

Japan's Rejection of the American Criminal Jury†

The Saiban-in system in which six lay assessors and three judges share the role of finding facts, applying the law, and sentencing was recently introduced in Japan. Before deciding on its recommendation to adopt the mixed jury system, the Justice System Reform Council (JSRC) had, after lengthy consideration, rejected the introduction of the American-style jury. The American jury system had been thoroughly studied by Japanese legal academics, some of whom presented their assessment to the JSRC. This Article analyzes the process by which the JSRC arrived at its conclusion. It focuses on three aspects of the American jury system: its liberal values, its democratic significance, and its legitimizing role in a multi-ethnic society. The Article concludes that the JSRC members dismissed the universal aspects of the American jury in a rather unexpected manner. The present case study describes how the foreign law research and legal scholarship were interpreted and put to use by law reformers. The discussion on the American jury in the JSRC provides an interesting and exceptional opportunity to observe comparative law in action.

* Associate Professor of Law, Osaka City University. This Article is based on an article published for Japanese readers. Takuya Katsuta, *Amerika Baishin Sei ni tsuitemo Ichi Kosatsu: Saiban-in Seido no Donyu wo Megutte* (pts. 1 & 2) [A Study on Our Understanding of the American Jury and Its Influence on the Judicial Reform in Japan (pts. 1 & 2)], 54 HÔGAKU ZASSHI [J. L. & POL. OSAKA CITY U.] 1743 (2008), 55 HÔGAKU ZASSHI [J. L. & POL. OSAKA CITY U.] 633 (2008). Significant changes were made to provide different information for English-speaking readers. I am grateful to Yutaka Sano, Mathias Reimann, and the anonymous reviewer(s) for their comments on the draft of this Article. Errors remain my own.

I received funds from Grant-in-Aid for Scientific Research for this project. In this Article, I cite a variety of English language publications on this subject where I deem them necessary and useful. I selectively cite Japanese-language publications, but only to the extent that they support the facts that I present. This should help those readers who can read Japanese as they may refer to the Japanese version of this Article, as well as others, to find Japanese sources.

The Ministry of Internal Affairs and Communications provides information on Japanese statutes on the web: see <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi> (last visited Apr. 20, 2010). Translations of Japanese statutes are increasingly available and can be searched at <http://www.japaneselawtranslation.go.jp/?re=02> (last visited Apr. 20, 2010).

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I. INTRODUCTION

This Article is intended to illustrate the recent legal policy-making process in Japan, focusing on the question of the introduction of the so-called *saiban-in* [lay assessor] system.¹ This is a case study that illustrates how the Japanese perception of the American jury has influenced the debate on citizen participation in the Japanese judicial system.

The American jury is one of the most controversial topics for Japanese lawyers, legal academics, and others who are interested in the Japanese judicial system. For some, the jury is a symbol of liberty, providing a bulwark against tyranny.² Some supporters of the jury

1. *Saiban-in no Sanka Suru Keiji Saiban ni Kansuru Horitsu* [the Act Concerning Participation of Lay Assessors in Criminal Trials] (hereinafter *Saiban-in Law*), Law No. 63 of 2004. English written materials include Kent Anderson & Emma Saint, *Japan's Quasi-Jury (Saiban-in) Law: An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials*, 6 *ASIAN-PAC. L. & POL'Y J.* 223 (2005); Robert M. Bloom, *Jury Trial in Japan*, 28 *LOY. L.A. INT'L & COMP. L. REV.* 35 (2006); Stephen Landsman & Jing Zhang, *A Tale of Two Juries: Lay Participation Comes to Japanese and Chinese Courts*, 25 *UCLA PAC. BASIN L.J.* 179 (2008); Kent Anderson & Mark Nolan, *Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (saiban-in seido) from Domestic Historical and International Psychological Perspectives*, 37 *VAND. J. TRANSNAT'L L.* 935 (2004); Joseph J. Kodner, *Policy Analysis, Re-Introducing Lay Participation to Japanese Criminal Cases: An Awkward Yet Necessary Step*, 2 *WASH. U. GLOBAL STUD. L. REV.* 231 (2003).

2. Thus, there is a long list of publications favoring the introduction of the jury in Japan. Part of the reason is that almost all criminal trials in Japan end with a guilty verdict and that there seem to be some clearly erroneous convictions. In 2007, the total number of guilty verdicts amounted to 69,135 in all district courts combined, whereas the number for not guilty verdicts was only 97 (approximately 99.86%/0.14%). SAIKO SAIBANSHO JIMU SOKYOKU [GENERAL SECRETARIAT, SUPREME COURT], HEISEI 19 NEN SHIHO TOKEI NENPO [ANN. REP. OF JUDICIAL STATISTICS FOR 2007], 2 *KEIJI HEN* [CRIMINAL CASES] 9 (2008). The statistical information provided by the Supreme Court of Japan is available at <http://www.courts.go.jp/search/jtsp0010?> (last visited Apr. 20, 2010). Professor Tanase criticized those who champion the introduction of a jury system, claiming that it provides a nostrum for miscarriage of justice. TAKAO TANASE, SOSHOU DOIN TO SHIHO SANKA [JUDICIAL MOBILIZATION AND PARTICIPATION] 137, 141 (2003) (the relevant part originally published as an article, Takao Tanase, *Keiji Baishin to Jijitsu Nintai* [Criminal Jury and Fact Finding], *HANREI TIMES*, Aug. 14, 1986 (no. 603), at 13). For other publications in Japan on this subject, see, e.g., Bunji Sawanobori, *Dokuritsu Kakumei to Amerika Keiji Baishin* [The Independence Revolution and the American Criminal Jury], in *KINDAI KEIJIHO NO RINEN TO GENJITSU* [THE IDEAL AND THE REALITY OF THE MODERN CRIMINAL LAW] 75 (Yoshito Sawanobori ed., 1991) (emphasizing the importance of the jury for the purpose of liberty); Yoshito Sawanobori, *Furansu Baishin Seido nimiru Kindai Keiji Soshoho no Sinzui to Baishin Naki Waga Ho no Sanjo* [The Genius of the Modern Law of Criminal Procedure seen in the French Jury System and Calamity of Our Law], *JYU TO SEIGI* [LIBERTY & JUSTICE], Dec. 1984 (vol. 35 no. 13), at 13 (asserting that the introduction of the jury is the only way to prevent erroneous convictions and that the French jury system provides a better example because Anglo-American laws are not sufficiently systematized). In his 1992 article published in English, Lempert also argues that the upsurge of interest in the right to a jury trial was sparked by criminal cases involving the death penalty in which the accused later turned out to be innocent: Richard Lempert, *A Jury for Japan?*, 40 *AM. J. COMP. L.* 37, 39 (1992). Lempert's article is based on his speech at the 1990 Meeting of the Japanese American Society for Legal

system also believe that the experience of acting as jurors would make them better citizens in a democratic society, as Alexis de Tocqueville famously described.³ These supporters insist that Japan should have a jury system similar to that in the United States.⁴ For others, the American jury system represents a judicial nightmare, which compromises the fairness of the adjudication process and even leads to false convictions. These opponents are fearful of the introduction of a pure lay jury that allows its members to reach a verdict independent of any intervention by professional judges. Those who do not reject lay participation itself, but do not support juries that have the power to make entirely independent decisions, generally argue in favor of mixed juries in which judges and lay assessors constitute a joint decision-making body.

The way the American jury operates, and the way Americans perceive juries, has an impact on how people outside the United States see their own judicial systems. The jury system is actively studied and debated; criminal trials, such as the O.J. Simpson's trial, were widely and sensationally reported by the Japanese media and thoroughly studied by Japanese academics and lawyers.⁵ The way the American jury operates, or the way we see how well the American jury does its job, is likely to influence the reforms we envisage for our

Studies. *Id.* at 37. See also Lester W. Kiss, *Reviving the Criminal Jury in Japan*, in *WORLD JURY SYSTEM* 353, 354-59 (Neil Vidmer ed., 2000).

3. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 248-54 (J.P. Mayer & Max Lerner eds., George Lawrence trans., 1966) (1835).

4. It seems that arguments in favor of lay participation in the form of juries increasingly rely on the democratic aspect of such participation. Many Japanese scholars have cited *Democracy in America* when explaining the significance of the American jury. See, e.g., TANASE, *supra* note 2, at 139; TAKASHI MARUTA, *AMERIKA BAISHIN SEIDO KENKYU: JURI NARIFIKESHON WO CHUSHIN NI* [A STUDY ON THE AMERICAN JURY: FOCUSING ON THE JURY NULLIFICATION] 3 (1988). The final report by the Justice System Reform Council also emphasized that it was incumbent on the Japanese people to break out of "the excessive dependency on the state that accompanies the traditional consciousness of being governed objects" and to become more actively involved in public affairs. The Justice System Reform Council expected the experience as *saiban-in* to create a better environment for that purpose:

If the people become more widely involved in the administration of justice together with legal professionals, 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. As a result, a much firmer popular base of the justice system will be established.

THE JUSTICE SYSTEM REFORM COUNCIL, FOR A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE 21ST CENTURY (hereinafter *RECOMMENDATIONS*) 101 (2001), <http://www.kantei.go.jp/jp/sihouseido/report/ikensyo/pdfs/iken-4.pdf>, translated at http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612_e.html. As this Article makes clear, the JSRC rejected the claim that an American-style jury system was indispensable for the existence of liberty.

5. Several books about the Simpson trial were published in Japan. See, e.g., SATORU SHINOMIYA, *O. J. SIMPSON HA NAZE MUZAI NI NATTAKA?* [WHY O.J. SIMPSON WAS FOUND NOT GUILTY] (1997); SEIICHI KUBOTA, *GREI ZON* [GRAY ZONE] (1997).

judicial system, for better or for worse.⁶ This Article deals exclusively with the influence of the American jury system on the Japanese judicial reform. The jury systems in countries other than the United States had probably little effect on Japanese judicial reform.⁷

The Japanese legal system has recently undergone historic transformations.⁸ The most significant change is perhaps the introduction of the *saiban-in* system in criminal trials. Three professional judges and six *saiban-ins* (lay assessors chosen from the electoral roll) constitute a decision-making body in the most serious criminal trials.⁹ This new system is a breakthrough because professional judges have dominated the Japanese judicial process since the suspension of the old Jury Law in 1943, following which there was no opportunity for laypersons to make a significant contribution to the

6. Lempert points out that juror "horror stories" in America reach Japan, taking the example of the McDonald's coffee spill case in 1992; Richard O. Lempert, *Citizen Participation in Judicial Decision Making: Juries, Lay Judges and Japan*, 2001 Sr. LOUIS-WARSAW TRANSATLANTIC L.J. 1, 5 (2001).

7. See *infra* notes 95-103 and accompanying text.

8. With regard to the judicial reform in Japan in general, see, e.g., Daniel H. Foote, *Introduction and Overview: Japanese Law at a Turning Point*, in *LAW IN JAPAN: A TURNING POINT* xix (Daniel H. Foote ed., 2007); Iwao Sato, *Judicial Reform in Japan in the 1990s: Increase of the Legal Profession, Reinforcement of Judicial Functions and Expansion of the Rule of Law*, 5 *SOCIAL SCIENCE JAPAN JOURNAL* 71 (2002). See also *Japanese Law Symposium*, 49 *AM. J. COMP. L.* 545 (2001).

9. Art. 2 of the *Saiban-in Law* provides that the following cases shall be tried by lay assessors and judges: (i) cases involving crimes punishable by death or imprisonment for an indefinite period or by imprisonment with hard labor, and (ii) cases involving crimes in which the victim has died due to an intentional criminal act (excluding matters covered in (i)). According to the Japanese Supreme Court, 2,324 (2.5%) of 93,566 cases commenced in district courts in 2008 would have been handled by *saiban-in*, if the *Saiban-in Law* had been in force in that year. See <http://www.saibanin.courts.go.jp/shiryō/pdf/03.pdf>.

The *Saiban-in Law* does not require a unanimous verdict but allows a simple majority verdict on one condition: art. 67 of the law provides that a decision "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." This means that four out of six laypersons' votes of "not guilty" lose their power if all three judges and the remaining two laypersons voted "guilty." Art. 2(3) provides that one judge and four lay assessors suffice to support a result if it is recognized that there is no dispute about the facts on trial as established by the evidence and the issues identified in the pretrial procedure. *Saiban-ins* and judges share the role of finding facts, applying the law to these facts, and determining the sentence to be handed down when the defendant is found guilty (art. 6). For the English translation of the Law, see Anderson & Saint, *supra* note 1.

Because most criminal defendants in Japan admit their guilt before trial, and almost all criminal trials end with a conviction under the current system, it is most probable that a layperson's assessment will have a bearing mainly on the sentencing, especially because Japanese criminal law provides much wider sentencing discretion than that available to judges in most American jurisdictions. In 2009, 138 *saiban-in* trials (involving 142 defendants and 836 citizens) were heard and every defendant was found guilty. It is reported that sentencing decisions in *saiban-in* trials are more flexible than in trials presided over by judges alone, although closer scrutiny of such an assertion is still required. *ASAHI SHINBUN*, Dec. 29, 2009, at 13.

Japanese judicial process.¹⁰ Not only civil trials but also criminal trials have been handled exclusively by professional judges, and most Japanese citizens did not object to their own exclusion from the judicial process.¹¹ The introduction of the *saiban-in* system may be considered a revolutionary turning point in the context of Japan's long history of almost absolute trust in professional judges, either as a fact or a perception.

This recent transformation of the Japanese legal system provides a fascinating opportunity for those interested in comparative law to observe the impact of foreign models on the reform of a legal system. The Justice System Reform Council (JSRC) has extensively discussed the proper role of lay participation in the Japanese judicial system. The American jury was the most hotly debated topic. In the end, the JSRC refused to recommend the introduction of a pure jury system. The JSRC's decision not to follow the American lead had several reasons, which are discussed in this Article. It should be pointed out in advance that the decision to recommend the *saiban-in* system was reached only after much deliberation.

I do not seek to prove any original or abstract theories with regard to the decision-making process as such. As mentioned above, this Article is purely a case study. Still, this process is an interesting subject for two reasons.

First, the JSRC was composed not only of practicing lawyers and academics but also had members with different backgrounds: management, union representation, writing, and teaching. In short, most important decisions were reached by a body that included members without legal education.¹² It may have been challenging for the non-

10. Several institutions allow Japanese citizens to exert influence on the judicial system. Most importantly, the *kensatsu shinsakai* [prosecution review committee], whose eleven members are randomly chosen from the electoral roll, reviews the appropriateness of the decision not to prosecute made by the public prosecutors. The committee, which shares features with the grand jury in common law countries, was established in 1948 as one of many efforts to democratize Japanese legal and political institutions. *Kensatsu Shinsakai Ho* [Prosecution Review Committee Law], Law No. 147 of 1948. However, the committee's recommendations were only advisory. In 2007, criminal charges were brought in only 18.2% of cases. (Eighteen charges deemed admissible while the *shinsakai* made ninety-nine decisions that it had been inappropriate for the prosecutors not to have prosecuted or that the prosecutors should have prosecuted.) HOMUSHO HOMU SOGO KENKYUJO [INSTITUTE OF LEGAL MATTERS, THE MINISTRY OF JUSTICE], HANZAI HAKUSHO 2008 [WHITE PAPER ON CRIME 2008] 195 (2008). English translations of white papers on crime before 2006 are available at http://hakusyo1.moj.go.jp/en/nendo_nfm.html (last visited Apr. 20, 2010). The recommendations by the *shinsakai* under certain conditions that it is appropriate to bring cases to trial have become mandatory since May 2009 (art. 41).

11. The new *saiban-in* system is used only in criminal trials. Citizen participation in civil trials was not considered a realistic possibility by Japanese law reformers.

12. This is not necessarily unusual for Japanese councils tasked with law reform. Of the nineteen members of the current *Hosei shingikai sokai* [a general committee of the Justice Ministry's Legislative Council], the mission of which is to answer basic legal questions posed by the Minister of Justice, academics and practicing lawyers

lawyer members of the JSRC to discuss legal matters on an equal footing with the other members who did have a legal education. This is ironic because there was concern whether citizens without legal knowledge could make a significant contribution to the deliberations in which they participate with professional judges in the mixed jury system. On the one hand, the mixed jury seems to provide better prospects for achieving accuracy and uniformity in decision making, which are considered highly important values in Japan; on the other hand, the mixed jury would be useless if jurors were unable to influence the decisions made by the professional judges alone.

Second, the transcripts of the JSRC's deliberations were made public in detail.¹³ How well the JSRC members, with or without legal education, understood the American jury and reached their recommendations, is documented in these "cahiers." The JSRC also invited several prominent lawyers to provide the necessary information on the American jury. This exchange between the JSRC members and professionals, and among the JSRC members themselves, provides us with an exceptional opportunity to observe an important Japanese legal policy-making process in action.

Part II of this Article briefly illustrates the history and effects of the original jury system in Japan, which was suspended in 1943. Part III summarizes the studies on the American jury by Japanese legal academics since the 1980s. Part IV presents the information on the American jury given to the JSRC. Part V analyzes the exciting discussion in the JSRC about the appropriate mode of lay participation, focusing on how the Committee members understood the American jury system and how they used their understanding with regard to their imminent task of legal reform in Japan.

make up nine members, slightly less than half. But the use of a decision-making body with a number of non-lawyers to decide the appropriate mode of lay participation could be considered somewhat unusual.

13. Councils of this sort were not required to hold public meetings or to publish their cahiers (minutes) before 1998, when *Chuo Shochoto Kaikaku Kihon Ho* [Basic Act on Central Government Reform], Law no. 103 of 1998, went into force. Article 30 of the law provides that meetings of councils or their cahiers shall be made public to ensure transparency. The JSRC members knew that it was not unusual for councils to publish cahiers without mentioning the names of committee members, but they ultimately decided to produce a cahier for each meeting, in which each committee member would be identified together with the member's observations. The cahiers of all sixty-three meetings are published in GEKKAN SHIHO KAIKAKU [JOURNAL OF JUDICIAL REFORM IN JAPAN] from vol. 1 (1999) through vol. 24 (2001). The cahiers are also available at <http://www.kantei.go.jp/jp/sihouseido/gijiroku-dex.html>. I cite GEKKAN SHIHO KAIKAKU when I refer to the cahiers because the PDF versions of the cahiers are not available on the web.

II. THE SUSPENSION OF THE OLD JURY LAW AND THE CONCERN FOR THE JURY AFTER WWII

Japan is famous for the accuracy and uniformity of its lower court decisions made under the supervision of the *jimu sokyoku* [general secretariat] of the Supreme Court.¹⁴ One could say that Japanese people highly respect the uniformity of the decisions made throughout the nation and hold the country's judges who are, in a sense, bureaucrats albeit with elite status, in high esteem for their successful accomplishment of this task. Yet, Japan had its own jury system from 1928 through 1943, and some information on the old Jury Law¹⁵ will provide a proper perspective regarding the recent justice reform.

Before entering into force in 1928, the old Jury Law passed the Japanese Imperial Diet in 1923 following considerable research and discussion initiated by Prime Minister Takashi Hara. Hara came into office in the era of the *Taisho Democracy*, when liberal and democratic movements gained wide support. Among many reforms during this period, the abandonment of the taxpaying requirement to vote¹⁶ and the introduction of the jury system were the most important politico-legal developments.¹⁷ The Jury Law must have been quite exciting for the Japanese people and lawyers of the day. In preparing for the enforcement of the law, the Imperial Japanese government increased the numbers of judges and prosecutors, built new jury

14. See, e.g., J. Mark Ramseyer & Eric B. Rasmusen, *The Case for Managed Judges: Learning From Japan After the Political Upheaval of 1993*, 154 U. PA L. REV. 1879 (2006).

15. *Baishinho* [Jury Law], Law No. 50 of 1923. See Kiss, *supra* note 2, at 359-63.

16. *Futsu Senkyoho* [General Election Law], Law No. 47 of 1925. The law gave every male subject over twenty-five years of age the right to vote.

17. Taichiro Mitani, one of the most respected political scientist in Japan, emphasizes the importance of the jury as a political institution in his thorough study of the old Jury Law. TAICHIRO MITANI, SEIJI SEIDO TOSHITENO BAISHIN SHI: KINDAI NIHON NO SHIHOKEN TO SEIJI [THE JURY SYSTEM AS A POLITICAL INSTITUTION: THE JUDICIARY AND MODERN JAPANESE POLITICS] (2001). Nobuyoshi Toshitani, *Shiho ni Taisuru Kokumin no Sanka: Senzen no Horitsuka to Baishin Ho* [Laymen Participation in the Judiciary: The Lawyers and the Jury Law Before WWII], in 6 GENDAI HO [THE MODERN LAW] 365 (Toshitaka Shiomi ed., 1966) also describes the Jury Law, focusing on the contribution by lawyers in private practice. For a classical study of the jury in Japan, see TAKEKI OSATAKE, MEIJI BUNKA SHI TOSHITENO NIHON BAISHIN SHI [THE HISTORY OF THE JAPANESE JURY AS A CULTURAL HISTORY IN MEIJI PERIOD] (Yumani shobo [Yumani Press] 2005) (1926). There is little in English about the old Jury Law, but the literature available includes Mamoru Urabe, *Wagakuni ni Okeru Baishin Saiban no Kenkyu* [A Study on Trial by Jury in Japan], in THE JAPANESE LEGAL SYSTEM: INTRODUCTORY CASES AND MATERIALS 483 (Hideo Tanaka ed. assisted by Malcolm D.H. Smith, 1976) (abbreviated translation of MAMORU URABE, WAGAKUNI NI OKARU BAISHIN SAIBAN NO KENKYU [A STUDY ON TRIAL BY JURY IN JAPAN] (1968)). See also Anna Dobrovolskaia, *The Jury System in Pre-War Japan: An Annotated Translation of "The Jury Guidebook" (Baishin Tebiki)*, 9 ASIAN-PACIFIC L. & POL'Y J. 231 (2008).

rooms and accommodations for jurors, and arranged 3,339 public addresses that were attended by 1.24 million people.¹⁸

The Jury Law differed from the jury systems in common law countries in several significant ways. The right to jury trial was limited to the most serious criminal cases,¹⁹ though, as in the United States, defendants who were eligible for the right to a jury trial could decline and opt for trials by judges without jurors instead. Twelve jurors could reach their verdict by a simple majority.²⁰ The jury did not give a general verdict but answered the question of whether the defendant did or did not commit the criminal act he was charged with by the prosecutor as instructed by the judge,²¹ which technically meant that there was no possibility for the jury to nullify a harsh law.²² Judges could reject the verdict if they did not agree with it, even when the jury answered that the defendant did not commit the criminal act in question. The court could call a new jury as many times as it wanted, whether this was to the benefit of the defendant or not.²³ Juries were dismissed and replaced at total of twenty-four times throughout the period the law was in force, most often to the detriment of the defendants.²⁴

It is difficult to argue that the jury trials under the old Jury Law made a significant difference in the ongoing criminal procedure practice. However, the testimony of lawyers and judges suggests that jury trial proceedings went well in some cases, jurors did their job conscientiously and lawyers paid them due respect.²⁵ Statistics show that 17.6% of defendants tried by juries were found not guilty, which is a much higher rate than in trials before judges alone.²⁶ This figure

18. TAKASHI MARUTA, BAISHIN SAIBAN WO KANGAERU: HOTEI NI MIRU NICHIBEI BUNAKA HIKAKU [CONSIDERING THE JURY TRIAL: COMPARATIVE CULTURAL STUDY OF TRIALS BETWEEN JAPAN AND AMERICA] 135 (1990).

19. Defendants charged with capital crimes or crimes punishable by imprisonment for more than three years had the right to jury trial (arts. 2 & 3). However, defendants charged with political crimes did not (art. 4).

20. Art. 91.

21. Art. 88.

22. It was theoretically possible for jurors to answer "no" contrary to their findings, anticipating an excessively harsh result from the mechanical application of the law by judges.

23. Art. 95.

24. MARUTA, *supra* note 18, at 146-47.

25. About half of the lawyers who had been involved in jury trials answered positively when asked whether they had confidence in jurors, half a century after its suspension. BAISHIN SAIBAN: KYU BAISHIN NO SHOGEN TO KONGO NO KADAI [THE JURY TRIAL: THE TESTIMONY OF THE OLD JURY TRIALS AND THE MISSION IN FUTURE] 66-67 (Tokyo Bengoshikai [Tokyo Bar Association] ed., 1992). The interviews with the twenty-five lawyers who experienced jury trials constitute the most valuable testimony with respect to the old jury trial system. *Id.* at 71-361. See also URABE, *supra* note 17, at 13-111, including fifteen interviews with lawyers (eleven judges, two public prosecutors, and two defense lawyers).

26. MARUTA, *supra* note 18, at 143-47. See also Masao Okahara, *Baishinho no Teishi ni kansusu Horitsu ni tsuite* [On the Act suspending the Jury Law], HOSOKAI ZASSHI, Apr. 1943 (vol. 21, no. 4), at 10, 21.

seems revealing, although it is not definitive because there is an element of case selection at work.²⁷

Whatever account one gives of the old Jury Law, or of the practice under it, and of its impact on the Japanese criminal procedure of the day and on those who served as jurors and others, the fact remains that the Act was suspended in 1943.²⁸ The number of jury trials declined sharply a few years after the law came into force in 1928.²⁹ In times of national emergency, notably fewer defendants chose to be tried by juries. Several factors may have been at work here. One factor is that the defendants may have had great confidence in the judges and also taken the view that juries might not be a

27. Those who are accustomed to the guilty/not guilty ratio of jury trials in common law countries might be surprised to see how low the acquittal rate in Japanese criminal procedure has been. Yet, one must not forget that every defendant in Japan has to go through the trial procedure even if he or she admits guilt beforehand and does not challenge the facts that the prosecutor tries to prove. Therefore, the number shown above is not so surprising; most criminal cases in America end with guilty pleas. However, the current guilty rate in Japan, about 99.9%, may be difficult to explain unless the criminal trial itself is regarded as a mere ceremony in which a judge accepts anything the prosecutor has decided before the trial begins. See *supra* note 2. Ryuichi Hirano, the late Professor of the University of Tokyo and highly influential scholar of criminal procedure, once said of Japanese criminal trials that this was where judges confirmed that the defendants were guilty. Ryuichi Hirano, *Genko Keiji Soshō no Shindan [Diagnosing the Current Criminal Procedure]*, in 4 DANDO SHIGEMITSU HAKASE KOKI SHUKUGA RONBUN SHU [IN CELEBRATION OF DR. SHIGEMITSU DANDO'S SEVENTY YEARS BIRTHDAY] 407, 407 (Yasuharu Hiraba et al. eds., 1985). He criticized Japanese judges for their overuse of documentary evidence and their inability to find the truth when faced with innocent defendants who had made confessions before trial. He expressed the pessimistic view that there will be no way out of this failing criminal procedure practice unless a mixed or pure jury system was adopted. *Id.* at 423. In 1999, he concluded that the mixed jury system would be better than the pure jury system for several reasons. One of the reasons was that the pure jury system had several problems that made it difficult to import from a foreign country. Ryuichi Hirano, *Sanshin Sei no Saiyō niyōru "Kakushin Shiho" wo: Keiji Shiho Kaikaku no Ugoki to Hoko [In Pursuit of "Core Justice" by Adopting the Mixed Jury: The Trends and the Direction of the Criminal Justice Reform]*, JURIST, Jan. 15, 1999 (no. 1148) at 2, 5. An explanation of "core justice" is required. Japanese scholars have referred to the American criminal justice system as "rough justice" with a negative implication of imprecision, whereas the Japanese criminal justice system has been referred to as *seimitsu shiho* [anatomical justice] for its close attention to every particular factual detail. Historically, Japanese judges have prided themselves on the accuracy of their decisions, but their attention to trifles has led to over-reliance on documentary evidence and to disregard of testimony given at a trial, which in turn leads to placing excessive emphasis on the defendant's admission of guilt before the trial. The weight that such admission carries in the trial invites the criticism that it encourages law enforcement officers to use any means available to secure a confession from the defendant, which might then result in an erroneous conviction. Hirano proposed to overcome the defects in both systems by introducing a mixed jury.

With regard to the system and practice of Japanese public prosecution, see DAVID T. JOHNSON, *THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN* (2001).

28. *Baishin no Teishi ni kansuru Horitsu [the Act suspending the Jury Law]*, law No. 88 of 1943. The third schedule of the suspension act provided that the Jury Law shall be in force again after the war.

29. In 1929, just one year after entering into force, as many as 143 jury trials took place, but then the number decreased. In the final five years before the suspension, fewer than five jury trials per year took place. Okahara, *supra* note 26, at 18.

good system for the Japanese people. This attitude may also explain the opposition to the introduction of the jury system in Japan in the twenty-first century, even though the country has experienced democratic government for more than half a century under the current Constitution.³⁰ On the other hand, one could argue that in 1943, the times were unsuited to continue with the jury system,³¹ and that the Jury Law contained many defects. This does not imply that the Japanese people are inherently unfit for this democratic practice of justice.

III. HOW THE AMERICAN JURY WAS STUDIED AND UNDERSTOOD IN JAPAN FOLLOWING THE 1980s

In 1946, the new Constitution, which in several respects is modeled on the American federal Constitution, was adopted.³² The new Code of Criminal Procedure, which adopted many characteristics of the common law adversarial procedure, was also enacted.³³ The act that had suspended the Jury Law had stipulated that the jury was to be reinstituted after the war.³⁴ Moreover, the Court Act of 1947 provides that "[t]he provisions of this Act shall not prevent the establishment of a jury system for criminal cases separately by law."³⁵ The jury system, however, did not reappear for a long time. A few activists and scholars championed its revival but failed to gain sufficient support from citizens or institutional actors to realize their political goal.³⁶

30. MARUTA, *supra* note 18, at 164 (criticizing these views). See Kiss, *supra* note 2, 366-73, for his analysis of the cultural traits of the Japanese people and their relevance to lay participation.

31. It is suggested that judges urged defendants not to choose jury trial in time of war. MARUTA, *supra* note 18, at 150. See also Masahiro Hayashi, *Sendai no Baishin Saiban ni tsuite* [On Jury Trials in Sendai], HANREI TIMES, May 15, 1987 (no. 630), at 17.

32. The Constitution entered into force in May, 1947.

33. KEISOHO, Law No. 131 of 1948.

34. See *supra* note 28.

35. Saibanshoho [Court Act], Law No. 59 of 1947, art. 3.

36. Toshitani describes how the suspended Jury Law was debated and how the government did not respond to the appreciable efforts to revive the jury just after WWII. Nobuyoshi Toshitani, *Sengo Kaikaku to Kokumin no Shiho Sanka: Baishin Sei, Sanshin Sei wo Chushin Toshite* [Postwar Reforms and Laymen Participation in the Judiciary: Focusing on the Jury System and Lay Assessor System], in 4 SENGO KAIKAKU: SHIHO KAIKAKU [POSTWAR REFORMS: JUDICIAL REFORMS] 77 (Institute of Social Science, University of Tokyo ed., 1975). Half a century after the war, the keyword "revival" was still being used with respect to the jury system in several Japanese publications. See, e.g., BAISHIN SEIDO WO FUKKATSU SURU KAI [COMMITTEE FOR THE REVIVAL OF THE JURY SYSTEM], BAISHIN SEI NO FUKKO: SHIMIN NIYORU KELJI SAIBAN [THE REVIVAL OF THE JURY SYSTEM: CRIMINAL TRIAL BY CITIZENS] (2000); SEIICHI NAKAHARA, BAISHIN SEI FUKKATSU NO JOKEN: KENPO TO NIHON BUNKA RON NO SHITEN KARA [REQUIREMENTS FOR THE REVIVAL OF THE JURY SYSTEM: IN LIGHT OF THE CONSTITUTION AND JAPANESE CULTURE] (2000).

Two new factors came into play following the 1980s. First, some form of lay participation in the justice system became acceptable around that time. The direct cause of this shift was a statement of Koichi Yaguchi, Chief Justice of the Supreme Court, in 1988.³⁷ Under Yaguchi's initiative, the Supreme Court of Japan began to study lay participation systems in other countries and sent judges abroad to observe them first-hand.³⁸ Following Yaguchi's statement, participation in criminal trials became a more realistic option and jury proponents seem to have regained their vigor following the remarks made by the Chief Justice.

Second, Japanese studies of the American jury system progressed noticeably. This progress built on existing Japanese legal scholarship on common law and especially U.S. law from the period following the adoption of our current Constitution. The increase of Japanese studies on the American jury following the 1980s is remarkable for the depth of information with regard to American history, culture, society, community, politics, social science, psychology, etc.

There is a reason for these developments. The interests of Japanese legal academics in studying foreign law had undergone a significant shift. Generally speaking, the purpose of studying foreign law depends very much on who is studying it, when, and where. Legal academics in a developing country study foreign law often for the immediate purpose of incorporating it into their own legal culture, whereas legal academics in a developed country study foreign law out of a more remote and academic concern, such as deepening their understanding of the law of a different legal tradition, finding common legal ground or gathering sociological data from different legal systems. These purposes are not necessarily exclusive. Any legal academic, whether consciously or not, may well have these or other objectives in mind. Yet, one can distinguish a specific purpose in the mind of an academic (or school of academics) in a particular society as a general trend.³⁹

37. Interview by Itsuo Sonobe with Koichi Yokota, *Saiko Saibansho no Kadai to Tenbo: Yaguchi Koichi Saiko Saibansho Chokan ni Kiku [The Task and the Perspective of the Supreme Court: Interview with Koichi Yaguchi, Chief Justice of the Supreme Court]*, in KONNICHI NO SAIKO SAIBANSHO: GENTEN TO GENTEN [THE CURRENT SUPREME COURT: THE ORIGIN AND THE PRESENT], HOGAKU SEMINAR (SPECIAL ISSUE) 4, 8 (1988).

38. This research project produced volumes of publications on the jury (pure and mixed) systems used in several countries: England, Sweden, Germany, France, etc. The research on the American jury includes three volumes of papers, each about 500 pages long. See I, II & III BAISHIN, SANSHIN SEIDO: BEIKOKU HEN [THE JURY SYSTEMS: THE AMERICAN JURY] (Saiko Saibansho Jimusokyoku Keijikyoku [Criminal Section, General Secretariat, Supreme Court] ed., 1992, 1994, 1996).

39. I am making this point not to claim an original theory of comparative law, but simply to clarify that the purpose of studying the American jury in Japan underwent a significant transformation during the 1980s, from accepting almost anything from

Japanese scholars have studied various aspects of the American jury.⁴⁰ This Article cannot discuss them all but will concentrate on three distinguished scholars. They made significant contributions by focusing on what they saw as most distinctive in the American jury system, and by stating their views on whether the pure jury system would suit Japan. While their concerns about the American jury can be seen as politically neutral, they do assess the implications for the Japanese legal system.

The confidence that the American people place in the jury system is difficult to comprehend for most Japanese observers, who believe in the value of uniformity and predictable accuracy of decisions. The question of why so many Americans trust the jury so deeply is one of the most difficult for Japanese academics. On the one hand, if one looks to the characteristic elements in American society or the country's historical experience, the American jury can lose its universal applicability and hence its relevance to the Japanese people. On the other hand, if one finds universal values in the American jury, it would be reasonable for Japanese people to learn lessons from the American experience and to accept the universal appeal of the American jury. This creates a tricky situation for those who study foreign or comparative law, because they are tempted to focus on what they find extraordinary in the foreign law, i.e., something different from their own, and they offer their assessment of the difference in terms of the peculiar historical, social, cultural, or political aspects that affect the foreign legal system. This tendency may lead to overemphasis on the very peculiar characteristics and thereby lose sight of its possible universal application.

the most influential country to pausing in order to consider carefully the system and the practice of the jury in that country. See MASAO OKI, HIKAKUHO KOGI [INTRODUCTION TO COMPARATIVE LAW] 76-87 (1992) (identifying the theoretical and practical purposes); TADASHI TAKIZAWA, HIKAKUHO [COMPARATIVE LAW] 23-30 (2009) (identifying the scholarly and practical objectives). In his textbook on Anglo-American law, Tanaka also identifies several rationales for studying foreign law. HIDEO TANAKA, 2 EIBEIHO SORON [ANGLO-AMERICAN LAW] 656-60 (1980) (hereinafter ANGLO-AMERICAN LAW). With regard to the purpose of comparative law discussed in textbooks for English-speaking readers, see, e.g., KONRAD ZWIEGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 15-31 (Tony Weir trans., 3d revised ed., 1998); PETER DE CRUZ, COMPARATIVE LAW IN A CHANGING WORLD 11-15 (3d ed. 2007).

40. Other Japanese academics have made significant contributions to the understanding of the American jury. They have invested great effort in studying various aspects of the American jury, i.e., its history, jury selection and racial discrimination, the jury and capital punishment, jury nullification, social and psychological studies, etc. However, I will refrain from providing a lengthy list for English-speaking readers. Selected publications include MARUTA, *supra* note 4; FUTOSHI IWATA, BAISHIN TO SHIKEI: AMERICA BAISHIN SEIDO NO GENDAI TEKI YAKUWARI [CAPITAL JURY: THE MODERN ROLE OF THE CRIMINAL JURY SYSTEM IN THE UNITED STATES] (2009); Takashi Ouchi, *Dokuritsu Zenya Massachusetts niokeru Baishin Saiban no Ichisokumen: 1771 nen 2 gatsu 12 nichi duke John Adams no "Nikki" wo Megutte* [An Aspect of the Jury Trials in Pre-Revolutionary Massachusetts: In Light of John Adams' "Diary" Under Date of February 12, 1771], 63 HÔGAKU [J. L. & POL. SCI. TOHOKU U.] 962 (2000).

The first scholar to be considered here is Hideo Tanaka, who may have been the most respected scholar of U.S. law in Japan.⁴¹ Tanaka provided basic and solid information on the American jury in his textbook and article on the subject.⁴² He pinpointed two historical experiences that explained the trust the American people place in the jury. The first of these is the colonial period in which American jurors protected American defendants from British tyranny. The second lies in the early nineteenth century when American democracy gained much acceptance and built confidence that normal citizens were able to govern themselves.⁴³ In 1967, Tanaka doubted whether it would be wise to introduce the jury to Japan because the country lacked such historical experiences. He took the view that the Japanese people seemed too dependent on the government to have the most democratic institution (i.e., a pure jury), and that, therefore, a mixed jury system would be a better choice. However, he later changed his view in favor of the pure jury for two reasons; the pure jury allows greater independent participation by citizens than the mixed jury, and the current law of criminal procedure uses the adversarial method, which is better suited for the pure jury.⁴⁴

In 1986, Takao Tanase, one of the most influential Japanese scholars of sociology of law,⁴⁵ published the most sophisticated and comprehensive article on the American jury ever in Japan, focusing on its procedural characteristics. Tanase's contribution is most remarkable for the close attention he paid to the leading publications of American legal academics, social scientists, and psychologists. He also examined the surprising confidence the American people have in their juries. He claimed that their affection for the jury system is nothing but a "fetish," and that the jury is placed above all else. According to Tanase's evaluation, the theory that power corrupts those who hold it, is not accepted in Japan, and the Japanese people have no trust in the idea of government by citizens, meaning that the democratic ideal of keeping the judiciary closer to the people is weak.

41. He taught Anglo-American law at the University of Tokyo for a long time as well as Japanese law at Harvard Law School. He passed away in 1992.

42. TANAKA, ANGLO-AMERICAN LAW, *supra* note 39, at 444-73; HIDEO TANAKA, 2 EIBEIHO KENKYU: DUE PROCESS [STUDIES ON THE ANGLO-AMERICAN LAW: DUE PROCESS] (hereinafter DUE PROCESS) 375 (1987) (The relevant part originally published as an article, Hideo Tanaka, *Gasshukoku Kenpo niokeru Baishin Shinri wo Ukeru Kenri: America Soshoh Rikai no Hitotsuno Tegakari Toshite [The Right to Jury Trial under the U.S. Constitution: Understanding the American Procedural Law]*, in 2 SAIBAN TO HO [TRIALS AND LAW] 717 (Akira Mikaduki et al. eds., 1967)).

43. TANAKA, ANGLO-AMERICAN LAW, *supra* note 39, at 445-46; TANAKA, DUE PROCESS, *supra* note 42, at 391-92. This Article does not intend to prove or disprove the accuracy of these historical statements.

44. TANAKA, DUE PROCESS, *supra* note 42, at 392 n.f.

45. Tanase also has considerable teaching experience at the most distinguished American law schools, and is extremely knowledgeable about American law and the American legal system.

Tanase seems to link the exceptionally strong confidence that the American people have in the jury system with their distrust in power and their trust in a democratic government. Tanase does not, however, oppose the introduction of the jury to Japan.⁴⁶

These two leading academics' views on the American jury and the confidence it enjoys among American people should be of interest to the reader, Japanese or American. The view of a third prominent scholar of American law is worth mentioning as well. Koichiro Fujikura viewed Americans' confidence in the jury from a novel viewpoint.⁴⁷ In an article published in 2000, he raised the question why so many jury trials, in both civil and criminal matters, are held in the United States, when jury trials are in decline in most other countries. His simple answer is that because the United States is a multiethnic society, it needs the jury as an educational tool for its citizens to acquire understanding of the judicial system, and that trial by jury chosen from the community reinforces the citizens' confidence in the legitimacy and the fairness of the proceedings. Fujikura believes that the jury serves to maintain at least the appearance of evenhanded justice.⁴⁸

Fujikura's contribution is interesting for his attention to ethnicity in the United States. It is a novel viewpoint because the fact that the United States contains various ethnic groups had formerly been regarded in a negative light with respect to the fairness of jury trials. It is known in Japan that juries from which a particular racial or ethnic group is excluded tend to reach verdicts unfavorable to members of the excluded group. One only needs to recall the trials of L.A. law enforcement officers in 1992, O.J. Simpson in 1995, or the shooter of a Japanese teenager in Louisiana in 1992.⁴⁹ The verdicts of those trials were widely reported in Japan and viewed with skepti-

46. Tanase comments on Tanaka's earlier pessimistic view about the appropriateness of adopting the pure jury in Japan where no national belief exists that every citizen is able to administer public affairs; he argues that this ideology could be changed in the long term. TANASE, *supra* note 2, at 140, 146-147 n.5.

47. Fujikura used to be a colleague of Hideo Tanaka at the University of Tokyo; he also taught Japanese law at the most distinguished American law schools.

48. Koichiro Fujikura, *Taminzoku Shakai ni Okeru "Koheina" Baishin: Amerika Baishin no Konsensasu Keisei Kiro* [The Fair Jury in a Multi-Ethnic Society: American Jury's Function to Form Consensus], in FUNSO TO SOSHO NO BUNKA SHI [CULTURAL HISTORY OF CONFLICTS AND LITIGATION] (Rekishu Gaku Kenkyu Kai [The Study Group of History] ed., 2000) 425, 426-28.

49. The tragic death of a Japanese teenager who was shot and killed on Halloween night by a local white man led to a new gun control movement. The defendant was acquitted possibly because the Japanese teenager approaching him did not stop in spite of being warned. See, e.g., <http://www11.plala.or.jp/yoshic/y-frame-eng.html> (last visited Apr. 20, 2010).

cism by many.⁵⁰ Fujikura turned the accepted wisdom upside down with his original research and findings.⁵¹

However, the thesis that the United States needs a jury system because of its multiethnic society can easily be used to oppose the introduction of the jury to Japan precisely because it does not have a multiethnic population. Fujikura, a respected scholar of American law, prefers the pure to the mixed jury if Japan does adopt some form of lay participation in criminal procedure.⁵² It would be ironic if Fujikura's thesis were to be used by opponents of the jury to deny the universality of the American jury. We shall see how this and other issues were dealt with in the JSRC.

IV. DISCUSSING THE AMERICAN JURY IN THE JUSTICE SYSTEM REFORM COUNCIL (JSRC)

A. *The Establishment of the JSRC and its Members*

The JSRC 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

50. Actually, it is difficult to find publications that directly link racial discrimination to those seemingly irrational verdicts. This is not surprising since many variables affect the verdicts, and the view that race is the only determining factor cannot be sustained. Publications about these verdicts usually suggest that there is some suspicion of racial discrimination behind these verdicts. See, e.g., Makoto Ibusuki, *King Jiken to Baishin Seido [King's Case and the Jury System]*, HOGAKU SEMINAR, Sept. 1992 (vol. 453), at 20; Yoshimoto Watanuki, *Rodney King Jiken Hyoketsu, Baishin to Yoron no Kankei* (pts. 1, 2, 3 & 4) [*Rodney King's Case, the Relationship Between the Jury and Public Opinion* (pts. 1, 2, 3 & 4)], HORITSU NO HIROBA, Feb. 1993 (vol. 46, no. 2), at 60, Mar. 1993 (vol. 46, no. 3), at 69, May 1993 (vol. 46, no. 5), at 54, June 1993 (vol. 46, no. 6), at 78.

51. It is fair to say that Fujikura's article is a thorough study of jury selection that mentions diverse sources ranging from the long history of racial discrimination in jury selection, the current jury selection procedure in practice, the Supreme Court decisions that try to prevent discriminatory practice, to the ideal of the role of the jury in a multiethnic country. However, his thesis that the legitimacy of the American jury lies in the multiethnicity of America is perhaps misleading because it is a mainly normative proposition, rather than a statement of fact. The American jury should function as a legitimizing factor in the country's multiethnic society, but in fact it has not worked the way Fujikura anticipates. There is a long history of racially discriminatory practice by American juries. He does not present strong evidence that the American jury actually performs its expected role, whereas he cites considerable evidence, including Supreme Court decisions such as *Batson v. Kentucky*, 476 U.S. 79 (1986) and its progeny, suggesting that racially discriminatory practices by American juries have not yet disappeared.

52. See *infra* notes 67-68 and accompanying text.

thereof, and other reforms of the justice system, as well as improvements in the infrastructure of that system.⁵³

The JSRC was composed of thirteen members. The chairman was one of the most prominent constitutional law experts in Japan, Koji Sato. Two other legal academics and three practicing lawyers constituted the professional block, but did not constitute a majority. Two members drawn from higher education, two from management, and another two from a union, together with one writer, brought the remainder to a total of seven, the bare majority of the JSRC.⁵⁴ The selection of the members may have been the product of political manipulation, although there is no direct evidence that they were chosen because of their dislike of the pure jury system. The views of some members on the American jury could not have been known because the attitudes of the nonprofessional members would have been difficult to ascertain in advance. However, it should be noted that most of the professional members could not have been very fond of the American jury because no legal academic had ever strongly argued in favor of the introduction of the jury system, and two of the three practicing lawyers would probably not have been favorably inclined because of their careers, one of whom was a judge and the other a public prosecutor. In short, it was almost certain that the majority of the JSRC members were not going to make a recommendation to introduce the pure jury system when they started discussing the participation mechanism.

The JSRC held sixty-three meetings during its period of existence, which ended when it presented its final opinion to the then Japanese Prime Minister Junichiro Koizumi.⁵⁵ It made various recommendations, including reforms to the civil and criminal justice systems, the legal training, the judiciary, expansion of the legal pro-

53. JSRC, RECOMMENDATIONS, *supra* note 4, at 1 (citing Shiho Seido Kaikaku Shingikai Secchiho [the Law concerning Establishment of the Justice System Reform Council], Law no. 68 of 1999, art. 2).

54. Koji Sato, Chairman, Professor Emeritus, Kyoto University, and Professor, School of Law, Kinki University; Morio Takeshita, Vice-Chairman, Professor Emeritus, Hitotsubashi University, and President, Surugadai University; Hiroji Ishii, President, Ishii Iron Works Co., Ltd.; Masahito Inoue, Professor, Faculty of Law, University of Tokyo; Keiko Kitamura, Dean, Faculty of Commerce, Chuo University; Ayako Sono, author; Tsuyoshi Takagi, Vice-President, Japanese Trade Union Confederation; Yasuhiko Torii, Executive Adviser for Academic Affairs, Keio University (Former President, Keio University); Kohei Nakabo, Attorney-at-Law (Former President of Japan Federation of Bar Associations); Kozo Fujita, Attorney-at-Law (Former President of Hiroshima High Court); Toshihiro Mizuhara, Attorney-at-Law (Former Superintending Prosecutor of Nagoya High Public Prosecutors Office); Masaru Yamamoto, Executive Vice President, Tokyo Electric Power Co., Inc.; Hatsuko Yoshioka, Secretary-General, Shufuren [Japan Housewives Association], <http://www.kantei.go.jp/jp/sihouseido/990803meibo.html> (last visited Apr. 20, 2010), translated at http://www.kantei.go.jp/foreign/policy/sihou/singikai/members_e.html (last visited Apr. 20, 2010). Their titles are from the time of the JSRC existence.

55. JSRC, RECOMMENDATIONS, *supra* note 4.

fession, and establishment of a participatory legal system. It is fair to say that the *saiban-in* system, i.e., the lay participation in criminal proceedings, was the most far-reaching recommendation made by the JSRC in light of the almost complete exclusion of laypersons from the Japanese legal system since the suspension of the jury in 1943.

The members of the JSRC had rather heated discussions about the proper role of lay participation. They studied not only the American jury but also other models of lay participation, such as the one used in Germany. They reached agreement on not importing a ready-made version, but to create a uniquely Japanese institution. First, they chose the name *saiban-in* and then they decided what substance would fill the form.

B. *The Process of Deliberation*

1. Input by Practicing Lawyers

The JSRC held substantive discussions on the subject of lay participation during at least six of its sixty-three meetings.⁵⁶ Two important debates stood out; the first involved practicing lawyers, the second, three prominent Japanese academics of law and political science with national and international reputations. Let us consider these important discussions in order.

First, at the 30th meeting of the JSRC on September 12, 2000, three bodies of the Japanese legal profession made their presentations before the JSRC, giving their views on the appropriate mode of lay participation in Japan. These bodies were the Japan Federation of Bar Associations (JFBA),⁵⁷ representing lawyers in private practice: the Ministry of Justice, representing public prosecutors and the government: and the Supreme Court of Japan, representing the bench.

Yamada, the then Vice President of the JFBA, clearly stated the view that the appropriate model for lay participation was the pure jury system. He said that lay participation in Japan was quite limited and insufficient in light of worldwide trends. He saw the jury as a tool to change the mindset of the Japanese people from governed objects to more active citizens, citing the interim report issued by the JSRC on December 21, 1999.⁵⁸ He stressed the advantage of the pure jury

56. Their first meeting was held in June 1999, and they completed their mission in June 2001 when they gave their final recommendations to the then Prime Minister Junichiro Koizumi.

57. The JFBA is an autonomous body comprising the fifty-two bar associations in Japan, their individual members, and the legal professional corporations. See <http://www.nichibenren.or.jp/en/about/introduction.html> (last visited Apr. 20, 2010).

58. SHIHO SEIDO KAIKAKU SHINGIKAI [THE JUSTICE SYSTEM REFORM COUNCIL], SHIHO SEIDO KAIKAKU NI MUKETE: RONTEN SEIRI [THE POINTS AT ISSUE IN THE JUSTICE REFORM] 10 (1999), <http://www.kantei.go.jp/jp/sihouseido/pdfs/1221ronten.pdf>, translated at http://www.kantei.go.jp/foreign/policy/sihou/singikai/991221_e.html.

in which laypersons have the responsibility to review the case and to deliver the verdict. He dismissed the European model of the mixed jury stating that there, citizens are too subservient to the professional judges.⁵⁹

Next, *Fusamura, shiho hosei chosa bucho* [chief researcher of the justice system], appeared before the JSRC and spoke for the Ministry of Justice. He did not clarify whether he believed the pure or the mixed jury to be more suitable. He insisted on the need to proceed with prudence, emphasizing that the jury system (pure or mixed) lay at the heart of many national judicial systems and had undergone significant transformation in the historical and social experience in any given country. In this context, he pointed to the historical significance of the jury in England and the United States where it safeguarded the people's freedom in the face of tyrannical oppression. He also mentioned the disappearance of the pure jury in France and Germany where it was replaced by a mixed regime following criticism of the pure jury.⁶⁰

Although he did not expressly denounce the pure jury system, he indicated several disadvantages. Among other issues, he questioned the fact-finding ability of the jury, taking the view that juries might be less accurate in their assessment of facts than judges in our highly developed and complex society. Other disadvantages he mentioned were mostly procedural ones that would have to be considered very seriously if the jury system were adopted, because several aspects of Japanese criminal procedure would be difficult to reconcile with jury trials.⁶¹

Nakayama, *somu kyoku cho* [director of general affairs] of the Supreme Court of Japan, spoke last. He also paid attention to the historical experience of each country and its judicial system. Nakayama argued that in the historical perspective, the evolution of the pure or mixed jury is closely linked to the formation or transformation that occurs in a given country in case of independence or revolution, so that the jury is a highly political institution. He also pointed out that the United States is exceptional; about eighty percent of all criminal jury trials occur in the United States while the jury system as such has been in global decline.⁶²

Nakayama strongly criticized the American jury in several regards; Americans care more about the procedure itself and less about the outcome; many studies indicate that jury verdicts are unpredictable and produce a high rate of erroneous verdicts. He mentioned a

59. The cahier of the 30th meeting, Sep. 12, 2000, 16 GEKKAN SHIHO KAIKAKU [JOURNAL OF JUDICIAL REFORM IN JAPAN] 75-78 (2001), available at <http://www.kantei.go.jp/jp/sihouseido/dai30/30gaiyou.html>.

60. *Id.* at 78-79.

61. *Id.* at 79-80.

62. *Id.* at 82.

statement by American academics that the American judicial system neither ensures guilty verdicts for those who actually committed crimes nor acquittals for those who truly were innocent.⁶³

Nakayama also made an interesting statement about the American jury by saying that the jury system functioned as an established institution because it was believed to be indispensable in order to ensure the unity of a nation composed of various ethnic groups. It is not clear whether this was his original idea or not, but it was reminiscent of Fujikura's article.⁶⁴

Next, Nakayama expressed his opposition to a jury system in Japan for one simple reason: the positive assessment of the current criminal trials by professional judges. He predicted that even though the introduction of the jury would direct the attention of the Japanese people to the judicial system, the role of that system—to ascertain the truth—would be significantly undermined.⁶⁵

Finally, he voiced his approval for the mixed jury. He said that introduction of the mixed jury, if administered appropriately, would make it possible for the judicial system to reflect the values and common sense of Japanese citizens without undermining its primary mandate of finding the truth. He thus made it clear that the Supreme Court preferred the mixed to the pure jury.⁶⁶

Following the presentations by the three bodies representing practicing lawyers, the JSRC members discussed what would be the best model for lay participation in Japan based on the presentations given at the 30th meeting as well as the reports by several members of the JSRC at the 31st and 32nd meetings.

2. Input by Academics

The second contribution from outside the JSRC came from prominent academics at the 43rd meeting, held on January 9, 2001. Three Japanese professors—Fujikura, Mitani, and Matsuo—shared their expertise with the members of the JSRC, the majority of whom were, as mentioned, not lawyers. All three professors formerly taught law or political science at the University of Tokyo. They are leading scholars in their fields, their reputation bolstered by the exceptionally

63. *Id.* (citing G. LOUIS JOUGHIN & EDMUND M. MORGAN, *THE LEGACY OF SACCO AND VANZETTI*, at vi (1948)). This reliance was rigorously criticized by Fujikura. The cahier of the 43rd meeting, Jan. 9, 2001, 19 GEKKAN SHIHO KAIKAKU [JOURNAL OF JUDICIAL REFORM IN JAPAN] 108, 112 (2001), available at <http://www.kantei.go.jp/jp/sihouseido/dai43/43gaiyou.html>. See *infra* note 68 and accompanying text.

64. The idea that the jury works as a legitimizing institution in a multiethnic society, whereas a monopolistic society such as Japan does not need a jury, is easy to put forward. See, e.g., Yoshiko Terao, *Sinpojiumu wo Oete* [After the Symposium], 1990 AMERIKAHŌ 229.

65. The cahier of the 30th meeting, *supra* note 59, at 82.

66. *Id.* at 83.

authoritative status enjoyed by the Law Faculty of the University of Tokyo.

First, Professor Fujikura, a specialist in American Law, gave an unbiased account of the American jury as befits a highly respected scholar, but his positive assessment of the American jury could not be concealed. He emphasized that the American people considered the jury system indispensable to the American legal system. He continued to say that the value Americans place on the jury system was worth careful consideration if it was the gem of wisdom gathered during long human experience, even though it could be argued that the American value simply reflected the particular history and culture of America and therefore did not lend itself to use elsewhere. He also maintained that if you want to ensure the fundamental principle of criminal law, namely that the innocent should not be punished, you have no choice but to construct rules of evidence that are used in jury trials. Moreover, he mentioned that it is not unusual to poll citizens on their opinions about a difficult problem on which reasonable people may have different views.⁶⁷

Fujikura then rigorously criticized the paper, "The Opinion of the Supreme Court on Lay Participation," presented by the Supreme Court of Japan at the JSRC during the 30th meeting. In Fujikura's view, the Supreme Court's conclusion based on the American studies that juries reached many erroneous verdicts was deeply flawed due to its reliance on very limited data. He felt that it was extremely one-sided and fell short of the expectation created by the status of the Supreme Court as the seat of wisdom for the nation.⁶⁸

Professor Mitani followed. He had studied and taught political science for many years and was widely respected as a leading scholar. Among his publications were extensive studies on the Japanese jury suspended during WWII. He provided information on the views of famous statesmen, political scientists, and thinkers about the jury system as a political and economic institution, referring to Alexander Hamilton, Alexis de Tocqueville, John Stuart Mill, Adam Smith, among others, who viewed the jury not only as a judicial institution but also as a political and economic one. Mitani especially emphasized de Tocqueville's view because it was he who most famously articulated the political significance of the jury. Mitani then turned to the current problem of lay participation in Japan and expressed his expectation that the pure jury would act as a check on the legal profession. He saw the jury system as something broader than a judicial body, namely a social institution, and insisted that the question of whether Japan should introduce the jury system or not was a prob-

67. The cahier of the 43rd meeting, *supra* note 63, at 111-12.

68. *Id.* at 112. Fujikura did not mention the legitimizing value of the American jury in a multiethnic society. See *infra* note 94.

lem of political reform, i.e., a problem beyond mere judicial innovation.⁶⁹

The last to speak was Matsuo, a criminal law professor who had been studying not only Japanese but also American criminal law extensively. His view on the American jury differed from that of his two colleagues. According to Matsuo, Japanese criminal law students had a very critical view of American criminal law in general. Japanese professors, he said, thought American criminal law and policy had failed profoundly. He mentioned the American jury as a brighter part of American criminal law, but his negative assessment of the American criminal justice system as a whole seemed strong enough to have him refrain from recommending the introduction of the pure jury in Japan.⁷⁰

During the 45th and 51st meetings, committee members then discussed the appropriate method for lay participation in Japan. Support for the mixed jury on the part of the members of the JSRC became increasingly evident during these deliberations. The 51st meeting was the final opportunity for the JSRC to consider and discuss the lay participation in detail. The JSRC concluded that the pure jury was not the best solution and that the *saiban-in* system, in which professional judges and laypersons constitute a joint decision-making body, should be introduced in Japan, despite the strong opposition of a few members.⁷¹ The JSRC gave its final recommendations to the Prime Minister, and the Diet duly adopted its recommendations.⁷² This meant that the system of lay participation was to be revived more than sixty years after the suspension of the old Jury Law in 1943.⁷³ The first *saiban-in* trial commenced on August 3, 2009.⁷⁴

69. *Id.* at 112-17. See also MITANI, *supra* note 17, at 3-30.

70. The cahier of the 43rd meeting, *supra* note 63, at 121.

71. Takagi, a nonprofessional member of the JSRC, had submitted his own proposal that the *saiban-ins* should be allowed, under specific circumstances, to reach independent verdicts, free from the influence of the judges. See the cahier of the 51st meeting, Mar. 13, 2001, 22 GEKKAN SHIHO KAIKAKU [JOURNAL OF JUDICIAL REFORM IN JAPAN] 112, 117-18 (2001), available at <http://www.kantei.go.jp/jp/sihouseido/dai51/pdfs/51bessi3.pdf>.

72. *Saiban-in Law*, Law No. 63 of 2004. The number of judges and laypersons that should constitute a decision-making body was recommended not by the JSRC but by the subcommittee, whose task it was to consider the various questions concerning the *saiban-in* system and criminal justice. The first meeting of the subcommittee was held on February 22, 2002, and following their final meeting, which was also the 32nd meeting after the Law was passed by the Diet of Japan on May 28, 2004. The subcommittee was composed of eleven members, most of whom were law professors and practicing lawyers. They recommended that three judges and six laypersons should constitute a decision-making body in *saiban-in* trials.

73. See *supra* note 28 and accompanying text.

74. The first trial ended on August 6, 2009. A panel of six *saiban-ins* and three judges convicted a seventy-two-year-old man of murdering a sixty-six-year-old female neighbor and sentenced him to fifteen years imprisonment. See, e.g., Hiroko Tabuchi & Mark McDonald, *Once Again, Trial by Jury in Japan*, N.Y. TIMES, Aug. 2009, at A4.

V. ANALYSIS: THE JSRC'S DISCUSSIONS OF THE AMERICAN JURY SYSTEM

A. *Framework of Analysis*

The JSRC rejected the pure jury system following heated discussions. The pure jury's negative image seems to be at least part of the reason why the mixed jury won. However, the key factor behind the JSRC's decision was perhaps the positive assessment of the ongoing criminal trials managed by professional judges. Nonetheless, the JSRC members' debate regarding the American jury provides an opportunity for those who are interested in observing comparative law in action.

The framework for my analysis is quite simple, partly because the majority of the JSRC members were laypersons and discussed the topic in general terms. This is not to say that the JSRC members were not serious or that some members were incompetent. On the contrary, I have been impressed by the fact that most of the members took their mission very seriously and discussed the important topics candidly and in plain Japanese.

I should start with the analytical framework which distinguishes between the universal applicability and the particular characteristics of the American jury. Universal applicability means that the American jury has a universal appeal that reaches beyond American borders; it thus speaks in favor of the pure jury system. Particular characteristics are those which stand for American virtues and values as well as the historical and cultural distinctiveness of the country; this argument would lead the JSRC not to recommend the introduction of the American pure jury system to Japan.

Three factors of the American jury will be considered: the liberal value, the democratic significance, and the legitimizing role of the jury in a multiethnic society. The first and second factors are easy to understand because conventional wisdom tells us that they are fundamental values. The liberal value means that the jury protects against tyrannical oppression. There is an assumption that power by its very nature tends to oppress the people. The jury protects its peers from oppressive government. The jury's democratic value should elevate the consciousness of the citizens to the higher level demanded in a democracy. As de Tocqueville noted, the experience of serving as a juror is expected to make a person a better citizen in a democratic society.⁷⁵

The legitimizing role of the American jury requires some explanation. The fact that there are various ethnic groups in America has usually been viewed in Japan as a rather complicating aspect of the American jury. The verdicts of not guilty returned in several notori-

75. See DE TOCQUEVILLE, *supra* note 3, at 248-54.

ous trials (e.g., trials of law enforcement officers in L.A. and of O.J. Simpson) were viewed as examples of racial injustice.⁷⁶ Yet, one can argue that a jury consisting of members of various ethnic origins legitimizes its verdict in a multiethnic society. This thesis was actually proposed by a leading scholar of American law in Japan, Koichiro Fujikura, who made his comments in favor of the American jury at the 43rd meeting of the JSRC.⁷⁷

Before we analyze how the JSRC members treated these three factors, it will be useful to note the type of argument that may be made for each of them more closely. First, it is easy to assert the universal acceptance of liberty inherent in the American jury, since fear of oppressive government has universal validity. Second, one could also, and even more forcefully, assert the universality of the democratic value of the American jury in light of an obsession (a curious subject in itself) on the part of the Japanese intellectual elite which has often insisted that the Japanese people are not yet ready for democracy because their mindset is that of intensely governed objects. The universal values of the American jury, if introduced to Japan, could push Japanese citizens to a higher level of political independence within a democratic society.⁷⁸

But the third factor, i.e., the legitimizing effect of the jury, is tricky because of the differences between the American and Japanese societies. There is extremely little ethnic diversity in Japan compared to America. One could use the third factor to disprove the universal applicability of the American jury; America needs the jury because it is a multiethnic country, while Japan does not because there are only a few, negligible ethnic minorities. Thus the (ethnic) legitimizing factor is commendable but applies only to the American jury based on its need for non-discriminatory practice.⁷⁹

B. Analyzing the Discussions within the JSRC

To begin with, the liberal value of the American jury was basically shared because its general significance is relevant for Japan as well. Yamada, speaking for the JFBA, pointed out that quite a few innocent defendants were found guilty in Japan, and he criticized the Japanese method of conducting criminal proceedings, which places

76. See *supra* notes 49-50 and accompanying text.

77. See *supra* note 48 and accompanying text: the cahier of the 43rd meeting, *supra* note 63, at 111-12.

78. Yamada, speaking for the JFBA, made this argument. The cahier of the 30th meeting, *supra* note 59, at 75-78.

79. To tell the truth, it is not necessary to relate the legitimizing factor to a particular model of lay participation—whether pure or mixed jury—because a mixed jury with sufficient lay members satisfies the requirement that the decision-making body should have involvement from a variety of ethnic groups. For the legitimizing factor to work, it is the size of the decision-making body that matters. See *supra* note 51.

excessive emphasis on admissions and documentary evidence.⁸⁰ Professors Fujikura and Mitani offered similar opinions.⁸¹ The Ministry of Justice did not support the introduction of the jury, but Fusamura, speaking for the Ministry of Justice, confirmed the universal respect for the liberal value of the American jury.⁸²

There were, however, critics as well; Nakayama, speaking for the Supreme Court of Japan, denounced the American jury system because innocent defendants were sometimes found guilty, an outcome clearly at odds with the mandate the jury is expected to fulfill.⁸³ Some members of the JSRC questioned the general value of the American jury in a historical context. One of the committee members, Mizuhara, a former public prosecutor, asked Mitani, one of the most distinguished political scientists of our time, whether it was realistic to be afraid of tyrannical punishment or oppressive rule in modern-day Japan.⁸⁴ His question shows that the need for the values inherent in the American jury was not widely accepted among the members of the JSRC. Fujita, a former judge, invited harsh criticism from Nakabo, the former President of the JFBA, when he agreed with the view of the Supreme Court and Mizuhara. Yet, Nakabo's efforts to draw attention to the erroneous convictions handed down by Japanese professional judges did not seem to sway other members.⁸⁵ This implies that the majority of the JSRC did not have any doubts about the integrity of the professional judges at large, and it indicates how difficult it was for nonprofessional members of the JSRC to question the accuracy of the professional judges' fact-finding ability.⁸⁶ Tanase's 1986 evaluation—the theory that power corrupts those who hold it is not accepted in Japan—revealed itself to be true during a discussion inspired by a former public prosecutor.⁸⁷

Second, the democratic value of the American jury was debated in a rather strange manner. At an earlier stage, several non-lawyer members of the JSRC—Takagi, Yoshioka, and Torii—had insisted on the need to introduce the pure jury in order to improve the Japanese citizens' mindset.⁸⁸ For them, the jury was a natural choice because laypersons could reach an independent verdict free from the inter-

80. The cahier of the 30th meeting, *supra* note 59, at 76.

81. The cahier of the 43rd meeting, *supra* note 63, at 111-12.

82. The cahier of the 30th meeting, *supra* note 59, at 79.

83. *Id.* at 89-90.

84. The cahier of the 43rd meeting, *supra* note 63, at 124.

85. The cahier of the 31st meeting, Sep. 18, 2000, 16 GEKKAN SHIHO KAIKAKU [JOURNAL OF JUDICIAL REFORM IN JAPAN] 99, 115-16 (2001), available at <http://www.kantei.go.jp/jp/sihouseido/dai31/31gaiyou.html>.

86. It was probably not easy for non-lawyer members to discuss the accuracy or appropriateness of existing trials in the very presence of the former high court judge and public prosecutor in the JSRC.

87. TANASE, *supra* note 2, at 140.

88. The cahier of the 31st meeting, *supra* note 85, at 105-11; The cahier of the 32nd meeting, September 26, 2000, 16 GEKKAN SHIHO KAIKAKU [JOURNAL OF JUDICIAL

vention by judges. This argument faced strong resistance from several members who did not have a legal background. Yamamoto, with a background in management, emphasized that the United States and England were societies in which citizens were more conscious of public interests. He questioned the appropriateness of introducing a jury system that had gained its vigor from the strong rights consciousness of colonists. Kitamura, a professor of commerce, agreed with him, saying that democracy had not yet entered the consciousness of the Japanese. Yamamoto then voiced his doubt that the jury itself held universal values at all.⁸⁹ Later, at the 51st meeting, which provided the final opportunity to discuss the model for lay participation, Yamamoto again showed his opposition to the idea that trials should act as schools of democracy in response to Takagi's argument that citizens should actively participate in the judicial system.⁹⁰ The views of Yamamoto and Kitamura do not necessarily represent the view of the JSRC at large, but the fact that no direct objection was made to their pessimistic and even dismissive argument seems curious.⁹¹ The democratic value of the American jury approved by liberal members invited strong opposition from a member who had a background in management; the rest of the JSRC members seemingly did not consider their disagreement as something that should be thoroughly discussed for their job to be completed. Here again, Tanase's concern, expressed in his 1986 publication that Japanese citizens did not have faith in government by citizens, was confirmed by the JSRC.⁹²

Finally, the legitimizing function of the jury in a multiethnic society was used to emphasize only the inherent role of the American jury. As we saw, Nakayama, speaking for the Supreme Court of Japan at the 30th meeting, said that the jury functioned successfully in the United States because of the belief that the jury was indispensable to ensure the unity of a nation composed of many different ethnic groups,⁹³ implying that Japan, whose population consists mostly of a single ethnic group, lacked such a need. The legitimizing factor was predictably used against the jury's universal applicability. It was un-

REFORM IN JAPAN] 118, 118-20 (2001), available at <http://www.kantei.go.jp/jp/sihouseido/dai32/32gaiyou.html>.

89. *Id.* at 121-22.

90. The cahier of the 51st meeting, *supra* note 71, at 122.

91. It is possible that the members with legal backgrounds abstained from the discussions on the democratic value of the pure jury. Their silence on this subject forms a strange contrast to their eagerness when mention was made of the accuracy of their decisions.

92. TANASE, *supra* note 2, at 140. American readers might be surprised to learn that an organized demonstration against the *saiban-in* system was staged by citizens who opposed the system itself, on the very first day of the first trial under the *Saiban-in Law* in August 3, 2009 in Tokyo. See, e.g., <http://no-saiban-in.org/> (last visited Apr. 20, 2010).

93. The cahier of the 30th meeting, *supra* note 59, at 82.

expected that Fujikura's contribution as a scholar was seemingly used to argue against his political preference for the American style jury.⁹⁴

C. *The Jury Systems in Countries Other than the United States*

I should comment on the JSRC's view concerning jury systems in countries other than the United States. The JSRC sent its members to the United States, Germany, France, and England from April to May 2000. During their short research trips, the members met several lawyers and judges in each country and interviewed them. After they returned to Japan, they presented their reports to the JSRC.⁹⁵ Their research covered many aspects of the judicial systems the JSRC was to consider.⁹⁶ Because of the brevity of the trips, the reports on citizen participation systems in those countries were not done in a comprehensive manner. Instead, they were performed in a rather haphazard fashion, mostly by means of interviews with lawyers and judges. The limited length and methodology of the reports does not allow an in-depth analysis comparable to the one done on the American jury. However, it is interesting to note the general attitude of the lawyers interviewed toward their respective systems. German lawyers seem to be more negative about their mixed jury system than lawyers in other countries. It was reported that one German judge said how annoying it sometimes was to deal with the lack of knowledge or competence on the part of the lay assessors. One researcher asked if it was useful for lay assessors to be involved in a trial when they lack knowledge or competence. The judge answered that in those instances, the presence of lay assessors is insignificant to the outcome of the trial because only the judges determine the judgment.⁹⁷ It was also reported that a German prosecutor saw no significant difference between judges and lay assessors in their guilty/not guilty verdicts and their sentencing decisions.⁹⁸

At the 30th meeting of the JSRC, practicing lawyers mentioned the mixed jury systems in European countries. The Japanese bar expressed a negative view because jurors were only subsidiary to judges

94. Given Fujikura's learning and reputation, one must wonder what difference it would have made if he had criticized the view of the Supreme Court of Japan not only for its misuse of the American study on the fact-finding ability of the jury but also for its reference to the legitimizing role in a multiethnic society. See *supra* notes 51 & 79.

95. The reports are available on the web. See <http://www.kantei.go.jp/jp/sihouseido/sonota/kaigai/pdfs/amerika.pdf>; <http://www.kantei.go.jp/jp/sihouseido/sonota/kaigai/pdfs/doitu.pdf>; <http://www.kantei.go.jp/jp/sihouseido/sonota/kaigai/pdfs/huransu.pdf>; <http://www.kantei.go.jp/jp/sihouseido/sonota/kaigai/pdfs/igirisu.pdf>.

96. See *supra* note 53 and accompanying text.

97. See the report on Germany, <http://www.kantei.go.jp/jp/sihouseido/sonota/kaigai/pdfs/doitu.pdf> (page unnumbered).

98. *Id.*

in those countries.⁹⁹ The Supreme Court and the Justice Ministry still expressed their preference for the mixed jury.¹⁰⁰

None of the three professors invited to the 43rd meeting offered their insights regarding the mixed jury systems. Two of them, Fujikura and Mitani, did not wish to discuss whether they preferred the pure or mixed jury,¹⁰¹ and offered observations mostly on the pure jury in the United States.

Throughout the deliberations within the JSRC, no comprehensive arguments about the citizen participation systems in countries other than the United States took place. The pure or mixed jury systems in European countries were sporadically mentioned,¹⁰² but they never commanded attention comparable to the American jury, for which the invited lawyers and academics provided a lot of information either in support of or in opposition to it.

The information on the jury systems in countries other than the United States in the JSRC's meetings was so limited that it is difficult to ascertain how much influence they had on the JSRC's decision to recommend the mixed jury. However, one thing is certain; the members knew that the mixed jury would not make any significant difference in outcome compared to trials by judges alone. This perception, combined with the positive assessment of the contemporary criminal trial practice by Japanese judges, might have weakened the acceptability of the American jury.¹⁰³ For the JSRC the exchange between judges and laymen was more important than the jurors' independence from the judges.

VI. CONCLUSION

Japanese academics and lawyers have paid considerable attention to the American jury since the 1980s. They have studied its various aspects thoroughly enough to explain the extraordinary confidence American people often seem to place in their jury system. Japanese scholars find that the American jury embraces a liberal (independent) value, represents a democratic value, and plays a legitimizing role in a multiethnic society. The Japanese law reformers, faced with the difficult task of designing an appropriate model

99. See *supra* note 59 and accompanying text.

100. See *supra* notes 60-66 and accompanying text.

101. The cahier of the 43rd meeting, *supra* note 63, at 110, 117.

102. See, e.g., the statement by Fujita at the 45th meeting, Jan. 39, 2001, 20 GEKKAN SHISHO KAIKAKU [JOURNAL OF JUDICIAL REFORM IN JAPAN] 95 (2001) (referring to the jury systems in Sweden, Denmark, and Norway).

103. The limited influence of the jury systems in countries other than the United States may be surprising because the Japanese legal system has been under strong influence of European, especially German, law after Japan's modernization in the late nineteenth century. The prominence of the American jury in the JSRC deliberations and the silence regarding the other jury systems' reviewers may provide an example of the influence American law has wielded in Japan after the WWII.

for lay participation in Japan, considered these elements of the American jury to be largely values inherent in American society and contingent on its historical experience. Ultimately, they did not accept the universal applicability of these values. Developing public consciousness among Japanese citizens was the stated goal of the law reformers, but the perception of the American jury among the members of the JSRC, for which academics were at least partly responsible, worked against the introduction of the most democratic legal institution. Japanese academics paid by far the greatest attention to the American jury system.¹⁰⁴ Yet, the JSRC had from the beginning been reluctant to support the introduction of the pure jury, and focused on the inherent values of the American jury; it ultimately found them not to be applicable to Japan.

The stated goal of the *saiban-in* system was for the Japanese people "to break out of the excessive dependency on the state that accompanies the traditional consciousness of being governed objects, develop public consciousness within themselves, and become more actively involved in public affairs."¹⁰⁵ Yet, instead of recommending the pure jury, the reformers chose communication between legal specialists and the participating public,¹⁰⁶ not independence of the people from the specialists. How the *saiban-in* system, seemingly a compromise between the old system and the stated goal, will fulfill its mission remains to be seen.¹⁰⁷

104. One could argue that other juries in the world, e.g., juries in Russia or Spain, should have been considered more closely because these countries have recently experienced the introduction or reintroduction of jury systems. For information on jury systems in these countries, see, e.g., Stephen C. Thaman, *Europe's New Jury Systems: The Cases of Spain and Russia*, 62 LAW & CONTEMP. PROBS. 233 (1999); Ana M. Martín & Martin F. Kaplan, *Psychological Perspectives on Spanish and Russian Juries*, in UNDERSTANDING WORLD JURY SYSTEMS THROUGH SOCIAL PSYCHOLOGICAL RESEARCH (Martin F. Kaplan & Ana M. Martín eds., 2006); Stephen C. Thaman, *Nullification of the Russian Jury: Lessons for Jury-Inspired Reform in Eurasia and Beyond*, 40 CORNELL INT'L L.J. 355 (2007); Jorge A. Vargas, *Jury Trials in Spain: A Description and Analysis of the 1995 Organic Act and a Preliminary Appraisal of the Barcelona Trial*, 18 N.Y.L. SCH. J. INT'L & COMP. L. 181 (1999); Stephen C. Thaman, *Europe's New Jury Systems: The Cases of Spain and Russia*, in WORLD JURY SYSTEM, *supra* note 1, at 319.

105. JSRC, RECOMMENDATIONS, *supra* note 4, at 101.

106. *Id.*

107. The *saiban-in* system is to be reviewed after three years from its entry into force. Schedule 9 of the *Saiban-in Law*, Law No. 124 of 2007.