm; *Lay judge system ruled constitutional*, YOMIURI SHIMBUN [DAILY YOMIURI] (Nov. 18, 2011), *available at* http://www.yomiuri.co.jp/dy/national/T111117005927.htm (Supreme Court rejecting a challenge to the constitutionality of the lay judge system by a woman convicted of smuggling stimulant drugs from Malaysia into Japan); *see also Lay judge system OK: top court*, JAPAN TIMES (Nov. 18, 2011), *available at* http://www.japantimes.co.jp/text/nn20111118a6.htm.

[70] Saikō Saibansho [Sup. Ct.] Nov. 16, 2011, Case No. 2010 (A) No. 1196, 65 Keishu 8.

[71] *Id.*

[72] Corey & Hans, *supra* note 33, at 92.

[73] *Japanese Supreme Court issues landmark decision on citizen juries*, MAJIROX NEWS (Feb. 14, 2012) available at http://www.majiroxnews.com/2012/02/14/japanese-supreme-court-issues-landmark-decision-on-citizen-juries/; *see also Lay Judges' Decisions Respected by High Courts,* YOMIURI SHIMBUN [DAILY YOMIURI] (Apr. 1, 2010).

[74] *See id.*; *see also Landmark ruling on lay judge case*, JAPAN TIMES (Feb. 18, 2012), *available at* http://www.japantimes.co.jp/text/ed20120218a2.html.

[75] *Lay judges' acquittal reinstated*, JAPAN TIMES (Feb. 14, 2012), *available at* http://www.japantimes.co.jp/text/nn20120214a3.html.

[76] *Ogawa has no qualms about executions: Justice minister says lay judges, public call shots on inmates' fate*, JAPAN TIMES (Apr. 6, 2012), *available at* http://www.japantimes.co.jp/text/nn20120406b5.html.

C. Challenges and Concerns Still Exist

Despite the positive achievements of Japan's lay judge system during its relatively short existence, the system still faces many challenges and concerns that Japan must address. Pursuant to the Lay Judge Act, policy makers were required to study and reassess the lay judge system three years after its inception. As such a committee was formed within the Ministry of Justice to study the lay judge system. The committee will issue a report with findings and recommendations in 2013.[77]

In any event, the strict secrecy restrictions prohibiting lay judges from speaking freely about the trial proceedings and deliberation process are counterproductive.[78] In addition to feeling frustrated with the vague boundaries of permissible behavior, citizen judges want to share their experiences with others.[79] Society and the legal community would benefit from the same.

These restrictions, in combination with the negative psychological effects caused by exposure to serious criminal trials, have negatively impacted some citizen judges. In May 2013, one lay judge filed suit against the government for trauma she suffered due to graphic photos and emergency responder calls played during the trial.[80] In another criminal trial at the Sapporo District Court in July 2012, another lay judge lost consciousness due to the vivid evidence offered by the prosecution.[81]

Trial procedures and results have been called into question as well. Some citizen judges have been critical of the limited flow of information within the judicial process. More specifically, they encourage greater disclosure of all evidentiary materials to defense lawyers and fewer limitations on the disclosure of pretrial records to lay judges.[82] In essence, many lay judges desire access to all relevant information. Restrictions on the information presented to the entire mixed tribunal give rise to the problems and concerns

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[77] A copy of the interim committee is accessible at http://www.moj.go.jp/content/000109144.pdf.

[78] Matthew J. Wilson, *The Dawn of Criminal Trials in Japan: Success on the Horizon?* 24 WIS. INT'L L. J. 835, 851 (2007) [hereinafter Wilson, *The Dawn of Criminal Trials in Japan*]; EDITORIAL: *Loosen the Lay Gag*, JAPAN TIMES (Apr. 10, 2013), *available at* http://www.japantimes.co.jp/opinion/2013/04/10/editorials/loosen-the-lay-judge-gag/#.UZESnoKJTMc; *see also* Setsuko Kamiya, *Scarred lay judges battle stress: Concerns grow over post-trial burdens of new court system*, JAPAN TIMES (Sept. 16, 2010), *available at* http://search.japantimes.co.jp/cgi-bin/nn20100916f1.html [hereinafter Kamiya, *Scarred lay judges*]; Wilson, *Japan's New Criminal Jury*, *supra* note 12, at 530-44.

[79] Shinomiya, *supra* note 37, at 12.

[80] *Lay judge sues gov't over mental trauma due to murder case*, JAPAN TODAY (May 8, 2013), *available at* http://www.japantoday.com/category/crime/view/lay-judge-sues-govt-over-mental-trauma-due-to-murder-case [hereinafter *Lay judge sues gov't over mental trauma*] (reporting that a woman in her sixties filed a lawsuit against the government for $20,000 in damages because she vomited after examining evidence in a graphic criminal case and has suffered insomnia and flashbacks since the trial).

[81] *Stressful hearings for lay judges*, JAPAN TIMES (Apr 30, 2013), available at http://www.japantimes.co.jp/opinion/2013/04/30/editorials/stressful-hearings-for-lay-judges/#.UZEBrIKJTMc (pointing out that the prosecution tends to present vivid evidence in an effort to convince judges that the crime was cruel, and suggesting that steps be taken to reduce the shock on the judges).

[82] Kamiya, *Lay Judges Present Ideas to Make System Better*, *supra* note 54.

associated with a lack of transparency.[83] Others have questioned whether comprehensiveness is being sacrificed for rigidity and time concerns. Breaks are rigidly taken during trial at the expense of thorough examination. Also, the court will typically determine the date and time of announcing the verdict before the trial begins. In nearly every lay judge trial, the panel has announced the verdict at the pre-determined time. Japan needs to explore whether justice is being unreasonably sacrificed at the hands of perceived time constraints. Even more significantly, many remain concerned about the extraordinarily high conviction rate, which continues to exceed 99.5%.

The balance of power among court participants has been another serious concern. Although the Japanese judiciary has carefully taken steps to minimize the potential for professional judges to dominate their citizen counterparts,[84] a number of lay judges still feel that professional judges have attempted to influence their decisions.[85] Substantial apprehension also exists about whether lay judges are unduly influenced by the *higaisha sanka seido*, or system that allows victims and their families to question witnesses, provide statements to the lay judge panel, submit recommended sentences, and give closing statements.[86] In Japan, criminal trials are not bifurcated into a separate phase for determining guilt and innocence, and then another for sentencing. Rather, these phases are combined into a single phase. Even though impassioned statements and victim questions do not constitute substantive evidence, lay judges will conceivably subconsciously factor these into their determinations of innocence or guilt, particularly given that victims can participate before they deliberate on these questions.[87] Also, the uneven distribution of human and financial resources when comparing prosecutorial power with resources available to defendants and their attorneys has been noted as a concern. For example, court surveys indicate that defense attorney presentations have been more difficult to follow than the prosecutors.[88]

Notwithstanding these and other challenges, the lay judge system has brought welcome changes consistent with the objectives underlying the system. The creation of a popular base through lay participation has started to make certain aspects of the justice system easier to understand, more reliable, and more transparent. It has also given many individuals and entities greater confidence in public governance. Accordingly, it is worth

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[83] *See* Wilson, *Japan's New Criminal Jury*, *supra* note 12, at 545-65; *see also generally Recordings of interrogations to be expanded to include early stages*, JAPAN TIMES (Mar. 30, 2012), *available at* http://www.japantimes.co.jp/ text/nn20120330a7.html (noting increased recording of interrogations, although recording measures still fall short of complete transparency).

[84] Daniel Senger, *The Japanese Quasi-Jury and The American Jury: A Comparative Assessment of Juror Questioning and Sentencing Procedures and Cultural Elements in Lay Judge Participation*, 2011 U. Ill. L. REV. 741, 753-54 (2011).

[85] Kyodo News, *21% of lay judges felt decisions guided by pros: Survey reveals mixed feelings on due process*, JAPAN TIMES (Aug. 2, 2010), *available at* http://www.japantimes.co.jp/ text/nn20100802a1.html. Six percent of respondents to a court-initiated survey responded that the professional judges tried to influence them and fifteen percent said the professionals tried "somewhat," for a total of twenty-one percent of the respondents. *Id*.

[86] *See* Ibusuki, *supra* note 13, at 48-49.

[87] *See generally id.*

[88] *See* Shinomiya, *supra* note 37, at 11.

exploring the possibilities and advisability of expanding the lay judge system given Japan's positive experience with lay participation and the potential benefits that can flow therefrom.

II. MAKING THE CASE FOR LAY PARTICIPATION IN CIVIL TRIALS

Civil dispute resolution plays a vital role in shaping any society. It constitutes the core of any legal system and popular base.[89] The civil legal process starts when an entity or person decides to seek legal relief or remedy from another. In civil law systems, citizen participation is alien to many forms of dispute resolution, particularly civil litigation. Consistent with this concept, Japan does not presently have a jury system or allow lay participation in civil cases.[90] Instead, professional judges conduct Japanese civil litigation without juries. Typically two or three judges conduct civil lawsuits in sequential hearings over a period of months or year. The parties submit documentary evidence, testimony, and arguments pursuant to the schedule established by the courts.

In resolving disputes and administering justice, the value of lay participation is widely recognized in many respects. More specifically, lay participation is gaining greater acceptance in many civil law countries. Albeit in a criminal context to date, Japan is no exception. In embarking on a course that encourages civic engagement and seeks for greater access and transparency to the justice system, the idea of lay participation is gradually finding favor in Japan through its new lay judge system. Given the high interest in Japan regarding lay participation together with the substantial impact that certain civil trials can have on society, the time is ripe for Japan to seriously consider expanding citizen participation into the legal decision-making process in civil trials. Opening certain civil trials to lay participation in lawsuits with major societal impact could be the next logical step for Japan in continuing to advance the goals underlying its legal reforms.[91] These lawsuits might involve governmental misconduct, administrative dispositions, environmental disasters, and other disputes having the greatest impact upon society.[92] With five years of intensive preparatory activities and four years of actual lay

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[89] *See generally JSRC Recommendations*, *supra* note 18, at Chp. II, Part. 8(1).

[90] *Overview of the Judicial System in Japan*, SUPREME COURT OF JAPAN, available at http://www.courts.go.jp/english/proceedings/l3/Vcms3_00000148. (last visited Mar. 13, 2013).

[91] It is not the objective of this paper to engage in a comprehensive comparison of the political, legal, and social environments in Japan with those in other common law countries where the jury trial is purportedly dying or in decline in an attempt to demonstrate that lay participation in civil trials will succeed or fail. Rather, it is sufficient to note that the political, legal, and social environments as well as the factors underlying the drive for enhance citizen participation and civic engagement differ significantly from the current state of the United Kingdom, United States, and other common law jurisdictions. By way of example, the decline of civil juries in the United Kingdom started in the 1850s due to litigant trust in the bench, legal practitioners desire to professionalize the profession, and successful experiments with bench trials at the county level. *See* Conor Hanly, *The decline of civil jury trial in nineteenth century England*, 2005 THE JOURNAL OF LEGAL HISTORY 26:3, 253-278, 257.

[92] Additionally, lay participation could be extended to criminal complaints for professional negligence resulting in injury or death as well. *Keihō* [Criminal Code of Japan], Art. 209-211 (providing penalties for criminal negligence causing injury or death). A recent example involves a total of 1,324 citizens filed a bill of indictment against TEPCO officials and the government's Nuclear Safety Commission with the

judge trial experience under its belt, the Japanese judiciary should be ready for a progressive expansion of the system particularly now that criminal lay judge trials have taken root and started bearing fruit.

A. Civil Juries: Borrowing from the U.S. Experience

By examining other legal systems, a country can learn about different practices and determine whether they would benefit society and the administration of justice. As Japan's lay judge system continues to develop, much can be learned and even borrowed from the jury systems and practices of other countries. In exploring the possible extension of lay participation to civil litigation, Japan can look to the United States experience to assess positive outcomes and potential pitfalls. This may be particularly helpful given that that the United States is the most prolific country in using civil jury panels.[93] It is also helpful that the examination of the civil jury trial system in the United States be fair and objective.

For Japanese lawyers and Japanese legal academics, the American jury system has been a divisive topic of study and discussion. For many, the American jury stands as a symbol of liberty capable of invigorating jurors to become better citizens in a democratic society.[94] At the same time, fueled by critics of the American jury system and a handful of sensationalized jury trials, others believe that lay involvement may lead to unpredictability and erroneous verdicts.[95] The Japanese judicial system is known for its predictability, and introducing lay participation into the mix could decrease uniformity within the system. This potential conflict causes some to fear the idea of civil jury trials. Those taking the middle ground support lay participation so long as there is professional judge oversight in the form of mixed jury panels, in which judges and lay assessors constitute a joint decision-making body.[96]

1. U.S. civil jury system: general background

Through its federal and state court systems, the United States has considerable experience with civil jury trials. Civil litigants in U.S. courts may claim a constitutional right to a "trial by jury" in certain instances. In federal cases, the right to a trial by jury arises from the Seventh Amendment to the U.S. Constitution, which specifies that "in Suits at common law, where the value in controversy shall exceed twenty dollars, the

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Fukushima prosecutor's office on June 11, 2012, in connection with the disaster at the Fukushima Daiichi nuclear plant. Kyung Lah, *Fukushima residents call for criminal charges against nuclear officials*, CNN (Jun. 12, 2012, 8:44 PM EDT) http://www.cnn.com/2012/06/11/world/asia/japan-nuclear-complaint; *1,324 Fukushima citizens file criminal complaints against TEPCO, gov't,* JAPAN TODAY (Jun. 12, 2012, 1:30PM JST), http://www.japantoday.com/ category/crime/view/over-1300-fukushima-citizens-file-criminal-complaint-against-tepco.

[93] *See* Katsuta, *supra* note 9, at 499-500 (stating that "the way the American jury operates, or the way we see how well the American jury does its job, is likely to influence the reforms we envisage for our judicial system).

[94] *See id.* at 498.

[95] *See id*.

[96] *See id*.

right of trial by jury shall be preserved. . . ."[97] The federal rules of civil procedure allow joinder of legal and equitable claims in the same case, and even the joinder of equitable claims – which do not themselves trigger a right to jury trial – does not destroy that right with respect to legal claims.[98] The U.S. Supreme Court has held that the right to a jury trial constitutes a fundamental guarantee, and "every reasonable presumption should be indulged against its waiver."[99] Similarly, the U.S. Supreme Court has established that U.S. citizens have the right to serve as jurors.[100] The Seventh Amendment does not apply to the states, so the right to a jury trial depends on each state's law.[101] However, all states generally guarantee civil litigants with the right to a jury trial in common-law actions, namely lawsuits seeking money for harms allegedly caused by a defendant.[102] The right to a jury trial may be waived though, depending on the jurisdiction, through conduct such as the failure to make a timely demand or through a contractual clause expressly waiving the right to a jury trial.[103]

Historically, civil juries in the United States were justified, in part, as a check against the abuse of government power and the hesitation to trust that government appointed judges could operate independently from the government.[104] Further justification of civil juries was founded in its role for protecting citizens from oppressive laws such as tax laws.[105] Over two hundred years ago, Thomas Jefferson told Congress that he considered trial by jury to "the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."[106] However, civil juries serve even broader purposes. In addition, civil jury trials were advanced to assure a fair and equitable resolution of factual issues, provide more reliable decisions, and protect

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[97] U.S. Const. amend. VII.

[98] The U.S. Federal Rules of Civil Procedure recognizes the right to a jury trial stating that "The right of trial by jury as declared by the Seventh Amendment to the Constitution - or as provided by a federal statute - is preserved to the parties inviolate." Fed.R.Civ.P. 38(a).

[99] *Hodges v. Easton,* 106 U.S. 408, 412 (1882).

[100] *Powers v. Ohio,* 499 U.S. 400 (1991).

[101] *Minneapolis & St. Louis R.R. Co. v. Bombolis,* 241 U.S. 211, 220 (1916).

[102] Randolph N. Jonakait, THE AMERICAN JURY SYSTEM 13 (Yale U. Press 2003) (noting that many civil matters do not qualify as common-law actions including disputes concerning estates and domestic relations. Pure actions in equity do not qualify for jury trials either. Actions outside of the common-law arena constitute the majority of disputes handled by state courts.)

[103] Amanda Szuch, *Reconsidering Contractual Waivers of the Right to a Jury Trial in Federal Court,* 79 U. Cin. L. Rev. 435, 437-38 (2010); William J. DeSantis, *Avoiding a Jury Trial,* New Jersey Law Journal (Sept. 3, 2012); *Deciding Enforceability of Jury Waivers in Disputed Contracts,* New York Law Journal, Vol. 242, No. 115 (Dec. 18, 2009); *see also generally* American Bar Association, *Principles for Juries and Jury Trials: American Jury Project* (2005) [hereinafter "American Jury Project"] available at http://www.americanbar.org/content/dam/aba/ migrated/juryprojectstandards/principles.authcheckdam.pdf (advocating that waivers remain possible).

[104] Jason M. Solomon, *The Political Puzzle of the Civil Jury,* 61 Emory L.J. 1331, 1341 (2012); *see also* Jonakait *supra* note 102, at 13. The right to a jury trial was a hotly contested issue from the start. When the drafters of the Constitution initially failed to include this right, it triggered massive popular resistance during the ratification process in most states. The drafters argued that certain cases did not warrant juries, and that Congress could determine the appropriateness of juries on a case-by-case basis.

[105] *Id.* This defense of the civil jury was based on the "jury's ability to find for certain defendants while disregarding the law when justice seemed to require." *Id.*

[106] *Id.* at 1340.

against the powerful, regardless of whether they were public officials or private citizens.[107]

Today, it estimated that one-third of all U.S. citizens will serve on a jury at some point.[108] Although the number of jury trials has decreased significantly in recent decades, there are still more than 50,000 jury trials held in the United States each year in the civil arena.[109] The typical juror experience in the United States differs widely from the dramatic depictions painted in popular movies, books, and sensationalized cases. In addition to involvement in criminal matters, jury service in the United States primarily involves shorter trials arising from negligence, fraud, other torts, contractual matters, intellectual property, and other matters.[110] Although the role of the American jury may vary, its primary objective continues to entail finding facts and applying the law to those facts to render a verdict, decide the remedy (if any), and essentially resolve the dispute between the litigants.[111] In addition to resolving disputes, jury trials also help facilitate settlement. The rational lawyer will look to past jury verdicts to decide whether to settle, how to settle, and what might happen if the case does not settle. In essence, civil jury trials "sit atop a pyramid of cases casting light below" such that subsequent cases can be reasonably settled.[112]

2. Long-standing attacks on the American civil jury system

U.S. civil juries have been widely criticized since inception.[113] Famous American author Mark Twain once commented that the U.S. jury system "puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity, and perjury" and opined that "it is a shame that we must continue to use a worthless system because it was good a thousand years ago."[114] Intense criticism typically emanates from defense lawyers, large corporations, the media, and some scholars.[115] More concretely, the contemporary criticisms facing American civil juries include claims of unpredictability,

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[107] *See* Jonakait, *supra* note 102, at 38-40 (questioning whether civil juries provide more protection against powerful than judges).

[108] John Gastil, E. Pierre Dees, Philip J. Weiser & Cindy Simmons, THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION 4 (Oxford U. Press 2010).

[109] Jonakait, *supra* note 102, at 14.

[110] Solomon, *supra* note 104, at 1335 (noting that an estimated 90% of civil jury trials every year take place in state courts, the civil jury is overwhelmingly a tort institution in these state courses).

[111] Graham C. Lilly, *The Decline of the American Jury*, 72 U. Colo. L. Rev. 53, 55 (Winter 2001).

[112] Jonakait, *supra* note 102, at 11.

[113] *See* Roscoe Pound Institute, *The Jury as Fact Finder and Community Presence in Civil Justice: Report of the 2001 Forum for State Appellate Court* Judges 7 [hereinafter RPI, *The Jury as Fact Finder*] (2005). By way of additional illustration, one writer over fifty years ago observed that "the jury system has been unmercifully beaten in the literature of law for the past fifty years." Milton Douglas Green, *Juries and Justice: The Jury's Role in Personal Injury Cases,* 1962 U. Ill. L.F. 152 (1962).

[114] Jonakait, *supra* note 102, at 57-58.

[115] *See* Gastil, Dees, Weiser & Simmons, *supra* note 108, at 155-156; Ann M. Scarlett, *Shareholders in the Jury Box: A Populist Check Against Corporate Mismanagement*, 78 U. Cin. L. Rev. 127, 141 (2009); *see also* Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 Cornell L. Rev. 325, 329-330 (1995).

subjectivity to passion, and juror incompetence.[116] Critics assert that jurors typically have a pro-plaintiff basis and tend to overlook substantive evidence in favor of emotion, stereotypes, and personal beliefs.[117] They similarly claim that juries are overgenerous and assess damages based on a defendant's deep pockets.[118]

With respect to ability, critics believe that civil jurors often fall short. Because almost all adult citizens qualify for jury service, critics claim that the jury pool is too broad and that the public at large is not qualified to assess certain disputes.[119] Simply put, the ordinary citizen cannot grasp difficult concepts.[120] Juror ability has particularly come into question when dealing with complex cases, specialized matters, or expert witnesses. One criticism is that jurors cannot critically weigh expert testimony because of its complexity, so jurors give "unquestioning deference to expert opinion." [121] Accordingly, the civil jury system should be modified in favor of specialized courts in which professional judges with expertise in certain matters adjudicate disputes.

Based on such beliefs combined with the high cost of litigation alternatives, many corporations have even resorted to contractual waivers of the right to a trial by jury.[122] Companies have attempted to utilize jury waiver clauses in a wide range of business-to-business and business-to-consumer agreements.[123] The enforceability of these clauses depends on the jurisdiction however. In New Jersey, for example, these waivers are generally enforceable so long as they are entered into knowing and voluntary, and do not violate public policy.[124] In contrast, California and Georgia generally do not allow a pre-dispute, contractual waiver of a jury trial.[125]

From an operational standpoint, civil juries have also come under fire for their alleged inefficient use of judicial resources. Critics assert that a judge-only system would eliminate the expense of juror pay as well as the time necessary for juror selection, education, instruction, and deliberation.[126] Aside from the criticisms, the practical realities of civil litigation in the United States have marginalized civil juries. In recent decades, not only has the total number of state and federal cases dropped, but the

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[116] Solomon, *supra* note 104, at 1349-50.

[117] *Id.*; *see also* DeSantis, *supra* note 103; *see also generally* RPI, *The Jury as Fact Finder*, *supra* note 113, at 7.

[118] *See* Scarlett, *supra* note 115, at 158 (noting complaints that juries can turn out like lotteries); *see also generally* RPI, *The Jury as Fact Finder*, *supra* note 113, at 7.

[119] Jonakait, *supra* note 102, at xx-xxi.

[120] Scarlett, *supra* note 115, at 151-52 *citing* Special Comm. on Jury Comprehension, American Bar Ass'n, JURY COMPREHENSION IN COMPLEX CASES 4 (1989) (observing in one study of alternate jurors in complex cases that "many jurors were confused, misunderstood the instructions, failed to recall evidence, and suffered enormously from boredom and frustration").

[121] *See* RPI, *The Jury as Fact Finder*, *supra* note 113, at 7.

[122] *See* DeSantis, *supra* note 103.

[123] *See id.*; Jane Spencer, *Companies Ask People to Waive Right to Jury Trial,* The Wall Street Journal (Aug. 17, 2004).

[124] *See id*.

[125] Szuch, *supra* note 103, at 439; *Grafton Partners LP v. Superior Court*, 36 Cal. 4th 944 (2005).

[126] Scarlett, *supra* note 115, at 150-51.

proportion of civil cases have declined even more rapidly.[127] Additionally, some claim that the original objectives supporting jury trials have disappeared. In essence, the argument flows that civil juries are not necessary to check the government and guard against oppressive laws because judges are more professional, less prone to corruption, and not as tied to the government as they were when the U.S. Constitution was drafted.[128]

3. Attacks on the American jury are largely unwarranted

In the United States, the right to trial by jury constitutes a major feature of democracy and reinforces the concept of liberty.[129] While civil jury trials are not perfect and there is an ongoing need to refine and constantly improve jury practice in the United States, [130] it is important to preserve the right to jury trial and enhance juror participation.[131] Moreover, the negative perceptions and criticisms of civil jury trials have been thoroughly tested and refuted.[132] Systematic data collected over the past several decades supports jury performance and demonstrates the merits of lay participation in the judicial system.[133] Civil juries are not incompetent or irresponsible. Conversely, civil jury trials continue to stand the test of time, and the pros definitely outweigh the cons.

The criticisms of civil juries are largely exaggerated and often founded on "anecdotes, cavalier uses of statistics, and appeals to authority or 'common sense.'"[134] Civil juries have the unenviable task of resolving difficult questions related to degree of responsibility, liability, and valuation of damages. For example, it is a challenge to determine how much compensation to award when negligence causes the loss of a loved one. If a civil jury does not answer such questions to a litigant's satisfaction, the unsuccessful litigant will likely complain and blame its failure (with or without justification) on the jury. Additionally, the civil jury has been the victim of incomplete information or slanted media coverage as the media has disproportionately featured jury

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[127] Gastil, Dees, Weiser & Simmons, *supra* note 108, at 154 (pointing out that there were roughly one-third as many jury trials per year in 2000 as there were in 1976).

[128] Solomon, *supra* note 104, at 1341. The concern still exists though with appointed judges.

[129] *See* Neil Vidmar and Valerie P. Hans, AMERICAN JURIES: THE VERDICT 15 (Prometheus Books 2007) [hereinafter "Vidmar and Hans, *American Juries*"]; James Oldham, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 5 (New York University Press 2006).

[130] Further empowering the jury as an active deliberative body and providing jurors with more tools can help enhance the effectiveness of juries as well. Recent concepts that started receiving attention in the 1990s include that ability to take notes, asking witnesses questions during trial, asking the judge more questions, and allowing jurors to discuss the case among themselves before final deliberations. *American Jury Project*, *supra* note 103 (containing the American Bar Association's acknowledgment that the legal community should continue to look for ways to refine and improve jury practice so that the right to jury trial is preserved and juror participation enhanced).

[131] Gastil, Dees, Weiser & Simmons, *supra* note 108, at 161-164.

[132] *Id.* at 156; Scarlett, *supra* note 115, at 141. Such improvements include, among others, allowing jurors to take notes, discuss the case with each other during trial, and providing jury instructions earlier in the process. *See generally* RPI, *The Jury as Fact Finder*, *supra* note 113, at 7.

[133] *See generally* Vidmar and Hans, *American Juries*, *supra* note 129, at 153-68; RPI, *The Jury as Fact Finder*, *supra* note 113, at 7.

[134] *See* RPI, *The Jury as Fact Finder*, *supra* note 113, at 7.

verdicts for plaintiffs.[135] Unsubstantiated attacks on civil juries can arise from casual observers of media coverage. Observers may second-guess the collective conclusion of the jurors notwithstanding the lack of access to all relevant information, the absence of any interaction with the judge, and no formal legal training. This second-guessing is compounded by unbalanced media coverage. The media tends to unfairly slant its coverage because "plaintiff victories are large damage awards are exciting and 'newsworthy.'"[136]

Most significantly, society benefits from civil jury trials on a host of levels. On a political level, lay participation in the judicial system enables the citizenry to better grasp and connect with democratic institutions.[137] Not only do jurors gain a better understanding and appreciation of the legal system, but they also tend to become more involved in the community after their jury service.[138] Distinguished French political observer Alexis de Tocqueville concluded that "I do not know whether the jury is useful to those who are in litigation; but I am certain it is highly beneficial to those who decide the litigation; and I look upon it as one of the most efficacious means for the education of the people which society can employ.[139] In a democratic society, it is important for citizens to "connect not just with each other, but also with the state in ways that are inspiring, empowering, educational, and habit forming."[140] Jury service provides an opportunity to build trust in judges and other jurors. It also leads to a greater sense of community and civic service. Although lay participation in civil litigation is not openly celebrated and most U.S. jury trials do not necessarily make the front page of the newspaper, those who have served on juries almost uniformly value their experience.[141] This civic service constitutes an invigorating individual experience that changes jurors' "understanding of themselves and their sense of political power and broader civic responsibilities."[142] In fact, jury service increases the likelihood of future civic engagement, including a greater propensity to vote.[143]

On an adjudicative level, concrete evidence demonstrates that jurors are competent decision makers.[144] In general, jurors also serve with a sense of duty and desire to administer justice. Judicial review of jury verdicts is rare, and the overturning of jury verdicts is rarer still.[145] A jury also interprets evidence better than an individual, and collectively can overcome personal bias, prejudice, and consider more implications

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[135] Sean G. Overland, THE JUROR FACTOR: RACE AND GENDER IN AMERICA'S CIVIL COURTS 2 (LFB Scholarly Publishing 2009).

[136] *Id.* at 2-4 (citing the *Liebeck v. McDonald's* case as a prime example)

[137] *Powers v. Ohio*, 499 U.S. 400 (1991).

[138] Gastil, Dees, Weiser & Simmons, *supra* note 108, at 106-130; RPI, *The Jury as Fact Finder*, *supra* note 113, at iv.

[139] Gastil, Dees, Weiser & Simmons, *supra* note 108, at 5.

[140] Gastil, Dees, Weiser & Simmons, *supra* note 108, at 9.

[141] *See generally id.* at 22.

[142] *Id.* at 4.

[143] *Id.* at 9, 26-51.

[144] *See* Vidmar and Hans, *American Juries*, *supra* note 129, at 153-68.

[145] RPI, *The Jury as Fact Finder*, *supra* note 113, at iv.

of that evidence.[146] Although many U.S. attorneys maintain a preconceived notion that jurors allow emotion to excessively cloud their judgment and consistently render outrageous damage awards, there is little systematic information to support such a notion.[147] To the contrary, the data from hundreds of jury trials and simulations suggest that "incompetence is a rare phenomenon."[148] Numerous studies suggest that judges and juries often reach very similar conclusions when resolving civil disputes,[149] and that juries are not biased towards plaintiffs.[150] In fact, in analyzing civil trial verdicts in 2001 in the 75 largest counties in the United States, the U.S. Department of Justice determined that plaintiffs won 65% of cases heard by judges, but only 53% of cases heard by juries.[151] The study results have stayed consistent despite changes in trials, evidentiary rules, and juror demographics.[152]

Also, studies confirm that juries are not typically confounded by complex cases and that professional judges do not necessarily function better in resolving complex disputes.[153] In fact, professional judges and juries have similar reactions to potentially biased information in such cases.[154] Not only can and do civil jurors handle complex civil cases well collectively, but juries can also "understand and evaluate scientific and other expert testimony without giving unwarranted deference to witnesses who demonstrate specialized education and training."[155] To compensate for the complexity of a case, civil juries simply tend to deliberate for longer periods and ask more questions.[156] Moreover, despite the criticism of civil juries from other sectors, judges generally do not harbor reservations about civil juries.[157] In assessing civil jurors, trial judges are naturally in the best position to do so given their daily interaction with jurors. On the whole, judges

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[146] Jonakait, *supra* note 102, at 44-49.

[147] Scarlett, *supra* note 115, at 150.

[148] Neil Vidmar and Valerie P. Hans, JUDGING THE JURY 129 (Perseus 1986).

[149] Scarlett, *supra* note 115, at 150 (noting that the empirical research showing that criticism of jury trials is not founded uses four primary methodologies: (1) mock jury experiments involving simulated trials, (2) post-deliberation interviews or surveys with ex-jurors, (3) analysis of jury verdicts in archival sources, and (4) field studies or experiments involving real juries. *See* Spencer, *supra* note 123.

[150] *See* Scarlett, *supra* note 115, at 157; *see also* Vidmar and Hans, *American Juries, supra* note 129, at 148-151 (citing the Chicago Jury Project, which found that judges and juries agreed on the appropriate verdict in 78% of the jury trials examined, and noting that interpretation of the facts was not an issue in 90% of cases in which the jury and judge disagreed as to the proper trial outcome).

[151] *See* Spencer, *supra* note 123 (noting that the average jury awards for successful plaintiffs were 32% higher than bench trials. However, there are several factors that mitigate against the increase).

[152] Vidmar and Hans, *American Juries, supra* note 129, at 151.

[153] Jonakait, *supra* note 102, at 49-50 (noting that there is no empirical information that judges function better in handling complex cases, and that judges are often uncomfortable with quantitative, scientific, and technological information).

[154] Scarlett, *supra* note 115, at 155-56 (citing the Chicago Jury Project, which found that judges and juries agreed on the appropriate verdict in 78% of the jury trials examined).

[155] *See* RPI, *The Jury as Fact Finder*, *supra* note 113, at iv.

[156] *See* Scarlett, *supra* note 115, at 156.

[157] *See* Paula L. Hannaford, *et. al.*, *How Judges View Civil Juries*, 48 DePaul L. Rev. 247, 248-49 (1998); *see also* Louis Harris & Assoc., *Judges' Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend at Least Half Their Time on General Civil Cases*, 69 B.U. L. Rev 731, 746-47 (1989).

respect lay participation even in complex litigation and believe that it is essential to retain the right to trial by jury in routine civil cases.[158]

In addition, while media coverage of "runaway" civil jury awards has skewed public perception, the typical award is not extraordinary.[159] Typically, juries attempt to employ a systematic process in determining compensatory and exemplary damages.[160] They also tend to award punitive damages in appropriate amounts.[161] In fact, damages awards from civil juries cannot be too far removed from those typically issued by judges. To ensure that awards do not get out of hand, U.S. courts have technical rules of evidence to keep juries from hearing evidence or arguments about the availability of insurance coverage, treble damages, attorneys' fees as well as the taxability of awards, settlement offers, and actual settlements involving some of the parties so as to reduce the potential that this information could adversely affect the final verdict.[162] Procedural mechanisms such as summary judgment, directed verdicts, and judgments notwithstanding the verdict also provide the trial judge with powerful tools to check civil juries and ensure that juries are focusing on factual determinations.

On a systemic level, civil juries provide certain advantages as decision makers. Jurors collectively can often remember more evidence presented at trial than a single individual because group memory serves the judicial process well.[163] Direct citizen involvement in the judicial process facilitates the integration of common sense into the dispute resolution process. Professional judges tend to be different from most of society as they are uniformly affluent and share a similar educational and work history.[164] Further, litigants (and society as a whole) gain from the collective intelligence, experience, and sense of justice brought to the system by ordinary citizens. Naturally, neither judge nor jury provides a perfect solution for dispute resolution due to the potential for human error. In theory, however, collective fact-finding is superior to the conclusions reached by a single individual.[165] In practice, research consistently shows that jurors are capable of collectively understanding the evidence, recalling relevant facts, and accurately determining issues of fact.[166] Additionally, the inclusion of men and women from all walks of life into jury panels better reflects the composition of society and surpasses the diversity of legislatures, executive branches, or the judiciary. This diversity can better reflect the standards and priorities of society in resolving disputes.

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158 *See id*.

159 Scarlett, *supra* note 115, at 157. To the extent that an award is extraordinary, it may be corrected by an appellate body.

160 *Id.* at 157-58.

161 *See* RPI, *The Jury as Fact Finder*, *supra* note 113, at iv.

162 Scarlett, *supra* note 115, at 154.

163 Jonakait, *supra* note 102, at 42-46 (citing social science research that indicated individuals correctly recalled only 60% of the evidence correctly, but that at least one member of a panel recalled 90% correctly).

164 *Id.* at 47 (Yale U. Press 2003).

165 Lilly, *supra* note 111 at 55.

166 Scarlett, *supra* note 115, at 155.

4. Civil jury lessons applicable to Japan

By extending jury trials to the civil realm, Japan could avail itself of the various benefits realized by the use of jury trials in the United States. This action would also be consistent with the various purposes underlying civil jury trials in the U.S. More specifically, civil jury trials would provide the citizenry with an additional check against the abuse of government power, enhance objectivity, further the independence of the judiciary, and assure the fair resolution of factual disputes. The inclusion of lay citizens into the process will help ensure the integration of common sense into the decision making process. In addition, as demonstrated by the U.S. experience, the Japanese judicial system will not be abandoning its penchant for uniformity and predictability. Civil juries are generally reliable particularly with the expert oversight of professional judges. One would assume that Japan would continue to utilize its quasi-jury or lay judge system, thereby enabling oversight by professional judges. Even if the all-citizen U.S. jury model were followed, professional judges would still maintain significant control. In a U.S. context, the phrase "trial by jury" is misleading given that the judge presides over the trial and gives instructions to the jury about procedure and substantive law. Not only must the jurors follow these instructions, but also in civil cases, the judges can override the verdict by entering a "judgment not withstanding the verdict," adjusting the damages awards, or ordering a new trial.[167] It is important for outside observers to realize that the U.S. system achieves predictability and relative uniformity through its "trial by judge and jury" system.

B. Japanese Society Will Benefit from Civil Trials in Selected Contexts

Although lay judge systems may not be appropriate in all civil cases in Japan, citizen involvement in certain areas would have many positive societal effects. Lawsuits involving alleged governmental misconduct, administrative dispositions, environmental disasters, serious harms such as drug defects, and other disputes that have the greatest impact upon society would be well suited for disposition by lay judges. Among other things, lay participation in the administration of civil justice would further reinforce the democratic foundation of Japanese society, promote justice, and help ensure equitable results.[168] While not absolutely necessary, lay participation in the judicial process is the cornerstone of democratic government regardless of its form.[169] The correlation between broader democratic governance and lay participation in the judicial decision-making process is unmistakable.[170]

By opening certain civil cases to lay participation, more individuals would have the chance to view the system firsthand, infuse a fresh perspective into civil justice, and

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[167] *See* Vidmar and Hans, *American Juries*, *supra* note 129, at 147.

[168] *See* Ivkovic, *supra* note 4, at 431-32; *see generally* Saikō Saibansho [Sup. Ct.] Nov. 16, 2011, Case No. 2010 (A) No. 1196, 65 Keishu 8 (Japan) (finding that there is no conflict between "reinforcing the democratic foundation" of society through citizen participation in the justice process and fundamental constitutional principles).

[169] The form taken can be a jury, mixed tribunal assessor, magistrate, or lay court. *See* Ivkovic, *supra* note 4, at 431-432.

[170] *See* Park, *supra* note 4, at 534-36.

provide the system with practical and grounded input. It would also further many of the goals advanced by recent reforms in Japan, particularly the goals of enhancing citizen participation in civic governance, educating, and increasing faith in the judicial system.[171] Assuming that Japan used a mixed tribunal model similar to that used for serious crimes, its citizens would have the opportunity to deliberate with professional judges about serious matters affecting society. This form of deliberative democratic activity will force citizens to offer and defend their opinions, thereby promoting a more informed, reflective, tolerant, and active citizenry.[172]

1. The major impact of certain civil litigation on society supports public involvement

Wrongdoers and victims are not limited to criminal cases. In fact, the civil justice system is designed to address serious harms. Citizens should have a direct voice in civil disputes that have significant impact on Japanese society as a whole. In fact, they should have the opportunity to consider and apply public policies for civil wrongs such as the deterrence of risk and wrongful conduct, victim compensation, protection of person and property from unjust injury, enhancement of safety, allocation of loss, and formation of minimum standards of social conduct. Important societal disputes should not be relegated to the impulse of the state.

There are many civil lawsuits that significantly impact society. One prime example is the recent lawsuit against the Japanese government in connection with the Self Defense Forces' monitoring of citizens opposed to the deployment of Japanese troops in Iraq.[173] Another even more substantial example is the Fukushima nuclear plant disaster in northeast Japan in March 2011 and lawsuits spawning therefrom. Despite the government's establishment of a mediation system for victim compensation,[174] various entities victimized by the disaster have started filing extensive litigation against Tokyo Electric Power Co., Inc. ("TEPCO"), operator of the Fukushima nuclear plant, in conjunction with harms suffered at the hands of nuclear contamination.[175] This includes lawsuits by individuals, spa and inn operators, schools, golf courses, and even a shareholders' lawsuit against current and former TEPCO directors to the tune of over $67

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[171] *JSRC Recommendations*, *supra* note 18, at Chp. IV, Part. 1(1); *see also* Dean, *supra* note 21, at 585.

[172] Corey & Hans, *supra* note 33, at 77.

[173] The Self Defense Forces took photos and collected personal information of those attending rallies and demonstrations opposing the dispatch of the SDF to Iraq. *See generally SDF's surveillance of civil protests illegal: court ruling*, JAPAN PRESS WEEKLY (Mar. 27, 2012), http://www.japan-press.co.jp/modules/news/index.php?id=2977; *Court says SDF intelligence operation was illegal*, THE ASAHI SHIMBUN (Mar. 27, 2012), http://ajw.asahi.com/article/behind_news/social_affairs/AJ201203270049; *EDITORIAL: Politicians must wield a firm hand over the SDF*, ASAHI SHIMBUN (Mar. 30, 2012), http://ajw.asahi.com/article/views/editorial/AJ201203300027. Although the district court found that the SDF violated the plaintiff's right to control the use of their personal information, the court denied any compensation to an overwhelming majority of the plaintiffs.

[174] *TEPCO Must Be Proactive in Nuke Crisis Compensation Negotiations*, MAINICHI SHIMBUN (Feb. 25, 2012), http://mainichi.jp/english/english/perspectives/news/20120225p2a00m0na001000c.html.

[175] Yoko Kubota, *Shareholders to sue Tepco executives for $67 billion*, REUTERS (Mar. 5, 2012, 5:45pm EST) http://www.reuters.com/article/2012/03/05/us-tepco-lawsuit-idUSTRE8240RY20120305.

billion.[176] The shareholders' lawsuit is believed to be the largest civil lawsuit ever filed in Japan. The public interests in this litigation are diverse. Not only does TEPCO provide electricity to millions of Japanese citizens, but the Japanese government has also infused billions of dollars into the company because of the disaster.[177]

Having citizens empaneled on a mixed tribunal with professional judges to decide important civil lawsuits that involve critical societal matters or governmental malfeasance such as those filed against TEPCO and the Self Defense Forces would be beneficial. At minimum, this would give the public a direct voice in the adjudication of these critical societal matters. It would also place a check on governmental pressure and influence. Unlike professional judges, lay judges do not have a career financed by and dependent upon the government.[178]

They are not subject to demotion or reassignment, as has often been a concern of professional judges in Japan. Accordingly, lay judges are less dependent upon the state, and therefore more able to reach decisions on important matters without undue influence.

2. Reforms have been targeted at improving the civil litigation system

As part of its recent groundbreaking reforms, Japan has made special efforts to bring the administration of justice closer to the people and improve its civil dispute resolution system.[179] In 1996, the Code of Civil Procedure was revised to provide easier access to the courts and make the civil litigation process more efficient and effective.[180] As part of its recommendations, the JSRC suggested that Japan further reform its civil justice system to make dispute resolution more effective, efficient, and accessible to the public.[181] Taking these recommendations to heart, Japan implemented reforms that brought civil justice closer to the public, including, among other things: the appointment of expert commissioners to assist in complex litigation and new civil dispute resolution

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[176] *Id.*; *see also* Ben Lewis, *The Legal Aftershocks of Fukushima*, LAW.COM (Jan. 26, 2012, 12:00 AM), available at http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202540087107&slreturn=1.

[177] The government has allocated over $20 billion USD for TEPCO to compensate disaster victims and continue providing services to its 45 million customers. Kazumasa Takenaka & Kaname Ohira, *TEPCO to seek billions more for Fukushima Compensation*, THE ASAHI SHIMBUN (Mar. 21, 2012), ajw.asahi.com/article/0311disaster/fukushima/AJ201203210049. Much of the funds sought by TEPCO will be distributed through the Nuclear Damage Liability Facilitation Fund established by the government to informally resolve claims, as opposed to payouts through formal litigation.

[178] In Japan, the Supreme Court appoints lower court judges for an initial ten-year period. *See* John O. Haley, *The Japanese Judiciary: Maintaining Integrity*: *Autonomy and the Public Trust, in Law in Japan: A Turning Point*, 99-155 (Daniel H. Foote ed., 2007). At the end of this period, an assistant judge is eligible for appointment as a full-judge, again for another ten year term. *Id.* Reappointment is routine so Japanese judges essentially have lifelong tenure until the mandatory retirement age of 65. *See id.* (The retirement age for Supreme Court Justices is seventy.)

[179] *Results of the Justice System Reform*, *supra* note 19, at 4. Japan passed legislation reforming its codes, commercial laws, tort law, administrative procedure, criminal trial procedure, and legal education system. *See generally id*.

[180] Minji Soshou-hou [Code of Civil Procedure of Japan], Act No.109 of June 26, 1996 (as last amended in 2006), *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=214952.

[181] *See generally JSRC Recommendations*, *supra* note 18, at Chp. II.

bodies, such as an Intellectual Property High Court,[182] a modified labor dispute system in which labor specialists take a central role in adjudication,[183] as well as amendments to its administrative case litigation system and enhancements to its alternative dispute resolution system.[184] Over the past decade, Japan has also implemented major reforms to laws involving corporations, insurance, bankruptcy, and civil litigation.[185] However, this flood of major reforms did not include a proposal for lay participation in civil trials.

3. Expansion of lay judge system to civil realm is plausible

Expanding lay judge participation into the civil realm would be a natural extension of the new system. Before issuing its final recommendations, the JSRC discussed the concept of citizen participation in civil lawsuits.[186] At the time, however, the idea of lay participation in civil trials was pushed aside because serious criminal trials were deemed to carry a deeper meaning, to involve major societal ramifications, and generally easier to grasp.[187] Moreover, there were concerns that this might impose too great of a burden on the citizenry if lay judge trials were initially utilized in civil trials.[188] However, in proposing lay participation, the JSRC did note that a "new system should be introduced, *for the time being* in criminal proceedings, enabling the broad general public to cooperate with judges by sharing responsibilities, and to take part autonomously and meaningfully in deciding trials."[189] This indicates that the JRSC did not dismiss the notion of extending lay participation to civil proceedings once criminal lay judge trials taken root. Also, albeit in a criminal context, the Supreme Court of Japan has accepted the premise of citizen involvement in the trial process declaring that the Constitution of Japan "does not clearly stipulate that lower courts shall be comprised solely of judges."[190] Accordingly, there should not be any legal blockades to expanding lay participation.

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[182] Nottage & Green, *supra* note 12, at 132; Chiteki zaisan koto saibansho sechiho [Act for Establishment of the Intellectual Property High Court], Law No. 119 of 2004 (Japan). An English translation of this law is electronically available at http://www.cas.go.jp/jp/seisaku/hourei/data/IPHC.pdf.

[183] Rodo shinpanho [Labor Tribunal Act], Law No. 45 of 2004 (Japan).

[184] Gyosei jiken soshoho no ichibu o kaisei suru horitsu [Act for Partial Revision of the Administrative Case Litigation Act], Law No. 84 of 2004 (Japan); Saibaingai funso kaiketsu tetsuzuki no riyo ni sokushin ni kansuru horitsu [Act on Promotion of Use of Alternative Dispute Resolution], Law No. 151 of 2004 (Japan); *see also* Sogo horitsu shienho [Comprehensive Legal Support Act], Law No. 74 of 2004 (Japan). An English translation of the alternative dispute resolution law is electronically available at http://www.cas.go.jp/jp/seisaku/hourei/data/AOP.pdf.

[185] *Results of the Justice System Reform*, *supra* note 19. Japan implemented a new Bankruptcy Act in 2004, Companies Act in 2005, Insurance Act in 2008, and plethora of other civil procedural laws. *See id. at* 10.

[186] *See Saiban-in I-Ro-Ha: Minji ni ha Dounyu shinai no? Kokumin no Futan Omoku Miokuri* [*Lay Judge ABCs: Why Not Civil Trials? Put Off Due to Heavy Public Burden*], NISHI NIHON SHIMBUN WEEKLY (May 26, 2009) [hereinafter "*Lay Judge ABCs*"].

[187] *Id*. The Ministry of Justice supported citizen involvement with violent crimes because "the more heinous the crime, the more meaning there is in the restoration of social justice by citizens, in whom sovereignty rests." *See* Wilson, *Japan's New Criminal Jury*, *supra* note 12, at 515. The government also believed that criminal cases can be more "straightforward and easier to understand than civil matters." *Id.*

[188] *See* Wilson, *Japan's New Criminal Jury*, *supra* note 12, at 515.

[189] *JSRC Recommendations*, *supra* note 18, at Chp. IV, Part. 1.1. (emphasis added).

[190] Saikō Saibansho [Sup. Ct.] Nov. 16, 2011, Case No. 2010 (A) No. 1196, 65 Keishu 8.

4. Mixed tribunals are equipped to render fair verdicts

With the guidance of a professional judge instructing on legal matters, all-citizen juries or mixed tribunals in Japan are well suited to render a fair and just verdict. Research has shown that criminal and civil juries produce results that are fair, impartial, and thorough.[191] This maxim can be applied to mixed tribunals as well. In fact, the Supreme Court of Japan has acknowledged that mixed tribunals are capable of similar results.[192] Most observers have concluded that there are substantial "fact-finding advantages of a representative cross-section of the community that engages in sustained deliberation" and that citizen jurors are sound fact-finders in the vast majority of cases.[193]

Albeit limited in duration, Japan's experience with criminal cases has been no different. With the introduction of the lay judge system, citizen involvement in the judicial process is no longer a foreign concept. The experiment with serious criminal cases has demonstrated that non-expert Japanese citizens can be trusted to learn and apply legal concepts. To date, Japanese lay judges have been credited with the ability to render sensible judgments and ignore the pressures associated with high profile cases.[194] In the current environment of reform, now is a prime opportunity for Japan to consider allowing lay participation in civil trials and obtaining the benefits of expanded civic engagement.

5. Logistical preparations have already been made

Lay participation in civil trials would not present an undue burden given the preparations made for citizen involvement in criminal trials. For purposes of uniformity and ease, Japan could easily adopt a quasi-jury trial system for certain "significant" civil lawsuits generally along the lines implemented for serious criminal trials. Relative uniformity with the criminal lay judge tribunals would reduce logistical burdens, confusion, and costs in extending lay participation to civil trials. The public has been thoroughly educated about lay participation as a result of government-led educational efforts, promotional materials, mock trials by bar associations, intense media coverage, and other activities related to the current lay judge system.[195] Courtrooms have been structurally modified to accommodate lay judges.[196] The public is now largely aware of the mechanics of lay judge participation and an overwhelming majority of those who serve as lay judges are satisfied with their experiences.[197] There is no reason to believe that the results from civil trials would be any different.

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[191] *See* Gastil, Lingle & Deess, *supra* note 2, at 75 *citing* Valerie P. Hans, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY (New Haven, Conn.: Yale University Press, 2000).

[192] Saikō Saibansho [Sup. Ct.] Nov. 16, 2011, Case No. 2010 (A) No. 1196, 65 Keishu 8.

[193] Corey & Hans, *supra* note 33, at 83.

[194] Shinomiya, *supra* note 37, at 9-11.

[195] *See* Ibusuki, *supra* note 13, at 27; In addition to spending significant sums on billboards, print advertisements, and commercials, the government spent considerable amounts on symposiums, mock trials, and other educational activities. Wilson, *Japan's New Criminal Jury*, *supra* note 12, at 493-94.

[196] *See* Wilson, *Japan's New Criminal Jury*, *supra* note 12, at 494.

[197] *See* McClanahan, *supra* note 9, at 748.

Naturally, the use of citizen judges would generate additional costs for the judiciary. However, careful planning and reduction of other expenditures might help finance the introduction of civil lay judge trials. To cover the additional expenses, the cost of a quasi-jury panel could be assessed as court costs to the losing party in the litigation. The cost of using lay judges might also be covered, in part, by diminishing the current caseload of professional judges. In Japan, civil cases currently fall within the exclusive province of professional judges.[198] A single district court judge will handle a civil lawsuit, unless it is deemed significant or particularly difficult.[199] In significant or difficult cases, a panel of three professional judges will hear the matter.[200] Creating a system in which only one professional judge is used in combination with citizen judges would theoretically free up two other professional judges to handle other cases. In the past, the prolongation of large-scale cases resulting from the insufficient number of judges has placed an excessive burden on the judiciary.[201] Implementation of civil lay judge trials would likely help reduce the duration of proceedings in civil cases and help the judiciary handle an increased civil caseload.[202] This reallocation of resources might help defray the costs of lay participation. In any event, it would be worthwhile for Japan to explore this matter further and perform a cost-benefit analysis into the expansion of the lay judge system.

C. Citizen Participation in Civil Trials is Consistent With the Original Purpose of Legal Reforms in Japan

Citizen participation in civil trials would also further the objectives underlying recent legal reforms in Japan. The country has made it a top priority to reform its legal system so that it is more accessible, understandable, and reflective of democratic norms. Reforms have centered on "establishing a popular base" and constructing a justice system that meets public expectations.[203] By taking the next step in direct citizen participation, Japan can also advance understanding of the civil justice system and alter the public's consciousness regarding civil dispute resolution.

1. Expanded participation would strengthen, educate, and empower the citizenry

As demonstrated by the American experience, lay participation in trials exposes the public directly to the moorings of democracy. If citizens adjudicate civil cases, Japanese society will benefit. In the words of Alexis de Tocqueville, the "jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens" and "invests each citizen with a kind of magistracy" in essence making them

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198 *Overview of the Judicial System, supra* note 100.

199 *Id.*

200 *Id.*

201 *See generally JSRC Recommendations, supra* note 18, at Chp. III, Part. 1, 2 (1).

202 *See generally id.* at Chp. III, Part. 1, 2 (1).

203 *Results of the Justice System Reform*, *supra* note 19, at 2.

feel bound towards society.[204] Public service in judicial proceedings will bind citizens to the state.[205] Lay participation also has the potential to increase public support for the court system and promote civic engagement.[206] It will also open the door to a sense of achievement, civic pride, and democratic empowerment.[207]

Expanded lay participation will empower individuals to directly impact the society in which they live. It will also supply the public with an extra chance to learn about the law, the civil side of the judicial system, and the important functions played by the judiciary in resolving private disputes. Through this process, Japanese citizens can obtain a heightened understanding of the pros and cons of civil litigation.[208] Also, hands-on involvement will facilitate enhanced scrutiny of the current dispute resolution system and its participants. This will enable society to better examine and provide meaningful input about the civil justice system.

Extending citizen involvement to civil trials will also provide more opportunities for civic service.[209] Comparatively, Japan has the lowest crime rates of any of the major industrial nations.[210] In fact, it is the only country that "witnessed significant reduction in violent crime over the course of the last half century.[211] Serious crimes occur in Japan at a rate much lower than that in other countries.[212] By extension, the number of serious criminal trials is quite low, meaning that many Japanese citizens may never have the opportunity to participate in the judicial process first-hand. In fact, during the first year after the lay judge trials were implemented, only 3,369 citizens had the opportunity to actually serve as lay judges and only 1,298 more as alternates.[213] If lay judge participation is restricted only to serious criminal trials, the opportunity for Japanese citizens to actually participate in the system is limited. Lay judge participation in significant civil trials will generate additional opportunities.

Also, private litigants in Japan would benefit from lay judge trials court proceedings could be expedited even further if trials are held on consecutive days. Identical to the criminal lay judge trials, the courts will need to hold trial sessions on consecutive days to minimize the negative impact on the citizenry. This would likely mean expedited private litigation. It would also help the courts and attorneys to meet

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[204] Alexis De Tocqueville, DEMOCRACY IN AMERICA, Vol. 1, 284-85 (Henry Reeve tr., Schocken Books, 1961) (1835).

[205] *See* Valerie Hans, *Citizens as Legal Decision Makers: An International Perspective*, 40 Cornell Int'l L.J. 303, 306 (2007).

[206] *See id.* 307-308.

[207] *See* Wilson, *Japan's New Criminal Jury*, *supra* note 12, at 521.

[208] *See Lay Judge ABCs*, *supra* note 186.

[209] John O. Haley, *Restorative Justice: Introduction – Beyond Retribution: An Integrated Approach to Restorative Justice*? 36 WASH. U. J.L. & POL'Y 1, 13-14 (2011).

[210] Harry R. Dammer & Jay S. Albanese, COMPARATIVE CRIMINAL JUSTICE SYSTEMS, 14-36 (4th Ed. Wadsworth, Cengage Learning 2011).

[211] Haley, *supra* note 144, at 13-14.

[212] *Id.*

[213] Fukurai, *supra* note 21, at 816 (explaining numbers issued by the Supreme Court of Japan); Kamiya, *Scarred lay judges*, *supra* note 78.

new requirements that civil trial hearings be held in a condensed period of time.[214] Any staffing pressures caused by holding trial on consecutive days could be alleviated by Japan's growing lawyer population that has comparatively expanded due to the recent reforms.

2. Better reflection of societal values and policy

By incorporating citizen participation in certain civil trials, it is possible to reflect Japanese societal values and policies more thoroughly. The Supreme Court of Japan has acknowledged this fact by emphasizing that direct citizen participation reflects the viewpoints and impressions of citizens in the administration and substance of trials.[215] This acknowledgement is equally applicable to civil trials.

Using an all-citizen jury or mixed tribunal consisting of at least several lay judges would infuse a fresh perspective reflective of society on matters addressed in civil trials.[216] While professional judges are experts at evaluating the law and applying rules of civil procedure, citizen judges are just as capable of determining truthfulness and evaluating facts. As experienced in the U.S., collective citizen determinations may be more comprehensive and thorough than a single judge or three judge panel. Also, citizens can inject their "common sense" thoughts, senses, practical observations, and opinions on public policy questions when asked to consider testimony and evidence in the context of specific cases.[217]

One of the original reasons underlying Japan's infusion of citizens into the judicial process was the perceived disconnect between professional judges and society. Lay judges can bridge the gap between career judges and society. While Japanese judges are supposed to have an extremely good sense of societal values, they have come under attack as being isolated, elitist, hailing from uniform backgrounds, and living a sheltered lifestyle.[218] The standard road to a professional judgeship entails constant studies through university graduation. At the university stage, future judges focus almost exclusively on passing their university courses and preparing for the bar examination. Extensive work experience is not typical. Once someone becomes a judge in Japan, that judge is typically isolated from other aspects of society and interacts predominantly with other judges.[219] By integrating citizen judges into civil and administrative trials, citizens can more effectively link societal values to professional judges' legal knowledge.

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[214] Masafumi Kodama & Jay Tyndall, *International Commercial Litigation in Japan* (Aug. 1, 2001) (paper prepared for the sixth annual meeting and conference of the International Pacific Bar Association in Manila on May 3, 1996) *available at* http://www.kitahama.or.jp/english/library/ litigatn.html (noting that courts have recently been striving to hear all witnesses within a single day so as to comply with Article 182 of the Code of Civil Procedure).

[215] *See Lay Judge ABCs*, *supra* note 186.

[216] *See generally* Wilson, *Japan's New Criminal Jury*, *supra* note 12, at 521.

[217] *See* Gastil, Lingle & Deess, *supra* note 2 at 75.

[218] *See* Arne F. Soldwedel, *Testing Japan's Convictions: The Lay Judge System and the Rights of Criminal Defendants*, 41 Vand. J. Trans. L. 1417, 1419–20 (2008).

[219] *See* Wilson, *The Dawn of Criminal Trials in Japan*, *supra* note 78, at 851; Robert M. Bloom, *Jury Trials in Japan*, 28 Loy. L.A. INT'L & COMP. L. REV. 35, 41 (2006).

Reflecting society's feelings and opinions in civil cases will improve the process and enrich the system itself.

D. Reducing the Disadvantages Associated With Serious Criminal Trials

Civil trials have the added advantage of providing a friendlier environment for citizen participation. In adjudicating serious criminal trials, lay judges can be traumatized. Despite the fact that Japan's experiment with citizen participation in serious criminal trials has been relatively positive, limiting participation to criminal matters can carry potentially serious side effects. In most cases, Japan's lay judges have exited the criminal courtroom feeling educated, enlightened, and filled with a sense of accomplishment.[220] However, some citizen judges have suffered from negative after-effects including undue stress and anxiety caused, at least in part, from viewing gruesome photographs, hearing about graphic crimes, and deciding the fate of other human beings during the serious criminal trials.[221] This trauma has been compounded by confidentiality prohibitions governing lay judges.[222] Lay judges may generally express their thoughts about the trial process, but they are prohibited from disclosing details of the deliberations.[223] Due to uncertainty about the acceptable boundaries of disclosure, many lay judges will not even consult or confide even with their spouse about a trial after the conclusion of their service.[224]

To deal with the traumatic ordeal, the government has established help lines and offers in-person consultations with clinical psychologists.[225] These rehabilitative services naturally come with considerable costs to both individuals and the government. Moreover, these services may yet be insufficient, as some lay judge veterans have resorted to privately formed comfort groups such as the *Saibanin Keikensha Nettowaku* ("Lay Judges Network).[226] By focusing lay participation on civil justice, all of the goals of judicial reform can be achieved without subjecting lay judges to the horrors potentially associated with violent crime and avoid any resulting rehabilitative costs.

E. Accountability, Legitimacy, Transparency, and Procedural Benefits

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[220] *See generally* EDITORIAL: *Review of the lay judge system*, JAPAN TIMES (Oct. 4, 2012), http://www.japantimes.co.jp/opinion/2012/10/04/editorials/review-of-the-lay-judge-system/#.UXRUvIKJTMc

[221] Kamiya, *Scarred lay judges*, *supra* note 78; *Lay judge sues gov't over mental trauma*, *supra* note 80.

[222] *Id.*

[223] *Id.*

[224] *Id.*

[225] *Id.* According to the Supreme Court of Japan, lay judges may disclose details about their trial participation to clinical psychologists given that the psychologists also have a duty of confidentiality.

[226] *Id.*

In many instances, the public eye focuses on civil disputes that have wide-sweeping ramifications. The judiciary is responsible for making many significant decisions that resolve disputes, address civil harms, enhance individual and corporate accountability, and affect society. Some believe that the Japanese economy is hindered by the lack of corporate and governmental accountability.[227] In fact, private accountability is often seriously questioned, as in the case with TEPCO and its dysfunctional nuclear reactors.[228] Citizen participation in civil trials would foster accountability and engender additional confidence in commerce and civil matters.[229]

Lay judge participation could facilitate increased scrutiny, transparency, and accountability in significant civil cases. As previously mentioned, public attention could be well suited for major civil cases such as those dealing with nuclear issues, environmental contamination, governmental malfeasance, and toxic torts. Administrative dispositions might be well suited for further lay participation as well given their close proximity and direct impact on citizen welfare. Observers have noted that the current system is weak in ensuring governmental accountability and the judicial check function is not working, particularly in lawsuits in which citizens face off against the government, administrative agencies, or military.[230] Citizen participation would add another layer of independent review and diminish the possibility of governmental influence on career judges. Private litigants file lawsuits against the government and military in areas of energy, pollution, refugees, protection of livelihood, anti-war demonstrations, privacy, and other similar issues.[231] At present, the rate of success in these lawsuits is relatively low.[232] Even if the rate of success did not increase, greater public scrutiny through the trial process would provide an even greater deterrent against illegal or harmful conduct by the government.

Furthermore, the involvement of disinterested individuals can dispel doubts about government cover-ups or favoritism among governmental or corporate actors. With the continuing uncertainty associated with the Fukushima nuclear reactor disaster and revelations that the government has not disclosed everything that it knows about this nuclear catastrophe, there is an increasing distrust of government.[233] In serious cases involving the government or governmental support of certain enterprises (its support of

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[227] *See* John Plender, *An accountability gap is holding back Japan's economy*, FINANCIAL TIMES (Mar. 14, 2007), http://www.ft.com/cms/s/0/034cc9c6-d261-11db-a7c0-000b5df10621.html#axzz2R8P7rXoD.

[228] *See generally* Kirk Spitzer, *Scant Fallout For Those Behind Japan's Nuclear Disaster,* TIME (Mar. 5, 2012), http://nation.time.com/2012/03/05/scant-fallout-for-those-behind-japans-nuclear-disaster/.

[229] *See Lay Judge ABCs*, *supra* note 186.

[230] *See* Nottage & Green, *supra* note 12, at 135-137, 141-143, 152 (noting the low success rate of claims against the government in comparison with other nations); *see also Saibanin Seido ga Wakaranai Kaikakuha Kara Mo Seikei Misu no Hihan Ga* [*Not Understanding the Lay Judge System: Criticism of Mistaken Design from Reformer*], TOKYO SHIMBUN (Sept. 29, 2008) [hereinafter *Criticism of Mistaken Design from Reformer*].

[231] *See* Nottage & Green, *supra* note 12, at 141-143, 149-151 (discussing several recent high profile claims against government); *see also Criticism of Mistaken Design from Reformer supra* note 230.

[232] *Id.*; *see also Lay Judge ABCs*, *supra* note 186.

[233] *See generally* David McNeill, *Fukushima lays bare Japanese media's ties to top*, JAPAN TIMES (Jan. 8, 2012), http://www.japantimes.co.jp/text/fl20120108x3.html?fb_ref=article_life.

TEPCO is a prime example), lay participation in the judicial process can help alleviate it this distrust. In fact, it can provide a "powerful counterpoint to the accusation of partial or politicized legal process."[234] In fact, England first used juries to boost the legitimacy of the judicial process because the judgments were construed as more fair when rendered directly by the lay public.[235] This concept would apply to governmental, military, corporate, and individual actors alike.

In having embraced lay adjudication, Japan finally possesses a mechanism capable of "providing an important check on elite political and judicial power, at last restoring credibility in the legal system through transparency, civic participation, and legal education."[236] However, the criminal lay judge trial component should only be the beginning of the road. The presence of lay judges on civil trial panels would add another level of potential deterrence against arbitrary, hasty, corrupt or biased decisions.[237] This would enhance the legitimacy of the civil justice system. Additionally, such presence would also provide professional judges with the opportunity to use ordinary citizens as sounding boards and justify the basis for their conclusions.[238]

Meaningful citizen involvement and collaborative deliberation can also increase the public's trust and confidence in judges and the judicial system.[239] These things will help validate the rule of law and will make Japan's civil system even more responsive to community values.[240] Identical to the criminal justice realm, the civil justice system would be strengthened if citizens have the chance to debate and deliberate about particular facts, policy issues, and societal norms as part of a quasi-jury body or jury. Moreover, public participation would naturally heighten scrutiny of the process and potentially facilitate quality public discourse among citizens, within governmental institutions, and between government and the public.[241] This process of deliberative democracy will only serve to benefit Japanese society as the public will not only become more familiar with the process and available legal tools, but will also generate results that society can endorse and accept.

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[234] Gastil, Lingle & Deess, *supra* note 2, at 73.

[235] *Id.* In England, the use of juries in civil cases has decreased significantly over the past several decades. However, the goals and objectives of Japan at this point in its history with respect to lay participation differ significantly from England or other countries in which juries are in relative decline.

[236] Fukurai, *supra* note 21, at 829. This important check was evident in the recent trial of former Democratic Party of Japan President Ichiro Ozawa. After prosecutors refused to indict Ozawa on two occasions, the Tokyo No. 5 Inquest Committee comprised of eleven citizens decided to press charges. Setsuko Kamiya, *Jury Out On If Inquest System Lived Up to Role*, JAPAN TIMES (Apr. 27, 2012). During the course of trial, it was discovered that the prosecutors had forged interrogation records and submitted inaccurate reports. *Id.* It was only public scrutiny that revealed these flaws in governmental conduct. *Id.*

[237] *See* Corey & Hans, *supra* note 33, at 86-87.

[238] Gastil, Lingle & Deess, *supra* note 2, at 74; *see also* Corey & Hans, *supra* note 33, at 86-87; Ivkovic, *supra* note 4, at 432 (noting that lay judges have the chance to "correct" professional judges and vice verse as part of the deliberation process).

[239] Gastil, Lingle & Deess, *supra* note 2, at 74.

[240] *See* Wilson, *Japan's New Criminal Jury*, *supra* note 12, at 520.

[241] Gastil, Lingle & Deess, *supra* note 2, at 74.

III. RESEARCHING THE POSSIBILITIES AND ADDRESSING POTENTIAL CONCERNS

Over time, Japan has consistently adopted and adapted ideas and legal models transplanted from other countries for its own purposes. Even though the influence and use of civil jury trials have gradually decreased over time in other jurisdictions, Japan has recently taken a foreign concept in lay participation in the administration of justice and adapted it for its purposes and society. Because the objectives underlying Japan's legal reforms focus on systemic change and greater civic participation in the judiciary, lay participation in civil trials would suit Japan nicely. These objectives and the current environment also differ substantially from jurisdictions such as England and the United States where civil juries are in decline based on factors and influences not present in Japan or other Asian nations. As it has done in other cases, Japan can develop its own blend of ideas, principles, and rules suited for its own objectives.

Naturally, the expansion of lay participation into the civil realm would raise various logistical issues that require detailed research and assessment. To the extent that Japan adopts a mixed tribunal system for civil trials, the typical disadvantages of such a system and issues challenging Japan's current lay judge system will need to adequately be addressed.[242] One such issue and primary criticism of mixed tribunal systems in which lay judges jointly serve with professional judges is that citizens are merely puppets, ornaments, or placeholders.[243] If professional judges attempt to unduly influence or look to coerce lay judges into adopting their opinions, then the system will not be successful. Another related potential disadvantage is that citizen judges will defer to professional judges to review case files and fail to attentively listen to the evidence.[244] To date, Japan's experiment with lay participation in criminal trials has not revealed these problems, as lay judges appear to take their duty quite seriously.[245] Also, it appears that Japan's career judges have made a concerted effort to avoid such scenarios. One would expect this to continue, particularly if the professional judges embrace lay participation and manage the trial and deliberation process so as to encourage the lay judges. Notwithstanding, in a civil context, it will be just as important to take measures ensuring that lay judges can take an active role in the proceedings.

Another major challenge facing expansion would likely be the time and costs associated with implementation and administration of the system. Providing for lay judge trials in all civil lawsuits could be costly, time-consuming, and burden the justice system. Measures to mitigate these challenges would need to be fully explored. This might include limiting the scope of civil cases that qualify for lay adjudication. In looking to determine which civil cases would be suitable for lay participation, those cases that traditionally employ a three-judge panel might be most suitable. More specifically, cases having a significant effect on Japanese society such as environmental harms, toxic torts, cases against the government, administrative dispositions, and other similar

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242 *See generally* Wilson, *Japan's New Criminal Jury*, *supra* note 12.

243 *See* Ivkovic, *supra* note 4, at 430.

244 *See* Corey & Hans, *supra* note 33, at 88.

245 David T. Johnson, *Early Returns from Japan's New Criminal Trials,* The Asia Pacific Journal, Vol 36-3-09 (September 7, 2009).

lawsuits seem quite appropriate for adjudication by lay judge panels in light of the goals underlying Japan's adoption of lay participation. These cases might be worth the extra effort and expense.

Furthermore, Japan could find other ways to cover the costs. For example, it could require the party requesting a lay judge panel to cover the related administrative costs. Payment of these court costs could be guaranteed through a bond mechanism, and even shifted to the loser upon the completion of the litigation. In addition, one professional judge could combine with several lay judges to adjudicate civil matters, thereby freeing up the time and expense of two other professional judges to handle other matters. Along these lines, Japan would also need to determine the optimal tribunal size for civil trials.[246]

Another important issue that Japan would need to determine is whether civil lay trials would be compulsory or optional. It would be necessary to decide whether a lay judge panel would automatically be empaneled for all qualifying cases, or whether a single party's request would trigger a lay judge trial, or whether an agreement by all litigants would be necessary. In any event, Japan would need to keep in mind the objectives and benefits underlying its ongoing legal reforms and mixed tribunals when addressing these and other related issues.

IV. CONCLUSION

Japan's experiment with lay participation over the past four years in serious and complex criminal trials has demonstrated that citizen judges are capable of succeeding in the context of civil and administrative trials. Civic engagement, greater involvement in the judicial process, and self-governance are several of the key prongs in Japan's recent legal reforms. Extending the lay judge system to certain significant civil trials is consistent with these and the other reforms. It would also bring many other benefits to Japanese society and private litigants. Accordingly, Japan should take advantage of the current environment and seriously explore the possibility of integrating citizen participation into the civil justice system.

[246] If Japan were to use the lay judge model for criminal trials, one professional judge could serve together with four lay judges, thereby conserving costs. Alternatively, a panel of three judges together with six lay judges could be used.