

## Japan's New Citizen Judges: How Secrecy Imperils Judicial Reform

Mark Levin, Virginia Tice

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#### I. INTRODUCTION



"The Lay Assessor System: Participating with My Opinions, My Sentiments, and My Words" -- cover of undated Supreme Court pamphlet for public distribution, 2006.

On May 21, 2009, lay citizens will join professional judges in deciding the fate of suspects of major crimes in Japan's new *saiban-in*

or lay assessor system.[1] (file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn1)

This system, laudable for pursuing public understanding and reform in a judiciary long criticized for being distant and overly bureaucratized, contains provisions that could do as much harm as good. Among causes for concern, the new law contains a harsh secrecy provision that stands out as a potential source of problems. This provision, which threatens to imprison or fine citizens who speak too freely about their service as lay assessors, will make reporting misconduct difficult and chill the public discourse that the system ostensibly aims to foster. Such secrecy may also inflict significant psychological harm upon those affected by the disturbing details of a criminal trial. These potential ramifications should be taken into consideration as Japan makes its way through this new world of lay participation.

Legal reform, of which the lay assessor system is but a part, should be seen in the context of a multi-faceted transformation currently taking place in Japan.[2] (file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn2) The economic crisis in the mid-1990s, as well as

a desire by Japan's leaders to assume a more influential role in global affairs, sparked a host of reforms in finance, education, and law to help equip the country for the domestic and international challenges of the 21<sup>st</sup> century. Additionally, the new system comes at a time when other Asian countries are creating or reinvigorating citizen participation in legal proceedings. China, for example, reintroduced a mixed jury system in 2004 and South Korea launched a five year pilot jury program in 2007. All of the new systems will be observed by the global community for the signs of genuine transformation they may stimulate and the lessons they have to offer.

Several aspects of Japan's plan are drawing concern from the legal community and citizens: the reported reluctance of Japan's citizens to serve in lay assessor roles, [3] (file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn3) whether lay participation will sway judgments and sentencing to unjustly lenient or severe punishment, whether professional judges will be overbearing in the deliberation room, and the potential impairment of media access to full information on criminal trials due to the above-mentioned jury secrecy provision. Although each of these topics warrants international attention and may offer insight into how a country can transition toward greater citizen participation in criminal justice matters, this article focuses primarily on an issue that appears to have drawn less attention: the potential problems the secrecy provision poses for citizens obligated to participate in the new lay assessor system.

## II. JAPAN'S NEW LAY ASSESSOR SYSTEM

### A. *The Lay Assessor Act*

*The Act Concerning Participation of Lay Assessors in Criminal Trials* (Assessor Act) was enacted by the Japanese parliament on May 28, 2004. [4] (file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn4)

This legislation is intended to realize one of the showpiece reforms proposed by the Judicial System Reform Council in 2001. [5] (file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn5)

The Reform Council proposed lay participation in trials as a key element in its effort to transform the populace "from governed objects to governing subjects." Accordingly, the Act's legislative purpose clause explicitly targets "the promotion of the public's understanding of the judicial system and . . . their confidence in it." [6] (file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn6)

The Act aims to achieve this objective via the appointment of lay assessors to serve alongside professional judges in designated cases. It does not affect pre-existing rules and conventions concerning public access to court hearings or court files such as restrictions imposed on reporters through courthouse "press clubs" or other issues related to public understanding of trials and the legal system. Regarding the role to be played by lay assessors, despite the declared mission of promoting public understanding, the Act strictly prohibits assessors from disclosing any information from or pertaining to the panel's deliberations.



The Assessor Act is a detailed statute of over one hundred articles and a set of supplementary provisions that allow for lay participation in cases of the most severe crimes, *i.e.*, those warranting the death penalty, life imprisonment, imprisonment with hard labor, or specified cases in which the victim has died. (Art. 2) Mixed panels of professional judges and lay assessors will decide both guilt and sentence. (Art. 6) These panels will be composed of three judges with six assessors in contested cases or one judge with four assessors in cases where there is “no dispute concerning the facts.” (Art. 2) Assessors are to be selected at random from local voter rolls to participate in a single case. (Art. 13) Potential assessors are subject to background checks, and can be disqualified if they are ex-convicts, suffer from mental incapacity, or “who the court recognizes might not be able to act fairly in a

trial.” (Arts. 12, 14 and 18) Once a citizen is summoned, service is compulsory except for specified categories of candidates who may apply to decline service if, for example, they are seventy years of age or older, ill, or a student. (Arts. 16 and 112)

Japan’s Continental Law tradition in criminal procedure has generally allowed for trials carried out in separate sessions spread over months or even years. However, because trials with lay assessors must be continuous to accommodate the citizens’ schedules, Japan’s Code of Criminal Procedure was revised contemporaneously with the enactment of the Assessor Act to allow for continuous trials. [7]

(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn7)

Similarly to accommodate the new regime, a section was added to the Code for new pre-trial procedures that require prosecutors and defense counsel to confer in advance of trial, to make substantial disclosures of evidence to be presented, and to deliver to the court a joint pre-trial brief that presents relevant matters in agreement and specifies the particular legal and factual issues remaining in contention. [8] (file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn8)

Once the trial has begun, the prosecution and defense are required to “endeavor to make trials quick and easy to understand” including giving statements that draw upon the pre-trial clarification procedures (Arts. 51 and 55) Generally speaking, assessors are authorized to question witnesses, victims, and defendants who have volunteered to testify. (Arts. 56, 57, 58 and 59) The assessors and judges are to come to a decision after they have all participated in

deliberations and “express[ed] an opinion.” (Art. 66) Acquittal is by majority vote but convictions must also obtain the concurrence of at least one professional judge. (Art. 67) Unlike the U.S. rule for criminal jury trials, both convictions and acquittals are subject to appeal by the government. [ 9 ]

(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn9)

Japan’s new lay assessors (*saiban-in*) will serve together with full-time career judges on mixed panels charged with judicial fact-finding and sentencing functions. [ 10 ]

(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn10)

In contrast to the Anglo-American juror, assessors have the authority and power to participate in trials as near co-equals to the professionals, at least as to their assigned roles in fact-finding and sentencing. Lay assessors are permitted to ask questions in trials, albeit generally under the managing hand of the presiding judge. (Arts. 56-59). Apart from the requirement of at least one professional judge concurring in convictions, lay assessors and professional judges’ votes formally share equal weight in deliberations. [ 11 ]

(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn11) (Art. 67)

Several provisions in the Act delineate the responsibilities and duties of lay assessors, including compulsory appearance at court sessions (Art. 112), acting fairly, independently, and honestly, and not committing acts that injure the dignity or fairness of the trial. (Arts. 8 and 9) Nevertheless, one duty of the lay assessors stands apart from the rest owing to the risk of actual imprisonment that it imposes upon the citizens drafted into judicial service. This is the secrecy

provision of Art. 70, which states that, “Information from the deliberations . . . such as the particulars that lay assessors are allowed to hear, the opinions and the number of both judges or lay assessors who held these opinions (hereafter ‘deliberation secrets’) shall not be revealed.” [ 12 ]

(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn12)

When lay assessors leak a deliberation secret or “other secrets learned in their employment” in the course of their service they are subject to a fine of up to ¥500,000 or imprisonment for up to six months. (Art. 108(1)) Former lay assessors are also everlastingly in jeopardy of imprisonment if they subsequently reveal any secrets for profit, specific deliberation secrets (*i.e.*, opinions shared or vote tallies during deliberations), or “other secrets learned in their employment” (Art. 108(2)). Former lay assessors are similarly barred from sharing “what they thought the weight of sentence should have been or the facts they thought should have been found,” even whether they agreed or disagreed with the sentence or facts found by the court. (Art. 108(6)). Thus, apart from a minor and nearly impenetrable *ex post* exception with regard to *some* deliberation secrets, [ 13 ]

(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn13)

lay assessors enjoy no exceptions from the jeopardy of the Act’s duty of secrecy and corresponding punitive provisions that include the threat of imprisonment.

### B. Japan’s Saiban-in System in International Comparison

As with many aspects of Japanese law, the *saiban-in* system hybridizes domestic approaches with features drawn from abroad. The Reform Council, the advisory body tasked to reinvent

Japan's judicial system, worked primarily from models in Europe and North America. In doing so, it explicitly acknowledged the inherent limitations to such an exercise, stating, "We must also argue about the propriety of introduction of jury trials/lay-judge system which are adopted in Europe and the United States of America, by paying attention to their historical/cultural backgrounds and institutional/practical conditions." [14]

(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn14) This tension in objectives – between drawing from and remaining separate from other systems – is reflected in the end product: a unique combination of legal concepts that does not have a readily comparable international counterpart.

Co-service with professional judges as a duty of citizenship is not uncommon. Such systems can be found in many courts in Europe, such as Denmark, Greece, and Germany. Usually, however, systems that employ lay persons provide extensive training for participants. For example, China, Czech Republic, Poland, and Finland all provide training sessions. Additionally, unlike Anglo-American jury systems or the new Japanese system, terms of service for the majority of European lay participants are not limited to a single trial. For example, participation in Austria lasts five days per annum for two years, and in Germany lay assessors serve a fixed term for a number of years with the possibility of re-election.

Similarly, Japan's restrictive use of its system for only the most serious crimes has many counterparts throughout the world, including both lay judge and jury systems. Japan joins Australia, Hungary, Belgium, Brazil, and Greece, among others, in using lay participants for only major cases. While Japan's Reform Council has

suggested that the system might be expanded to other crimes or areas of the law in the future,[15] (file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn15) the current approach was selected not only for ease of transition and the perhaps obvious (but unstated) rationale of curtailing costs, but also because of an expressed belief that the public's interest would be most engaged in crimes that have the heaviest penalties.[16] (file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn16)

On the other hand, the requirement that the prosecution obtain the concurrence of at least one professional judge to convict seems to be a unique element of Japan's system. The closest analog may be the super-majority vote mechanism used in Malta, Norway, and Spain.[17]

(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn17)

But Japan's lay assessor system may be most unique for its uncompromising secrecy provision. While many countries prohibit lay judges from discussing the identity of other jurors or how votes were cast, most provide exceptions to address possible misconduct or for disclosure to a mental health professional. For example, the United Kingdom has a particularly harsh secrecy provision whereby a juror may be held in contempt of court for disclosing information about "any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations or after the case is over." [18]

(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn18)

8) Indeed, this statutory text is so thorough that it might allow prosecution of a juror for discussing the jury's deliberations with a spouse. Yet even in the midst of such strict secrecy, the English system provides an exception for a juror to speak about "an offence alleged to have been committed in relation to the jury." [19] (file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn19)

The need for strict secrecy during the course of trial proceedings seems relatively easy to appreciate. However, the need for strict secrecy after the trial has concluded is a more contentious matter. An oft-cited argument for such *ex post* secrecy is that it is necessary to preserve a fair trial, *i.e.*, to ensure that opinions will be exchanged freely unimpaired by participants' concern with later exposure. The European Court of Human Rights has stated that secrecy of jury deliberations is "a crucial and legitimate" feature of a fair trial that "guarantee[s] open and frank deliberation." [20] (file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn20)

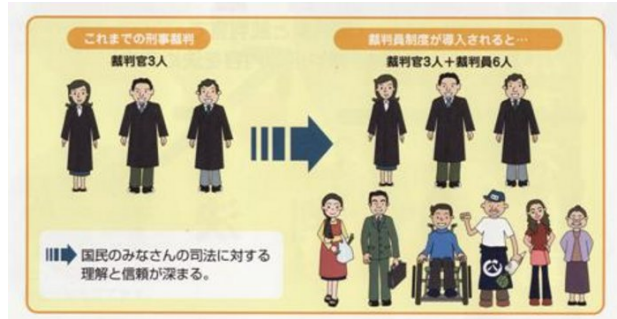
0) The Department for Constitutional Affairs of the U.K. has summarized the arguments for maintaining confidentiality as being essential to ensure the jury can speak frankly, protect jurors from threats and intimidation, and protect the privacy of jurors. [21] (file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn21)

1) Accordingly, Japan's Reform Council recognized the need for confidentiality in commenting that "[i]t is natural that, as with judges, assessors (*saiban-in*) should bear the duty of confidentiality with regard to secrets they come to know during their duties, such as deliberation details . . . ." [22] (file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn22)

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Yet the aforementioned justifications for strict secrecy *ex post* appear to be primarily concerned with preserving assessors' anonymity rather than protecting the confidentiality of proceedings. Furthermore, the scope and duration of secrecy requirements could be limited without impairing most of the intended benefits. Most importantly, although lay assessors are theoretically "judges" for purposes of the trial and therefore should shoulder the same burdens, citizens are not the same as professionals. Lay assessors are ordinary persons yanked from their lives and abruptly obligated to take part in difficult and often traumatic proceedings. Professional judges are life-long civil servants who have sought out this role in society and then gained the benefit of years of professional training and experience to guide them through the psychological perils of criminal trials and deliberations.

Lastly, if it seems that there should be relative leniency towards lay participants, Japan's system instead goes further astray by burdening lay participants with an unequal and significantly *stricter* secrecy measure than is imposed on career judges. In dramatic contrast to the criminal risk of imprisonment that lay participants face, career judges in Japan are constrained only by the confidentiality provisions in the Court Act of 1947. Violators may face workplace sanctions vis-à-vis their employment status as judges, but no *criminal* sanctions whatsoever. [23] (file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn23)



"To deepen the public's understanding and trust in the Judiciary" - graphic excerpt showing diverse and happy participants, from a Supreme Court pamphlet for public distribution, 2006.

### III. POTENTIAL RAMIFICATIONS OF THE SECRECY PROVISION

The Assessor Act, although remarkably detailed, still leaves a great deal to be worked out. Research on jury systems conducted by other countries enables Japan to anticipate and successfully address the practical challenges inevitably posed by a process that calls upon non-professionals to make morally weighty legal decisions. The Reform Council urged, "Even after its implementation, the initial system should not be regarded as fixed in stone. Rather, the actual circumstances of the system should be constantly monitored and, bearing in mind the importance of establishing the popular base, the system should be flexibly readjusted from a broad viewpoint, as necessary." [24] (file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn24) Japan should strive to adapt to new

information, "so that these reforms do not simply end up as an unrealized dream." [25] (file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn25) It is in this spirit of flexibly adjusting to new information that the following sections are offered.

#### A. "Vicarious Traumatization"

Lay assessors in Japan will have front row seats to some of life's most haunting stories. They will see photos of bloody crime scenes, surveillance tapes of actual killings, and hear graphic depictions of victim deaths. They will listen to bereaved family members seeking retribution and have to attempt to objectively discern the facts while perhaps under the cold stare of a serial killer or the pitiful appearance of a remorseful defendant begging for mercy. In the end, they may be required to render a decision directing the state to kill a fellow human being and then be dismissed to return to their pre-service lives as ordinary citizens.

Unsurprisingly given the gruesome details a criminal trial often entails and the burden of jury responsibilities, studies of jury and lay judge systems throughout the world have found that prohibiting jurors from communicating their trial experiences with others – particularly family members or therapists – may be detrimental to their well-being. Lay participants exposed to distressing testimony, aggressive examinations of witnesses or victims by counsel, and the graphic evidence of a crime, can suffer a range of disturbing reactions. Among the symptoms reported by jurors exposed to what is termed "vicarious traumatization" are tearfulness, fatigue and irritability, sleep disturbance, eating problems and intrusive thoughts and imagery. [26]

(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn26) Some lose interest in sex or experience physical ailments like hives, chest pains, and ulcers. The torment can last a few days or a few years depending on the person, the trial, and whether professional mental health services are rendered. [27]

(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn27)

Particularly in the United States, which has the most open access to jury deliberation and thus the greatest amount of data on the jury experience, courts have implemented various measures to address juror trauma. [28] (file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn28) In some courtrooms, the judge (along with a mental health professional) meets with jury members after the trial to talk about the case. These so-called “stress debriefings” provide an immediate outlet for disturbed lay participants and bring closure to jury service.

Jury debriefing is generally modeled after a process called crisis debriefing, which is used to help people affected by traumatic events such as earthquakes, automobile accidents, and violent crimes. The technique is routinely employed for first responders such as rescue, police, and medical personnel who confront devastating crises on the job. [29] (file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn29) In the debriefing discussion, participants are taught to recognize symptoms of stress and reassured that if they have problems, it is a normal response to the stress of the trial. If acute stress symptoms persist, individual counseling is recommended and may be paid for by the court.

Debriefing is meant to prevent future trauma whereas counseling is for problems that continue or surface after jury service is over. Both are needed to fully address the disturbance that can occur after witnessing traumatic events. Of course, some participants may eschew professional help altogether and opt instead to quietly and informally discuss the case with family or friends.



“We Don’t Need the Lay Assessor System”, book by Takayama Shoukichi published by Kodansha, September 2006.

*Thus, Japan’s choice to bar lay assessors from discussing their experience tragically and unnecessarily risks the mental health of its citizen*



participants after their valorous public service complete. Only by allowing an exception for participants to speak with a counselor, the judge, or family members, will the emotional crises of lay participants be defused. At the very least, a system should be in place for courts to assess lay assessors' circumstances in closed door proceedings in particularly difficult or violent cases and to make mental health services available on a case by case basis.

### B. Preventing and Addressing Misconduct

A second pitfall of Japan's *ex post* strict juror secrecy regime is that fear of punishment may chill or bar reports of irregular or illegal procedures. If, for example, lay participants have flipped a coin, [30] (file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn30) consulted a ouija board, [31] (file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn31) or searched the internet for evidence by cell phone [32] (file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn32) to decide the verdict or sentence, such improprieties ought to be disclosed in order to preserve the public's desire for and the defendant's right to just results. However, a lay assessor informed of the risks associated with violations of the duty of secrecy may be understandably averse to sharing information regarding hidden miscarriages of justice. In the current framework, the inevitable problems and confusions of implementing the new system may go unchecked or unknown. [33] (file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn33)

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Potential issues are not restricted to lay participants; an equally weighty concern should be with overbearing or dishonest career judges in the deliberation room. Arguably, the Act's requirement that lay assessors state the reasons for their verdict may help prevent explicitly coerced decisions. Moreover, the presence of more than one professional judge on a panel could act as a check on any misconduct by their peers. But the presence of professionals cannot entirely avert the risk of potential professional judge abuse, particularly as to implicit or subtle manners of coercion or if the problem is with the panel's senior presiding judge. [34] (file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn34)

Similarly, and without meaning to slander the well-deserved exemplary reputation of Japan's judicial cadre, it is at least possible to imagine the scenario of a judge abusing or sexually harassing a lay participant. Here again, a victim could be fearful that whistle-blowing would put her in criminal jeopardy under the exceptionless duty of secrecy regarding deliberation proceedings.

*Accordingly, the system must at least be competent to adequately safeguard against or expose failures of justice or malfeasance.* However, the current system does not allow for public inquiry into alleged impropriety. [35] (file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn35) Ironically, having circumstances where abuse cannot be investigated may gnaw at public confidence in the judiciary, precisely the opposite of what the new system seeks to accomplish.

### C. Promoting “Public Understanding”

The express purpose of the Assessor Act is “the promotion of the public’s understanding of the judicial system and . . . their confidence in it.” This is consistent with the vision expressed by the Reform Council, which stated that the transformation of the judicial system is intended to “deepen the public understanding of the significance of the justice system and set the justice system on a more solid popular base.” [36]

(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn36) But the Council also understood that transparency is a precondition for public understanding. “[I]t is indispensable to improve the transparency of the justice system for the public. . . . To this end, the courts, the public prosecutors offices and the bar associations should continue to promote the disclosure and furnishing of information.” [37]

(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn37) After all, the Council continued, “[j]ustice can play its role fully only if its activities are easily seen, understood, and worthy of reliance by the people.” [38]

(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn38)

When the Council’s astute findings are contrasted with the law ultimately enacted by Japan’s parliament and now being implemented by its Supreme Court, a deep disconnect becomes apparent. Some secrecy, such as during the course of proceedings, is certainly understandable. But excessive secrecy, particular *ex post* the conclusion of proceedings, directly contradicts the goal of public understanding.

How can the citizenry learn from lay

participants when they are essentially silenced?

As noted above, a common justification for secrecy in criminal justice deliberations is that this will promote frank discourse and fair trial results. And needless to say, notwithstanding the fact that the Assessor Act’s purpose clause omits any mention of defendants’ rights, all who stand accused deserve fair and impartial resolutions. But even assuming that *ex post* secrecy operates beneficially to promote fairer deliberations, protection of the accused stands alongside Japan’s constitutional declarations of principles of freedom of speech, of the press (Article 21) and of open trials (Articles 34, and 82) – principles that in return protect the citizenry from autocratic governance and promote justice. [39]

(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn40)

*Thus we find it profoundly ironic that the Assessor Act, which clearly states its purpose to promote citizen understanding, employs a harsh secrecy regime that operates in opposition to the law’s intended purpose. After all, people cannot participate if they do not understand, they cannot understand if they do not see and hear, and they cannot see or hear so long as there are strict secrecy requirements. Moreover, secrecy, such as limitations on lay participants’ disclosure and restrictions on the media’s access to hear from former lay assessors, is also antithetical to the word and spirit of Japan’s Constitution.*

### IV. CONCLUSION

To prevent the problems outlined above, we call for speedy revision to the Assessor Law. While we believe that broader changes may be warranted, at a minimum, we urge the

establishment of confidential debriefing and counseling services and an explicit exception to secrecy for *bona fide* disclosures of alleged abuses. Doing so will protect the citizens called to serve as well as aid the success of the new *saiban-in* system in achieving better public understanding and confidence in Japan's judiciary.

One approach taken in Victoria, Australia offers an attractive model for Japan.

The Juries Act of 2000 (Vic), addresses all of the issues with which Japan's law is seemingly concerned: media publication or solicitation of lay judge statements, opinions, arguments and votes; and disclosure by a juror of such information. [40]

(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_edn4

1) The Juries Act, however, goes further and addresses investigation into impropriety, the provision of counseling, and the level of anonymity needed to protect participants. Section 3 allows for a juror to disclose information to a judge or court, a board or Commission, the Attorney General, Director of Public Prosecutions, or police or others investigating jury misconduct. Sections 5 and 6 specifically state that a juror may disclose deliberation secrets to a certified medical practitioner or licensed psychologist while receiving treatment for a condition related to jury service, and that the practitioner or therapist must not disclose the information.

Section 7 of the Juries Act allows for the publication of deliberation secrets if the information is stated in such a way as to not allow for the identification of the juror or the relevant legal proceeding. Such a provision encourages the free flow of information and a

measure of transparency but protects the anonymity of jury members. Lastly, Section 9 states that nothing in the Juries Act prevents the Attorney General from conducting research into "matters relating to juries or jury service," thus permitting information to be gathered on the efficacy of the jury system as a whole or to gauge specific trends, like sentencing.



The Victorian standard constrains assessors and the media but gives enough flexibility to help guide and protect participants. As such, it is a modest and humane measure to correct for abuse and avoid suffering. Japan should not wait until problems have surfaced to address the issues other nations have already experienced and taken steps to solve.

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(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_ednref1)Notes

[1] *Saiban'in no sanko suru keiji saiban ni kansuru hōritsu* [Act Concerning Participation of Lay Assessors in Criminal Trials], Law No. 63 of 2004. For an English translation of a pre-enactment draft, see Anderson & Saint, *Japan's Quasi-Jury (Saiban-in) Law: An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials*, 6 ASIAN-PACIFIC L. & POL'Y J. 233 (Winter 2005). English translations of the term *saiban'in* include "lay judge", "lay assessor", and "jury" system. As explained below, the first two are equally apt, while "jury system" is a misnomer. Although

media reports appear to commonly adopt the phrasing "lay judge", this article adopts "lay assessor" following Anderson and Saint's widely cited translation of the draft legislation.

[ 2 ]

(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_ednref2)

Japan's judiciary began to take its modern form soon after the Meiji Restoration of 1867 and the process was completed by the Court Act of 1890. The postwar Constitution of 1947 kept intact that essential structure, but exchanged the weak and limited authority of the former Great Court of Cassation with the Supreme Court that remains today. While a robust debate in assessing the autonomy of the judiciary from political control has emerged, the most salient features of the judiciary for purposes of this article are essentially undisputed – the centralized control of the judiciary by the Supreme Court and the concurrent removal of local autonomy over civil and criminal justice mechanisms. In this regard, an important paper by Professor Hiroshi Fukurai forthcoming in the *Okinawan Journal of American Studies* will present the new *saiban'in* system as beneficial for restoring self-determination and political sovereignty to marginalized local communities in Okinawa. OJAS, no. 5, 2008, pp. 31-42.

[ 3 ]

(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_ednref3)

f3) See e.g., *70% Don't Want to Serve on Juries in New System*, The Japan Times, April 17, 2005; *Preparing for Lay Judge System*, The Japan Times, April 22, 2008.

[ 4 ]

(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_ednref4)

Hereinafter, Lay Assessor Act.

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(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_ednref5)

The Justice System Reform Council (“Reform Council”) was established by the Cabinet in July 1999 for the purposes of “clarifying the role to be played by justice in Japanese society in the 21st century and examining and deliberating fundamental measures necessary for the realization of a justice system that is easy for the people to utilize, participation by the people in the justice system, achievement of a legal profession as it should be and strengthening the functions thereof, and other reforms of the justice system, as well as improvements in the infrastructure of that system” (Article 2, Paragraph 1 of the Law Concerning Establishment of the Justice System Reform Council). For the Council’s final report, see *Recommendations of the Justice System Reform Council – For a Justice System to Support Japan in the 21<sup>st</sup> Century*, June 12, 2001, available in English translation

(<http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>), (hereafter *Reform Council, Recommendations*)

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Lay Assessor Act, Art. 1. It seems striking that notions of improving the fairness of the criminal justice system for the accused are entirely absent from the law’s expressed purpose. In conversation, a Japanese criminal law scholar has suggested to the authors that this should not be viewed as a meaningful omission because Article 1 of Japan’s Code of Criminal Procedure already enumerates such values and that provision sits above the Lay Assessor Act in the hierarchy of Japan’s criminal laws.

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Code of Criminal Procedure, Art. 281-6. Although this provision is not limited to trials involving lay assessors, it is anticipated that trials not involving lay assessors may continue to be carried out with non-consecutive sessions.

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Code of Criminal Procedure, Arts. 316-2 – 316-32. These procedures became operative in November 2005 as part of the transition to the lay assessor system. They are mandatory for trials involving lay assessors (Lay Assessor Act, Art. 49) and otherwise discretionary such as where

the court decides it is needed due to the complexity of the case.

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This is simply the Japanese rule for all lower court decisions in criminal cases provided for in Code of Criminal Procedure Art. 351-1 and neither addressed in nor affected by the special enactment of the Lay Assessor Act.

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Determinations of law are made solely by professional judges. Lay Assessor Act, Art. 6.

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This is apart from concerns that professional judges may be able to unduly influence outcomes through demeanor, body language, or their statutorily designated control over process and deciding interpretations of law.

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Lay Assessor Act, Art. 70(1); this duty is also referenced in Art. 9(2). Penalties are provided for in Art. 108.

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The sole exception from lay assessors' threat of imprisonment is that *ex post* leaks of non-core deliberation secrets (*i.e.*, not the opinions shared or vote tallies during deliberation or the lay assessors sentiments with regard to the results, but other factual aspects of the deliberations) are subject only to fines of up to ¥500,000. (Art. 108(3))

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(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_ednref14)

The Judicial System Reform Council, *The Points at Issue in the Judicial Reform, December 21, 1999*. English translation available at <http://www.kantei.go.jp/foreign/judiciary/0620reform.html>.

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(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_ednref15)

*Reform Council, Recommendation* ps86, stating, "The possibility of introducing the participation system for proceedings other than criminal cases should be considered as a future issue, keeping watch on the circumstances of the introduction and operation of the new participation system in criminal proceedings."

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(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_ednref16)

*Reform Council, Recommendation* ps88, noting that these are "cases in which the general public has a strong interest and that have a strong

impact on society.”

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(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_ednref17) These are not unanimity requirements, but requirements beyond a simple majority. In Malta, a conviction requires six-out-of-nine votes, in Norway, seven-out-of-ten, and in Spain, seven-out-of-nine.

[ 1 8 ]

(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_ednref18) Contempt of Court Act, 1981, c.49, §8(1) (Eng.).

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(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_ednref19) Id. at §8(2)(a-b).

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(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_ednref20) Gregory v. UK (1997) 25 EHRR 577 at para. 44.

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(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_ednref21) Department for Constitutional Affairs, *Jury Research and Impropriety: A Consultation Paper Assess Options for Allowing Research Into Jury Deliberation and To Consider Investigations into Alleged Jury Impropriety* (2005).

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(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_ednref22) *Reform Council, Recommendation* p88.

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(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_ednref23) Court Act (No. 59 of April 16, 1947), states, “Article 75 (Secrecy of Deliberation) (1) Deliberations of decisions in a panel shall not be disclosed; provided, however, that the presence of legal apprentices may be permitted. (2) Deliberation shall be commenced and regulated by the presiding judge. Except as otherwise provided for in this act, strict secrecy must be observed with respect to the proceedings of deliberations, the opinions of each judge and the number of opinions constituting majority and minority.

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(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_ednref24) *Reform Council, Recommendation* p86.

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(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_ednref25) *Reform Council, Recommendation* p93.

[ 2 6 ]

(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_ednref26) Feldman, T. B. & Bell, R. A., *Crisis Briefing of a Jury After a Murder Trial* 42 HOSP. & COMMUNITY PSYCHIATRY 79 (1991).

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(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_ednref27) Feldman, T. B. & Bell, R. A., *Juror Stress: Identification and Intervention* THE BULL. OF THE AMERICAN ACADEMY OF PSYCH. & THE LAW, Vol. 21, No. 4, p. 414 (1993).

[ 2 8 ]

(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_ednref28) The First Amendment to the U.S. Constitution prevents courts from imposing restraints on jurors from discussing their experiences in the jury room, once the trial has ended. See N. Vidmar, *WORLD JURY SYSTEMS* 38 (Oxford, 2000), stating, "Under special circumstances some courts [in the US] have placed limitations on the press, what individual jurors may say to the press, and even limitations on what jurors are permitted to disclose, but in general, there are few restraints on jurors."

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(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_ednref29) The procedure is called Critical Incident Stress Debriefing (CISD). For more information, see Davis, J., *Providing Critical Incident Stress Debriefing to Individuals and Communities in Situational Crises* AMERICAN ACADEMY OF EXPERTS IN TRAUMATIC STRESS, <http://www.aacts.org/article54.htm>. Such debriefing was crucially important for the first responders after the tragedy on September 11,

2001.

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(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_ednref30) Kim Wessel, *Jury Flipped Coin to Convict Man of Murder* The Courier-Journal, Apr. 26, 2000.

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(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_ednref31) "In 1994 insurance broker Stephen Young was granted a retrial after it emerged that a jury at Hove Crown Court had consulted a ouija board during their deliberations." *Jury Deliberations May Be Studied* BBC News Channel, Jan. 22, 2005.

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(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_ednref32) John Schwartz, *As Jurors Turn to Web, Mistrials are Popping Up* The New York Times, Mar 18, 2009.

[ 3 3 ]

(file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_ednref33) Presumably, lay participants and junior judges can report improprieties to judicial officials. However, those officials' response would likely be itself secret and free from any public oversight.

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f34) This failing also appears to rub against the Reform Council's expressed hopes for the system. The Reform Council argued that, "it is essential to ensure that the opinions of *saiban-in* could influence the results of verdicts. In this connection . . . matters such as the manner in which trial hearings are conducted and the method of deciding the verdict are also relevant." *Reform Council, Recommendation* p88. Nonetheless, the Act's strict secrecy makes opaque the method of deciding the verdict.

[ 3 5 ]  
 (file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_ednref35) Again, lay participants and junior judges may presumably report improprieties to judicial officials, but those officials' response would likely be itself secret and free from any public oversight. The safeguards in the system are inadequate.

[ 3 6 ]  
 (file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_ednref36) *Reform Council, Recommendation* p88.

k/Desktop/LevinTiceSaiban%203.m.htm#\_ednref36) *Reform Council, Recommendation* p88.

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 (file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_ednref37) *Reform Council, Recommendation* p92.

[ 3 8 ]  
 (file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_ednref38) *Reform Council, Recommendation* p12.

[ 3 9 ]  
 (file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_ednref40) The essential nature of the values raised here

has been recognized by Japan's Supreme Court in *Repeta v. Japan*: Judgment of the Supreme Court of Japan, Grand Bench, March 8, 1989, available in *Law in Japan*, vol. 22, p. 29 (Chafee trans.).

[ 4 0 ]  
 (file:///C:/Documents%20and%20Settings/Nick/Desktop/LevinTiceSaiban%203.m.htm#\_ednref41) The Juries Act, 2000, No. 53 (Vic.).