

PATCHING OLD WINESKINS: HEIGHTENED DEFERENCE TOWARDS SAIBAN-IN FINDINGS OF FACT ON KOSO APPEAL IS NOT ENOUGH

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Abstract: The successful introduction of the *saiban-in seido*—the Japanese lay assessor system—was a tremendous step towards creating meaningful exchange between the public and the judiciary and democratizing the criminal justice system in Japan. To preserve the quality of this exchange, judges must conscientiously solicit and respect lay assessor input during deliberations, and *saiban-in* decisions must retain their force on appeal. Under current appellate procedure, however, *saiban-in* findings of fact may be replaced on *koso* appeal. *Koso* appeals threaten to eviscerate lay participants' contributions in the individual case being reviewed and, in the long term, will discourage judges from taking lay assessors' contributions seriously during jury deliberations. Although the Supreme Court of Japan has affirmed the unique capacity of *saiban-in* panels to assess credibility and make factual determinations, a 2012 Supreme Court decision threatened the panels' responsibility by failing to impose a higher standard of review for reviewing the factual findings of *saiban-in* trials. Even if it had adopted a higher standard, such standards are subject to erosion over time as judges apply them in individual cases. To ensure the vitality of the *saiban-in*'s contribution to the Japanese criminal justice system, the Supreme Court of Japan should eliminate *koso* appeals courts' ability to replace *saiban-in* findings of fact on appeal.

I. INTRODUCTION

“[N]o one puts new wine into old wineskins; or else the new wine bursts the wineskins, the wine is spilled, and the wineskins are ruined. But new wine must be put into new wineskins.”¹

The reforms that took place at the turn of the millennium in Japan have been described as equal in significance to those of the Meiji Restoration and the Occupation.² Arguably, the crowning achievement of these reforms was the *saiban-in seido*—the Japanese lay assessor system—whereby laypersons are selected randomly from the public to sit on panels with professional judges to decide criminal cases. The *saiban-in seido* has

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¹ *Mark* 2:22 (King James).

² Setsuo Miyazawa, *Successes, Failures, and Remaining Issues of the Justice System Reform in Japan: An Introduction to the Symposium Issue*, 36 HASTINGS INT'L & COMP. L. REV. 313, 314 (2013) (“[T]he recommendations of the [Justice System Reform Council] were so comprehensive that they could be considered as the third major series of reforms of the modern legal system in Japan, following the first wave of major reforms in the late 19th century and the second major wave of reforms introduced after World War II.”).

certainly been the most visible of the millennium reforms.³ Although the *saiban-in* is new, the appellate procedure into which it is placed is old. Pouring the new wine of lay participation into the old wineskins of pre-*saiban-in* appellate procedure threatens to undermine the *saiban-in*'s influence and to spoil the contribution it was intended to make.

Part II of this comment briefly reviews the millennium reforms, and the historical and spiritual significance of the *saiban-in seido*. Part III describes current appellate procedure in Japan, and explains why the capacity of appellate judges to replace facts on appeal threatens to compromise the goals behind the *saiban-in*. Part IV reviews a Supreme Court of Japan decision that indicates a move toward establishing a heightened standard of review for *saiban-in* findings. Part V of this comment argues that even if the Court were to institute a heightened standard for *saiban-in* findings, this protection would still not be sufficient to protect lay participants' contributions. Instead, the Court should move strongly to protect *saiban-in* input, and end the appellate practice that allows judges to replace facts on appellate review.

II. THE *SAIBAN-IN SEIDO* AND ITS SIGNIFICANCE TO DEMOCRATIC IDEALS

A. *The Saiban-in Seido*

Responding to a perceived need to improve the quality of justice in Japan, the Japanese Diet⁴ introduced the *saiban-in seido*—or lay assessor system—into the criminal justice system in 2004; it went into effect in 2009.⁵ The *saiban-in seido* is a system of joint decision making,⁶ whereby professional judges and laypersons together find facts and determine the sentence of a criminal defendant.⁷ Only in cases involving crimes punishable by death or indefinite imprisonment, or in cases in which a victim has died, is the *saiban-in* mandated under the system.⁸ The *saiban-in*

³ See Daniel H. Foote, *Citizen Participation: Appraising the Saiban'in System*, 22 MICH. ST. INT'L. L. REV. 755, 756 (2014).

⁴ While the Japanese Diet is made up of an upper and lower house, called the House of Representatives and the House of Councilors, respectively, this comment will refer to them collectively as "the Diet" or "the Japanese Diet." See Relationship to Other Bodies, HOUSE OF COUNCILLORS, THE NATIONAL DIET OF JAPAN, available at www.sanglin.go.jp/eng/guide/relation/index.htm (last visited Mar. 7, 2015).

⁵ See John O. Haley, *Japan*, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW 393, 398 (Kevin Jon Heller & Markus D. Dubber eds., 2011).

⁶ 1 Saiban'in no sanko suru keiji saiban ni kansuru horitsu, Law No. 63 of 2004, translated in 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. 233, 233 (2005).

⁷ See *id.* at 240-41, art. 6.

⁸ See *id.* at 236-38, art. 2(1)(i), (ii).

system borrows features of European and Anglo-American criminal justice models, but is not identical to any other system in the world.⁹

In most circumstances, *saiban-in* panels are made up of three judges and six lay assessors.¹⁰ *Saiban-in* members are randomly selected from the voting population,¹¹ and may be subject to dismissal for specific reasons.¹² Like professional judges, lay participants may ask questions of witnesses,¹³ victims,¹⁴ and the defendant.¹⁵ To secure a guilty verdict, a simple majority that includes at least one lay assessor and one judge is necessary.¹⁶ The same majority is sufficient for determining a sentence, except in cases where the majority does not include both a lay assessor and a professional judge. In such a situation, the vote most unfavorable to the defendant is counted with the next most unfavorable until such a majority is reached.¹⁷ The chief judge manages the panel during proceedings. She must update and educate lay assessors on legal rulings or court procedural decisions.¹⁸ In addition, she must “conscientiously explain[] the necessary laws or ordinances to the lay assessors, making arrangements so that deliberations are easily understandable . . . [and] provid[e] sufficient opportunity for the lay assessors to voice their opinions . . . so that lay assessors are sufficiently able to execute their duties.”¹⁹ Lay assessors, as well as judges, are ‘entrusted’ to freely decide the issues before them “based on the strength of the evidence.”²⁰ However, they are prohibited from disclosing ‘secrets’ learned during deliberations.²¹ Further, they may not disclose ‘the particulars’ they are “allowed to hear, or the opinions of any of the panelists and who voiced them.”²² The lay assessors may be punished for disclosing such secrets.²³

⁹ See *id.* at 234.

¹⁰ See *id.* at 237, art. 2(2). There is an exception. A panel may consist of only one judge and four assessors if the court “decide[s] that it is appropriate” and there is “no dispute concerning the facts.” *Id.* at 237, art. 3. To date, there has been no *saiban-in* trials where such a ratio was employed.

¹¹ See *id.* at 243, art. 13.

¹² See *id.* at 256-57, 260-62, art. 34, 41.

¹³ See *id.* at 267, art. 56-57.

¹⁴ See *id.* at 268, art. 58.

¹⁵ See *id.* at 268, art. 59.

¹⁶ See *id.* at 273, art. 67(1).

¹⁷ See *id.* at 273, art. 67(2) (“[T]he number of opinions for the option most unfavorable to the defendant will be added to the number of opinions for the next favorable option, until a majority opinion of the members of the judicial panel which includes both an empanelled judge and a lay assessor holding that opinion is achieved.”).

¹⁸ See *id.* at 273, art. 66(3).

¹⁹ *Id.* at 273, art. 66(5).

²⁰ *Id.* at 268-269, art. 62.

²¹ See *id.* at 242, art. 9(2).

²² *Id.* at 274-75, art. 70.

²³ *Id.* at 277-78, art. 79.

B. *The Saiban-in is Significant to Democratic Ideals Because it Was Introduced in Response to the Opacity of the Justice System*

The introduction of the *saiban-in seido* was, and continues to be, greatly significant to democratic ideals in Japan. This significance likely does not stem from its potential and actual effects on individual defendants alone. Instead, the *saiban-in*'s significance stems from what it symbolizes: a democratic solution to the opacity of criminal justice in Japan, and the triumphal return of lay participation after the failure of the pre-World War II jury system.

Prior to the millennial reforms, Japanese law scholar Ryuichi Hirano made his now famous statement that “[t]he Japanese criminal justice system is rather hopeless.”²⁴ At the time of his statement, criminal processes in Japan had long been criticized. Although formally adversarial, Japan’s criminal procedure has followed its European heritage closely²⁵ and was—at least until the introduction of the *saiban-in*—predominantly inquisitorial.²⁶ Criminal trials were heavily document-based,²⁷ contributing to the criticism that the Japanese trial was “trial by dossier.”²⁸ This dossier was assembled by the prosecutor’s office—a major actor in both criminal prosecution and investigation in Japan²⁹—while defense counsel played little, if any, role in its assembly.³⁰ Confessions were (and still are) extracted from defendants kept for interrogation for long periods of time prior to arrest,³¹ and evidence of guilt weighs heavily on such confessions.³² Typical of the system’s reliance on documents, these confessions were presented to the court as summaries written by the investigator.³³ Ninety percent of cases in Japan involve a confession,³⁴ and although persons are presumed innocent,³⁵ the

²⁴ Ryuichi Hirano, *Genko keijisoshō no shindan* [Diagnosis of Current Criminal Procedure], in DANDO SHIGEMITSU HAKUSHI KOKI SHUKUGA RONBUNSHI [COLLECTION OF WORKS TO COMMEMORATE THE SEVENTIETH BIRTHDAY OF DR. SHIGEMITSU DANDO] 407, 407 (Yasuhara Hiraba et al. eds., 1985), translated in 22 LAW IN JAPAN 129, 129 (1989).

²⁵ The Japanese legal system has long been influenced by continental models. See Haley, *supra* note 5, at 394; see also Arne F. Soldwedel, *Testing Japan’s Convictions: The Lay Judge System and the Rights of Criminal Defendants*, 41 VAND. J. TRANSNAT’L L. 1417, 1423 (2008) (discussing how the lay judge system is heavily modeled on European mixed jury or lay judge systems).

²⁶ See Haley, *supra* note 5, at 397-98.

²⁷ CARL F. GOODMAN, THE RULE OF LAW IN JAPAN 479 (3rd ed. 2012); Lester W. Kiss, *Reviving the Criminal Jury in Japan*, 62 LAW & CONTEMP. PROBS. 261, 265 (1999).

²⁸ Kiss, *supra* note 27.

²⁹ See David T. Johnson, *Japan’s Prosecution System*, 41 CRIME & JUST. 35, 52 (2012).

³⁰ GOODMAN, *supra* note 27, at 477.

³¹ *Id.* at 467.

³² Johnson, *supra* note 29, at 52.

³³ GOODMAN, *supra* note 27, at 489.

³⁴ Matthew J. Wilson, *Japan’s New Criminal Jury Trial System: In Need of More Transparency, More Access, and More Time*, 33 FORDHAM INT’L L.J. 487, 509 (2010).

conviction rate is still 93 to 98 percent for contested cases.³⁶ This predictability elicited criticism that the Japanese criminal trial was a ritual matter in which the court merely confirmed the prosecutor's determination of guilt by reviewing the prosecutor's dossier.³⁷

The millennial reforms aimed to alleviate the obscurity³⁸—and sometimes secrecy³⁹—of the criminal justice system to the public. This obscurity has been perpetuated, at least in part, by the veiled and cloistered existence of one of the trial court's key figures: the judge. Prior to the introduction of the *saiban-in*, professional judges were the sole arbiters of guilt and sentencing in all cases.⁴⁰ One reason for having career judges arbitrate facts and sentences was conformity between judgments,⁴¹ and Japan does enjoy “a high degree of nationwide consistency in adjudication.”⁴² Judges undergo a rigorous legal training⁴³ meant to produce ethical, professional, and elite civil servants who will work hard and remain independent.⁴⁴ Judges graduate from undergraduate law programs, and go through the Legal Research and Training Institute.⁴⁵ Most judges graduate from elite schools, and spend their lives thereafter working alongside fellow judges until retirement at age sixty.⁴⁶ However, while this training works to produce a judiciary that is “by all reliable accounts . . . the most

³⁵ See Haley, *supra* note 5, at 397.

³⁶ See Johnson, *supra* note 29, at 48.

³⁷ See GOODMAN, *supra* note 27, at 479; see also Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317, 338-39 (1992).

³⁸ Consider prosecution review commissions, whereby laypersons check the prosecutor's decision not to prosecute. See, e.g., Mark D. West, *Prosecution Review Commissions: Japan's Answer to the Problem of Prosecutorial Discretion*, 92 COLUM. L. REV. 684, 700 (1992) (“Prosecution review commissions remained virtually unknown in Japan through the late 1980s . . . [O]ne Nagasaki woman who received a notice for ‘jury duty’ was so frightened to receive something from what she assumed to be the prosecutor's office that she committed suicide on the spot by drinking herbicide.”).

³⁹ Consider, for example, the death penalty. After a random questioning of thirty Japanese citizens, one expert wrote that “[s]everal did not know that death is delivered by hanging in Japan (a misunderstanding I encountered in numerous other conversations), and most knew nothing about the social isolation that surrounds inmates on Japan's death row.” David T. Johnson, *Japan's Secretive Death Penalty Policy: Contours, Origins, Justifications, and Meanings*, 7 ASIAN-PAC. L. & POL'Y J. 62, 115 (2006).

⁴⁰ Joseph J. Kodner, *Re-Introducing Lay Participation to Japanese Criminal Cases: An Awkward Yet Necessary Step*, 2 WASH. U. GLOBAL STUD. L. REV. 231, 236 (2003).

⁴¹ *Id.* at 237.

⁴² Haley, *supra* note 5, at 397.

⁴³ See *id.* at 396; see also Overview of the Judicial System in Japan, *Judges of the Lower Courts*, available at http://www.courts.go.jp/english/judicial_sys/overview_of/overview/index.html#08 (last visited Mar. 7, 2015).

⁴⁴ John O. Haley, *Litigation in Japan: A New Look at Old Problems*, 10 WILLAMETTE J. INT'L L. & DISP. RESOL. 121, 139 (2002).

⁴⁵ J. Mark Ramseyer, *Who Hangs Whom for What? The Death Penalty in Japan*, 4 J. LEGAL ANALYSIS 365, 372-73 (2012).

⁴⁶ *Id.*

autonomous, corruption-free and trusted judiciary in the world,”⁴⁷ it also obscures the criminal process from the public, and weakens the connection between the justice system and the people. In fact, one of the goals of the Japanese Federation of Bar Association (“JFBA”) for the millennium reforms was to counter this weakening by introducing lay participation into the justice system. By introducing lay participation, the bar association sought to ensure respect for the presumption of innocence and the reasonable doubt standard in the courtroom.⁴⁸

The Japanese criminal justice system’s failures were made apparent to the public with a series of false convictions that came to light between 1983 and 1989. During this time, four famous death row inmates were recognized as wrongfully accused and convicted and were subsequently exonerated.⁴⁹ The prosecutions of all four used confessions that had been coerced from the accused during long interrogations.⁵⁰ Prior to their exonerations, the victims had spent between twenty-eight to thirty-three years in prison, many on death row.⁵¹ These cases may have helped to bring the issue of false confessions to the public eye,⁵² and caused justice officials to begin thinking about structural change.⁵³

C. *The Process by Which the Saibain-in was Introduced, the History of Lay Participation, and the Public’s Interest in the Saibain-in Demonstrates its Significance to Democratic Ideals*

The Japanese justice system’s opacity prompted calls for lay participation before the 1990s,⁵⁴ but the false convictions of the 1980s—combined with political influences that existed in the late 1990s—created “the serendipity of events”⁵⁵ that led the JFBA to propose comprehensive

⁴⁷ Haley, *supra* note 44.

⁴⁸ Foote, *supra* note 3, at 758 (“For the organized bar, key objectives [to introducing the lay assessor system] were achieving true respect for the presumption of innocence and the reasonable doubt standard and preventing miscarriages of justice.”).

⁴⁹ Kazuko Ito, *Wrongful Convictions and Recent Criminal Justice Reform in Japan*, 80 U. CIN. L. REV. 1245, 1254 (2012).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² GOODMAN, *supra* note 27, at 461.

⁵³ Daniel H. Foote, *From Japan’s Death Row to Freedom*, 1 PAC. RIM L. & POL’Y J. 11, 13 (1992).

⁵⁴ For an excellent and thorough review of the events leading up to the reforms, see Setsuo Miyazawa, *supra* note 2, at 313-14; see also 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, 939 (2004).

⁵⁵ Anderson & Nolan, *supra* note 54, at 939.

judicial reform in 1999.⁵⁶ The Japanese Diet passed the Act to Establish the Justice System Reform Council (“JSRC”) on June 30, 1999,⁵⁷ and the JSRC eventually published findings recommending lay participation in trials, leading to the establishment of the *saiban-in seido*.

The *saiban-in seido* is significant to democratic ideals in great part because of the democratic process by which the JSRC was formed. The JSRC was established independently from the dominant forces of the justice system—the Ministry of Justice, the Supreme Court, and the JFBA.⁵⁸ Instead it was established directly under the Cabinet.⁵⁹ In fact, the JSRC was made up predominantly of laypersons. In addition to a former chief judge, former prosecutor, and former JFBA president, the JSRC’s members included three law professors, two business people, the president of a university federation, a professor of accounting, the president of the Nippon Foundation, a representative from the largest labor organization in Japan, a representative from a consumer organization, and a novelist.⁶⁰ The deliberations were open to the public, and individuals could voice their opinions to the panel.⁶¹ The success of the JSRC’s recommendations was “a major achievement”⁶² because it was “the first time that major reforms [had been] successfully proposed by a government committee as national policies.”⁶³

The government imposed lofty goals on the JSRC. In addition to “clarifying the role to be played by justice in Japanese society in the 21st century,”⁶⁴ the JSRC was to examine and deliberate on reforms to effect a justice system that was “easy for the people to utilize,”⁶⁵ that included some manner of public participation, and was optimized to “achieve [the] legal profession as it should be.”⁶⁶ After two years of deliberations, the JSRC published its recommendations for reform in 2001.⁶⁷

⁵⁶ Kazuko Ito, *supra* note 49 at 1256-57.

⁵⁷ Setsuo Miyazawa, *supra* note 2, at 317.

⁵⁸ *Id.* at 313-14.

⁵⁹ JUSTICE SYS. REFORM COUNCIL, RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL - FOR A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE 21ST CENTURY (2001), *available at* <http://japan.kantei.go.jp/judiciary/2001/0612report.html>.

⁶⁰ Setsuo Miyazawa, *supra* note 2, at 317.

⁶¹ *Id.* at 318.

⁶² *Id.* at 326.

⁶³ *Id.*

⁶⁴ JUSTICE SYS. REFORM COUNCIL, *supra* note 59 (citing Shihō kaikaku shingi-kai secchi hō [Act on the Establishment of the Justice System Reform Council] Law no. 68/1999 (Japan)).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *See* Setsuo Miyazawa, *supra* note 2, at 320.

The JSRC described its recommendations as part of a process by which the fundamental ethic of Japanese self-government was to be changed for the better:

Japan, which is facing difficult conditions, has been working on various reforms, including political reform, administrative reform, promotion of decentralization, and reforms of the economic structure such as deregulation. What commonly underlies these reforms is the will that each and every person will break out of the consciousness of being a governed object and will become a governing subject, with autonomy and bearing social responsibility, and that the people will participate in building a free and fair society in mutual cooperation and will work to restore rich creativity and vitality to this country. This reform of the justice system aims to tie these various reforms together organically.⁶⁸

The JSRC saw the role of the people in self-governance as essential:

The people, who are the governing subjects . . . must participate in the administration of justice[,] . . . must . . . maintain places for rich communication with the legal profession, and must themselves realize and support the justice system for the people. For justice to achieve the role demanded of it[,] . . . broad popular support . . . [is] necessary [T]he judicial branch must establish a popular base by meeting the demand for accountability to the people.⁶⁹

It was under the heading “Establishment of the Popular Base of the Justice System” that the JSRC explained the need for lay participation at trial:

[I]t is incumbent on the people to break out of the excessive dependency on the state that accompanies the traditional consciousness of being governed objects In the field of the judiciary which plays an integral part . . . of the existing

⁶⁸ JUSTICE SYS. REFORM COUNCIL, *supra* note 59.

⁶⁹ *Id.* at 131.

governance structure based on popular sovereignty, the people also are expected to participate broadly.⁷⁰

Under the same section, the JSRC proposed the *saiban-in seido*, stating:

[P]opular participation in [litigation] proceedings has very important significance as a measure to establish the popular base of the justice system [T]hrough having the people participate in the trial process, and through having the sound social common sense of the public reflected more directly in trial decisions, the people's understanding and support of the justice system will deepen and it will be possible for the justice system to achieve a firmer popular base [A] new system should be introduced . . . enabling the broad general public to cooperate with judges by sharing responsibilities, and to take part autonomously and meaningfully in deciding trials.⁷¹

When the JSRC published its recommendations, it seemed that the introduction of lay participation was “a forgone outcome.”⁷² Ultimate responsibility for the implementation of the *saiban-in seido* was delegated to the Lay Assessor/Penal Matters Study Investigation Committee (“the Investigation Committee”).⁷³ By 2004, the Investigation Committee had finished its work and the Japanese Diet enacted the Act Concerning Participation of Lay Assessors in Criminal Trials.⁷⁴ In 2009, the first *saiban-in* trial took place.⁷⁵

The *saiban-in* was a central tenant of the reforms, more so than most other parts of the JSRC's recommendations. The JSRC's recommendations were meant to revitalize the criminal justice system by many means—including the introduction of post-graduate law schools, the relaxation of standards for passing the bar, and the endowment of then-existing lay person prosecution review commissions that were not only able to recommend, but also compel prosecution, and the expansion of access to legal services for the public.⁷⁶ In the eyes of the JSRC, however, the *saiban-in* was one of

⁷⁰ *Id.* at 211.

⁷¹ *Id.* at 213.

⁷² Anderson & Nolan, *supra* note 54, at 940.

⁷³ *Id.*

⁷⁴ See Douglas G. Levin, *Saiban-in-Seido: Lost in Translation? How the Source of Power Underlying Japan's Proposed Lay Assessor System May Determine Its Fate*, 10 ASIAN-PAC. L. & POL'Y J. 199, 200 (2008).

⁷⁵ See Foote, *supra* note 3, at 756.

⁷⁶ See JUSTICE SYS. REFORM COUNCIL, *supra* note 59.

“the three pillars of [the] reform.”⁷⁷ However, given the other factors that relate to the introduction of the *saiban-in* system, its importance is likely even greater than stated by the JSRC.

In addition to the *saiban-in*'s central place in the JSRC's efforts to “establish[] the popular base of the justice system,” historical factors make the *saiban-in seido* immensely significant. The *saiban-in seido* is not the first attempt to introduce lay participation into criminal trials in Japan. The Japanese criminal justice system employed juries in 1928,⁷⁸ but juries became defunct due to lack of use and were officially suspended in 1943.⁷⁹ For many years afterward, reformers unsuccessfully called for the reintroduction of a jury system.⁸⁰ However, in an attempt to curtail the judicial tendency to rubber stamp criminal convictions, lay participation was reintroduced to the Japanese court system in 2009.⁸¹ Layperson participation was reintroduced to the system in the hope that laypersons would not be biased by daily work with prosecutors and would therefore be better able to apply the presumption of innocence.⁸² Indeed, these aspirations were justified based on previous experience. The acquittal rate by pre-WWII juries was 15.4 percent, while the acquittal rate of pre-WWII professional judges was 1.3 percent to 3.7 percent.⁸³ The recently introduced *saiban-in seido* has not attained the degree of disparity between *saiban-in* outcomes and the outcomes of professional judge-made panels at this stage in its development. However, the success of the JSRC's initial call for the reintroduction of laypersons to the court system—sixty-six years after the pre-war jury was discontinued in 1943⁸⁴—was itself momentous.

Finally, the introduction of the *saiban-in seido* was also significant to the Japanese public. The extensive media coverage the *saiban-in* received demonstrates this significance.⁸⁵ The public was highly interested in this

⁷⁷ *Id.* at 212.

⁷⁸ See Levin, *supra* note 74, at 203.

⁷⁹ See Anderson & Nolan, *supra* note 54, at 962.

⁸⁰ Kiss, *supra* note 27, at 264 (“The roots of the debate on the readoption of the jury trial . . . go far deeper than a mere reaction to erroneous verdicts by judges.”); see also Foote, *supra* note 53, at 83-84 (“Reintroduction of the jury would have profound implications for criminal trials in Japan. Live witnesses presumably would replace the heavy reliance on written witness statements, and questioning of the defendant likely would take on greater formality.”).

⁸¹ See Kiss, *supra* note 27, at 264.

⁸² See Foote, *supra* note 53, at 84.

⁸³ See *id.*

⁸⁴ See David Johnson, *Early Returns from Japan's New Criminal Trials*, THE ASIA-PACIFIC JOURNAL: JAPAN FOCUS (2009), available at http://www.japanfocus.org/-David_T_-Johnson/3212.

⁸⁵ See Setsuo Miyazawa, *supra* note 2, at 326; see also Foote, *supra* note 3, at 756. For examples of media coverage, see Setsuko Kamiya, *Jury System for Criminal Trials Urged*, THE JAPAN TIMES (Dec. 12, 1999), <http://www.japantimes.co.jp/news/1999/12/21/national/jury-system-for-criminal-trials-urged>; *Panel Calls for Juries in Criminal Trials*, THE JAPAN TIMES (Sept. 19, 2000), <http://www.japantimes.co.jp/news/>

reform because it could affect every person.⁸⁶ In order to help citizens and judges prepare for the change, pamphlets, videos, and mock trials were made available,⁸⁷ and surveys were sent out to test the public's willingness to perform its duty.⁸⁸ However, not all coverage was positive.⁸⁹ In conclusion, *saiban-in*'s historical significance, the media (and scholarly) fanfare that attended its introduction, and the process by which it was introduced make *saiban-in* one of the most visible, and perhaps the most significant, of the millennial reforms.

D. The Saiban-in is Significant to Democratic Ideals Because it Has Demonstrated its Capacity to Influence the Justice System

While the *saiban-in* has democratic legitimacy and historical and emotive significance as a symbol of democratic progress, it has also demonstrated its capacity to do as it was intended: influence the justice system.⁹⁰ The introduction of lay participation through the *saiban-in* has broken the professional judiciary and procuracy's sole control over the criminal trial. Lay participation has breathed fresh influence into the justice system, and brought "orality and directness"⁹¹ to the courtroom. Significantly, trials are shifting away from exclusively using written witness statements and confessions, and are instead employing live in-court testimony and cross-examination.⁹² Attorneys now reportedly speak in more plain terms.⁹³

Presumably, these changes are ushering in better processes and results for defendants. Mixed panels have not been shy to find acquittals on the serious cases that come before them.⁹⁴ In fact, contrary to concerns that the

2000/09/19/national/panel-calls-for-juries-in-criminal-trials; Mark Willacy, *Japan Revives Jury Trials*, ABC (Aug. 4, 2009), <http://www.abc.net.au/news/2009-08-05/japan-revives-jury-trials/1379146>.

⁸⁶ Justin McCurry, *Trial By Jury Returns to Japan*, GUARDIAN (Aug. 3, 2009), <http://www.theguardian.com/world/2009/aug/03/japan-trial-by-jury-returns>; *Japan's Landmark Jury Trial Ends*, BBC NEWS ONLINE (Aug. 6, 2009), <http://news.bbc.co.uk/2/hi/asia-pacific/8188447.stm>.

⁸⁷ Norimitsu Onishi, *Japan Learns Dreaded Task of Jury Duty*, N.Y. TIMES (July 16, 2007), http://www.nytimes.com/2007/07/16/world/asia/16jury.html?ex=1342238400&en=e03e6e32d7b87f74&ei=5088&partner=rssnyt&emc=rss&_r=0.

⁸⁸ See Foote, *supra* note 3, at 761.

⁸⁹ *Id.* at 760 ("[A]s soon as it became apparent that a system of lay participation would be introduced, the mass media embarked on what can only be described as a campaign of saiban'in system bashing.")

⁹⁰ See generally, Foote, *supra* note 3 (reviewing the diverse and salutary effects of the *saiban-in seido* on the justice system in Japan).

⁹¹ See *id.* at 773.

⁹² *Id.* at 765.

⁹³ *Id.* at 767.

⁹⁴ *Gallows Averted in a First as Lay Judges Acquit*, JAPAN TIMES (Dec. 11, 2010), <http://www.japantimes.co.jp/news/2010/12/11/national/gallows-averted-in-a-first-as-lay-judges-acquit/#.VHv-koeDpUQ>.

Japanese lay public would merely be more retributive than professional judges,⁹⁵ the *saiban-in* has had a visible yet complex effect on sentencing. For example, although in murder cases “there has been modest increases . . . in sentences over [the past] fifteen years, there [has also] been an even greater increase in sentences of less than five years.”⁹⁶ Additionally, there has been an increase in suspended sentences for several categories of crimes, and an increase in the use of probation officers.⁹⁷ “These figures suggest a rather nuanced view, with harsher (by Japanese standards, at least) sentences imposed in some cases, but on the whole, reflect[] considerable faith in defendants’ potential for rehabilitation.”⁹⁸ Finally, the introduction of the *saiban-in* has also “provided the impetus for renewed reflection on the fundamental meaning and significance of the criminal justice system,”⁹⁹ encouraging the introduction of other, long-called for reforms, such as expanded discovery and the strengthening of the defense bar.¹⁰⁰ It is heartening to see that the *saiban-in seido* has been making an impact, even in its early tenure.

III. THE CURRENT SYSTEM GUARANTEES LAY PARTICIPATION’S SURVIVAL, BUT NOT ITS VITALITY

A. *Absent Legislative Action, the Saiban-in Seido Will Continue to Exist*

As currently structured, the *saiban-in seido*’s survival is guaranteed unless the legislature intervenes. Its success and vitality as a democratic influence on the judiciary and justice system, however, are not as certain. The *saiban-in seido*’s purpose is to “establish the popular base for the justice system”¹⁰¹ by allowing lay persons to “participate in the administration of justice autonomously and meaningfully.”¹⁰² However, the judges who work with the public in their courtrooms are predominantly responsible for ensuring the meaningfulness of this exchange, not the Japanese public. This is because only about 12,000 lay assessors (including alternates) will deliberate each year, and these 12,000 lay assessors will only sit on one case per service.¹⁰³ The quality of lay participants’ contribution to the judicial

⁹⁵ See Foote, *supra* note 3, at 766.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 773.

¹⁰⁰ *Id.*

¹⁰¹ JUSTICE SYS. REFORM COUNCIL, *supra* note 59.

¹⁰² *Id.*

¹⁰³ See Foote, *supra* note 3, at 769.

system will depend ultimately on whether or not judges respect lay participants' input during and after trial, and the effect jurors' input has on career judges over the long run. Therefore, in order for the reform to be successful, it is essential that judges respect layperson input.

As a preliminary matter, there is no concern that *saiban-in* trials will fall into disuse under the current system. Japan's failed attempt at lay participation helps to assuage this concern. Trials by jury were initially popular when Japan instituted its jury system in 1928.¹⁰⁴ By 1943, jury usage had declined so precipitously that the institution's influence on the criminal justice system was virtually non-existent.¹⁰⁵ While the decline may have been attributable to the developing fascism of the pre-WWII era, this reason is probably not exclusive.¹⁰⁶ Procedural factors, in addition to the fact that defendants could decline a jury trial, probably contributed most to the disuse of juries. For example, although juries were generally more lenient than professional judges,¹⁰⁷ a jury's decision could be set aside and a new jury empaneled if the judge felt that the verdict was in error,¹⁰⁸ which happened often. In addition, defendants could not mitigate the sentence of a jury on appeal.¹⁰⁹ These procedural features, as well as the fact that it was more expensive and time consuming for defense attorneys to conduct a trial by jury, likely contributed to juries' unpopularity.¹¹⁰ This unpopularity would have been irrelevant if juries were mandatory for some or all cases, but under the pre-war system, defendants often had the right to choose to be tried by a judge or jury.¹¹¹

In contrast, the current *saiban-in* system will not suffer the same fate as Japan's pre-WWII jury system because it denies defendants the right to choose to be tried by a *saiban-in* panel.¹¹² Thus, the *saiban-in* is hardwired into the system: as long as the prosecutor continues charging the qualifying crimes and the legislature does not discontinue the system, the *saiban-in seido* will live on.

¹⁰⁴ See Anderson & Nolan, *supra* note 54, at 963 (143 were held in the first year of jury trials in Japan).

¹⁰⁵ See *id.* (In their final year, only two jury trials were held.).

¹⁰⁶ *Id.* ("Commentators offer a wide variety of explanations for the decline of juries; most focus on the effect of structural elements of the jury law and on defendants' and their legal counsels' strategic considerations.").

¹⁰⁷ See Foote, *supra* note 53, at 84 (The pre-WWII jury acquittal rate was 15.4%, while a professional judge's acquittal rate was between 1.3% and 3.7%).

¹⁰⁸ See Kiss, *supra* note 27, at 268.

¹⁰⁹ *Id.* at 269.

¹¹⁰ *Id.*

¹¹¹ Leah Ambler, *The People Decide: The Effect of the Introduction of the Quasi-Jury System (Saiban-in Seido) on the Death Penalty in Japan*, 6 NW. J. INT'L HUM. RTS. 1, 40 (2007).

¹¹² See Anderson & Saint, *supra* note 6, at 236-38, art. 2.

B. *Although the Saiban-in will Survive, its Enduring Vitality as a Democratic Influence on the Judicial System Is Less Certain*

Although making trial by *saiban-in* mandatory may avoid the fate of Japan's original experiment in lay participation, it does nothing to avoid the loss of its vitality. The possibility that Japan's mixed panels will lose their vigor as potent forces of democratic influence in the judiciary—thus failing to fulfill their purpose of establishing democratic exchange between the public and the judicial system—is no idle fear. Germany's mixed-court system is similar to Japan's system in many ways, and, despite its seventy-year tenure, it has been criticized for providing no real exchange between lay participants and the judiciary.

Japanese criminal procedure borrows heavily from German models.¹¹³ “German law and legal science continue to exert strong influence” over Japan.¹¹⁴ The German system is predominantly inquisitorial in nature.¹¹⁵ For example, German prosecution has typically been paper-based, with prosecutors preparing large files of evidence to be presented to a panel.¹¹⁶ Accordingly, it is unsurprising that Japan's mixed-court system bears many similarities to Germany's system.¹¹⁷ In Germany, like Japan, “lay judges” sit alongside professional judges to decide guilt and sentence.¹¹⁸ The judge also has control over drafting the summary that will be given to the appellate court on appeal after the verdict, similar to the Japanese system.¹¹⁹ Moreover, in both systems, only professional judges can sit on appeal.¹²⁰

The similarity between Japan's *saiban-in seido* system and Germany's mixed court system serves as a portent of things to come for the Japanese system.¹²¹ The efficacy of German lay judges in affecting outcomes has been seriously criticized. Critics have said that German lay judges tend to be passive, and few cases resolved by a mixed-court panel “necessarily reflect lay participation of any kind.”¹²² Cases tried by a mixed panel “may be—and most often are—decided by the professional judge or judges to whose authority the lay judges generally defer both at trial and during

¹¹³ David T. Johnson, *Japan's Prosecution System*, 41 CRIME & JUST. 35, 39-40 (2012).

¹¹⁴ Haley, *supra* note 5, at 394.

¹¹⁵ Thomas Weigend, *Germany*, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW 252, 257 (Kevin Jon Heller & Markus D. Dubber eds., 2011).

¹¹⁶ See Kodner, *supra* note 40, at 247.

¹¹⁷ See *id.* at 246.

¹¹⁸ *Id.* at 246-47.

¹¹⁹ See *id.* at 247; see also JUSTICE SYS. REFORM COUNCIL, *supra* note 59.

¹²⁰ Weigend, *supra* note 115, at 258.

¹²¹ Kodner, *supra* note 40, at 246.

¹²² *Id.* at 248 (quoting Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 565 (1997)).

deliberations.”¹²³ This deference is so great that lay judge presence may be merely ‘honorary’.¹²⁴

[A] review of the professional literature and the popular press, combined with trial observations and conversations with professional and lay judges, prosecutors, and former judicial clerks, strongly suggest that German lay judges play an insignificant and largely symbolic role in the administration of criminal justice.¹²⁵

In fact, in most cases, “it is well known that . . . lay judges go along with what the professional judges suggest.”¹²⁶

However, differences do exist between the development of the Japanese *saiban-in* system and the German lay judge system. For example, German lay judges were formerly prohibited from viewing the prosecutor’s dossier and lay judges had to make up their minds based upon the evidence presented at trial alone.¹²⁷ This may have created a culture of lay judge independence that carried through to today, despite the fact that the dossier is now open to lay judges. In contrast, Japanese *saiban-in* members were never subject to this limitation, so perhaps such a culture will not develop. Not all the differences that exist between the two systems bode well for Japanese lay participation’s health, however. German lay judges serve for terms of five years,¹²⁸ whereas *saiban-in* participants only sit for one case. Although sitting for only one case may help prevent *saiban-in* duties from becoming routine for individual lay participants, and may keep them engaged with the process, it will also give professional judges the upper hand in every deliberation. Unlike German lay judges, Japanese lay participants will not have time to develop experience with the law and the practices of the courtroom. Presumably, this will prevent them from developing the confidence and rapport in the courtroom that would allow them to exchange with professional judges on more equal footing.

In full fairness to the current *saiban-in seido* model, the judges who administer it, and the Japanese public, assessments of the deliberations by *saiban-in* participants from the last six years have been positive. Although lay assessors may not discuss the inner workings of the decision-making

¹²³ *Id.* at 247 n.114 (quoting Dubber, *supra* note 122, at 565).

¹²⁴ *Id.* at 249.

¹²⁵ Dubber, *supra* note 122, at 582.

¹²⁶ Weigend, *supra* note 115, at 258.

¹²⁷ Kodner, *supra* note 40, at 248.

¹²⁸ Weigend, *supra* note 115, at 258.

process¹²⁹—a requirement that has not gone without criticism¹³⁰—early assessments of the process were positive.¹³¹ Seventy percent of former assessors say that they were able to talk and express themselves.¹³² It is also encouraging that the judiciary seems to be enthusiastic about the *saiban-in seido*.¹³³ Further, the fact that *saiban-in* panels are having an effect on sentencing outcomes may be seen as direct proof that the deliberators are genuinely considering lay assessor input.

The novelty of the *saiban-in seido* creates suspicion in the long-term sustainability of these positive reports. Certain features of the system have been criticized for disadvantaging the *saiban-in*'s position in relation to professional judges;¹³⁴ some of these features overlap with those of Germany's lay judge system.

German lay judges lost their independence and “languish in obscurity”¹³⁵ in part because “they do not participate in the formulation and public announcement of the justification for the court's judgment.”¹³⁶ Similarly, in Japan, the court announces the judgment and sentence at the conclusion of the deliberations,¹³⁷ and the junior judge writes the opinion.¹³⁸ Although the JSRC considered the option of having *saiban-in* members participate in the publication of the opinion,¹³⁹ it ultimately decided that the *saiban-in* members should not take part in this process. The JSRC stated that “[e]ven when *saiban-in* participate, the contents of judgments should fundamentally be structured in the same way as those for trials by judges only, and judges should prepare the judgments based on the results of the deliberations.”¹⁴⁰ Additionally, the JSRC declared it necessary that “judgments set forth the substantial reasons [for the judgment], so as to . . . obtain [the parties' and general publics'] understanding and trust.”¹⁴¹ Lay

¹²⁹ Anderson & Saint, *supra* note 6, art. 70.

¹³⁰ Bryan M. Thompson, *Japan's Lay Judges and Implications for Democratic Governance*, THE RYAICHI SASAKAWA YOUNG LEADERS FELLOWSHIP FUND (May 11, 2012), <http://www.tokyofoundation.org/sylff/9140>.

¹³¹ Setsuko Kamiya, *Lay Judges Off to Solid Start*, THE JAPAN TIMES (Feb. 9, 2015), <http://www.japantimes.co.jp/news/2010/02/26/national/lay-judges-off-to-solid-start/#.VHT5voeDpUQ>.

¹³² Foote, *supra* note 3, at 767.

¹³³ *Id.* at 772. Additionally, the judges that the author spoke with speak very highly of the system, and even enjoy working together with the *saiban-in*.

¹³⁴ See Levin, *supra* note 74, at 211-22.

¹³⁵ Dubber, *supra* note 122, at 582.

¹³⁶ *Id.*

¹³⁷ Anderson & Saint, *supra* note 6, at 241, art. 63.

¹³⁸ Ramseyer, *supra* note 45, at 378.

¹³⁹ Anderson & Nolan, *supra* note 54, at 956.

¹⁴⁰ JUSTICE SYS. REFORM COUNCIL, *supra* note 59, at 217.

¹⁴¹ *Id.*

assessors need not even appear at the announcement of the judgment.¹⁴² *Saiban-in* members' inability to participate in the drafting of the explanation of the judgment and sentence is concerning, especially given its similarity to Germany's lay judge system.

The fact that lay assessors cannot, under penalty of a fine, discuss their deliberations¹⁴³ creates further concern. Critics argue that removing this restriction will allow for more transparency in the deliberations in the future.¹⁴⁴ These criticisms and others are not meant to suggest that Japanese judges will intentionally disregard lay participants' contributions. The Japanese judiciary's integrity is widely accepted,¹⁴⁵ and judges seem enthusiastic about the changes that are happening.¹⁴⁶ However, as the system becomes commonplace, and the patience and energy necessary to work with *saiban-in* on equal footing begins to counter its novelty, judges may be tempted to represent the contributions of lay-persons more loosely. By doing so, judges could get what they see as a just or reasonable result without being accountable to the *saiban-in*. Therefore, it is imperative that professional judges do not come to dominate deliberations, not only in the immediate future, but also over the long run as the novelty and fanfare surrounding the new system begin to fade.

C. *The Most Significant Threat to Meaningful Exchange Between the Public and the Judiciary is the Appellate Judges' Ability to Replace Saiban-in Findings of Fact on Appeal*

The greatest threat to the judiciary's long-term respect for lay-person input, and with it the potent force of democratic exchange between the public and the judiciary, is the capacity of courts to find error in, and even replace, *saiban-in* findings of fact on appeal. This capacity to circumvent the *saiban-in*'s findings will encourage judges to take their deliberations with laypersons less seriously because they know that improvidently found facts can be re-found on appeal.

¹⁴² Anderson & Saint, *supra* note 6, at 241.

¹⁴³ JUSTICE SYS. REFORM COUNCIL, *supra* note 59, at art. 79.

¹⁴⁴ Wilson, *supra* note 34, at 530-31.

¹⁴⁵ See, e.g., Jon P. McClanahan, *Citizen Participation in Japanese Criminal Trials: Reimagining the Right to Trial by Jury in the United States*, 37 N.C. J. INT'L L. & COM. REG. 725, 753 (2012) (referring to the honesty and integrity of judges in Japan); Jessica Conser, *Achievement of Judicial Effectiveness Through Limits on Judicial Independence: A Comparative Approach*, 31 N.C. J. INT'L L. & COM. REG. 255, 311 (2005).

¹⁴⁶ Foote, *supra* note 3, at 772.

Both the prosecution and defense have a right to appeal in Japan.¹⁴⁷ Appeals may be made for error in the application of law,¹⁴⁸ error in the reasonableness of the sentence,¹⁴⁹ and error in findings of fact.¹⁵⁰ These appeals are called *koso* appeals. *Koso* appeals courts may reverse a judgment, amend the judgment, and/or enter a new one for any such error.¹⁵¹ There is no fundamental distinction between standards of review for findings of fact by professional judges at the trial level, or professional judges on the appellate level. Appellate courts, including the Supreme Court, consider facts, assess credibility, and make their own factual determinations. It is not uncommon for appellate courts to reverse acquittals or guilty findings.¹⁵²

Judgment 2007 (A) No. 1785 (“No. 1785”)—a case without a *saiban-in* panel—demonstrates appellate judges’ ability to reverse trial level findings.¹⁵³ In No. 1785, the defendant was accused of molesting a 17-year old on the morning train.¹⁵⁴ The prosecution presented the complaining witnesses’ testimony, which consisted of her description of events, and her identification of the defendant.¹⁵⁵ The defendant denied the molestation.¹⁵⁶ A panel of professional judges convicted the defendant at the trial level, and the court of appeals affirmed.¹⁵⁷ The Supreme Court of Japan reviewed the evidence under Article 317 of the Code of Criminal Procedure, which requires that “facts shall be found on the basis of evidence,”¹⁵⁸ and concluded that the appellate court had erred. The Supreme Court did not accept the credibility determination of the prior two panels and, contrary to the trial court, found that:

¹⁴⁷ KEIS SOSHŌHŌ [KEISOHŌ] [C. CRIM. PRO.] 2007, art. 351 (Japan) available at <http://www.japaneselawtranslation.go.jp/law/detail/?ft=3&re=02&dn=1&ia=03&x=37&y=18&bu=16&ky=&page=8>.

¹⁴⁸ *Id.* at art. 380.

¹⁴⁹ *Id.* at art. 381.

¹⁵⁰ *Id.* at art. 382.

¹⁵¹ *Id.* at art. 397; see, e.g., Saikō Saibanshō [Sup. Ct.] Feb. 13, 2012, 2011 (A) 757, 66 SAIKŌ SAIBANSHŌ KEIJI HANREISHŪ [KEISHŪ] sec. II.1, available at http://www.courts.go.jp/app/hanrei_en/detail?id=1142 (stating that the court cannot render a heavier sentence than the trial court did); *id.* art. 402, 452.

¹⁵² *White Paper On Crime 2012*, JAPANESE MINISTRY OF JUSTICE, available at http://hakusyo1.moj.go.jp/en/61/nfm/n_61_2_2_3_4_0.html (last visited Mar. 7, 2015).

¹⁵³ For a judgment concerning what method the final appellate court should apply when reviewing assertions of errors in fact finding, see Saikō Saibansho [Sup. Ct.] Apr. 14, 2009, 2007 (A) no. 1785, 63 SAIKŌ SAIBANSHŌ KEIJI HANREISHŪ [KEISHŪ], available at http://www.courts.go.jp/app/hanrei_en/detail?id=995.

¹⁵⁴ *Id.* at sec. I.

¹⁵⁵ *Id.* at sec. II.2-3.

¹⁵⁶ *Id.* at sec. II.2-3, 5.

¹⁵⁷ *Id.* at sec. I.

¹⁵⁸ KEIS SOSHŌHŌ [KEISOHŌ] [C. CRIM. PRO.] 2007, art. 317 (Japan), available at <http://www.japaneselawtranslation.go.jp/law/detail/?ft=3&re=02&dn=1&ia=03&x=37&y=18&bu=16&ky=&page=6>.

[A]lthough the acts of molestation . . . alleged to have suffered were considerably persistent and serious, [the complaining witness] did not take any active action to avoid such acts within the train, such behavior of [the complaining witness] does not seem to be exactly consistent with [the complaining witness'] active action to condemn the accused as described [earlier in the testimony], and it was unnatural for [the complaining witness] to have got off the train . . . but then returned.¹⁵⁹

This opinion drew two dissents, including Justice Yukio Horigome's, which emphasized that the Supreme Court makes its decisions based only on documentary evidence, in contrast to the trial court, which has the opportunity to observe the witnesses in person.¹⁶⁰ Nonetheless, the Court ultimately concluded that "there [was] still room for doubt about the credibility of [the complaining witness'] statements concerning the acts of molestation that she alleged to have suffered," and pronounced the defendant not guilty.¹⁶¹ Courts of appeal are no less willing to reverse acquittals and render guilty verdicts than they are to reverse guilty verdicts and render acquittals.¹⁶²

The process by which professional judges find facts on appeal has been described in terms similar to *de novo* review by Justice Yu Shiraki of the Supreme Court of Japan:

[I]n many cases, the court of second instance for criminal cases (*koso* appeals court), in the course of making reviews, seemed to have first made its own determination with regard to the fact findings or sentencing based on the records . . . then compared its determination with the findings and sentencing made in the judgment in first instance (the trial court), and changed the latter if there were any differences, in line with its own determination. Although this style of making reviews might be considerably different from what was originally intended, it fit with the intent of the parties . . . and thus has been well-

¹⁵⁹ See Saikō Saibansho [Sup. Ct.] Apr. 14, 2009, 2007 (A) no. 1785, 63 SAIKŌ SAIBANSHŌ KEIJI HANREISHŪ [KEISHŪ], available at http://www.courts.go.jp/app/hanrei_en/detail?id=995, at sec. II.5.

¹⁶⁰ See *id.* (Jorigome, J., dissenting).

¹⁶¹ See *id.* at sec. II.5.

¹⁶² See, e.g., Saikō Saibanshō [Sup. Ct.] Apr. 16, 2013, 2012 (A) no. 167, 67 SAIKŌ SAIBANSHŌ KEIJI HANREISHŪ [KEISHŪ], available at http://www.courts.go.jp/app/hanrei_en/detail?id=1195.

established.¹⁶³

Japanese appellate courts' willingness and ability to review and replace both guilty verdicts and acquittals from the trial level may shock the American trained lawyer as violating the province of the jury and double jeopardy.¹⁶⁴ However, the ability of judges to review and find new facts on appeal is common in civil law jurisdictions. For example, the same is true in Germany, although Germany does require a retrial to find new facts.¹⁶⁵ This difference between civil law nations and the common law influenced by the United States is understandable given the traditional nature of civil law trials. Further, the trial court has no special advantage in finding facts due to the absence of lay participants' input and the fact that no professional judge can claim special competence to determine facts over any other professional judge. In the absence of lay participation and the court's reliance on paper files to make a determination under traditional civil law models, both trial and appellate level judges are equally competent to find facts.

With the introduction of lay participation into criminal trials, however, there is a hierarchy of preferred agents to make factual determinations. With the introduction of the *saiban-in*, the trial court and its determinations as to what occurred belongs to lay participants in the adjudication process. Applying the same standard of review to judicial and *saiban-in* findings of fact on appeal renders superfluous lay participants' input and undermines the very contribution that lay participation was intended to make. As a result, the practice seriously undermines the goals of the *saiban-in seido*.¹⁶⁶

Although judges seem to be respecting lay participants' input now, the reviewability of *saiban-in* found facts on appeal threatens to significantly dilute the respect that judges give to lay assessors and their participation during deliberations over time. Allowing appellate circumvention of lay input increases the ease with which panel judges can slip into listless explanations of law and procedure to panelists, in the hope that their guidance will equip them to participate. However, they ultimately rely on the court of appeals to reverse if the laypersons' findings are improper. The fact that a court on *koso* appeal may replace the contribution of lay

¹⁶³ See Saikō Saibanshō [Sup. Ct.] Feb. 13, 2012, 2011 (A) 757, 66 SAIKŌ SAIBANSHŌ KEIJI HANREISHŪ [KEISHŪ] sec. II.1 (Shiraki, J., concurring) (parentheses added), available at http://www.courts.go.jp/app/hanrei_en/detail?id=1142

¹⁶⁴ Levin, *supra* note 74, at 212.

¹⁶⁵ *Id.* at 213.

¹⁶⁶ It should be noted that although Judgment 1785 was decided in 2007, this case would still have been tried by a single judge or panel because it does not qualify as a serious offense under the *Saiban-in* Act. Anderson & Saint, *supra* note 6, at 236.

participants in the judicial system affects the amount of respect judges afford that contribution and, over the long run, the respect such judges afford the *saiban-in* members themselves.

The pre-existing procedural structure into which *saiban-in* panels have been placed may be likened to wineskins, and the invigorating influence of the lay public by way of the *saiban-in* to new wine poured into them. Unfortunately, the pre-*saiban-in* practices that allow judges to reverse lay participants' findings are like old wineskins. The old procedure is inappropriate for the new influence. Just as the old wineskins are prone to crack and break, allowing the wine to leak out, the old procedure risks the spoliation of the *saiban-in*'s potential in the justice system. To enjoy meaningful exchange between the public and the judiciary and produce a justice system that enjoys a 'popular base,' it is essential that professional judges regard the contribution of laypersons on *saiban-in* panels highly, with the knowledge that the panel's contribution will have a lasting weight on the particular case. In order to preserve the integrity of laypersons' contributions to the justice system, and for trial judges to continue fostering a meaningful exchange of ideas and values in deliberations, it is essential that *saiban-in* findings not be replaced by professional judges on appeal.

IV. A DEFERENTIAL STANDARD TO REPLACE *SAIBAN-IN* FINDINGS IS INSUFFICIENT TO PROTECT THE PUBLIC'S CONTRIBUTION TO THE JUSTICE SYSTEM OVER THE LONG RUN

A. *A 2012 Decision by the Supreme Court of Japan Requires Judges to Give Trial Courts' Findings of Fact Deference*

In 2012, the Supreme Court of Japan decided 2011 (A) 757, a judgment concerning the meaning of the errors in fact finding provided for in Article 382 of the Code of Criminal Procedure.¹⁶⁷ Article 382 of the Code of Criminal Procedure allows parties to appeal on errors of factual findings.¹⁶⁸ This decision, made three years after the introduction of *saiban-in* panels, is a step in the right direction towards insulating *saiban-in* findings from appellate replacement. However, it fails to guarantee the deference necessary for meaningful exchange between the public and the judiciary over the long run. A thorough review of the case is necessary to

¹⁶⁷ See Saikō Saibanshō [Sup. Ct.] Feb. 13, 2012, 2011 (A) 757, 66 SAIKŌ SAIBANSHŌ KEIJI HANREISHŪ [KEISHŪ], available at http://www.courts.go.jp/app/hanrei_en/detail?id=1142.

¹⁶⁸ KEIS SOSHŌHŌ [KEISOHŌ] [C. CRIM. PRO.] 2007, art. 382 (Japan) available at <http://www.japaneselawtranslation.go.jp/law/detail/?ft=3&re=02&dn=1&ia=03&x=37&y=18&bu=16&ky=&page=8>.

explain what the Supreme Court of Japan accomplished through its decision, and what it failed to do.

In Judgment 2011 (A) 757, Japanese customs officials found nearly 1000 grams of drugs hidden in “chocolate cans” in a man’s¹⁶⁹ bag as he entered Japan through an international airport.¹⁷⁰ This man also had five foreign passports in his possession—some of them forged.¹⁷¹ The prosecution charged the man with transporting illegal drugs into Japan by conspiring with others.¹⁷² The main issue at trial was whether or not the defendant knew that the chocolate cans had drugs in them.¹⁷³ He argued he had agreed to transfer stolen passports for a fee, and that he had been given the chocolate cans as a gift to be given to the recipient (the “recipient”) of the passports.¹⁷⁴

The trial court—a *saiban-in* panel—acquitted the defendant after it determined that he was unaware of the drugs. In the opinion of the panel, the court found that the defendant could not have observed the drugs because the cans had not been opened. The court so reasoned despite the fact that the defendant had been concerned that drugs might be inside the cans, and that the intended recipient of the passports was a known drug liaison. The court noted that the defendant had an alternative explanation for coming to Japan that was substantiated by the forged passports. Furthermore, the court stated that, although the cans were heavy,¹⁷⁵ the defendant had no chance to compare them to others. It also found that while the defendant had made some inconsistent statements, they could be explained by a desire to get through customs quickly. Moreover, the court noted that the defendant’s arguments were corroborated by the fact that the cans looked normal, as they were placed at the top of the bag (and not the bottom, like the passports). Lastly, the court stated that the defendant made no attempt to delay examination of the cans, even though he did attempt to delay examination of the passports.¹⁷⁶

The prosecutor appealed on the grounds that the trial court’s factual findings were incorrect.¹⁷⁷ On appeal, the *koso* court disagreed with the trial

¹⁶⁹ The English translation does not indicate the gender of the defendant; for purposes of convenience the author refers to the defendant as a man.

¹⁷⁰ Saikō Saibanshō [Sup. Ct.] Feb. 13, 2012, 2011 (A) no. 757, 66 SAIKŌ SAIBANSHŌ KEIJI HANREISHŪ [KEISHŪ], sec. II.2, available at http://www.courts.go.jp/app/hanrei_en/detail?id=1142.

¹⁷¹ *Id.* at sec. II.2(5).

¹⁷² *Id.* at sec. II.1.

¹⁷³ *Id.* at sec. II.3(1).

¹⁷⁴ *Id.* at sec. II.2(6).

¹⁷⁵ *Id.* at sec. II.1(6).

¹⁷⁶ *See id.* at sec. II.2-3.

¹⁷⁷ *Id.*

court's conclusions. The *koso* court found the defendant's story unconvincing for several reasons: he changed his statements several times, he failed to mention the forged passports, he was not confused or resistant when arrested, and he failed to call the recipient of the passports at trial to corroborate his story. Instead, he attempted to conceal the relationship. Finally, the appeals court found it unlikely that the defendant would not have opened the cans to check for drugs when he had admitted to expressing concern that there might have been drugs inside. The *koso* appeals court reversed the judgment and found the defendant guilty.¹⁷⁸ The defendant appealed to the Supreme Court of Japan.

The Supreme Court began its analysis by describing the context of appellate review:

[T]he court of second instance (the *koso* appeals court) should review the judgment in first instance (the trial court) . . . rather than examin[e] the case itself from the same standpoint [of] the court of first instance.¹⁷⁹

The Court explained that this is because the trial court “directly hear[s] arguments and examine[s] evidence and . . . hold[s] these procedures orally.”¹⁸⁰ The Court emphasized that the trial court finds facts “comprehensively by directly examining the witnesses concerned [and] . . . determining the credibility of the statements based on their attitude in giving testimony.”¹⁸¹ The Court specifically highlighted the significance of lay participation in this process:

This [above mentioned approach] shall apply more appropriately to a situation where the judges who are to make a judgment on the case are thoroughly required to directly hear arguments and examine evidence and to hold these procedures orally in the first instance upon the introduction of the [*s*] *aiban-in* (Lay Judge) system.¹⁸²

Finally, before delving into the appellate court's opinion and reasons for it, the Court laid out the specific standard of review that it would apply to the

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at sec. II.4(1).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at sec. II.4(1).

koso court's determination:

[T]he court of first instance (the trial court) determined the indirect facts [indicating knowledge] . . . were insufficient to presume that the accused was aware of the existence of illegal drugs. Accordingly . . . the (trial court) judgment . . . cannot be found to contain errors in fact finding unless it is specifically demonstrated that such judgment in first instance (the trial court) was unreasonable in light of the rules of logic or rules of thumb, etc. From this standpoint, we will review the judgment in prior instance (the appellate decision).¹⁸³

The Court then moved to address each of the appellate court's four findings. The Supreme Court first stated that although the *koso* court found that the defendant's story was unreliable because it had changed, such change "can be regarded as a circumstance, in general, to . . . abate the credibility of the accused's statement,"¹⁸⁴ and whether or not the defendant's final explanation can be rejected "should be determined in a comprehensive manner."¹⁸⁵ In response to the appellate court's findings on the other three points, the Court stated that the defendant's behavior and explanations did not necessarily render his story unreliable, deferring to the trial court's determination. The Supreme Court of Japan ultimately concluded that the court of appeal erred by failing to "sufficiently demonstrate[] that the holdings of the judgment in first instance [were] unreasonable."¹⁸⁶

The Supreme Court of Japan's affirmation of the trial court's special position to assess creditability and weigh evidence is a strong step in the right direction towards respecting and shielding lay participants' contributions to criminal justice.¹⁸⁷ This case is significant because the Court deferred to the trial court's determination, and specifically referred to the *saiban-in*. The Court also invoked the values of "orality and

¹⁸³ *Id.* sec. II.4(2) (parentheses added).

¹⁸⁴ *Id.* sec. II.4(3).

¹⁸⁵ *Id.* sec. II.4(2).

¹⁸⁶ *Id.* sec. II.4(4).

¹⁸⁷ *See, e.g.*, Saikō Saibanshō [Sup. Ct.] Mar. 20, 2014, 2012 (A) 797, 68 SAIKŌ SAIBANSHŌ KEIJI HANREISHŪ [KEISHŪ], available at http://www.courts.go.jp/app/hanrei_en/detail?id=1225 (invoking 2011 (A) 757 and reversing a *koso* court decision that had reversed a trial court decision on grounds that the *koso* court failed to "sufficiently demonstrate[] that the findings in the judgment in first instance (the trial court) were unreasonable"). *But see* Saikō Saibanshō [Sup. Ct.] Mar. 10, 2014, 2012 (A) 744, 68 SAIKŌ SAIBANSHŌ KEIJI HANREISHŪ [KEISHŪ], available at http://www.courts.go.jp/app/hanrei_en/detail?id=122; Saikō Saibanshō [Sup. Ct.] Oct. 21, 2013, 2012 (A) 724, 67 SAIKŌ SAIBANSHŌ KEIJI HANREISHŪ [KEISHŪ], available at http://www.courts.go.jp/app/hanrei_en/detail?id=1206.

directness,”¹⁸⁸ which were discussed at length by the JSRC in its recommendations, and affirmed the special position of the trial court in fulfilling these values.¹⁸⁹ Additionally, the standard the Court used to reject the *koso* appeal court’s decision demonstrates the significance of this case. After it discussed the value of a comprehensive evaluation of the evidence, the Court rejected the appellate court’s conclusion that the defendant’s explanation was false because he had changed his statements. It rejected this conclusion in part because the appellate court did not make its “determin[ation] in a comprehensive manner.”¹⁹⁰ Further, it noted that the appellate court did not “tak[e] into consideration other specific circumstances in th[e] case.”¹⁹¹ As the Court had already explained, “fact finding is expected to be made comprehensively” on the *saiban-in* level.¹⁹² Ultimately, the court rejected the *koso* appeals court’s finding because it failed to “sufficiently demonstrate[] that the holdings of the judgment in first instance (the trial court) [were] unreasonable.”¹⁹³ As a result, the *koso* appeals courts must demonstrate that the *saiban-in* found facts are unreasonable in order to reject them.

It is necessary to point out that the decision does not prohibit appellate courts from finding new facts on appeal. The Court’s laudatory language about the trial level aside, the decision merely adds an additional hoop through which judges must leap in order to replace facts. The decision requires appellate judges to “specifically demonstrate that the findings of the judgment in first instance are unreasonable.”¹⁹⁴ This standard departs from the near de novo review enjoyed by appellate courts in the past, but fails to comprehensively protect the public’s contribution. The barrier for appellate judges to find new facts should be higher in order to effect this protection. Justice Shiraki stated as much in his concurrence.¹⁹⁵ It is insufficient, he noted, that appellate courts must now consider whether or not the trial court’s credibility determinations are unreasonable and then demonstrate it specifically.¹⁹⁶ According to Justice Shiraki, the presumption should be in

¹⁸⁸ JUSTICE SYS. REFORM COUNCIL, *supra* note 59.

¹⁸⁹ Saikō Saibanshō [Sup. Ct.] Feb. 13, 2012, 2011 (A) 757, 66 SAIKŌ SAIBANSHŌ KEIJI HANREISHŪ [KEISHŪ] sec. II.4, available at http://www.courts.go.jp/app/hanrei_en/detail?id=1142.

¹⁹⁰ *Id.* sec. II.4(3).

¹⁹¹ *Id.* sec. II.4(3).

¹⁹² *Id.* sec. II.4(1).

¹⁹³ *Id.* sec. II.4(4) (parenthesis added).

¹⁹⁴ *Id.*

¹⁹⁵ See Saikō Saibanshō [Sup. Ct.] Feb. 13, 2012, 2011 (A) 757, 66 SAIKŌ SAIBANSHŌ KEIJI HANREISHŪ [KEISHŪ] sec. II.1 (Shiraki, J., concurring), available at http://www.courts.go.jp/app/hanrei_en/detail?id=1142

¹⁹⁶ *Id.*

favor of the *saiban-in*: “I would like to point out the importance [of] tak[ing] a stance to consider the determination of the court of first instance as acceptable unless it is unreasonable.”¹⁹⁷ A standard like the one Justice Shiraki proposes would better protect the *saiban-in*’s democratic exchange between the public and the judiciary.

B. Deferential Standards for Replacing Saiban-in Factual Findings Are Insufficient to Protect Meaningful Exchange Between the Public and the Judiciary in the Long Run

Even if the Supreme Court of Japan instituted a new and highly deferential standard of review for *saiban-in* findings, the long-term sustainability of such a standard would remain uncertain because judicial standards of review are vulnerable to deterioration. While every policy maker must accept the limited lifespan and temporal applicability of any new rule or policy, it is easy to imagine a situation in which an initial attempt to establish a heightened standard of review is followed diligently in the early years, but over time is diluted by considerations of efficiency and the desire to make things right in the immediate case.

If a heightened standard of review towards lay participants’ role in the judiciary in Japan eroded over time, it would not be the first time that such erosion took place in a modern judiciary. For example, summary judgment proceedings in the United States were intended to allow civil litigants to avoid a jury trial when no rational juror could find for the plaintiff.¹⁹⁸ It was originally intended to be a measure employed by judges sparingly,¹⁹⁹ when the proceedings became available to federal judges, they were wary of granting it.²⁰⁰ Over time (and after the Supreme Court clarified the standard), summary judgment came to “stand[] alongside trial and settlement as a pillar of [the American] system.”²⁰¹ Modern federal jurisprudence is “largely the product of summary judgment in civil cases.”²⁰² Strikingly, this erosion was able to take place in the United States despite constitutional protections for trial by jury.²⁰³

¹⁹⁷ *Id.*

¹⁹⁸ See FED. R. CIV. P. 56.

¹⁹⁹ See Patricia M. Wald, *Federal Practice And Procedure Symposium Honoring Charles Alan Wright: Summary Judgment at Sixty*, 76 TEX. L. REV. 1897 (1998).

²⁰⁰ Amelia G. Yowell, Note, *Race to Judgment? An Empirical Study of Scott v. Harris and Summary Judgment*, 85 NOTRE DAME L. REV. 1759, 1762 (2010).

²⁰¹ John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 523 (2007).

²⁰² Wald, *supra* note 200, at 1897.

²⁰³ U.S. CONST. amend. VII.

Presumably legitimate motives have fueled the desire to grant more summary judgments in the United States—efficiency and the desire to afford justice more immediately to litigants—rather than have cases draw out needlessly.²⁰⁴ Similarly, if a highly deferential “no rational juror” standard was adopted in Japan, pure motives would urge courts of appeal judges to find that a *saiban-in* panel had misinterpreted or misunderstood the evidence when a professional judge believed a different result would have been more equitable.

V. NEW WINESKINS FOR NEW WINE: APPELLATE JUDGES SHOULD NOT BE ALLOWED TO REPLACE THE *SAIBAN-IN*'S FACTUAL FINDINGS ON APPEAL

Patching old wineskins is a short-term fix for a long-term problem. Encouraging judges to give heightened deference to *saiban-in* factual findings, or enforcing a heightened standard of review, is well intentioned but insufficient to guarantee judicial regard for lay participants' input in the long term. Deference is prone to deterioration, and higher standards can be avoided. To ensure that lay assessors' decisions have the intended effect on the cases they decide, and to ensure that the *saiban-in seido* makes an enduring contribution to the criminal justice system in the long run, the Supreme Court of Japan should prohibit appellate courts from replacing facts on *koso* appeal.

It should be noted that the decision to maintain *koso* appeals was made deliberately. Even while stating “the relevant laws should be modified to . . . ensure autonomous and meaningful participation by *saiban-in*,”²⁰⁵ the JSRC ultimately failed to recommend banning *koso* appeals.²⁰⁶ The Lay Assessor/Penal Matters Study Investigation Committee also considered, but ultimately rejected, a number of options, including: completely barring factual review on appeal; allowing factual review on appeal but requiring an annulment of the judgment (and likely a retrial); and incorporating lay participation on appeal.²⁰⁷ It is possible that the JSRC and Investigation Committee maintained the *koso* appeal because reviewability of factual findings on appeal is common to civil law systems, or because German criminal procedure specifically allows parties to do so. In Germany, however, reversals on factual grounds must be tried before a new panel so

²⁰⁴ Yowell, *supra* note 200, at 1759 (“Summary judgment is an important vehicle for promoting the efficiency of the federal court system.”).

²⁰⁵ See JUSTICE SYS. REFORM COUNCIL, *supra* note 59.

²⁰⁶ *Id.*

²⁰⁷ Anderson & Nolan; *supra* note 54, at 957.

that the inviolability of the public's influence is preserved.²⁰⁸ It may also be possible that the JSRC, and especially the Investigation Committee, maintained *koso* appeals because banning them would be asking too much of the judiciary. Additionally, the JSRC may have felt that incorporating lay participation on the trial level is a decision properly made by way of political processes, and that changes to appellate review and procedure so deep beneath the surface of the justice system would upset the independence of the judiciary.

The Supreme Court of Japan is in an ideal position to prohibit judicial replacement of *saiban-in* factual findings on appeal because of its legitimacy and power as the highest court in the land. Barring appellate courts from replacing facts on *koso* appeal would not require the creation of any new appellate process because it would not require the promulgation of any new laws. Appellate courts would still be able to find error in *saiban-in* fact finding, but, when such error were to be found, the court would no longer be able to independently replace facts. Instead, the *koso* court would have to either find the error harmless or remand the case. Although this change would ultimately require more judicial expenditure in the form of time and cost for the cases that were remanded, no changes in the current infrastructure would be necessary to effectuate the change. Furthermore, knowledge that a finding of error on the *saiban-in* level would require a new trial would inhibit many judges from otherwise finding an error—thereby subconsciously raising the standard for finding factual error.

For *saiban-in* trials, the Supreme Court of Japan should discontinue the practice whereby appellate judges replace *saiban-in* found facts on *koso* appeal. Doing so is essential to ensuring that laypersons' input on particular cases is safeguarded and that meaningful exchange between the public and the judiciary continues to occur into the future when the novelty and fanfare surrounding the new system wear off. In order to effectuate the goals of the millennium justice reforms and to allow lay participants to "take part autonomously and meaningfully in deciding trials,"²⁰⁹ the Supreme Court of Japan should prohibit courts of appeal from replacing facts found by *saiban-in* panels during trial.

²⁰⁸ See Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 Ala. L. Rev. 441, 460 (1997); see also *supra* note 70 at 213.

²⁰⁹ *Supra* note 59, at 213.