I. INTRODUCTION

Japan’s first jury trial in more than sixty years apparently went off without a hitch in August 2009. The defendant, a seventy-two-year-old man charged with murdering his sixty-six-year-old neighbor, had confessed to the killing prior to trial, explaining that he attacked his neighbor with a knife because she knocked over some bottles of water on his property. Thus, the jury of six laypeople and three professional judges had only to decide the level of culpability and the severity of punishment, not whether the defendant was guilty of committing the criminal act. The jury ultimately convicted the defendant of murder and sentenced him to fifteen years in prison.

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2 Tabuchi & McDonald, supra note 1.

3 Id. According to one news report, four of the six jurors were women and the other two were men. Id.

4 According to the Supreme Court of Japan, during sentencing, to help educate lay assessors on sentencing norms during deliberations, they will be shown graphs and other data which indicate trends in sentencing in precedent cases of the same type of offense. Supreme Court of Japan, Outline of Criminal Justice in Japan, Section 6 (Trial) Note 35,
Prior to the reinstitution of jury trials in Japan in 2004 (known as “saiban in”), there was a great deal of skepticism and reluctance about adding citizen participation to the criminal justice process. The Japanese culture of deference to authority was thought to be a significant impediment to impaneling lay jurors who would be willing to participate in the process. Additionally, the lack of transparency in the criminal justice system based upon a foundation of “benevolent paternalism” had left much of the population in the dark about the operations of criminal justice. Unfortunately, this notion of a secretive criminal justice system far removed from the citizens subjected to it had deep historical roots in Japan.

In an attempt to address these concerns, Japan instituted a jury system based upon a model used in many inquisitorial systems of


5 Tabuchi & McDonald, supra note 1. Public opinion surveys to evaluate attitudes towards the lay assessor system initially revealed that 70% of citizens did not want to serve on lay assessor panels. The reasons for this reluctance varied from “not wanting to judge people at all” to fear that jury service would interfere with caring for children or elderly family members. Interestingly, the percentage of women expressing reluctance (75%) was higher than the percentage of men (64%). Kent Anderson & Leah Ambler, The Slow Birth of Japan’s Quasi-Jury System (Saiban-in Seido): Interim Report on the Road to Commencement, 11 J. JAPAN. L. 55, 69 (2006) [hereinafter Anderson & Ambler]. The Supreme Court of Japan was among the entities most skeptical about the introduction of the lay assessor system. To diminish the impact of lay participation, the court initially suggested that “if a system based on lay participation had to be introduced, a non-binding advisory, mixed-court was preferred.” Id. at 59.

6 Lester W. Kiss, Reviving the Criminal Jury in Japan, 62 LAW & CONTEMP. PROBS. 261, 283 (1999) (explaining that the purpose of lay jury participation could be defeated by lay persons always deferring to the opinions of judges even if not rationally persuaded).

7 Benevolent paternalism is a criminal justice theory that permits broad discretion, intrusiveness, and the infringing of individual rights by police and prosecution officials as long as suspects are treated in a manner that promotes rehabilitation. Joseph Rozenshtein, Japan’s Jury: A Weak Start at Reform, 4 COLUMB. E. ASIA REV. 22, 28 (2001). The Justice System Reform Council, the governmental body that recommended establishment of the lay assessor system, acknowledged that the newly proposed system aimed to, among other things, remove a longstanding barrier between the government and the governed. They opined that “[i]f the people become more widely involved in the administration of justice... the interface between the justice system and the people will become broader in scale and deeper, public understanding of the justice system will rise, and the justice system and trial process will become easier for the public to understand.” JUSTICE SYSTEM REFORM COUNCIL, RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL FOR A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE 21ST CENTURY (2001), available at, http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html [hereinafter JSRC Recommendations].

8 Rozenshtein at 25-26 (describing the Tokugawa period in Japanese history (1603-1868) during which citizens had no access to the criminal justice system and criminal justice dispositions were considered official secrets).
justice, i.e., lay jurors deliberating with professional judges. Although this is not a jury of one’s peers in the purest sense, there are advantages to having individuals skilled in the law in the deliberation room, especially if the citizenry has been effectively shielded from the criminal justice process for a prolonged period, as happened in Japan. Of course, there is also significant concern that the professional judges may dominate the proceedings, and this concern is particularly acute in Japan with its culture of deference to authority.

To combat the potential for judicial dominance, Japan codified the “principle of free conviction” and a juror voting process designed to reduce such influence. Each of the nine jurors has a vote, but even if all three professional judges vote guilty, five of the lay jurors can essentially “veto” the judges by voting not guilty. However, if all six lay jurors vote guilty, they need at least one professional judge in agreement to prevail.

Allowing jurors to directly question defendants and witnesses during the trial is another feature that enhances citizen participation in Japan’s jury trial process. This level of juror participation is dramatically different from the process across most of the United

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9 For example, in France, three professional judges and nine lay assessors form the jury panel when the Court of Assizes rules in the first instance. See CODE DE PROCÉDURE PÉNALE [C. PR. PEN.] art. 296 (Fr.). The judges and the lay assessors deliberate together and guilt is determined by a vote of at least eight members of the panel. Id. at art. 359.

10 Empirical research on the German mixed jury system revealed that “jurors are likely to defer to the judge too often and too quickly,” thereby discounting the inherent value of citizen participation. Matthew Wilson, The Dawn of Criminal Jury Trials in Japan: Success on the Horizon?, 24 WISC. INT’L L.J. 835, 855 (Winter 2007) (quoting Jenia Iontcheva, Jury Sentencing as Democratic Practice, 89 VA. L. REV. 311, 374-75 (2003)).. See also, Daniel Senger, The Japanese Quasi-Jury And The American Jury: A Comparative Assessment Of Juror Questioning And Sentencing Procedures And Cultural Elements In Lay Judicial Participation, 2011 U. ILL. L. REV 741, 752 (2011)(explaining that “[i]n the Soviet Union, the jury system was replaced by a lay assessor system when the Bolsheviks took power in 1917. The system involved so little power for the lay assessors relative to the professional judge that the lay assessors came to be referred to as ‘nodders’ for nodding along with the professional judge”).

11 Anderson & Saint, supra note 1, at 268-69 art. 62. The Principle of Free Conviction states that: “Regarding decisions in which lay assessors’ participate, judges and lay assessors are both entrusted to decide freely based on the strength of the evidence.”

12 Anderson & Saint, supra note 1, at 273 art. 67. The Verdict section provides that: “A decision involving lay assessors’ participation...will be by majority opinion of the members of the judicial panel, which shall include both an empanelled judge and a lay assessor holding that opinion” (emphasis added).

13 Id. at art. 56. If the court questions a witness, “a lay assessor may, upon informing the chief judge, question that person concerning those matters that are required to be decided with lay assessors’ participation.” See also id. at art. 59: If the “defendant makes a voluntary statement...lay assessors may, at anytime ... request a statement from the defendant concerning those matters that are required to be decided with the lay assessors' participation.”
States, in which jurors are, for the most part, seen but not heard from until the verdict.\textsuperscript{14} The practice of allowing in court inquiries by jurors is similar, however, to some inquisitorial systems in which lay jurors are allowed to question defendants and witnesses after asking the presiding judge for permission to speak.\textsuperscript{15}

In Japan's first jury trial under the new system, lay jurors demonstrated their understanding of the core issues in the case and took advantage of the opportunity to question the defendant in court by asking him about the particular knife he used (why a survival knife instead of a kitchen knife?) and questioning why he didn't seek help for the victim even though he thought she could die (the defendant claimed that he thought another neighbor would call for help).\textsuperscript{16} Although this particular jury trial appeared to go smoothly and the lay jurors took an active role as expected, this is a process that is still in its infancy, which means there will inevitably be some bumps in road.

For example, Japan has an exceptionally high conviction rate (greater than 99\% by most estimates).\textsuperscript{17} While this can certainly be attributed, in part, to prosecutorial selectivity, it is also clear that most of the criminal cases in Japan are presented to the courts

\textsuperscript{14} In the United States, judges on the federal and state levels may, at their discretion, permit jurors to ask questions which are posed by the judge. Such questioning is typically permitted: “(1) for clarification in a lengthy, complex trial; (2) for clarification if the attorneys are unprepared or obstreperous, or if the facts are becoming muddled and neither side is succeeding at attempts to clear them up; and (3) if a witness is difficult, if a witness' testimony is unbelievable and counsel fails to adequately probe, or if the witness becomes inadvertently confused.” United States v. Collins, 226 F.3d 457, 462-63 (6th Cir. 2000). But, because of the potential risks associated with unfettered jury questioning, “[a]llowing juror questions should not become a routine practice, but should occur only rarely after the district court has determined that such questions are warranted. In exercising their discretion, trial judges must weigh the potential benefits of juror questioning against the possible risks and, if the balance favors juror questions, employ measures to minimize the risks.” Id. at 464.

\textsuperscript{15} C. Pr. Pén. supra note 9, at art. 311. In France, the jurors may put questions to the accused and to the witnesses after asking the presiding judge for leave to speak. They have a duty not to show their opinion. See also Strafprozeßordnung [StPO] [CODE OF CRIMINAL PROCEDURE] §240. Under the German Code: “(1) The presiding judge shall permit the associate judges, upon request, to address questions to the defendant, witnesses and experts [and] (2) The presiding judge shall give similar permission to the public prosecution office, to the defendant, and to [defense] counsel, as well as to the lay judges.”


\textsuperscript{17} However, “[t]he conviction rate in Japanese criminal cases - 99.8 percent - cannot be compared directly with those of other countries because there is no plea bargaining in Japan and prosecutors bring only those cases they are sure to win. But experts say that in court, where acquittals are considered harmful to the careers of prosecutors and judges alike, there is a presumption of guilt.” Norimitsu Onishi, Coerced confessions: Justice derailed in Japan, N.Y. Times, May 7, 2007.
wrapped neatly with pre-trial confessions by defendants. In most instances, such confessions are obtained without the benefit of counsel and within the secret confines of the interrogation room. Japan has resisted repeated calls for general audio- or videotaping of entire interrogations, explaining that recording could impede the interrogation process. This systemic reliance on uncounseled confessions will likely present two challenges to the newly established jury system. First, what will happen when jurors are presented with a challenge to the credibility of a confession? Can Japan continue to resist calls for recorded interrogations when the voluntariness of confessions becomes critical to determinations of guilt or innocence? Second, what will happen if, or when, the conviction rate in Japan declines? Finally, will Japan be able to maintain the requisite level

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18 Id. Explaining that in Japan, “[c]onfessions have been known as the king of evidence.... Especially if it’s a big case, even if the accused hasn’t done anything, the authorities will seek a confession through psychological torture.” Id. (Quoting Kenzo Akiyama). Reliance on confessions is part of a long tradition dating back to the Tokugawa period. To preserve social stability and prevent the undermining of state power, “Tokugawa officials relied heavily on written confessions which were considered the strongest indicators of fact, even to the extent that torture was sanctioned in the pursuit of their extraction.” Rozenshtein, supra note 7, at 26.

19 The Japanese Justice Ministry issued a report explaining that electronically recording interrogations aids in “detering inappropriate interrogation and preventing false charges.” However, “the report does not necessarily call for electronically recording the entire process of interrogation” likely due to the resistance of public prosecutors (a survey of 1042 prosecutors asked whether they support electronic recording revealed that “86 percent were reluctant about introduction of total recording and 58 percent even opposed partial recording”). Editorial, Report on interrogation recording, THE JAPAN TIMES ONLINE. Aug. 23, 2011, http://www.japantimes.co.jp/text/ed20110823a2.html.

20 In August 2011, the Justice Ministry ordered expanded use of “visualization” on an experimental basis in “cases subject to lay judge trials in which the accused denies the charges, creating such recordings for all cases subject to lay judge trials.” Visualization had previously been limited to lay judge cases in which the accused admitted the facts. Despite the connotation of the term “visualization,” during the trial, lay judges do not see an actual recording of the defendant’s interrogation. In most instances, “visualization” “does not refer to a recording of the interrogation itself. Instead, prosecutors write interrogation reports and then are recorded reading them aloud for 15 to 30 minutes on a DVD.” More interrogations ‘visualized’ / Justice minister wants procedure used in all lay judge cases, Aug. 10, 2011, THE DAILY YOMIURI ONLINE, http://www.yomiuri.co.jp/dy/national/T110809006050.htm.

21 Historically, acquittals in Japan have been regarded as “a disgrace that might undermine respect [for the government]...and an assault on the regime's social projects as well as on its claim to power.” Rozenshtein, supra note 7, at 26. In the two and a half years since the institution of the lay assessor system, there is already precedent that suggests a devaluation of lay judge acquittal verdicts. For example, in June 2010, the Chiba District Court acquitted a defendant of charges that he smuggled drugs in a can of chocolates. According to the Court, the defendant’s “claim that he was unaware drugs were in the can ‘could not necessarily be deemed false.’” However, in March 2011, the Tokyo High Court reversed the district court’s ruling concluding that the defendant “fabricated stories every time his
of citizen participation in the jury trial process? During the first trial, a lay juror withdrew due to an apparent illness and had to be replaced. As mentioned above, Japanese culture exhibits strong deference to authority. This inclination is in sharp conflict with the responsibilities of jury service, which will sometimes require challenging the prosecutor’s evidence and might require debating with the professional judges. Will lay jurors come to accept these challenges as a natural part of the process or will jurors simply seek to avoid jury service altogether?22

Overall, when viewed as an isolated component, Japan’s establishment of a jury trial system is a bold effort to democratize its criminal justice process after decades of judicial dominance. Lay citizen participation in the criminal process adds transparency and a level of credibility to the criminal process. However, when placed in the broader context of Japan’s criminal justice system, the lay juror process is but an incremental quasi-adversarial adjustment sitting atop a long inquisitorial tradition. A myriad of issues will inevitably arise from the tension created by the competing values of two traditions.

To explore some of those issues, this Article will examine the foundational and systemic impact of transitioning to a lay participation jury in an inquisitorial system accustomed to near-perfect conviction rates. To begin, Part I of the Article will discuss Japan’s Act Concerning Participation of Lay Assessors in Criminal Trials (hereinafter “Lay Assessor Act”), the statute outlining the criteria for participation in the jury trial process as well as the responsibilities of lay assessors.

Next, for purposes of comparison, Part II will explore Russia’s transition to a lay jury system in the early 1990s. Russia’s “experiment” with jury trials is a very instructive comparative assessment because, like Japan, Russia reestablished jury trials in 1993, after a sweeping reform of its criminal justice system.23 As will be discussed, the revival of lay participation in the criminal justice system was short-lived because a mere fifteen years later, Russia has eliminated jury trials for most cases primarily due to a perception that leniency by jurors was resulting in excessive acquittals.24

22 As of May 14, 2011, more than 16,000 people had “served as lay judges or reserve lay judges, handing down rulings to a total of 2,144 defendants.” Id.

23 Indeed, the reasons for reestablishing jury trials in Russia mirrored Japan’s rationales. According to Stephen Thaman, “[t]he introduction of the jury trial was aimed at expanding the participation of the citizenry in the administration of justice and democratizing the judicial branch of government. It was intended to school citizens in the rule of law and develop public confidence in the judiciary and the legal system.” Stephen C. Thaman, Nullification of the Russian Jury: Lessons for Jury-Inspired Reform in Eurasia and Beyond, 40 CORNELL INT’L L.J. 355, 360 (Spring 2007).

24 Russian jurors had “proved to be more skeptical [than judges] of
Indeed, today, Russia has virtually scrapped its jury system process. The political and social dynamics that led to Russia’s shift away from citizen participation in the criminal justice system is a cautionary tale that will be discussed with an eye toward analyzing whether Japan’s new system might suffer a similar fate. Because both Russia and Japan incorporated citizen participation into judge dominated systems with near universal conviction rates, Part III will examine the Japanese citizen jury participation model through the prism of Russia’s experience to determine where potential pitfalls may lie as Japan seeks to enhance transparency and democracy in its criminal justice system.

II. JURY SYSTEMS IN JAPAN

A. THE PRE-WWII EXPERIENCE

This most recent iteration of democratic participation in the criminal justice process is not Japan’s first foray into a jury trial system. From 1928-1943, Japan had a jury trial system that was very limited in its authority and function.25 However, this early Showa period jury fell far short of meaningful citizen participation in the criminal process insofar as it could only be comprised of tax paying adult men whose income exceeded a certain amount.26 With respect to the procedural aspects of the lay jury system, crimes that could go before a jury were limited to a narrow range of serious infractions, and defendants could opt for a bench trial if they wanted one. The crucial issue concerning the effectiveness of this jury system was that the presiding judge could overrule the jury if he did not like the verdict; in other words, the verdict did not bind the court at all. Neither party could appeal to the higher court.27

prosecutors, acquitting 15 to 20 percent of the time.” Ellen Barry, After Dismissal of Jury, Judges Convict Russian, N.Y. TIMES, Dec. 29, 2010, at A6 (discussing how a Russian jury was abruptly dismissed in a trial when it appeared that they might be leaning toward acquittal).


26 See Kanako Ida, Introducing Citizen Participation in Japanese Courts: Interaction with Society and Democracy from the Perspective of the American Jury System 14 (USJP Occasional Paper 06-03, 2006), available at http://www.wcfia.harvard.edu/us-japan/ research/pdf/06-03.Ida.pdf. See also Dobrovolskaia, supra note 25, at 233 (“jury members had to be male citizens over thirty years old, reside in the same city, town or village for at least two years, pay more than three yen in national direct taxes, be literate, and possess Japanese citizenship”).

27 Ida, supra note 26 at 6; see also Dobrovolskaia, supra note 25, at 232 (“[M]embers of the pre-war jury did not decide whether the defendant was guilty or not guilty. Instead, the judge submitted questions on the points of fact...to the jury and had the option of ignoring the jury’s answers and calling another jury”).
Given the inherent risks and few benefits to defendants in this system, it is perhaps not surprising that the jury trial system was used less frequently over time.\textsuperscript{28} An internal analysis of the system in a publication known as the \textit{Jury Guidebook}\textsuperscript{29} revealed that the lay jury system “had not yet penetrate[d] all of the Japanese society.”\textsuperscript{30} The \textit{Jury Guidebook} proposed several theories as to why the jury system had not lived up to expectations. Those reasons included a lack of continuing financial support by the government and public indifference to the law due to a societal perception that “law is something to be followed, not known.”\textsuperscript{31} The \textit{Jury Guidebook} determined that because “[l]aw was coercively imposed upon the people…the public therefore was completely uninterested in its provisions.”\textsuperscript{32} This attitude had become so entrenched that it became “the traditional way of looking at the law, and this perspective has been difficult for our people to rid itself of.”\textsuperscript{33}

Finally, in the midst of a world war that challenged Japan’s resources and its commitment to due process for its citizens, the jury
system was suspended. The specific reasons for suspension related to both the internal and external challenges to the system identified above. To wit, the internal structure of the system provided little benefit to defendants, leading most to avoid its application. Procedural hurdles, particularly the judge’s authority to ignore the jury’s findings, “frustrated attorneys, sometimes to the point where they would prefer to waive jury trial as a way of expressing piety to the authority of the judge in hopes of leniency in sentencing.”

However, these procedural deficiencies in isolation probably would not have completely doomed the system. Instead, the deathblow was likely delivered by a coalescence of historical, political and societal pressures. These external factors included the jury system’s basic incompatibility with the inquisitorial system in Japan at the time, the political climate (a rising tide of fascism), and the Japanese culture in which people were accustomed to experienced judges deciding cases instead of untrained laypeople.

In the Act calling for the suspension of the jury system, the Minister of Justice commended the lay jury system and expressed hope that it might be reintroduced in the future:

The jury system is appropriate in order to manage trials in a democratic way. It is difficult, however, to manage this system practically. Since the Jury System Act went into effect, only a few cases have been decided by jury. We need to scrutinize whether this system matches the conditions of our country. If we revive the jury system again, we will have to have large courthouses. Given the present circumstances, this is just impossible. I do not intend to deny the jury system in the least and obviously it should be reintroduced at some point: however, we would like to research this issue fully for the future.

More than half a century would transpire before Japan would once again consider the question of how “[the justice system] and the legal profession [could] be reformed so as to make the law (order), which serves as the core of freedom and fairness on which [the country] should be based, broadly penetrate the entire state and all of

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34 “The Jury System Suspension Act ... in 1943 provided that ‘the jury system will be re-activated when the War is over.” Yet, “after the War the government did not let the criminal jury system be revived in Japan. The Jury Act is literally still sleeping.” See Takashi Maruta, The Criminal Jury System in Imperial Japan and the Contemporary Argument for its Reintroduction, 72 INT’L REV. PENAL L. 215, 219 (2001).

35 Kiss, supra note 6, at 269.

36 Dobrovolskaia, supra note 25, at 238 n. 27. See also Kiss, supra note 6 at 269. (“Many scholars are convinced that as a result of the hierarchy in Japanese society, the Japanese people prefer trial by ‘those above the people’ rather than by ‘their fellows,’ and that this caused the Japanese to distrust juries from the beginning.”)

37 Ida, supra note 26, at 15.
society and become alive in the people's daily life.”

B. THE PUSH FOR REFORM

After decades of judge dominated trials and a criminal justice system with a near perfect conviction rate, what finally led Japan to begin the process of reestablishing the jury trial system? Like the factors that led to the suspension of the earlier system, the reasons were both internal and external. Internally, the judge-dominated system came to be seen as authoritarian, secretive, and isolated from the citizens it served. The jury system was promoted as an antidote to those systemic issues because it would involve the people directly in the process of their government. In effect, the jury system would provide a *quid pro quo* of sorts between the government and the governed in that it would:

> [P]romote a more democratic society that brings the norms and operations of the judiciary to the attention of the citizenry. Also, it [would] enhance the court system's legitimacy and bolster respect by creating the perception that disputes are resolved openly and fairly in the Japanese courts.

Along similar lines, the Justice System Reform Council (“JSRC”) summed up the overriding populist intent of the jury reform legislation when it observed that:

> What commonly underlies these reforms is the will that each and every person will break out of the consciousness of being a governed object and will become a governing subject, with autonomy and bearing social responsibility, and that the people will participate in building a free and fair society in mutual cooperation and will work to restore rich creativity and vitality to this country.

The external factors that led to reform were equally compelling. The 1980s brought calls for reform of Japan's government administrative structure. While initially limited to the commercial sector, the reform movement quickly spread to the legal

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38 JSRC Recommendations, *supra* note 7, at Chap. 1 Introduction.
39 Kiss, *supra* note 6, at 264 (describing how “prosecutors conduct the factfinding and draw legal conclusions, and judges simply ‘rubber stamp’ their results,” which often include “voluntary confessions”).
40 JSRC Recommendations, *supra* note 7 (observing that “[t]he people, who are the governing subjects and the subjects of rights, must participate in the administration of justice autonomously and meaningfully, must make efforts to form and maintain places for rich communication with the legal profession, and must themselves realize and support the justice system for the people”).
41 Wilson, *supra* note 10, at 848.
43 The momentum for such reform resulted from a stagnating economy and a desire to reduce the national debt. Wilson, *supra* note 10, at 842.
profession generally and to the judiciary specifically. A desire to fully participate in the “globalized” era led reformers to view “judicial reformation as the ‘final linchpin’ in restructuring the shape of Japan.” Overall, the JSRC’s mission was to facilitate a more accessible and user-friendly justice system, ensure public participation in the system, redefine the legal profession, and reinforce its function. This agenda was supported by the theory that deregulation in Japan would reduce government intervention in many aspects of life; therefore, the public must be afforded better access to the judicial system and legal profession in order to ensure its protection.

Against this reform oriented backdrop, the first effort to construct a jury trial system since the suspension of the previous system in 1943 emerged. The legislation, known formally as an Act Concerning Participation of Lay Assessors in Criminal Trials (“Lay Assessor Act”), was enacted by the Japanese Diet on May 28, 2004. While the legislation encountered little resistance on its path to enactment, it was not without its critics, chief among them the Japanese courts. As mentioned above, after the suspension of jury trials in 1943, judges resumed their dominant role in the criminal justice hierarchy. It is, therefore, not surprising that legislation requiring them to share power and consider the opinions of those untrained in the law would give rise to significant apprehension. As momentum for the lay jury system increased, the judiciary’s trepidation about the dilution of its power was often cloaked in language that focused on the potential burdens to other actors in the lay jury process. For instance, in a September 2001 letter opposing the reestablishment of jury trials, the Japanese Supreme Court identified several factors that would likely impede the full realization of a jury trial system. Such factors included the enormous burden on citizens who had heretofore been excluded from the inner workings of an efficient and effective criminal justice system. The Court openly questioned how citizens could be adequately trained for such an enormous task and how the justice system could provide assurances that there would be no errors in the process due to this experiment with citizen democracy. And, last, but almost certainly

44 Id. at 843
45 Id.
46 Id. at 847 (explaining that the “Supreme Court of Japan was diametrically opposed to the introduction of ‘jury trials’ in any form [b]ecause the Supreme Court...adamantly believe[d] that the system was never broken...[a]nd that there [was] certainly no reason for it to be ‘fixed’”). See also Senger, supra note 10 at 753 (discussing the Japanese Supreme Court’s objections to a full jury system).
47 Wilson, supra note 10, at 847.
48 In a stinging comparative critique of the U.S. jury trial system, the Japanese Supreme Court simply “could not fathom how twelve ordinary citizens prone to inconsistency and error could arrive at verdicts more just and fair than three professional judges.” Id.
49 Such criticism likely resulted in a provision in the Supplementary
not least among the criticisms, was the issue of resources. Including lay jurors in the criminal trial process meant construction of new courtroom facilities, compensating lay jurors and accounting for lost productivity while jurors were away from their primary employment. What ultimately emerged from the vigorous debate on both sides was compromise legislation that created a European style mixed court with professional judges deliberating alongside lay jurors.

C. The Lay Assessor Act

1. The Fundamentals

Article 1 of the Lay Assessor Act defines its purpose as “promotion of the public’s understanding of the judicial system [which] thereby [raises] their confidence in it.” Although one of the rationales for the new lay jury system was to “reflect the people’s sturdy social common sense on the content of trials,” the law was not made retroactive to cases pending when the law came into effect.

section, Art. 2, paragraph 1 of the Lay Assessor Act that provided:

[T]o encourage citizens to participate in criminal trials substantively based on personal conviction and to deepen citizens’ understanding and interest in the system for lay assessors’ participation in criminal trials, the Government and the Supreme Court shall by the enforcement date implement measures to explain, so that they are clearly and easily understood, things such as the lay assessors’ duties in deliberations and the hearing of cases, the procedure to select lay assessors, and the significance of citizen participation as lay assessors in trials.

Anderson & Saint, supra note 1, at 280-81 art. 2. Eventually, the Lay Assessor Promotions Office was created as a joint-venture among the Ministry of Justice, Supreme Court, and Japanese Federation of Bar Associations to disseminate information about the lay jury system. “Activities proposed at the time the office was created included filming a public relations motivated television drama, conducting mock trials in various regions, and making promotional posters representing each of the three parties comprising the legal profession in Japan.” Anderson & Ambler, supra note 5, at 68.

“As of the end of 2008, facility costs related to the lay judge system alone totaled approximately JPY 23.1 billion (US$231 million), and additional preparatory expenditures exceeded JPY5.5 billion (US$55 million).” 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, 494 (2009). Going forward, “[b]ased on current estimates, the Supreme Court of Japan estimates yearly expenditures of JPY2 billion (US$20 million) for lay judge compensation and JPY1.2 billion (US$12 million) for lay judge travel related expenses.” Id. at 494-95.

Japan’s lay juror system does differ, however, from European mixed panel systems. Senger, supra note 10, at 748 (discussing how Japan’s model is procedurally different from mixed panel models in Italy, France and Germany).

Anderson & Saint supra note 1, at 236 art 1.

JSRC Recommendations, supra note 7, at Chap 1, Part 3(2).
The new mixed jury system provides that a judicial panel comprised of three professional judges and six lay assessors will handle cases “involving crimes punishable by death or imprisonment for an indefinite period or by imprisonment with hard labor,” and cases involving “crimes in which the victim died due to an intentional criminal act.” The new law does not contain a provision allowing defendants to waive trial by lay jury. There are, however, certain circumstances that might permit the court to remove cases from the lay jury’s jurisdiction. Article 3 provides that the prosecutor, defendant, defense counsel or the court, sua sponte, may determine that a case is to be handled solely by a panel of judges when conditions are such that it would be difficult for lay assessors to fulfill their duties. Examples of such circumstances include:

[L]ay assessor candidates’ fear of significant violation to their peaceful existence or their fear of added injury to...assets or life arising from the defendant’s statements or statements of an organized group, or at the behest of a member of the defendant’s organized group, or where there has been violence, or reports of violence, towards present lay assessor candidates or lay assessors....

The separately allocated powers of judges and lay assessors are set out in Article 6. Both judges and lay assessors will make decisions concerning sentencing judgments, exonerations, innocence, and transfers to family court. Their chief responsibilities will be “recognizing facts, applying laws and ordinances and determining sentences.” By contrast, the judges on the panel alone have complete authority concerning interpretation of laws and ordinances, however, the courts were given discretion to try pending cases with a judicial panel if they deemed it appropriate to consolidate a pending case with one that fell under the jurisdiction of the new law. Anderson & Saint, supra note 1, at 281 art 4.

However, in cases in which “it is recognized that there is no [factual] dispute concerning the facts at trial as established by the evidence and the issues identified by pre-trial procedure, the court may decide...that the trial and hearings be conducted by a judicial panel composed of one judge and four lay assessors” barring any objection by the prosecutor, defendant and defense counsel. Anderson & Saint supra note 1, at 236-37 art 2. Because the verdict requires a majority of the panel including one lay assessor and one judge, the judge holds veto power with the smaller panel. However, “because matters referred to the small panel will likely only cover cases where there is nothing in controversy, this is not expected to be problematic.” Anderson & Ambler, supra note 5 at 66.

Anderson & Saint supra note 1, at 236-37 art 2.
See Anderson & Ambler, supra note 5, at 62. This is a vast improvement over the pre-war system which allowed such waivers and arguably contributed to the demise of the lay jury system. Id. at 62 n. 41.
Anderson & Saint supra note 1, at 238 art. 3.
Id. A determination by the District Court to accept or reject a request under paragraph 3(1) may be immediately appealed. Id. at 239.
Id. at 240 art 6.
Id. at 240-41.
litigation procedure, and “other decisions except those decisions involving lay assessors’ participation.”

Chapter 2 of the Act, entitled “Lay Assessors,” contains the bulk of the provisions regarding lay assessors’ authority, selection, appointment, disqualification, and dismissal. Lay assessors must act independently, honestly, and fairly. They are also under a duty to “not disclose secrets from deliberation.”

In terms of appointment, lay assessors are selected from among those with voting rights in the Lower House. However, no person shall be qualified to serve as a lay assessor if he/she has not completed compulsory education, has been imprisoned, or has significant physical or mental incapacities. Also prohibited from service are members of the National Diet, Ministers of State, and employees of specified national administrative institutions. Judges, lawyers, prosecutors, judicial clerks, notaries public, judicial police officers, court personnel, professors of law, and legal apprentices are also among those in the long list of people who are prohibited from serving as lay assessors. Persons who have the option to decline service include those aged seventy and older, members of local councils, students, those who have been lay assessors within the past five years, and those who have serious illness or injury, significant childcare responsibilities, or business obligations. The Act also provides that people bearing certain relationships to specific cases may not serve as lay assessors. Such persons include the defendant or victim in the case, their relatives or representatives, witnesses or expert witnesses, or people who have made claims or complaints in the case. Finally, “persons [whom] the court recognizes might not be able to act fairly in a trial according to the prescribed laws cannot become lay assessors in the relevant case.”

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61 Id. at 241.
62 See generally id. at 241-65 chap. 2. This Chapter also covers the appointment of reserve lay assessors “where it is recognized as necessary considering the length of the trial and other circumstances.” Id. at 242 art. 10. However, the number of reserve lay assessors cannot exceed the number of lay assessors on the panel. Id.
63 Id. at 241 arts. 8 & 9.
64 Id. at 242 art. 9. This particular provision was the subject of much controversy. Indeed, “[t]he bar association and others voiced their opposition to extreme restriction on a lay judge's ability to openly communicate about their trial experience” because transparency and communication could serve to further educate the public about the lay jury process. Wilson, supra note 50, at 517. The Lay Assessor Act includes a compromise provision that limits lay jurors' ability to speak but “does not impact the ability of citizen judges to discuss their personal feelings about their overall experience as lay judges.” Id.
65 Anderson & Saint supra note 1, at 243 art. 13.
66 Id. at 243-44 art. 14.
67 Id. at 244 art. 15.
68 Id. at 245-46 art. 15.
69 Id. at 246-47 art. 16.
70 Id. at 247-48 art. 17.
71 Id. at 249 art. 18.
The selection of lay assessors for trial is not open to the public. The chief judge directs the selection process, which includes questioning the lay assessor candidates regarding their legal qualifications to serve. Potential lay assessor candidates have a duty to answer all questions truthfully and must answer all questions barring an appropriate reason to decline responding. Lay assessor candidates may still be disqualified at this stage if the questioning discloses that they lack the necessary legal qualifications or if there is a fear that they would act unfairly during the trial. In addition to the non-appointment of lay assessor candidates for specific reasons, the prosecutor and defendant may each challenge the appointment of up to four lay assessor candidates without specifying a reason. The court determines whether such challenges will be successful.

Once selected, lay assessors may be dismissed for a variety of reasons including a failure to take the oath, failure to attend the proceedings, and/or failure to participate in the deliberation process. Lay assessors may also be dismissed if there is a fear that they may act unfairly or if it is discovered that they made a false entry on the juror questionnaire or for abusing the dignity of the court. Once appointed, a lay assessor’s duties terminates when either (1) there is “notice of the completion of the trial,” or (2) there is a determination that the trial will be handled by a single judge or a panel of judges. The lay assessor’s work may officially begin prior to trial if pre-trial proceedings require the questioning and inspection of witnesses. During the trial, a lay assessor’s participation is limited.

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72 Id. at 256 art. 33. The only persons allowed to be present are the judges, court clerks, the prosecutor and defense counsel. Id. at 256 art. 32. The court may also allow the defendant to attend, if necessary. Id.
73 Id. at 256 art. 33. The court must also give due consideration to “the feelings of lay assessor candidates” so that requests by individual candidates for determinations of non-appointment do not occur in the presence of the lay assessor candidates. Id.
74 Id. at 256 art. 34. The chief judge conducts the questioning of jurors, but attending judges, the prosecutor, defendant, or defense counsel may request the chief judge to ask specific questions of the lay assessors. “When it is found appropriate, the chief judge will do the requested questioning of the lay assessor candidates.” Id. at 257 art. 34.
75 Id.
76 Id. at 258 art. 36. The prosecutor and the defendant may also challenge the appointment of reserve lay assessors. Id.
77 Id.
78 Id. at 260 art. 41.
79 Id. at 261 art. 41. Abusing the dignity of the court can include engaging in abusive language or inappropriate speech in court or a failure to heed the orders of the chief judge. Id. After appointment, lay assessors themselves may apply to the court to resign their position as a lay assessor for reasons of hardship related to illness or family or work issues that arose after appointment. The court then reviews the lay assessor’s application and makes the determination as to whether the lay assessor should be dismissed. Id. at 264 art. 44.
80 Id. at 265 art. 48.
81 Id. at 266 arts. 52 and 53. A lay juror must appear at pre-trial proceedings or risk dismissal and punishment.
to those aspects of the process they are required to decide. Lay assessors may pose questions to witnesses upon informing the chief judge. If matters within the lay assessor’s province are to occur outside of court, lay assessors may attend and participate with the permission of the chief judge. When victims or their legal representatives offer testimony, lay assessors may question them for purposes of clarifying their statements. When the defendant chooses to make a voluntary statement, lay assessors may request a statement from the defendant concerning matters within the province of the lay assessors’ decision-making authority. The Act does not appear to provide an opportunity for lay assessors to question the defendant generally. This limitation is consistent with the defendant’s rights during trial, which include the right to silence and the option to make a statement.

During the deliberation process, lay assessors are required to attend and to express an opinion. Decisions are made in accordance with the principle of free conviction, i.e. “judges and lay assessors are both entrusted to decide freely based on the strength of the evidence.” The chief judge is responsible for “inform[ing] the lay assessors of any rulings on the interpretation of laws [and/or] procedures” made by the panel of judges. To enhance the educative value of the lay assessors’ participation and to bolster trust in the outcome of the deliberative process, the chief judge shall:

- consider matters such as conscientiously explaining the necessary laws or ordinances to the lay assessors,
- making arrangements so that deliberations are easily understandable for the lay assessors, providing sufficient opportunity for the lay assessors to voice their opinions, and so forth, so that lay assessors are sufficiently able to execute their duties.

The verdict is determined by a majority of the panel members, but it must include both a lay assessor and a judge in the opinion. In the event there is division of opinion regarding the

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82 See supra note 55 and accompanying text.
83 Id. at 267 art. 56.
84 Id. at 267 art. 57.
85 Id. at 268 art. 58.
86 Id. at 268 art. 59. Pursuant to Article 311 of the Japan’s Code of Criminal Procedure, a defendant may choose to remain silent at all times throughout the trial or may selectively refuse to answer particular questions. KELII SOSHIOHO [KESHO] [CODE OF CRIMINAL PROCEDURE], art. 311.
87 Anderson & Saint, supra note 1, at 268 art. 59.
88 Id. at 273 art. 66.
89 Id. at 268-69 art. 62.
90 Id. at 273 art. 66.
91 Id.
92 Id. at 273 art. 67. Although not entirely clear from the language of the Act, “it is asserted that a five or six lay person majority to acquit without a judge consenting would result in a not guilty verdict, but a five or six lay person majority to convict without a judge consenting would not result in conviction.” Id. at 273 n 49.
nature of the sentence, a process for gaining majority opinion requires combining votes for the least favorable result for the defendant with votes for the next favorable opinion until a majority that includes the votes of a judge and a lay assessor is achieved.\(^{93}\) By law, a shroud of secrecy surrounds the deliberation process including the nature of the opinions held by panel members as well as the number of people holding a particular opinion.\(^{94}\) To enhance the deterrent impact of this provision, criminal penalties are included in the Lay Assessor Act. Lay assessors are subject to a fine and/or jail time if they leak deliberation secrets (or other secrets learned during their employment), thoughts about the weight of the sentences, or facts they believe should have been found in the defendant’s case.\(^{95}\)

There are also several provisions designed to protect lay assessors from any sort of retribution for actions during their service as jurors.\(^{96}\) Employers may not treat lay assessors adversely for serving on a jury\(^{97}\) nor can anyone contact a lay assessor regarding the case or for the purpose of learning information about the deliberations.\(^{98}\) Once again, to emphasize the seriousness of the concern about lay assessor safety, the Lay Assessor Act outlines criminal sanctions for solicitation or threatening lay assessors for the purpose of influencing their opinions or to learn other information regarding their decisions.\(^{99}\)

The Supplementary Provisions of the Lay Assessor Act, which further illuminate its purpose, address Pre-Enforcement Measures that required the Japanese government and the Supreme Court to implement measures to explain the lay assessor process to citizens in an easily understood fashion. This educational initiative encouraged “citizens to participate in criminal trials substantively based on personal conviction and to deepen citizens’ understanding and interest in the system for lay assessors’ participation in criminal trials...”\(^{100}\)

\(^ {93}\) Id. at 274 art. 67.

\(^ {94}\) Id. at 274-75 art. 70.

\(^ {95}\) Id. at 277 art. 79. Criminal sanctions also apply to lay assessors who make fraudulent statements during the selection process, fail to appear after being summoned (or for proceedings thereafter if selected) without appropriate reason, or who fail to take the oath without appropriate reason. Id. at 278-79 art 81-83.

\(^ {96}\) For instance, Article 80 makes it a punishable offense for prosecutors, defense counsel, or defendants to “reveal the name of a lay assessor candidate” without an appropriate reason. Id. at 278 art. 80.

\(^ {97}\) Id. at 275 art. 71.

\(^ {98}\) Id at 275 art. 73.

\(^ {99}\) Id. at 276-77 articles 77 & 78. Persons found guilty of these crimes can be subject to a fine of ¥200,000 and/or imprisonment for up to two years. Id.

\(^ {100}\) Id. at 280 art. 2. Indeed, the government embarked upon an aggressive advertisement/educational campaign that included traditional public relations methods (websites, newsletters, flyers, television, and video) as well as a few non-traditional approaches (at one festival the Minister of Justice dressed as Santa Claus to serve as master of ceremonies for a quiz regarding the new lay assessor system). Anderson & Ambler, supra note 5, at 70-76.
Finally, the Act recognizes that systemic change will not only require citizens to understand and to make adjustments, but that “[t]he nation shall endeavour to adjust the environment as necessary to allow the smooth operation of the system to involve lay assessors’ participation in criminal trials according to a belief in the indispensability of having citizens able to participate easily in trials as lay assessors.”

1. The Risk of Incremental Change

Japan’s new lay assessor system is noteworthy for its intense focus on transparency and citizen involvement in the criminal justice process. However, it is clear from the pre-Act debate as well as from the specific language of the Lay Assessor Act, that the Japanese government chose a jury trial approach that potentially retains a judicial stronghold on the decision making process in the deliberation room. There is nothing inherently wrong with this method of jury trial, and it exists in many European countries. The risk for Japan, however, is that retaining this particular fragment of the inquisitorial system might exert such enormous pressure on the emerging adversarial system in both subtle and obvious ways that it forces the system back to a de facto judge dominated system. When other components of the inquisitorial approach are considered, such as the paternalistic approach that courts have traditionally taken, the near perfect conviction rates (supported by secret police interrogations), and the general lack of citizen interest in participation due to fear of challenging authority, then the perfect recipe for a reversion to the old system looms large.

Consider Italy as an example. In 1988, Italy entirely reformed its criminal justice system from inquisitorial to adversarial through legislative enactment. During this process, several adversarial components were introduced into the system that gave

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101 Anderson & Saint supra note 1, at 281 art. 3.
102 See Kiss, supra note 6, at 271.
103 One scholar has argued that the “history of Japanese criminal justice from at least the seventeenth century shows that, time and time again, Japan’s government has supported popular sovereignty and due process only to the degree that they augment governmental stability and legitimacy. The structure of the new Japanese jury is the product of this same governmental mentality.” Rozenshtein, supra note 7, at 23
104 For a very detailed and insightful analysis of Italy’s transition to an adversarial system, see William Pizzi & Mariangela Montagna, The Battle to Establish an Adversarial Trial System in Italy, 25 MICH. J OF INT’L L. 429 (2004). Italy is distinct from Japan in that Italy attempted a more sweeping transition of its criminal justice system. The Italian transition is nevertheless useful because it provides an example of the inevitable tension that results when trying to build adversarial structures on inquisitorial foundations.
105 According to Pizzi & Montagna, “[t]he goal of the 1988 Code was to create a trial system that was more fair and open, and one that the drafters felt was more consistent with the values of an open democratic society. But there was another reason for changing the old trial system—a secondary reason, but still an important one nonetheless: the hope to gain some much needed efficiencies in the system.” Id. at 437.
parties more control over the criminal trial (as opposed to the judge) and that required in-court testimony (as opposed to trial by dossier). However, the basic foundation of judicial control, which included a responsibility to achieve the “correct” outcome in a particular case, led to a slow erosion of the newly introduced adversarial principles. Before long, hearsay evidence was being routinely introduced and defendants were being convicted based upon evidence that they could not directly challenge in court, resulting in a striking reemergence of the inquisitorial tradition.

It was not until Italy undertook to change the constitutional foundation of its system that the judges took notice of the new orientation of the Italian criminal justice system toward an adversarial approach. Thus, Italy provides a compelling example of the risks inherent in changing specific components in a system without concomitant foundational modifications. The tension between strong foundational tradition and modern structural components will inevitably pull the system toward reversion, especially when tradition is synonymous with a paternalistic judiciary tasked with obtaining “correct” verdicts and high conviction rates.

III. THE RUSSIAN JURY TRIAL EXPERIENCE

Trial by jury is, probably, the privilege of a stable society. It must be stable in the economic, social, political and legal respects. In the opposite case, trial by jury is doomed to live out a miserable existence. Trial by jury in Russia is a vivid example of that.
A. EARLY JURY TRIALS AND THE BOLSHEVIK REPUDIATION

Russia’s transition to a lay jury system and its gradual movement away from that process is an instructive model for Japan. While Russia introduced an all layperson jury, its transition is similar to Japan’s in that both countries retained traditional inquisitorial components, such as the right to appeal an acquittal, that could overshadow newly introduced adversarial elements and eventually reduce them to the level of hollow symbolism. This section will trace Russia’s path toward reestablishing a system of trial by jury and explore the travails that such transition caused in the Russian criminal justice system.

Trial by jury in Russia was first introduced in 1864 as a legal reform measure during the reign of Tsar Alexander II. The interposition of lay citizens into the criminal justice process was viewed as a means to inject popular democracy into the system and combat rampant corruption. Despite political challenges and efforts to limit its jurisdiction, the jury system thrived in Russia and was a model of citizen participation until the Bolshevik revolution abolished it in 1917. In its place, the Bolsheviks introduced a system of “people’s courts,” which, despite its name, included one professional judge and two to six people’s assessors. In addition to replacing the lay jury system, other inquisitorial components such as strong prosecutorial influence, few defense rights and a weak judiciary that often favored or substituted for prosecutorial authority were also introduced. In this Bolshevik reformed system, “[t]he prosecutor directed a purely

111 The jury trial process was institutionalized pursuant to the Court Charter of 1864, but it did not have universal appeal. “[S]upporters of the institution considered it a trial of ‘public consciousness,’ ‘common sense,’ [and] ‘truth proved by life.’” Opponents, on the other hand, “called it ‘mob punishment,’ ‘trial without any sense of purpose,’ [and] ‘a toy in the hands of the prosecution and especially the defense.’” Nemytina, supra note 110 at 365. See also John C. Coughenour, Reflections on Russia’s Revival of Trial by Jury: History Demands That We ask Difficult Questions Regarding Terror Trials, Procedures to Combat Terrorism, and Our Federal Sentencing Regime, 26 Seattle U. L. Rev. 399, 401 (2003) (explaining how opponents warned that “public resentment of law and authority would lead to rampant jury nullification”).

112 Russia’s jury trial system was rudimentary democracy as there were no literacy, education, or property requirements for prospective jurors. Guilt or innocence was decided by simple majority. Coughenour, supra note 111, at 401-02. Jurors apparently took their responsibilities seriously, returning verdicts of ‘not guilty’ in approximately 40% of cases. In cases of political crimes against the state, the percentage was even higher, which “made representatives of state institutions hostile to the institution because of the political situation in Russia and the rise of the revolutionary movement.” Nemytina, supra note 110, at 365.

113 Indeed, the fifty-plus years of jury trials, which included 7.5 million jury verdicts, has become known as the “Golden Age of Russian Law.” Coughenour, supra note 111, at 405.

114 Id. Despite the appearance of democratic participation, the people’s assessors became known as “nodders” because they often simply nodded in agreement with professional judges. Id. at 406.
inquisitorial process in which coerced confessions, false, politically-motivated prosecutions, and falsifications of evidence were routinely carried out. Criminal suspects had virtually no protection against the often illegal methods of criminal investigators.” ¹¹⁵ The judiciary was characterized by corruption and lack of independence. This meant that “[j]udges were poorly paid and often under-educated professionals [who]...were bound to follow the orders of [Communist party] officials, whose telephone calls enjoyed more probative value than any evidence or argument presented in court.” ¹¹⁶

Not surprisingly, acquittals were noticeably rare in this system and the jury of one professional judge and two lay assessors often functioned as one voice—that of the professional judge.¹¹⁷ Over time, “[t]he blurry separation of powers in the Soviet criminal justice system thus perpetuated illegality and injustice. It is this system that Gorbachev inherited and set out to reform during his perestroika, or restructuring.”¹¹⁸

B. THE PUSH FOR REFORM

The reform of Russia’s jury system was part of a legal reform package instituted in the early 1990s that sought to give judges greater authority and increased independence from Communist party politics.¹¹⁹ During the initial stages of this reform movement, incremental change to the people’s court system was proposed. Specifically, the new trial by jury would be comprised of an expanded panel of lay assessors who would be “the sole arbiter of guilt and innocence, and [who would] deliberate with the professional judge only at the sentencing stage.”¹²⁰

On October 21, 1991, the “Concept of Judicial Reform” advocated a sweeping overhaul to the criminal justice system.¹²¹ The newly proposed changes included the introduction of adversarial proceedings, the presumption of innocence, the right to remain silent, and the institution of three “flavors” of adjudication: trial by layperson jury, single judges and three judge panels.¹²²

Nearly two years later, on July 16, 1993, the Jury Law was enacted and heralded “not as something borrowed from the West in

¹¹⁶ Id. at 66-67.
¹¹⁷ The lay assessors, while nominally elected, were pre-screened by the Communist party. Thus, the party controlled the judges and the assessors. Id. at 67. See also Coughenour, supra note 111, at 405 (explaining that “although elected, all people’s assessors were screened by local Communist Party officials and committees”).
¹¹⁸ Thaman, supra note 115, at 67-68. Although reestablishment of a jury trial system was proposed under Gorbachev in May 1989, an attempted coup in 1991 halted implementation of the legislation. Coughenour, supra note 111, at 407 n. 66.
¹¹⁹ Thaman, supra note 115, at 69.
¹²⁰ Id. at 71.
¹²¹ The Concept for Judicial Reform was “the first comprehensive plan for judicial and criminal justice reform since 1864.” Id. at 72.
¹²² Id. at 73-74.
the course of democratic changes, but as a native legal tradition that was being revived.” The law was, however, incremental in its implementation in that it reintroduced jury trials on an experimental basis only in several regional courts. The jury trial process was further limited to thirty-five serious felonies. Finally, this new right to trial by lay jury would also coexist alongside the previously existing trial by people’s assessors, with the decision on which form to use left solely to the accused. Although trial by jury symbolizes transparency and democratic participation in the criminal justice system and promotes ideals of justice and fairness at the hands of one’s peers, Russian defendants did not rush to avail themselves of the trial by lay jury process. There were likely many reasons for this initial reluctance to use the system, but two of the most prominent explanations were “anxiety and lack of knowledge of the new procedure,” and the “insignificant salary paid to court-appointed counsel...for the increased work and pressure involved with jury trials.” The jury trial process also engendered sharp yet familiar criticism from opponents who argued that public resentment of governmental authority would lead to a sharp rise in acquittals.

C. WHAT WENT RIGHT...AND WRONG

Although jury trials were initially proposed for all crimes punishable by deprivation of liberty for one year, the right to a jury trial was only made available to criminal cases within the original jurisdiction of territorial or regional courts. This meant that the right was limited to approximately thirty-five serious felonies punishable by death or ten to fifteen years imprisonment. Accused persons were also entitled to representation by counsel, either retained or approved by the court.

However, despite the introduction of these adversarial components, some aspects of the pre-reform inquisitorial system remained. First, judges retained the authority to send cases back for further investigation on the motion of the prosecutor, defense, or its own motion even after the preliminary investigation had been completed. Prosecutors were obviously reluctant to have poorly

123 Nemytina, supra note 110, at 366. Essentially, Russia hoped to resurrect its Golden Age.
124 Because jury trials were considered an experiment, nine regions were chosen on the basis of their “even mix of industrial and agricultural activity, and [because they] were free of political, nationalist, or economic tensions.” Thaman, supra note 115, at 81. See also Nemytina, supra note 110, at 366 (explaining how there was a presumption that jury trials would be established in the whole of Russia between 1993-96).
125 Thaman, supra note 115, at 80.
126 A defendant may choose “whether his/her case will be tried by a panel of three professional judges, a judge and two people’s assessors, or by a jury.” Nemytina, supra note 110, at 367.
127 Thaman, supra note 115, at 90.
128 Coughenour, supra note 111, at 409.
129 Id. at 407.
130 Id. at 408.
131 Thaman, supra note 23, at 372 (observing that “[w]ith increasing
investigated cases presented to juries.\textsuperscript{132} When such weak cases did go forward, jurors used their newfound authority to express outrage toward prosecutors for weak cases or sympathy for defendants by issuing an increasing number of acquittal verdicts, a rather alarming development for a system so accustomed to guilty verdicts even on the sparsest evidence. Essentially, trial by jury served as a corrective force as “the need to convince a jury...forced prosecutors to examine more critically the charges contained in the investigator’s indictment.”\textsuperscript{133}

Another inquisitorial system throwback, the narrative style of witness testimony, also proved problematic in front of juries and made it particularly difficult to exclude prejudicial or illegally obtained evidence.\textsuperscript{134} The victim or aggrieved person also has a role in Russian jury trials, sometimes questioning witnesses and/or presenting their own narrative, tearful accounts of what occurred or how they have been impacted by the crime.\textsuperscript{135}

As far as appeals, pursuant to Article 369 of the Russian Code of Criminal Procedure, prosecutors, defendants, and victims can appeal judgments of conviction or acquittal on the following exclusive grounds:

1. discrepancy between the court conclusions, expounded in the sentence, and the factual circumstances of the criminal case established by the court of the appeals instance;
2. violation of the criminal procedural law;
3. an incorrect application of the criminal law;
4. unjustness of the administered punishment.

On the basis of one or more of these grounds, the appellate court may, among other things, overturn an acquittal and convict the defendant.\textsuperscript{136} Arguably it is this right to appeal an acquittal and have it overturned and replaced with a conviction that poses the most significant threat to the system of trial by jury. Under these circumstances, the judiciary ultimately retains its stronghold on the frequency...prosecutors began to move to return the case to the investigator after the jury had been selected and had heard the bulk of the evidence”).

\textsuperscript{132} To combat this practice, which greatly diminished the adversarial system, in April 1999, the Russian Constitutional Court ruled that in cases in which “there is insufficient evidence to convict, then the trial court must direct a verdict of acquittal, regardless of whether the motion is made by the judge or by one of the prosecuting parties.” Id. at 372.

\textsuperscript{133} Thaman, supra note 115, at 110.

\textsuperscript{134} As Thaman explains, “[t]he free narrative form of witness testimony and the generally wide-open character of Russian trials have led to some difficulty in excluding illegally gathered evidence and defendants’ prior criminal records.” Id. at 106 (citations omitted). Victims and witnesses have repeatedly alluded to defendants’ prior convictions and in one case “a witness yelled from the audience, ‘It’s the second person he killed and he says he didn’t kill!’” (referring to the defendant). Id. at 106-7.

\textsuperscript{135} Id. at 107.

\textsuperscript{136} UGOLOVNO-PROTsessual’NYI KODEKS Rossiiskoi Federatsii [UPK RF] [Criminal Procedural Code] art. 369 (Russ.).

\textsuperscript{137} Id. at 367(3)(3).
criminal justice system wielding statutory authority to diminish the impact of democratic participation in the criminal justice system.\textsuperscript{138} Indeed, the statistics on reversals of acquittals in Russia reveal that courts are apparently determined to retain their power at the expense of the continued legitimacy of the lay jury system. Since the institution of the jury trials:

The Supreme Court of the Russian Federation (SCRF) has shown great zeal in reversing such jury acquittals. The statistics relating to acquittals in the first nine years of jury trial, when it was restricted to just nine regions of the RF, are revealing. In 1994, 18.2\% of jury cases ended in acquittal, in comparison to only 1\% in non-jury trials. Yet...of the 19 judgments reversed by the SCRF, nine were acquittals, and only one acquittal was upheld on appeal. In 1995 the acquittal rate fell to 14.3\%. 17.3\% of these acquittals were reversed. In 1996 the acquittal rate rose to 19.1\%, but the SCRF reversed 34.2\% of those challenged on appeal. In 1997 the acquittal rate rose to 22.9\% but the SCRF reversed 48.6\% of those appealed. Finally, in 1998, the acquittal rate fell slightly to 20.6\%, but 66\% of those were overturned on appeal. In 2000 the acquittal rate fell to 15.2\%, and was 15.6\% in 2001. In 2001, the SCRF reversed 43\% of acquittals as opposed to only 6.7\% of convictions. 32.4\% of all acquittals were reversed in 2002 as opposed to 5.9\% of all convictions. By 2003, the first year that the jury trial began expanding throughout Russia only 15\% of cases ended in acquittal, yet the SCRF reversed 24\% of those as opposed to only 5\% of convictions. The trend continued in 2004 when 53.5\% of all acquittals were reversed.\textsuperscript{139}

The procedural reasons for reversing acquittals have included, among others, the erroneous exclusion of evidence, errors in the judge’s summation (in some cases the judge will intentionally err to plant the seeds for reversal in the event of an acquittal), and errors in the jury deliberation (the jury failed to deliberate for exactly three hours prior to returning a majority verdict as required by statute).\textsuperscript{140}

In some instances, however, jurors are directly persuaded to

\begin{itemize}
  \item \textsuperscript{138} Coughenour, supra note 111, at 409.
  \item \textsuperscript{139} Thaman, supra note 23, at 407-08. This is an alarming trend, but Thaman observes that there may be a strong societal impetus for the SCRF’s aggressive assault on acquittals. That is, “despite the acknowledged incompetence of investigative organs and their inability to present credible inculpatory evidence, [there] is the ugly fact that the murder rate in Russia has risen progressively since jury trials began in 1993, and...the SCRF is unwilling to release alleged murderers who are charged with brutally killing more than one person.” Id. at 408.
  \item \textsuperscript{140} Id. at 413.
\end{itemize}
avoid acquittals. In one case, when jurors were thought to be leaning toward an acquittal, security officers approached at least two of the jurors and encouraged them to drop off the panel.\footnote{Barry, supra note 110.} When they both declined, the trial was delayed for several months, ostensibly due to the unavailability of a victim in the case, before the jury panel was eventually completely dismissed before rendering a verdict.\footnote{Id.} On January 2, 2009, Russian President Dmitry Medvedev signed a bill eliminating jury trials for certain crimes against the state.\footnote{Id.} “The law does away with jury trials for a variety of offenses, leaving people accused of treason, revolt, sabotage, espionage or terrorism at the mercy of three judges rather than a panel of peers. Critics say the law is dangerous because judges in Russia are vulnerable to manipulation and intimidation by the government.”\footnote{Megan Stack, New Russian Law Ends Jury Trials for ‘Crimes Against State,’ L.A. T\textsc{imes}, Jan. 2, 2009, http://articles.latimes.com/2009/jan/02/world/fg-medvedev-juries2.}

With this most recent legislation, it appears that the systematic overhaul that was intended to democratize the Russian criminal justice system, promote judicial independence, and provide fair trials to defendants is regressing into its previous inquisitorial modus operandi. The foundational pressures of the inquisitorial system, including judges who remained active throughout the trial process and who maintained a commitment to obtaining correct verdicts, exerted strong pressure on the lay jury trial modification that was seemingly looked upon from the start as an “experiment.”\footnote{Id.} When other traditional inquisitorial components such as the right to appeal acquittals and strong victim participation are added to the equation, “the ambitious reforms increasingly appear to be democratic window-dressing for a system that functions in the same manner as its forerunner.”\footnote{Many of the judges tasked with ensuring the success of the new jury trial system were “holdovers from the Soviet system who spent their entire careers protecting state power and state interests in preference to individual rights.” Coughenour, supra note 111, at 410 n. 93.}

IV. LESSONS FROM RUSSIA FOR THE FLEGLING JAPANESE JURY TRIAL SYSTEM

As Japan sets out to maximize citizen participation in its criminal process, several lessons can be gleaned from Russia’s experiment with the jury trial system. First, there must be an attitudinal shift away from an expectation of near perfect conviction rates. Early returns from the first two years of Japan’s lay jury system appear to indicate that the conviction rate remains high at 99.8%.\footnote{Thaman, supra note 23, at 360.} On the surface it may appear that the introduction of the

\footnote{Lay Judge Conviction Rate 99.8% So Far, THE JAPAN T\textsc{imes} O\textsc{nline}, May 22, 2011, http://www.japantimes.co.jp/text/nn20110522a8.html.}
lay assessor system has had little impact on Japan’s criminal justice system. However, lurking just below the surface of the statistical evidence may be three factors that prevent a realistic assessment of lay citizen participation. First, many cases may come before the lay assessor panel “pre-packaged” with false or forced confessions extracted during long periods of detention. Indeed, prosecutors will typically “proceed with a case only if they are sure they will win and a confession has been called the king of evidence.” The Japanese government has thus far resisted calls for electronic recording of the complete interrogation process, instead requiring only a limited recording of the confession portion. Such a “limited electronic recording does not capture the entire interrogative process, and has been primarily intended to serve the prosecutors’ own purposes.”

Until lay juries are able to view complete recordings of interrogations in context, it will be virtually impossible to discern how many cases might result in acquittals due to false or forced confessions.

The second factor that stands poised to undermine Japan’s jury system is one that plagued the Russian system: a strong foundation of judicial/prosecutorial dominance and control over the trial process. Indeed, this may be an even more compelling factor in the Japanese system because of the mixed jury panel and the Japanese traditional hierarchical society. Regardless of the justice system, judges are usually held out as authority figures entitled to respect and deference. This special regard is multiplied in a society like Japan in which it is considered impolite to “blatantly disagree with a superior.” Therefore, unlike Russia, where the pressure on jurors to convict may come by way of sudden visits from security personnel, such influence may be manifest in the jury deliberation room in Japan. Because of societal conditioning, during deliberation, it is likely that the Japanese lay juror “would possibly speak up once or twice, but if the judge did not somehow reinforce the viewpoint, only a courageous Japanese juror would press the issue.”

Moreover, because lay jurors are bound by strict confidentiality requirements concerning deliberations, in the short term, it will be impossible to know the precise extent of undue influence in the form of judicial overreaching. Therefore, as one scholar has suggested, “policymakers should amend the Lay Judge Act to include a mechanism to enable whistle blowing and provisions that protect lay judges who seek to raise or correct an impropriety. Lay judges must be able to speak about the deliberations with the assurance that the government will not punish them for blowing the whistle on an

May 2009, when Japan’s lay assessor system was instituted, to March 2011, “3,377 people were indicted for crimes mandating trial under the lay judge system, of whom 2,060 received rulings…. 2,055, or 99.8 percent were found guilty, including two people found not guilty on some counts.”


149 Wilson, supra note 50, at 551.

150 Id.

151 Kiss, supra note 6, at 275.

152 Id.
Finally, a factor that can fairly be said to epitomize the traditional inquisitorial model—the right to appeal an acquittal—remains part of Japan’s criminal justice system just as it did in Russia. As the Russian example illustrated, the ability to appeal acquittals is a procedural “insurance policy” against declining conviction rates due to lay juries failing to reach the “correct” verdict. Of course, the ability to overturn judgments of acquittal rendered by lay assessor panels is inconsistent with the goal of enhancing perceptions of fairness and justice through lay participation in the criminal justice system. Instead, this procedural “checkmate” resurrects and reinforces competing goals that place an extraordinarily high value on near perfect conviction rates, which means eliminating acquittals. Indeed, acquittals can be career-defeating events for judges and prosecutors in the Japanese criminal justice system. Thus far, there does not appear to be reason for concern regarding acquittals. Lay jury panels are maintaining the traditional better than 99% conviction rate. But, the jury trial process is still young in Japan so it remains to be seen whether the right to appeal an acquittal will become an obsolete relic of Japan’s inquisitorial tradition or a much used procedural resource to “correct” a declining conviction rate.

To help strengthen the nascent adversarial orientation of the Japanese system, defense attorneys, who were previously passive players, have now become critical components in the jury trial process. An active defense bar can serve as a bulwark against a reversion to the old ways of doing business and can reinforce lay assessors’ confidence that their verdicts will be based on a genuinely adversarial process. Unfortunately, in Russia, criminal defense attorneys became targets for criminal prosecution and disbarment simply because they dared to challenge the state’s evidence and provide their clients with a zealous defense. Japan must guard against the rise of similar antipathy toward those charged with protecting the rights of the accused. As Japanese defense lawyer Takano Takashi explains:

[W]e defense lawyers must empower lay judges to

153 Wilson, supra note 50, at 541.
154 Kiss, supra note 6, at 264 n.32 (explaining that “when a judge issues an acquittal, the faces of his superiors and the displeased faces of prosecutors with whom he’s become friendly will appear in his mind”); see also Wilson, supra note 50, at 507-08 (explaining how prosecutors can be subject to demotion or termination for even a single acquittal).
155 As is typical in inquisitorial systems, defense attorneys in Japan had “been little more than passive props in trial ceremonies that are scripted by prosecutors, certified by judges, and barely contested by the defense. This passivity has been recognized by lay judges, who report much more dissatisfaction with defense lawyers’ activities than they do with those of the prosecution.” David T. Johnson, War in a Season of Slow Revolution: Defense Lawyers and Lay Judges in Japanese Criminal Justice, 9 The Asia-Pacific Journal, (2011), available at http://japanfocus.org/David_T.-Johnson/3554.
stand up to professional judges and defeat them in the deliberation room. For this to happen, defense lawyers must shed the feeling of uselessness that has been their biggest burden. Defense lawyers are habituated to being passive in the criminal process. We have been socialized to believe that what we do does not matter. But with lay judges in front of us, we are no longer talking to a wall. Now we have a real opportunity to make a difference, and we need to make the most of it. We must fight in open court to change a system that is stacked against us.\footnote{\textcopyright{}\textsuperscript{157} Johnson, supra note 155.}

CONCLUSION

As the new jury trial system nears its first official review in 2012, the Japanese government will likely use a number of metrics to assess whether the jury trial system has been a success. Undoubtedly the variance, if any, between the pre- and post-jury conviction rates will be one measure of success. During this evaluation, the Japanese government must recognize that near perfect conviction rates are a remnant of political systems that seek to maximize deterrence and social control at all costs. While deterrence must be a goal of any criminal justice system, the strategies used to achieve that goal should not overemphasize outcomes. Instead, a lay assessor process designed to enhance popular participation in the criminal justice system as a means to educate citizens and lend legitimacy to the system should be an end in itself. This means that safeguards must be implemented to reduce the influence of judicial and societal forces that would diminish lay assessors’ willingness to consider and choose from a full range of verdict options, including acquittal.

The jury trial system is still a very novel component of the Japanese criminal justice system. Therefore, much remains to be seen in terms of its progress toward the stated goals of “making the justice system more easily understandable to the general public, increasing education about the justice system, and...raising the transparency of the justice system to the public by promoting disclosure of information about the justice system.”\footnote{\textcopyright{}\textsuperscript{158} JSRC Recommendations, supra note 7, at Chap. IV.} For now, however, “the cages have started to rattle—and maybe the ripples of reform will continue to spread.”\footnote{\textcopyright{}\textsuperscript{159} Johnson, supra note 155.}