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Lay Judge System

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Over a year has passed since the lay judge system, the most significant reform of criminal proceedings in Japan since the end of the occupation era, came into force on May 21, 2009. More than 3,000 ordinary citizens served as judges in criminal trials during the first year of the new system (*Nihon Keizai Shimbun* May 21, 2010). What are the purposes of the lay judge system, why was it implemented at this point, and what changes will the new system bring about in Japanese society? Several experts address these questions in this issue of *SSJ*.

First, Sato Iwao provides us with an overview of the lay judge system, setting out the context of the introduction of the new system and its aims. Shinomiya Satoru then analyses the significance of the lay judge system and how it operates from his practical point of view based on his experience as a practising attorney and a former member of the Lay Judge System and Criminal Justice Task Force of the Governmental Head Office on Justice System Reform. Referring to Tocqueville, Uno Shigeki evaluates the relationship between the lay judge system and democracy in political and historical contexts. Kawai Mikio discusses how the criminal justice system will change due to the participation of lay judges. Finally, by presenting the history and the consequences of the *Jury Act* back in the Taishō period, Dimitri Vanoverbeke adds great insights to our understanding of past and present citizen involvement in the Japanese legal system.

In the "Research Report" section, Kudo Akira, emeritus professor of economics at the University of Tokyo and a former member of the faculty of the Institute of Social Science, discusses his interests in, and research on, the history of Japanese-German/Euro-Asian relations. Owan Hideo, who joined the Institute of Social Science in September 2009, presents his recent research on invention remuneration policies in Japanese companies and the debate over judicial oversight of those policies.

In addition to the above mentioned essays and presentation abstracts of the ISS Contemporary Japan Group (CJG), we present the updated webpage of the CJG, as well as more than twenty recently published books written by members of our research staff at the ISS.

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Emergence of Citizen Participation in Trials in Japan: Background and Issues

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1. Japan's Other Regime Change in 2009

Nearly one year has passed since the lay judge system (*saiban-in seido*) went into effect on May 21, 2009. The lay judge system is a system in which six lay judges (*saiban-in*) chosen from among the general public form a collegial body with three professional judges to determine guilt or innocence, apply laws and review sentences in serious criminal cases. The first trial in which lay judges participated began on August 3, 2009 in the Tokyo District Court, and a verdict was handed down on August 6. In the twelve months leading up to May 20, 2010, decisions for 530 defendants were handed down in trials with lay judge participants in courtrooms throughout the nation.

This is the first time that Japan has adopted a system of citizen participation in trials (i.e., direct popular participation in criminal proceedings) since the end of World War II. As John Stuart Mill, Alexis de Tocqueville and many later advocates

have since pointed out, citizen participation in trials is not only an important component of the justice system, it holds a great deal of significance for the nature of a country's political systems and political culture. The regime change in the summer of 2009, which was featured in the last issue of the *SSJ* (issue 42), was a highly visible and major reform in Japanese politics. The adoption of the lay judge system, which also occurred in 2009, may not have been as attention-getting as the change in government, but over the long-term, it possesses the latent potential to have a profound and wide-ranging impact on Japanese society and politics. In short, it is Japan's other regime change. This issue focuses on the lay judge system following on the heels of last issue's regime change feature because we decided to zero in on this latent potential.

In addition to introducing this issue's special feature in this article, I will briefly describe the course of events leading up to the current lay judge system as well as what was chosen (and what was left out) in designing this system. I will also mention several points that I think are important for the future development of the lay judge system.

2. Course of Events Leading to the Adoption of the Lay Judge System and Its Features

For a time before World War II (1928 - 1943), Japan had a jury system that was used for some criminal trials (for more on this, see the article by Vanoverbeke in this issue); however, this system was suspended due to the war, after which a system of direct popular participation in criminal proceedings ceased to exist. Immediately after the end of World War II, there was a debate about reinstating the jury system as part of Japan's democratic reforms, but this never came to fruition. After that, lawyers' groups, citizens' groups and some academics continued to issue policy proposals and campaign for the reinstatement of the jury system, but none of these actions

held enough sway to bring the system back. Until the late 1990s, most people never thought a jury system or equivalent system of citizen participation could become a reality in the near future. However, the situation changed drastically in a few short years.

The discussions held by the Justice System Reform Council (JSRC), which was established by the Keizo Obuchi administration in June 1999, contributed directly to the eventual adoption of the lay judge system (see Sato 2002 for more on the political and social context of the establishment of the JSRC). The mission of the JSRC was to clarify the role that the judicial system should play in Japanese society in the 21st century and propose the fundamental policies required for judicial reform. The JSRC debated a wide-range of judicial reform issues including increasing the number of lawyers, establishing a professional law school system, accelerating civil and criminal trials and reforming the administrative litigation system, but one of their central issues was realizing citizen participation in trials.

On June 12, 2001 the JSRC presented its final report entitled *Shihō Seido Kaikaku Shingikai Iken-sho: 21-seiki no Nihon o Sasaeru Shihō Seido* (Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21st Century) (JSRC 2001) to then-prime minister Junichiro Koizumi. The report proposed: "A new system should be introduced in criminal proceedings, enabling the broad general public to cooperate with judges by sharing responsibilities, and to participate autonomously and meaningfully in deciding trials." After that the government (more specifically, the Lay Judge System and Criminal Proceedings Review Board of the Justice System Reform Promotion Headquarters) began working out the details of the JSRC's proposal, the results of which were summarized in the bill that was submitted to the Diet in March 2004 and signed into law as the *Lay Judge Act* (officially, the *Act Concerning Participation of Lay Judges in Criminal Trials*) on May 21. The act went into effect on May 21, 2009 after a five-year preparatory period.

In the series of discussions held between the establishment of the JSRC and the enactment of the *Lay Judge Act*, a wide array of issues was cov-

ered. Participants asked whether Japan should implement a system of direct citizen participation in criminal trials and, if so, whether an American-style jury system or a continental European-style citizen-participation system was more appropriate. The lay judge system that eventually resulted from these discussions was based on a citizen-participation system in which lay judges work in concert with professional judges to determine innocence or guilt as well as to apply laws and determine sentencing. However, the system ended up adopting an aspect of a jury system with respect to the random selection of lay judges from among the people for each trial.

In the course of discussions, some members emphasized a ratio of one professional judge (or two at most) to nine or eleven lay judges in an effort to strengthen the jury-like aspect of the system, while other members argued for panels with three professional and two lay judges to keep the system as close as possible to conventional criminal trials (which are overseen, as a rule, by three judges). In the end, the current system of three professional and six lay judges was agreed upon. Verdicts issued in trials are conditional majority verdicts, meaning that a majority of the collegial body must reach a verdict and at least one professional judge must agree with that verdict. In other words, even if all six lay judges agree that a defendant is guilty, or not guilty, a verdict cannot be reached if all three professional judges reach the opposite conclusion.

Cases subject to lay judge trials are those involving: (1) crimes warranting the death penalty or life imprisonment, and (2) cases in which victims were killed by intentional criminal acts. Lay judges were only given purview over such serious cases because citizens are thought to have a great deal of interest in such cases and there is a limit to the number of trials that can be handled with lay judge participation. Defendants do not have the right to choose whether they will be tried in a lay judge trial or in a trial overseen only by professional judges, so in effect, lay judge trials are held for all eligible cases.

Some felt that the extent of confidentiality obligations borne by lay judges should be limited to the absolute minimum after the conclusion of trials,

but the "confidentiality of deliberations" clause deemed that the course of deliberations, opinions of all judges, and the vote tally all required confidentiality indefinitely after the conclusion of trials. Initially, prison terms or fines were proposed for violations of confidentiality obligations, but this was criticized as excessive for a system of citizen participation so punishment was limited to fines.

3. The Purpose of the Lay Judge System: Ensuring Democracy or Promoting the People's Understanding of and Confidence in the Justice System?

The lay judge system was enacted after years of deliberations, but a crucial difference has appeared between why this system was implemented and past discussions that called for citizen participation in the justice system.

In the past, advocates of citizen participation in the justice system, especially through the adoption of a jury system, sought to more fully realize democracy or popular sovereignty. In other words, their aim was the political and educational effects of promoting judicial legitimacy—bolstering democratic legitimacy, ensuring fair trials (and preventing mistrials), and deepening the people's awareness of their status as sovereign members of the nation through their direct participation in the administration of justice, an important venue for exercising state power. This idea was partially incorporated into the JSRC's 2001 opinion brief, but it has gradually been left in the background in subsequent discussions.

Article 1 of the *Lay Judge Act* sets forth the purpose of the system as follows:

Through the participation in criminal proceedings of lay judges—who have been selected from among the people—with [professional] judges, this legislation seeks to contribute to the promotion of the people's understanding of the judicial system and thereby raise their confidence in it.

This rationale shares common ground with traditional argument in that it aims to bolster the legitimacy of the courts (i.e., establish a popular foundation) through the participation of the people in

trials. However, the ideological grounds for this do not lie in the people's intrinsic right to participate in trials as sovereign members of the nation. Rather, the unique feature of the lay judge system is that participation in trials is expected to have instrumental value for contributing to "the promotion of the people's understanding of the judicial system and...their confidence in it."

This difference does not stop at the ideological level; it also has several consequences for the details of the system's design. If a country adheres to the argument for citizen participation in the justice system based on democracy or popular sovereignty, then a jury is a more appropriate choice than a citizen-judge system. If a country chooses to use a citizen-participation system, then the number of citizens participating in trials should be as high as possible in order to reflect the diverse composition of the people in the makeup of the collegial body (For example, nine or eleven lay judges for one or two professional judges). However, during the discussion on the details of Japan's system, it was assumed that the system to be adopted would not directly correlate with the basic principle of popular sovereignty, hence its grounding in a citizen-participation system instead of a jury system. Likewise, the choice was made to include three professional and six lay judges (for a judge-lay judge ratio of 1:2) in the collegial body.

The public discussion on the lay judge system in Japan differed drastically from the conventional argument for citizen participation in the justice system in one more aspect: the recognition of the current state of criminal trials. In the conventional argument for citizen participation in the justice system, myriad problems exist with criminal trials in Japan, and particularly with upholding the defendant's right to an adequate defense (and the prevention of mistrials thereby). Proponents stressed the need for a system of citizen participation in criminal trial to remedy this situation. Meanwhile, the leading proponents of introducing lay judges took the position that there were no major problems with the current criminal justice system and that it was sufficiently supported by the people, but that the adoption of a citizen participation system would further increase the people's confidence in criminal proceedings (as

per the statement by Minister of Justice Nozawa in the March 16, 2004 plenary session of the Lower House). This difference in perception about the present state of affairs resulted in the design of a lay judge system that was fundamentally more accommodating to existing criminal proceedings and led to a judge-lay judge ratio that was comparatively similar to that of current trials.

In fact, some of the criminal law experts and criminal defense lawyers who actively campaigned for citizen participation in the justice system in the past expressed deep reservations about the lay judge system which was enacted in the Diet. That these proponents of citizen participation in the justice system expressed distrust in the lay judge system may seem strange at first, but from their point of view, the rationale for the system and its design had drifted too far from reforming criminal justice in Japan to increasing people's acceptance of the actions of prosecutors and courts.

4. Conclusion: Regime Change as a Process

As I have outlined above, the lay judge system has not been solely designed as a system of popular participation or popular sovereignty. Nonetheless, the lay judge system is significant as the first foray into citizen participation since the former jury system was discontinued in 1943. Going forward it will be important to firmly establish the system as part of Japanese society through its continued implementation and to develop it as a system in which citizens proactively participate as sovereign members of the nation. While it goes without saying, the key to achieving this will be the way in which participating citizens come to understand the meaning of the system. In the various polls conducted before the lay judge system was adopted, people were not entirely positive about serving as lay judges (for example, in a poll conducted by the *Asahi Shimbun* on January 9, 2009, 76% of respondents said they did not want to participate "at all" or "if they could help it"). As this shows, there have been doubts about whether or not this system can succeed as a way to expand popular participation. However, in the year since the lay judge system went into effect, it appears that most of the lay judges have taken their role

seriously and feel positively about their experience (for more on this, see the article by Shinomiya in this issue). Given this, the prospects that the lay judge system will evolve into a system of self-motivated citizen participation are good.

In light of this, I would like to conclude this essay by mentioning two points that I think are essential for the future development of the lay judge system. The first point is the need for improvements in the criminal justice system on which the lay judge system is based. As many proponents have noted, systems for citizen participation in the justice system are political institutions, and popular participation in trials is an opportunity to deepen the people's understanding of democracy. However, at the same time, it must be confirmed again that the essential purpose of lay judges is, above all else, the actualization of fair criminal proceedings. The current Japanese criminal justice system has many shortcomings, and improving on these is an absolute prerequisite for the conduct of fair trials with lay judges.

The biggest issue is that nothing has been done to address the long interrogations of suspects behind closed doors, without legal representation. The fact is that the confessions obtained from these interrogations are definitively crucial in the courts. There have been some recent newspaper reports of suspects being forced to issue false confessions after undergoing illegal interrogations, so it is important to take measures to ensure the full transparency of the interrogation process, such as making audio and video recordings, so that lay judges can assess the authenticity of confessions. Another major issue is the discovery of evidence held by the prosecutors. The scope of evidence subject to discovery was expanded in line with the adoption of the lay judge system, but it still cannot be considered sufficient. In order to effectively protect the defendant's rights in lay judge trials in which intensive deliberations are conducted in a short period of time, it is absolutely necessary for prosecutors to disclose all evidence in their possession in advance (at the very least, a list of all evidence in the prosecutor's possession needs to be released). It is thought that the merit of the lay judge system—that is, people participating in trials, scrutinizing evidence with their

own eyes and issuing a verdict of guilty or innocent based on common sense—will only be fully realized once these overarching problems in the criminal justice system are remedied.

Secondly, it is important to promote the continuous improvement of the lay judge system and how it operates rather than treat its current rules as final and conclusive. For instance, the confidentiality obligations borne by lay judges under the current system are too stringent. Lay judges must not breach the privacy of the plaintiffs and defendants they encounter in trials, and it is natural to place some restrictions on divulging court proceedings. However, for regular citizens to be selected as lay judges and exercise adjudicative power is a significant and serious experience. I think the system could be a little more open to allowing lay judges, once a certain amount of time has passed after a trial concludes, to engage in serious public discussions about their experiences, sharing with the rest of society their deep insights into a system in which people pass judgment on other people. There are also several questions concerning the nature of the lay judge system that society must discuss and answer, for example, should defendants be given the right—which they currently do not possess—to choose whether or not lay judges will participate in their trials? Should the requirements for issuing verdicts be weighted to favor the presumption of innocence? What kinds of cases should be eligible for lay judge trials—should they be limited to denial defense cases? Should sex crimes be excluded?

Under the *Lay Judge Act*, a review of the lay judge system was slated for 2012, three years after the act's implementation, and the system may be amended as needed. Going forward it will be necessary to ascertain how well the lay judge system is operating and to engage in a continuing debate on improving the system. More discussion will also be needed on the meaning of the citizen participation in the justice system. The significance of this so-called regime change of realizing popular participation in the justice system does not lie with the one-off occurrence that was the system's adoption, but in the continuous process of people participating in trials as sovereign members of the nation and striving to ensure trials' fairness, reviewing the system and its operation, and reexamining the meanings thereof.

Further Reading

Justice System Reform Council. 2001. *Shihō seido kaikaku shingikai iken-sho: 21-seiki no Nihon o sasaeru shihō seido* (Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21st Century). Retrieved June 23, 2010 (English version: http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612_e.html).

Sato, Iwao. 2002. "Judicial Reform in Japan in the 1990s: Increase of the Legal Profession, Reinforcement of Judicial Functions, and Expansion of the Rule of Law." *Social Science Japan Journal* 5(1): 71-83.

Defying Experts' Predictions, Identifying Themselves as Sovereign: Citizens' Responses to Their Service as Lay Judges in Japan

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Introduction

A new trial system known as *saiban-in seido*—a mixed tribunal consisting of three professional judges and six lay people—started in Japan in May 2009. *Saiban-in* [lay judges] are picked randomly from voter rolls and have the power to find facts and decide sentences along with professional judges. As of the end of May 2010, 1898 individuals had been indicted for lay judge trials (Supreme Court in Japan [SCJ] 2010a: table 1-1); 601 defendants had been tried before lay judges and sentenced by them (*ibid.*: table 2-1). In all, 3369 citizens had served as lay judges, and 1298 had served as alternates in 554 cases (*ibid.*: table 7).

It is too early to analyze the general public's attitudes toward lay judge trials because the numbers are still small. However, surveys of lay judges do suggest some things about the future of this new system of citizen participation in Japanese criminal justice.

The Legal Professions' Predictions

Before implementation of the new system, some legal professionals who opposed it made dire predictions regarding lay judges' competence. A former high court judge, Okubo Taro, prognosticated that: (1) lay judges would be so nervous and trial procedures would be so hard to understand and boring that the citizens would regret having come to the court; and (2) people willing to serve despite this complexity and tedium are likely to be an odd lot comprised of individuals seeking novelty or financial gain, government employees who are dependent on government, and rigid ideologues, to wit, hardly the type of people you would turn to for a well-considered and objective inquiry (Okubo 2005: 5-6).

Law professor Nishino Kiichi, also a former judge, argued that the lay judge system is unreasonable because we cannot expect people to read documents and find facts (Nishino 2007: 160), it is not their wish to be forced into a strange world (161), since they are lay people, as well as jurors in courtrooms abroad, they would fall asleep during proceedings (162), and there may be lay judges who, despite having slept during a trial, would deny having done so and insist they fully grasped the issues at hand, exasperating the professional judges and the other lay judges (175). In these ways (and more), some legal professionals expressed great skepticism about the average person's capacity to serve as a lay judge.

* The author would like to thank Professor David T. Johnson at University of Hawaii for much useful advice on the subject of this paper. The author's warm thanks also go to Dr. Margaret Gibbons and Dr. Kuniko Ishiguro for their editing and correction of English.

People's Responses Before Implementation

So what has been the public's reactions to the lay judge system? According to a May 2008 survey conducted by the Supreme Court (multiple choices), less than 20 percent of citizens said they were willing to serve as a lay judge ("want to serve," 4.4 percent, "willing to serve," 11.1 percent). On the other hand, more than 80 percent said they were reluctant or opposed to participating. 44.8 percent said they "would serve only if obligated to do so," and 37.6 percent were "unwilling to participate regardless of any obligation." The reasons for people's reluctance were: "the responsibility to decide another's fate is too great" (75 percent); "lay people cannot try a case without legal knowledge" (64 percent); and "lay people cannot deliberate as equals with experienced and professional judges" (55 percent) (SCJ 2010c: 16; 22).

People's Responses After Implementation

1. Attendance Rate

By the end of May 2010, 601 defendants had been tried before lay judges. The total number of prospective lay judges for those cases was 52,206. Of those, 27,141 (51.9 percent) were excused from service for cause by the courts. This high rate of excusals suggests that courts were indulgent in their acceptance of excuses during the first stage of the new system. The attendance rate of prospective lay judges who were not excused was 82.6 percent (SCJ 2010a: table 4, 5).

Under the old jury system that Japan had between 1928 and 1943, 36 prospective jurors were to be summoned to select 12 jurors in each case.¹ Of the first 114 cases, the average attendance rate was 91 percent (Saikō Saibansho Jimu Sōkyoku Keiji Kyoku 1995: 274). It appears that people were and are taking their duties seriously.

By the end of May 2010, 3369 people had served as lay judges and 1298 as alternates in 554 lay judge trials. Japan conducted 484 jury trials under the old jury system in its fifteen years of opera-

tion, a number exceeded in the first ten months of the new system.

2. Change of Attitude Toward Service

According to the questionnaire surveys conducted by each district court from January 2010 through May 2010 (hereinafter, the "court surveys"), 1889 citizens who served as lay judges in 342 cases answered as follows. Before being summoned, 52.9 percent were reluctant to serve (19.5 percent did not want to serve, and 33.4 percent would rather not). But after serving, 96.1 percent were happy with their experience (55.9 percent had a very good experience, 40.2 percent had a good experience) (SCJ 2010b: Chōsa Kekka Daijeto (2), p.7).

This reminds us of similar responses by people involved with another aspect of the justice system. A 2005-2007 survey of 290 people who had served as a member of Kensatsu Shinsa-kai (Committees for the Inquest of Prosecutions)—a system in which eleven lay people are picked randomly from voter rolls (serving a term of six months) to make inquiries as to whether prosecutors had dropped a case appropriately—had the following results. Before being summoned, 66.9 percent said they were reluctant to serve (51.7 percent "reluctant," 15.2 percent "annoyed"), while after service 95.9 percent were happy with their experience (50 percent "very good," 45.9 percent "good").²

Thus, the two surveys show a remarkable change of citizens' attitude "before and after." One key to understanding their attitude changes can be found in the voices of lay judges after their service.

Real Voices of Lay Judges

1. The Trial Experience

At the end of May of 2010, the average number of court sessions held per trial was 3.5 (SCJ, 2010a: table 10). According to the court surveys, 68.6 percent of lay judges said the trial was understandable, 25.3 percent normal and 5.2 percent found it hard to understand (SCJ 2010b: Chōsa

¹ Baishin Hō [Jury Act 1923], Art. 27.1.

² *Kensatsu Shinsain, Hojūin Keikensha no Anketo Kekka* [Questionnaire Survey to CIP Members and Alternates], Tokyo Daiichi-Dairoku Kensatsu Shinsakai Jimukyoku and Tachikawa Kensatsu Shinsakai Jimukyoku, *Kensatsu Shinsakai? Nandaro* : 10. The survey had been conducted by Tokyo No.1CIP, Tokyo No.2 CIP, and Hachioji CIP.

Kekka Daijesuto (1), p.6). At post-trial press conferences, most lay judges said that legal professionals were trying to make trial procedures understandable, though some said that it took too much effort to make the proceedings comprehensible.³ Lay judges also reported that the legal professionals did not use legal technical terms,⁴ and respected the lay judges.⁵

It seems the legal professions' efforts to make their courtroom performance more comprehensible have been working. But lay judges' assessments of the understandability of each professions' performance differ across professions with judges receiving the highest marks at 89.5 percent, prosecutors following at 77.2 percent, and defense attorneys a distant third at 47.0 percent (SCJ 2010b: Chōsa Kekka Daijesuto (1), p.6). I will discuss this in more detail below.

2. Deliberations

For the cases concluded by the end of May 2010, the average length of deliberations is just over seven hours (439.3 minutes) (SCJ 2010a: table 12). In regards to the atmosphere of the joint deliberations of lay and professional judges, according to the court surveys, 77.6 percent said they felt it was easy to speak, 1.3 percent found it hard to speak and 20.8 percent fell between the two (SCJ 2010b: Chōsa Kekka Daijesuto (2), p.7). 70.9 percent of respondents said they could discuss the issues thoroughly, 7.7 percent could not fully discuss matters, and 20.5 percent could not say (ibid.). Also at the media conference, most lay judges said that teamwork was good and deliberations went smoothly,⁶ that members of the mixed panels were able to express their own opinions freely,⁷ and that they expected only a few opinions to be expressed, but in fact, the atmosphere was open and harmonious enough to enable the exchange of opinions.⁸ But some lay judges said it

seemed like the trial and deliberation schedule was predetermined and too tight,⁹ and one lay judge said he felt as if there were a pre-decided "rail" that could not be deviated from.¹⁰

How is the System Working?

It is probably too early to analyze the new lay judge system. But the record of the first eight months does show changes in two spheres—the trial system and the political system.

1. As a Trial System

The lay judge system has been changing criminal trials dramatically. Before the invitation of lay people into courtroom, criminal trials were:

- hard to understand because prosecutor and judges used many dossiers, and prosecutors did not read them aloud in the courtroom but judges read to themselves in their chambers.
- lacked transparency because prosecutors had no obligation to disclose evidence in their hands other than they wanted to submit to the court.
- time consuming because trial sessions for a given case were held only once a month or every other month.

Inviting lay people to act as judges is changing trial procedures materially so that they can discharge their duties meaningfully and thoroughly.

(a) Pre-trial procedures

Lay judge cases should go through a pre-trial procedure which was created especially for lay judge trials.¹¹ In the new pre-trial procedure, prosecutors are obliged to disclose evidence that falls within certain criteria, adding to the evidence they want to submit to the court.¹² Also, the court and parties agree to a trial schedule before the start of court sessions.¹³

(b) Oral presentations and examinations

Although no article of the Code of Criminal Procedure on evidence was changed by implementa-

³ Sankei Shimbun, 2009.8.12 (Saitama Case).

⁴ Yomiuri Shimbun, 2009.10.3 (Koriyama Case).

⁵ Ise Shimbun, 2009.9.17 (Tsu Case).

⁶ Yomiuri Shimbun, 2009.12.21 (Osaka Case).

⁷ Yomiuri Shimbun, 2009.10.2 (Yokohama Case).

⁸ Yomiuri Shimbun, 2009.9.17 (Wakayama Case).

⁹ Sankei Shimbun, 2009.9.9 (Kobe Case).

¹⁰ Asahi Shimbun, 2009.10.30 (Hamamatsu Case).

¹¹ Saiban-in no Sanka Suru Keiji Saiban ni Kansuru Hōritsu [Lay Judge Act, LJA], Art. 49.

¹² Keiji Soshō Hō[Code of Criminal Procedure, CCP], Art. 316-2 through 316-32.

¹³ CCP, Art. 316-24.

tion of the lay judge system, courts and parties have made a big shift in courtroom evidence from dossiers to witnesses.¹⁴

(c) Continuous sessions

If a trial session could not finish in a day, the following sessions are to be conducted on successive days.¹⁵

As these examples indicate, criminal trials have been changed as a result of the participation of lay judges, becoming more transparent, fair, and swift.

2. As a Political System

No one doubts that Japan is a democratic country. But since Japanese politics has few systems in which the electorate can exercise its sovereignty, most Japanese think that democracy is just voting in elections. However, the critical stage of democracy is not only to reach a conclusion by voting but to have deliberations by the people before votes are cast.

Many lay judges describe their experience as a good chance to think about their society. One lay judge said that "Since our mission is heavy, we should discharge it seriously. It is a good chance to think about our society as a whole" (SCJ 2010b: 140). Another lay judge said, "I was reluctant but changed my mind. Since our society is made of individuals, each of us should speak up to change our society. If each of us thinks of what we can do for our society, it will develop."¹⁶

What are the Challenges?

1. Imbalance of Power between Parties

As I showed above, the understandability of the legal professions' performances in the courtroom differs across professions with 77.2 percent find-

ing prosecutors understandable but only 47.0 percent feeling that way about defense attorneys. The gap between these parties' ratings might depend, in general, on whether they have an organization which can easily and effectively run training programs. Also, in particular, the fundamental power gap between prosecutor and defense is a product of the uneven distribution of human resources, financial resources, and ability to access forensic science.¹⁷

2. Privacy of Victims

Some sex crimes are eligible for lay judge trial.¹⁸ Victims and their supporters argue that it is an extra burden for sex crime victims to be known to prospective lay judges. However, as of this writing, courts have yet to reject trial by lay judge for these crimes and they have been trying to avoid revealing names and addresses of victims to prospective lay judges. Prosecutors, after disclosure of prospective lay judges' names list,¹⁹ ask the victim to see if there are any familiar names on the list. If so, the prosecutor will remove those prospective lay judges by peremptory challenges.²⁰ In addition, in the courtroom, the court keeps the victim's name and address from being reading aloud and permits victims to testify from a room outside of the courtroom using a video link.²¹

Despite these efforts by the court, some critics maintain that sexual assault cases should not be eligible for lay judge trials. Do the lay judges who participated in such cases agree? While one lay judge said, "If a victim doesn't want to be tried before lay judges, we would be better off respecting her request,"²² another lay judge said, "As people who hear victims' stories, we have a duty to ask the government to establish some kind of institute to support them."²³ Trying sexual assault cases before lay judges seems to have begun a

¹⁴ The reason why the shift did not need to change CCP on evidence is CCP originally expected trial session should be conducted orally, i.e. introduction of hearsay rules, but legal professions preferred dossiers to witnesses, using hearsay exemptions.

¹⁵ CCP, Art. 281-6.

¹⁶ Sankei Shimbun, 2009.8.6

¹⁷ Police has its own institutions, i.e. Kagaku Keisatsu Kenkyūjo[National Research Institute of Police Science] for National Police Agency, and Kagaku Sōsa Kenkyūjo[Prefectural Institute for Forensic Science] for each prefectural police. And prosecutor's office easily be able to access these institute, but defense are not.

¹⁸ Rape/sexual assault resulted in injury (Penal Code (PC) Art.181, 176, 177) and rape by robber (PC. Art. 241).

¹⁹ Court give both party a list of names of prospective lay judges two days advance to the first court session (LJA. Art.31.1).

²⁰ Each party has right to peremptory challenge up to four (LJA. Art. 36.1).

²¹ CCP. Art. 157-4, 290-2.

²² Jiji Press 2009.12.18 (Kobe case).

greater sharing of the problems of these crimes with society.

3. Capital Case

Japan is retaining capital punishment,²⁴ and capital cases are eligible for lay judge trial.²⁵ By the end of July 2010, prosecutors had not recommended the death penalty in any lay judge trial case, and so lay judges were never faced with making a life or death decision. After the start of the lay judge system in 2009, some critics said that capital cases should be taken off the list of crimes eligible to be tried by lay judges. They argue that it is too stressful to require lay people to decide death penalty cases.²⁶

But we should think about this very carefully. The purpose of the new system is not only to imbue criminal trials with the common sense of society, but to check the exercise of governmental power in serious cases, especially in potential capital cases, in which the government may try to deprive a member of our community of his or her life. People bear a heavy responsibility to check the exercise of that power, to make sure it is fair, just, and accurate. What we should do is, I think, not to put blinders on people again but to urge government to disclose information on the death penalty so that lay judges, when they must consider capital punishment, in reality for the first time, can discuss it meaningfully. I also expect that greater disclosure of death penalty will spur more debate on capital punishment as people recognize that the system is theirs to reshape.

4. Obligation of Secrecy

Lay judges bear a duty of secrecy, especially concerning their deliberations. *Lay Judge Act* (LJA) Art. 70 stipulates the obligation not to violate the

“secrecy of deliberations.” It defines “secrecy of deliberations” as the “process of deliberations, individual opinions, and distribution of the vote.”²⁷ Most lay judges show they understand this obligation after their service. On the other hand, they want to share their experience with their community. At least three lay judges attended a press conference in 105 of the first 116 trials (91 percent). Excluding alternates, 77 percent of the citizens who participated as regular lay judges in 2009 also participated in press conferences.²⁸ From January through March 2010, lay judges and alternates participated in post-trial media conferences in 217 cases out of 228 (95 percent) (Nihon Shinbun Kyokai 2010). And they spoke out frankly and freely about their experiences.

Lay judges feel frustrated by the vagueness of the definitions of “secrecy of deliberations” and “process of deliberations” which are so hazy that they cannot determine what the boundaries are. Another source of dissatisfaction is that court officials who participate in courthouse media conferences sometimes act to keep lay judges from making comments to the press without providing a clear justification for their interference.²⁹ Sharing the experiences of lay judges with society is the best course to embed the lay judge system into our society. We should observe the duty of confidentiality as it was originally intended: to protect the privacy of people involved, not reveal individual opinions of lay and professional judges, nor reveal the impeachments of verdicts or sentences.

Conclusion

As mentioned above, it is probably too early to

²³ Sankei Shimbun, 2009.9.4 (Aomori case).

²⁴ 18 crimes are eligible for death, e.g. rebellion (PC Art. 77.1), inducement of foreign aggression (PC Art. 81), arson of an occupied dwelling (PC Art. 108), murder (PC Art. 199), robbery resulting in death (PC Art.240), robbery and rape resulting in death (PC Art. 241), etc.

²⁵ LJA Art. 2.1.

²⁶ For example, Shoko Egawa, a well-known journalist, said on “Nichiyō Tōron” (Sunday Debate), an NHK TV program broadcasted on May 2, 2010, that “Lay people will be stressful if they sentence the defendant to death. Professional judges take their job voluntarily as it is. We should take capital cases away from the lay judge system.”

²⁷ And LJA. Art. 108 stipulate punishment when lay judge breach the obligation.

²⁸ Daily Yomiuri, 25 December 2009. David Johnson and Satoru Shinomiya, *Judging Japan's New Criminal Trials: Early Returns from 2009*, forthcoming.

²⁹ By the end of February 21, 2010, court officials stopped lay judge remarks in the media conference in 29 cases (Kyōdō Tsūshinsha Saiban-in Kentōkai, “Saiban-in Saiban to Jiken Hōdō” [Kyodo News, Committee on Lay Judge Trial, *Lay Judge Trial and Crime News Report by the Media*]). The interference might raise a constitutional argument.

analyze the attitudes of people in the new lay judge system. But with the information and help provided by the legal professionals, citizens do seem to understand what a lay judge is, what the justice system is, and what democracy is. These are not small achievements. And despite the legal restrictions on reporting about one's own experiences as a lay judge, personal accounts have been shared not only with those who served, but also with people in the community. One woman wrote a letter to a newspaper editor saying, "The press conferences of the lay judges conveyed a strong sense of responsibility to me. I was struck by their words that 'Our lives should be made by ourselves.' Whether we can make better politics and society depends on our attitudes, too."³⁰

As Alexis de Tocqueville wrote in his *Democracy in America*, the jury system and universal suffrage are two wheels of democracy (Tocqueville 1990: 283). Mitani Taichiro, a prominent political scientist, describes the introduction of the lay judge system as not only judicial reform but political reform (Mitani 2001: 25). Ohsawa Masachi, a sociologist, described the lay judge system as the "quiet revolution of 2009" compared to the "front-page revolution" of the change of government that same year (Shinomiya and Ohsawa 2010: 40). Indeed, the lay judge system has started to work not only as a judicial system but as a political one.

After a 60-year moratorium on lay participation in Japanese criminal justice, the lay judge system has thrown a stone into the pond of Japanese society, and the ripples are gradually, and deeply, spreading.

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³⁰ Yomiuri Shimbun, 2009. August 18.

The Lay Judge System as Viewed from a Political Context

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Assessing the Lay Judge System

Over a year has passed since the lay judge system was launched on May 21, 2009. The most prevalent assessment in the media is that the system, for the most part, started on the right note. According to a survey by the *Asahi Shimbun* (May 17, 2010), over 90 percent of citizens who have served as lay judges responded that they were glad to have had the experience of serving. That being said, as a Tocquevilleist, I cannot deny that I feel ambivalent about Japan adopting a lay judge system.

Having studied Alexis de Tocqueville as a researcher of the history of political thought, I know that he considered juries an essential part of democratic systems of government, and the fact that Japan has finally introduced a jury system—although in the form of the lay judge system—can be regarded as a major step forward. In his most important book, *Democracy in America*, Tocqueville (2004) stated:

To regard the jury simply as a judicial institution would be to take a notably narrow view, for if the jury has a great influence on the outcome of a trial, it has an even greater influence on the fate of society itself. Hence the jury is first and foremost a political institution and must always be judged as such (p. 313).

Here, one should focus on the fact that Tocqueville defines the jury as a “political institution.” Above all else, Tocqueville highly regarded the jury system within a political context.

Nevertheless, I am hesitant to fully support the adoption of the lay judge system because I am a Tocquevilleist. Tocqueville viewed the jury as a political institution that comprised one aspect of popular sovereignty. He posited that as the democratization of political systems progressed, regular citizens would be able to participate in the courts that were once monopolized by the political elite. In other words, citizens would win back partial sovereignty from elites. If so, then Japan’s lay judge system can hardly be considered as something won back by the citizens because, aside from a handful of legal professionals, no one strongly advocated for a jury system as the lay judge system was being put in place. After its inception, a noticeable number of people dismissed the system as a burden both financially and in terms of time. Typically, a jury system should be a right of the people. However, after the introduction of the lay judge system most Japanese citizens considered it a burden as evidenced by the volume of comments such as “I don’t know what I’ll do if I get chosen as lay judge,” and “I wonder what kind of reason I will need to get out of lay judge duty.” After one year I am still skeptical as to whether or not the number of people who think lay judge service is a right and not a duty has grown. Koya Matsuo, University of Tokyo emeritus professor and godfather of the lay judge system, said that “the participation of the people in the justice system is becoming part of the Japanese culture,” but it is still not certain whether or not one can go so

far as to say this.

Juries as Political Institutions—Tocqueville’s Insight

Let us now take a closer look at Tocqueville’s theory on juries. When thinking about Tocqueville’s arguments, one must focus on that fact that he made a distinction between juries for criminal and civil trials. Tocqueville considered the jury system an important step in realizing the sovereignty of the people mainly with regard to criminal trials. As a matter of fact, Tocqueville did not rule out the possibility of misjudgment by juries. This is because while juries in underdeveloped societies that are only charged with handling simple problems may judge them correctly, the juries in societies with highly complex interpersonal relationships do not always make the correct decision.

That being said, Tocqueville championed juries as political institutions:

The jury is above all a political institution. It should be regarded as a form of popular sovereignty. If popular sovereignty is repudiated, the jury should be discarded entirely; otherwise it should be seen in relation to other laws establishing popular sovereignty (p. 315).

Punishing criminals in criminal trials is an essential function of society which intertwines issues of power and legitimacy. Given this, for the people to partially regain this function they must wrest from the political elite the right to lead society. Tocqueville considered that the sovereignty of the people in the administration of justice was fully achieved when regular citizens in the United States were added to juries which had been first established as aristocratic institutions in Great Britain. Granted, his main focus was on juries in civil trials. According to Tocqueville, where the jury system could truly take root and transform the political culture of society was in civil trials. This is because civil trials are more immediately concerned with everyday life and when people are tried by their neighbors, one comes to realize that one day you, too, could become involved.

Approximately 4.5 million cases go to trial in Japan every year, of which 1 million are criminal trials. Looking at these numbers, civil trials com-

prise a vast majority of cases. The chances that a person may find himself involved in trial as a defendant, plaintiff, witness or other concerned party are much higher for civil trials than for criminal trials. In this sense, it is safe to say that civil trials are indeed more immediately concerned with our everyday lives. Tocqueville said that participation in civil trials made people rethink what people’s rights are, what the law means and what constitutes a responsible judgment. In that context, the biggest reason why Tocqueville held juries in high regard was the effect they had on “the practical intelligence and political good sense” of the people. If that is the case, then doubts still remain about the lay judge system given that its use is limited to serious cases such as murder and arson, while civil trials as well as many criminal trials—larceny cases, for example—are outside of its purview.

The Lay Judge System in Comparison to Other Systems

Interestingly, Japan’s newly adopted lay judge system differs from not only from the juries of England and the United States, but also from the citizen-participation systems in France, Germany, and Italy. Juries in England and the United States are systems in which regular citizens are selected at random for each case with the duty of determining whether the facts of the case, as presented to them by opposing counsel, are sufficient to prove that a crime has been committed by the defendant. It is the duty of the jurors alone to decide if a defendant is guilty or not guilty, and if a guilty verdict is levied, it is the duty of a professional judge to decide the sentence. Compared with this, the citizen-participation systems in continental Europe are comprised of representatives nominated in each region who serve as citizen judges for a certain period of time. Citizen judges engage in deliberations with professional judges to determine the facts of a case and issue sentences. Given this, Japan’s lay judge system is akin to taking the sum of these two types of systems and dividing by two. Japan’s system is similar to a jury system in that citizen participants are selected at random for each case, but the practice of lay judges conferring with professional judges to determine facts and levy sentences is identical to the citizen-participation system. This system in which randomly selected citizens are tasked with

both fact-finding and sentencing, in essence bearing the same responsibilities as professional judges, is unique to Japan, and there is no doubt that it imposes a very heavy burden.

However, the problem here lies within the context of how the system was conceived. Underlying the development of these systems are the fundamental ideas that each country possesses to justify their existence. One could say there is a serious problem with discussing these systems superficially without pondering the underlying ideas.

A common thread between the jury systems of England and the United States is a decentralist tradition. In countries with a strong tradition of regional self-government, there is resistance to having an outsider, i.e., the central government, resolve disputes in one's own community. Therefore, juries should consist of an unbiased sample, a microcosm of society.

Comparing this to continental Europe using the example of France, citizen judges do not participate in trials as epitomes of the populace. In France, with its long tradition of central authority, the national ideal is universalism, the principle that no one citizen in his core essence is different from the next. As such, citizen judges in France can be understood as embodiments of abstract popular sovereignty. The fact is that Jean-Jacques Rousseau's concept of "the general will" (*volonté générale*) has had a direct impact on citizen participation in French courtrooms.

One can also see differences in the concept of the courtroom trial. In brief, prosecutors and defense lawyers in England and the United States have essentially equal opportunities to present their cases, and the juries, as representatives of the people, decide which party has a more convincing argument. The potential problems of the Anglo-American systems result not from jurors establishing the truth in a trial, but with the fairness of the court proceedings and the reasonableness of the jury's decisions. In comparison, French citizen-judges are directly involved in discovering what are the facts of a case as they may question witnesses and request that additional evidence be presented. In France, where national sovereignty has traditionally been strong, the tradition of an

officially-controlled inquisitorial system in which the courts act to determine the facts is also robust. Therefore, after the French Revolution when the people took back power from the king, it was thought that they, as sovereign citizens, should naturally determine facts in trials.

Whether Japan's lay judge system will "become part of Japanese culture" depends on the extent to which a consensus can be reached given the people's understanding of the relationship between central and local governments and of the system itself, including the practicality of the system's design. In that sense, there are still many issues that need to be examined.

A History of Jury Systems in Japan

When thinking about systems, one must compare them to other systems in the world as well as to other systems within the historical context of one's own country. It is next to impossible to predict whether or not a given system will function well without careful consideration of the historical experience of the country in question. In regards to juries, Japan promulgated the first *Jury Act* in 1923 and inaugurated a jury system in 1928. The use of this jury system was suspended during the war in 1943 and to this day has never been reinstated (although the actual law is still on the books).

Incidentally, the history of the jury concept in Japan predates the *Jury Act* by several decades. From 1877–78, the Ministry of Justice was engaged in discussions with the legal advisor to the Japanese government, a Frenchman named Gustave Emile Boissonade de Fontarabie, who included provisions for a jury in his proposed reforms to Japan's penal code. In the end, this proposal was rejected by the Meiji government, but it is often said that Ito Hirobumi gave serious thought to adopting the jury system before drafting the Meiji constitution. At the same time, the Freedom and People's Rights social movement emphasized the establishment of a jury system as one of its goals. Underlying this, of course, was the fact that jury systems were well established in Western nations which Japan was trying to emulate. However, another crucial factor was the backlash against the Meiji government's execution of ringleaders of the samurai rebellions that

led to the Seinan War without a public trial.

The next attempt at establishing a jury system in Japan was during the 1910s and early 1920s in what is known as the Taishō Democracy period. This movement was spearheaded by Hara Takashi, the leader of the *Rikken Seiyūkai* (Friends of Constitutional Government), who eventually formed a cabinet as the first commoner prime minister. During his time at the Ministry of Justice School, Hara studied under Boissonade and adopted his cause of establishing a jury system, but Boissonade's influence was not all that motivated him. The prosecutor-centric Ministry of Justice which emerged toward the end of the Meiji era took the political parties to task over a bribery case known as the Nitto Incident. Furthermore, it apprehended Kotoku Shusui and other socialists and anarchists in what is called the High Treason Incident. Shocked by these events, Hara began to think about how best to control the bloated and politicized Ministry of Justice and incorporate it into the political party system, which was an important issue for the establishment of political parties in prewar Japan. Although Hara was assassinated, his intentions lived on, and a jury system was established not long after his death. What is important to remember here is that the jury system established in prewar Japan was done so in parallel with the development of party politics; it was primarily the product of a politician-led initiative and not the public's demands.

The Future of the Lay Judge System

Speaking of politician-led initiatives, the fact that the Democratic Party of Japan (DPJ) ousted the Liberal Democratic Party with a call for politician-led initiatives in 2009—the year when the lay judge system was enacted—may have been significant in its own right. That being said, the lay judge system itself originated in a proposal from the Justice System Reform Council which was established by the Obuchi Keizo cabinet, and the bill was signed into law during the Koizumi Junichiro administration. As for the DPJ, its former head, Ozawa Ichiro, once made a point of saying that if the DPJ gained control of the government, it would review the lay judge system. When viewed in this light, one must admit that it was entirely a coincidence that the implementa-

tion of the lay judge system corresponded with the DPJ's rise to power. It is also uncertain as to whether the DPJ's call for politician-led initiatives even included the concept of the lay judge system as a "political institution," that is to say, a system that was "one aspect of popular sovereignty."

Be that as it may, the lay judge system taken together with the expansion of the powers of the lay Committees for the Inquest of Prosecutions in 2009 certainly constitute structural reforms that have remarkably expanded the influence of citizens in the realms of politics and justice. Putting aside whether citizens wanted such systems or how aware they are of the systems' significance, citizens must now more than ever deal with problems that are not easily solved, pass judgment on others, and live with the outcomes of those decisions. In a book that I recently published entitled, *'Watashi' jidai no demokurashī* (Democracy and the "Me" Generation), I stressed that the role that democracy plays grows more important as the number of problems with no clear answers increases. When taken in that context, citizens are now faced with having to pass judgment on an increasing number of vexing problems that have no easy answers.

The issue lies with the extent to which people have discussed and understand the relationship between changing times such as these and structural reforms. As I have already pointed out, we still have not reached a point where we can decidedly state how well established the lay judge system has become in Japanese society. What is important here is not only the immense burden of becoming a lay judge and the justness of the judgments passed by lay judges, but also how well the system can be incorporated into Japanese society as its democracy progresses forward. A large number of questions remain with regard to the functioning of the lay judge system and further discussion of the meaning of citizen participation in trials is required. A great deal of effort is still needed to ensure that most people will someday believe that adopting this system was a good idea.

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The Impact of the Lay Judge System on Japanese Criminal Justice

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In May 2009 Japan established its lay judge system which has received a great deal of press attention since its planning phases for two main reasons. First, the fact that lay judges are chosen at random from among the general public means that justice is no longer somebody else's problem. Framed in terms of the macro-level impact on Japanese society, debates have focused on the pros and cons of adopting a lay judge system. The second reason is the major change in criminal justice procedures brought about by the new system. This change is expected to substantially affect not only trials but also investigations, interrogations, and probation. In this article, I will primarily discuss this second set of concerns.

However, this new system cannot be discussed without keeping in mind overarching trends in Japanese politics and society. The recent adoption of the lay judge system was not a solitary reform, but part of a set of reforms to the justice system. One major issue we must consider before we can begin to characterize the lay judge system is how

to evaluate the previous administration of Japan's criminal justice system. Starting with a broad perspective, I will outline the state of affairs before judicial reforms were enacted, and having placed the reform policy in historical context, predict what impact that the adoption of the lay judge system will have.

The History of Japan's Adoption of Western Law

Let us briefly look back on the history of criminal law in Japan. The Edo Era (1600–1868), in which the Shogunate unified Japan under a feudal ended after the forced opening of Japan's harbors by the West. With the start of the Meiji Era, Japan adopted a system of governance modeled on Western systems and established a National Diet and courts in an effort to establish a democratic nation governed by the rule of law. The civil code initially drafted was based primarily on a translation of France's Civil Code, but Japan later received its strongest influence from Germany. The Criminal Code, in particular, uses the German model.

The second wave of Western legal influence began during the U.S. Occupation after the end of World War II. The current constitution was promulgated and the emperor was stripped of his power and recast as a symbolic figurehead. On paper at least, Japan had become a genuinely democratic nation governed by the rule of law.

The Dual Structure of Japanese Society

With regard to industrialization, Japan underwent development and came to rival the West, but its systems of governance are not entirely Western. In Japan an official, modern nation-state coexists with a traditional social structure, and this has come to be called the dual structure of Japanese society. We must note that some old type activities are even illegal.

If we limit our focus to the justice system, it is

true that the judiciary is the preeminent official decision-making body, but the number of lawyers per capita is extremely low. Immediately after World War II there was not even one lawyer for every 10,000 persons. It was entirely normal for a regular citizen to have never seen a lawyer in person. Recently, there has been a strong call for judicial reform, and while the government is in midst of increasing the number of lawyers, there is still only one lawyer for every 4,000 persons. The scarcity of lawyers is proof that the justice system has not played a major role in making Japanese society function.

Judicial Reforms

In 1999 the Cabinet Office established the Justice System Reform Council which led to the current round of legal system reforms that, first and foremost, will increase the number of lawyers. These reforms, in essence, are an effort to generate change so that Japanese society becomes really based on legal system. When viewed in this light, these legal reforms can be seen as the third phase of the transformation of Japanese society into a nation-state governed by the rule of law. These reforms are generally regarded as a response to pressures arising from the globalization of the world economy.

The current round of judicial reforms was preceded by political and administrative reforms all of which can be regarded as pieces of one reform package. During the Hosokawa Morihiro administration, four political reform acts were passed in 1994 to limit the practice of Diet members acting as advocates for special interest groups, which had become customary during the period of uninterrupted one-party rule. Former prime minister Hashimoto Ryutaro subsequently established the Administrative Reform Council, enacted the *Basic Law on Reforming Government Ministries*, implemented administrative reforms and strengthened cabinet functions. His aim was to inject political leadership into operations which had been controlled by high-level bureaucrats and to streamline the bloated government organization.

These political and administrative reforms were extremely ambitious efforts, but they did little to remedy Japan's dual structure. In this sense, the

judicial reforms are an attempt at deeper reform. Given this, some anticipate that the lay judge system could be a policy that overcomes what has been called the "non-maturity" of Japanese democracy, while others take the opposing view that the system cannot function due to Japanese traditions. In short, the adoption of the lay judge system can be seen as an attempt to resolve Japan's dual structure.

History of Criminal Justice

Keeping in mind the main trends I outlined above, I would now like to turn to the criminal justice system. Above all, the unique feature of the Japanese criminal justice system is said to be the care with which it operates, or what is referred to as "legal precision." This practice presupposes very low crime rates, so if the caseload is not light, there is no way each case can be handled with such attention to detail. If legal precision is a unique attribute, it causes distortions elsewhere. Explaining Japan's low crime rates is a complicated task, but there is no doubt that it stems from strong social control through community ties. After the Meiji Restoration, Japan adopted a Western-style police organization, but crime rates have been low since the Edo Era. This fact in and of itself is evidence of the dual structure of Japanese society. Japan relies on more than its justice system to keep crime in check.

If Japan had intended to maintain this traditional system, it seems strange that it opted to import a Western-style criminal justice system in the first place. In fact, Westernization in this instance was not implemented for the sake of crime control. Since the West would not recognize Japan as a nation of equal standing, the adoption of the system was merely window-dressing used for the revision of the so-called Unequal Treaties. In particular, the construction of modern prisons was important in maintaining the appearance of a modern nation. It is doubtful that the Meiji government ever intended the laws it compiled to actually be applied to Japanese society. In a nutshell, the Meiji criminal justice system was a product of diplomatic necessity. However, the establishment of the national police force led to a complete overhaul of traditional crime control practices. The police were not merely figureheads.

They were overseen by the Interior Ministry which saw the organization of police forces as useful for promoting the modernization of Japan from stem to stern. It is often said that no country's police force is as powerful as Japan's, and indeed, its presence looms large.

History of the Jury System

Japan has had many chances to establish a jury system, the first being the period of initial Westernization during the Meiji period. During this time, modernization was strongly top-down in nature and it would have been unthinkable to give the people a role in the justice system. It was difficult enough to implement universal male suffrage. The next opportunity arose during the Taishō Democracy movement after the people had finally gained a certain amount of power. A jury system was inaugurated in 1928, the same year that universal male suffrage went into effect, but after a time, the courts stopped using it. The military officially discontinued the jury system in 1942. This was not necessarily an act of military repression since the system had fallen out of use well before then. This first jury system, while it was based essentially on the British and American models, was unique in that verdicts were decided by a majority vote. As such, the system was disadvantageous for defendants, and this is thought to be a major reason why it fell out of use.

The next chance to establish a jury system was during the American occupation after World War II. It would have been natural to revive the jury system given the push to democratize Japan. The Ministry of Justice, which was negotiating with U.S. Occupation officials at this time, argued that it would be impossible to establish a jury system in Japan. To respond to the demands of the Occupation and democratize in some form, the ministry established Committees for the Inquest of Prosecution (CIPs). These committees are comprised of eligible voters chosen by lot, in the same manner that lay judges are now selected. The CIPs determine whether decisions to file or drop charges by Japan's prosecutors—who operate under the principle of discretionary prosecution—were correct and, if necessary, request prosecutors to re-examine cases. Given the 99.9% con-

viction rate in Japanese criminal trials, to be prosecuted essentially guarantees a guilty verdict. Therefore, the decision to prosecute constitutes the core of a criminal trial. Incorporating a decision by citizens into this process means that the CIPs are essentially the same as juries. When first introduced, the CIPs did not have the power to force prosecutors to file or drop charges, but they did make their presence known in several cases and committee members expressed high levels of satisfaction with the role they played. As a result, the system has been considered more or less successful, giving the authorities the confidence to institute the new lay judge system. Furthermore, when the current lay judge system was adopted, the CIPs were given the power to force prosecutors to file or drop charges.

Assessment of Japan's Criminal Justice System

Now, let us examine the state of criminal justice today. We must not simply believe the National Police Agency's white papers claims that the low crime rate and high rate of convictions on which Japan has prided itself are due to the high caliber of the police. When viewed in terms of criminology, the root cause is thought to be that juvenile delinquents are rehabilitated before they can become adult criminals. To date, rehabilitation has been the work of dedicated private citizens, such as volunteer probation officers, working together. Given that Japan was safe before the modern police force existed, the contribution of private citizens comes as no surprise. But the reality is slightly more complicated than this. The fact is that police officers, prison guards and other criminal justice professionals who would not normally be involved in probation have been part of the rehabilitation process. At times, these officials engaged in activities beyond the purview of their duties and they considered rehabilitation work one of the more rewarding aspects of their work. In this sense, we can say that the work of the police has contributed to the very low recidivism rate.

Japan's criminal justice professionals have always been expected to catch and punish criminals while recognizing that the ultimate goal is their rehabilitation. While it would be an overstatement to say that it is a Japanese cultural tradition

to seek resolution by absolving wrongdoing, there is an undoubtedly large number of novels, movies, and comic books with protagonists who discover that beating the villain does not always feel good. Since the criminal system is the framework for meting out penalties, a large majority of persons in custody are released without being formally indicted and then unofficially placed under surveillance by civilians, in order to circumvent punishment. Every year more than two million cases are sent to prosecutors, but the number of cases that actually go to trial is less than 500,000. Of those, 30,000 end in prison sentences. Even when the 5,000 cases which result in juvenile detention are added to this number, it is plain to see that most cases are delegated to private-sector supervision. While it is difficult to confirm the activities of the private-sector, it is safe to consider them successful to some degree given the lack of repeat offenses.

Given this context, we could give overall high marks to the criminal justice system, but it is obviously flawed given that once cases go to trial, 99.9% of them end in guilty verdicts. In other words, the infallibility of the police and the prosecutors is staunchly maintained. The general public believes that the police always catch the real criminals and major cases have never been allowed to end without an arrest. For this reason, there was a spate of unjust accusations in major cases in the 1950s, and it was only in the 1980s that four death-row inmates were found innocent in retrials. While much progress has been made in overcoming this flaw, persons who should have been presumed innocent under the law at each stage of criminal proceedings have been treated as guilty. First of all, accused parties have had difficulty in seeing their lawyers, prosecutors' discovery has been insufficient, and bails after charge have only been accepted a little more than 10 percent; in Japan, bail can be admitted only after charge by a court. In 70 percent of cases, defendants admitted to all charges against them and their lawyers sought only to reduce sentences by showing how remorseful the defendants were. In almost all of the remaining 30 percent of cases, lawyers haggled over minute details in an effort to merely lessen the charges. It is safe to say that those cases in which the debate focused on whether the defendant was guilty or innocent

have been rare.

Many Western observers feel that the effectively non-adversarial practices of Japan's justice system have yielded positive results. While there were a handful of unjust accusations in major criminal cases, nearly 99 percent of defendants have actually been guilty and their sentences have been comparatively light. Some have claimed that Japan adopted the lay judge system even though there were no problems with its criminal justice system, but this opinion is limited to criminal judges and criminologists. It is unacceptable to ignore due process and allow decisions to be made by prosecutors in the interrogation room even if the outcome is factually correct.

Major Change is Inevitable

With the adoption of the lay judge system, the courts which used to merely confirm what the prosecutors had decided now actually hand down rulings. Before the system was instituted in 2009, there was a drastic increase in the bail rate and prosecutors' discovery improved due to the introduction of pretrial summary procedures. In addition, the Supreme Court issued a ruling that ordered police to disclose any notes taken during their investigations when requested to do so by lawyers. Court trials, which had become ritual ceremonies for issuing guilty verdicts, are now transforming in every way into truly deliberative proceedings.

However, major change always faces resistance. The prosecutors, who still tend to dislike not guilty verdicts, have not changed. Almost one year has passed since the introduction of the lay judge system, but there has yet to be a single not guilty verdict. This is abnormal considering that several hundred guilty verdicts have been handed down. Some claim that all defendants have been found guilty because the lay judge system is being gradually phased in starting with relatively clear-cut cases, but the results are still disheartening. Only a handful of cases have seen debates over innocence and most of those were drug-related cases involving foreigners.

Furthermore, prosecutors have been known to file charges for rape instead of rape involving bodily

injury—a crime which requires a lay judge trial—in order to avoid the hassle of a lay judge trial. There are also reports of juvenile cases getting sent back to the prosecutors who then expand their written case comments in an effort to ensure that those cases are not heard by lay judges when they are transferred to family court.

I am interested in the impact of lay judges on death penalty cases, but no such sentences have

yet been sought from a lay judge trial. The last orders of execution were issued in July of last year, and nearly one year has passed since justice minister Chiba Keiko placed a moratorium on the use of the death penalty. Finally, if we are at a defining moment where the once rock-solid foundation of the older part of Japan's dual structure is about to collapse, then I predict that those who resist this inevitable change will likely be defeated one by one.

The Taishō Jury System: A Didactic Experience

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1. Introduction

The introduction of a jury or lay judge system (*saiban-in seido* 裁判員制度) is just one of a series of major legal reforms initiated since 2001 that have attempted to fortify the rule of law in Japan and to close the gap between the citizen and the state. Is this jury system a first for Japan? Japan actually had recurrent debates on introducing a jury system since the very beginning of the Meiji period, but it was only in 1923—at the high point of the Taishō democracy movement—that the Jury Act was promulgated. After five years of preparation, the Jury Act became operative and was in use until it was suspended in 1943. Despite the fact it operated during the early Showa period, Japan's first jury system can rightfully be called the Taishō system because it was the result of the political and social dynamics that generated the Taishō democracy movement.

Hozumi Nobushige, in an address on April 14,

1923 to an audience of prominent people involved in drafting the Jury Act, stated that its enactment signified a “major revolution in Japan's legal history” (Hozumi: 261). Prominent scholars in 1923 considered establishing juries as one of the most important judicial reforms of their time but enthusiasm faded rapidly as few cases were actually tried by jury. Was this system a failure?

2. The Jury Act of 1923

The 1923 Jury Act stipulates that the jury will decide by deliberation in criminal trials (Art. 1). Only those crimes that are punishable by death or life imprisonment would *require* trial by jury (Art. 2). Suspects in crimes with more than three years confinement as statutory sanctions and within jurisdiction of the regional courts could *request* a jury trial (Art. 3). However, if a suspect requested a trial by jury, he could be ordered to pay all related costs including daily allowances, accommodation and travel expenses of the twelve members of the jury and substitute members (Art. 106 & 107). This was a far from attractive prospect as the costs of such a trial were very high and unaffordable for most people.

Many crimes were excluded from trial by jury--crimes related to the Imperial family, diplomatic relations, political rebellions, the Election Act, as well as army and navy-related crimes (Art. 4). From 1929 onwards, crimes falling under the Peace Preservation Act were also excluded from trial by jury. In sum, all political trials were excluded from jury trials despite the fact that Hara Kei and other policy entrepreneurs wanted a jury system mainly for political cases that had in the past resulted in aggressive actions by prosecutors, actions which deepened citizens' distrust of criminal procedures.

A jury was to be composed of twelve members (Art. 29) who decided, by majority vote, on the guilt of the accused by answering questions from the judge on the facts of the case. Article 91 of the

Jury Act stipulated that if a majority of the jury members did not agree on the guilt of the accused, he or she would be acquitted. No appeal was possible against the decision of the jury (Art. 101) if it had been accepted by the court in its sentencing (Art. 97) with the exception of final appeals to the Supreme Court on narrow procedural grounds, mainly judges issuing unlawful instructions (*setsuji* 説示) to a jury (Art. 102).

The jury was primarily charged with determining the facts of a case through examining evidence and hearing testimony (Art. 71) but exceptions were numerous. Records of testimony from pre-trial hearings and additional documents could lawfully be used as evidence in a jury trial if: (a) an accomplice or witness had died or was affected by contagious disease or similar problems which made it difficult to summon the person to court; (b) if an accomplice or witness made a substantial alteration to his testimony during the trial compared to his statements during interrogation; or (c) if the accused or a witness refused to testify during trial (Art. 73). All documents and testimony relating to the case that were generated outside the court and which, due to the death of the witness or person who drafted the documents, could not be reproduced in court could be accepted as evidence in a jury trial (Art. 74). Moreover, the president of the court could present such "pre-recorded" evidence and documents to the jury at any time, even after it had begun deliberations (Art. 82).

No objection could be made by the defense against the judge's instructions to the jury (Art. 77). These instructions could influence the jury extensively as they included the judge's own interpretation of the evidence. The judge, moreover, could decide at any stage of a trial that the findings of the jury were not adequate and assign the case to another jury (Art. 95). The judge could impanel new juries in a case as many times as he deemed necessary so that the jury's decision and the judge's opinion would be in accordance.

Eligibility for jury duty was restricted to males over thirty who paid at least three yen in national taxes and were registered as residents for more than two consecutive years in a village or city (Art. 12). Observers of the prewar jury questioned

the representativeness of the jury as only men of a certain age and wealth were entitled to become jurors. The total number of people eligible to vote in the first general elections of 1928 was 19,409,078 but only 1,781,232 were entitled to participate in a trial by jury in the same year (Toshitani 1984: 6). This was less than ten percent of people with voting rights.

The Jury Act indeed was less of a turning point than Hara Kei had hoped it would be or than Hozumi claimed it was. The Act in itself provided no radically new vision with regard to the judiciary in general or to the participation of lay people in criminal proceedings in particular. Nevertheless, the jury system did operate--after five years of costly and intense preparations--from October 1, 1928 onward, allowing citizens to participate in criminal prosecutions. The Taishō jury system was certainly not the result of inertia or path-like "business as usual" evolution. In fact, the jury system was finally realized, enabling citizens to participate in criminal proceedings, albeit in a limited number of cases and in a restricted way.

3. The jury in action

The early reports on the operation of the jury system praised the new system. On February 23, 1929, the *Hōritsu Shimbun* (Law Journal) reported that "it is remarkable how the juries' findings are contrary to the conclusions drawn by judges and prosecutors." This journal enthusiastically suggested that the jury system should be expanded to other areas of criminal procedure. However, by May 1929 the tone of the *Hōritsu Shimbun's* commentary had changed after many acquittals occurred in cases which, "if tried by professional judges, would certainly have ended with conviction." *Hōritsu Shimbun* even questioned if the jury system might not endanger public peace and order if acquittals happened in too many cases (Toshitani 1984: 8).

As for the mass media, newspaper articles expressed surprise over the paucity of jury trials held at the request of the accused (Art. 2). The headline of an article printed in the *Yomiuri Shimbun* on July 31, 1930 read, "The extremely unpopular jury: already now claims for reform!" The article predicted that because "not even one-tenth

of the anticipated number of trials” had actually taken place, the much anticipated jury system will end “achieving a destiny of existing only in name.” Hanai Takuzō, one of the architects of the Jury Act, was quoted as lamenting how the Taishō jury system failed to change the perception that “the main problem of the judiciary is excessive political action by prosecutors.” Some months later on January 15, 1931, the *Yomiuri Shimbun* intensified its criticism in an editorial that asserted, “the jury court is useless and judicial authorities will find it difficult to restore their lost reputation.”

Was the Taishō jury system a failure? Suzuki Nobuo, one of the lawyers in a 1929 jury trial at the Shizuoka Regional Court aptly summarized the shortcomings of the jury system. He said that the jury system was a failure first because of problems with the provisions of the Jury Act; second because of the difficulties jurors had with escaping the historical legacy of showing respect for government officials (*kanson minpi* 官尊民卑); and finally because of the inferior status of lawyers at the time. Many other reasons have also been put forth including the impossibility of appealing a jury trial verdict and the practice of

requiring defendants to bear all the costs of a jury trial should they request one. The average total cost amounted to 386.62 yen, which is equivalent to about 1,300,000 yen today (Fujita 2008: 125). Another reason why few demands for trial by jury were registered and why most defendants accused of serious crimes automatically entitling them to a jury trial waived that right was fear of the damage to their reputations that would result from the publicity generated by newspaper coverage of the trials. Finally, it was difficult to find lawyers willing to represent a defendant in a jury trial. Given all of these factors, it should come as no surprise that the number of jury cases remained very limited.

4. Another perspective: a didactic experience

Despite its defects, the Jury Act of 1923 also enhanced the rule of law in modern Japan in a less visible but still important way by bringing an impressive number of people into contact with some aspect of the jury system. Once every four years, a list of potential members of the jury had to be compiled by the heads of villages and mayors (Art. 17). These lists had to include enough people to fill the number of juror positions that

Table 1: Jury Trials and Outcomes (1928-1943) *1

YEAR	STATUTORY CASES	LECTIVE CASES	GUILTY	NOT GUILTY	DISMISSAL OF PROSECUTION	JURY REPLACEMENTS
1928	31	0	23	5	0	3
1929	136	7	125	14	1	3
1930	66	0	63	3	0	0
1931	59	1	40	17	0	3
1932	54	1	35	14	0	6
1933	35	1	29	6	0	1
1934	24	2	21	5	0	0
1935	18	0	9	8	0	1
1936	19	0	12	4	0	3
1937	15	0	10	3	0	2
1938	4	0	4	0	0	0
1939	4	0	3	0	0	1
1940	4	0	3	1	0	0
1941	1	0	0	1	0	0
1942	2	0	1	0	0	1
1943	0	0	0	0	0	0
Total	472	12	378 (78%)	81 (16.7%)	1	24 (4.9%)

*1 Compiled from figures in Urabe 1968: 9-10 and Fujita 2008: 114.

regional courts assigned to each locality, a number that the courts communicated annually to the mayor or head of the village (Art. 22). The head of the village selected candidates for jury duty by drawing lots in the presence of at least three candidates (Art. 23) and then informed those chosen of their registration (Art. 25, part 2).

At the Aomori Regional Court, for example, not a single trial by jury was recorded in 1936 or 1937. Yet the list of potential members for jury duty submitted in 1937 included a total of 1,048 people. They were farmers (542), retailers (204), owners of bars and restaurants (14), agricultural managers (4), farm aids (26), administrators (14), fishermen (12), smiths (3), farm tenants (22), teachers (2), etc. (Tohoku University 1989). Even if most candidates were reluctant to participate in a jury trial, the process of drafting a list of candidates by local leaders stirred discussions on legal process. Moreover, the involvement of villagers with state matters combined with the introduction of general suffrage in 1928 intensified political discourse at the most local administrative level. The jury system entered towns and village more through their preparations for jury trials than by actual trials.

In his groundbreaking writings on law and society in Meiji and Taishō Japan, Osatake Takeki pointed to the importance of didactic effects by referring to “legal training for the people” (*koku-min no hōteki kunren* 国民の法的訓練) who directly (by being jurors or candidates for jury trial) or indirectly (through newspaper articles, etc.) were confronted with criminal justice procedures. Osatake (1923) also argued that the main cause of human rights abuse is the fact that the people have “a poor knowledge of the law” (*hōritsushisō no toboshisa* 法律思想の乏しさ).

The didactic effects of the Taishō jury system were not restricted to “regular citizens.” Judges, prosecutors and lawyers also learned through involvement in trials by jury. The major challenge that a judge faced was how to comprehensively and constructively formulate his instructions to the jury (Urabe 1968: 32). A prosecutor had to be extremely careful in deciding whether to indict a suspect due to the greater possibility of a jury rejecting the evidence he presented (Urabe 1968: 107). Lawyers had to be more diligent and careful,

aware that an appeal was not possible and that their clients had only one chance to prove their innocence or argue for a reduced sentence. Certainly, the most important didactic effect of the Taishō jury system was for citizens who “through the trial by jury would come to support the courts” and benefited because “the implementation of the jury system raised the people’s level of literacy in legal and political matters” (Urabe 1968: 119).

5. Conclusion

In a little less than fifteen years after the jury system was launched in Japan, 484 jury trials had been conducted. Almost 17 percent ended in a “not guilty” verdict, a rate which diverged greatly from the approximately 98 percent conviction rate in trials by professional judges. The Jury Act was suspended from April 1, 1943 due to—as Minister of Justice Iwamura explained in the Diet—the excessive administrative burden on villages and because “the citizens were busy with war” (Toshitani 1975: 94).

The legacy of the 1923 Jury Act carried on to the postwar period. We can read, for example, in Article 3, Part 3 of Japan’s Court Act (Act No. 59 of April 16, 1947) that “The provisions of this Act shall not prevent the establishment of a jury system for criminal cases separately by law.” Despite signs that jury trials would be quickly revived after 1945, and an erroneous article in the *Asahi Shimbun* on March 6, 1946 that stated the jury system was operative again, only in the 1990s, in the wake of larger judicial reforms, did the policy proposals on lay participation in the criminal justice system catch fire. These lessons of the Taishō jury experiment alongside careful consideration of non-Japanese models of jury systems would form the basis of today’s lay judge system.

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A Personal Historiography of Japanese-German/ Euro-Asian Relations

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When my first two books, *Nichidoku kigyō kankeishi* (A History of Japan-German Business Relations) and *I Gē Faruben no tainichi senryaku* (I.G. Farben's Japan Strategy) were published in 1992, there were three major sentiments which leapt out from the book reviews and personal communications I received. First, some remarked that my work “lent itself to publication in foreign journals,” to which I could only reply that that very well might be the case. Another sentiment similar to the first but tinged with condescension—or at least that is how it felt to me—was that my work “was aimed at a niche audience.” To this I could only respond with a wry grin. The third sentiment was the one which rang truest to me: “So you have studied the history of Japanese-German relations. What’s next?” Nearly twenty years have passed since then and I have come to ponder what would happen if I attempted to respond to this query again. The following is a synopsis of my answer.

My Interest in the History of Japanese-German/ Euro-Asian Relations

First, let me discuss why I have studied the history of Japanese-German relations and why the study thereof poses challenges. In essence it is two separate questions, why Germany and why Japan? When answering the former question, several replies immediately come to mind. Germany, economically and otherwise, is an important country, it has been a driving force of European integration, and it is the United States’ most important partner in continental Europe. But at the same time I think that as research subjects everything (not just nations) throughout history are equally deserving of attention, and an idea that comes to mind is that things only become unequal by way of a researcher’s interest in an issue. If this is true, then I am obliged to explain my interest.

This obligation also applies to the question of why Japan. In fact, it applies even more so. Although I am a researcher who was born and raised in Japan and thinks in Japanese, it obviously does not necessarily follow that I should deal with Japan. Here, the nature of the interest I have in the issues is called into question even more sharply.

If this is the case, then why Germany and why Japan are not the right questions to ask. Rather, I think I should reply to the original query of “why Japanese-German relations?” My immediate reply to this question—or should I say the reply I have pondered repeatedly over the years—is as follows.

First, Japan and Germany developed an important partnership starting in the mid-nineteenth century and continuing through the twentieth

century. With regard to politics and diplomacy, there was both confrontation, as typified by the Siege of Tsingtao (China) in 1914—known then as the Japanese-German War—and cooperation, as seen with the conclusion of the Tripartite Pact in 1940. One might say that this relationship of confrontation and cooperation was more significant for Japan than for Germany and that this significance declined after World War II, but that is a separate issue. What I will stress here is simply the importance of Japanese-German relations in the realms of politics and diplomacy.

As for economic ties, there was competition between Japanese and German companies in the global marketplace—Germany often accused Japan of “social dumping” both before and immediately after the war—and collaboration via technology licensing. In the high-growth era after the war, the direction of transfers was from Germany to Japan, but technology later began to flow in the reverse direction. Here, too, the issue that this bilateral economic relationship of competition and collaboration grew comparatively weaker at some point after the war arises, and if one looks back to before the war, one could also note that the relations between the two countries were fragile then. In either case, I will leave this issue—which is thought to relate to the existence of a hegemonic United States—on the back-burner.

My second reason for focusing on Japanese-German relation is, in a few words, the parallelism evident between the histories of the two nations. Much emphasis has been placed on the shared political and economic backwardness of both countries from the mid-nineteenth century until the middle of the twentieth century, with various examples drawn from the study of Japanese history in particular. I feel strongly that the theories about this backwardness must be reexamined with a focus on the nations’ bilateral relationship because time lags make it hard to define this situation as a case of parallelism, but I will leave this point aside for the time being. In any case, the historical parallels after the war were plain as day: both countries lost the war as Axis nations, were occupied thereafter, and reformed and rebuilt into economic powers. Some might say that this postwar parallelism faded away at some point—again this is thought to pertain to the rise

and fall of American hegemony—but let us just leave it at that.

The third reason is the record of the two nations studying each other. For well over a century, various actors have studied a wide range of sectors in the other nation. It goes without saying that from the late nineteenth century and throughout the twentieth century this primarily took the form of Japan studying Germany. Without question, the German or Prussian models were vital to the establishment of the Meiji state. In the field of scholarly thought alone, the study of Germany progressed steadily from *Staatslehre* and *Sozialpolitik* to Marxism. Meanwhile, German companies also served as models for Japanese companies. For example, when the Mitsubishi zaibatsu launched a chemical company in the 1930s, its slogan was “Bound to be the I.G. Farben of the East.” Here, some may say, and rightfully so, that Japan’s study of Germany was replaced by its study of the United States, and for a time after the war, there is evidence—albeit limited to the fields of business and economics—of the study of Japan by Germany. In any case, let us leave this issue aside for the time being.

While not entirely orderly, the paragraphs above constitute my initial answer to the question of “why Japanese-German relations?” However, several more questions, some of them which I pose myself, immediately arise therefrom. The first question is whether my interests are limited to nations and their bilateral relations. My answer to this is a resounding “no”. At some point after the war there was a staged progression toward regionalization in the form of European integration, and this gave rise to the issue of “Europeanizing” Germany. European integration led to the incorporation of Japanese-German relations into Japan-Europe relations. Meanwhile, regionalization also spread through Asia despite the region’s differences from Europe. It was not possible for Japan to remain immune to this trend. Regionalization was a global phenomenon and a situation emerged which could be considered the relativization of nations. This is how Japanese-German relations came to be one facet of Euro-Asian relations. Therefore, if one takes an interest in the history of Japanese-German relations, one has no choice but to expand one’s interests to

include Euro-Asian relations.

This is not to say that my research is restricted to inter-regional and bilateral ties either. My ultimate interest is in depicting a wider picture of the world economy, especially during the twentieth century. I believe that understanding the history of Japanese-German/Euro-Asian relations is one approach to that end. Moreover, I maintain that understanding Japanese-German/Euro-Asian relations is absolutely essential for understanding the world economy of the twentieth century, in which the hegemony of Great Britain was followed by that of the United States. Earlier in this article when I mentioned the importance of Japan's partnership with Germany dating back to the mid-nineteenth century, I was referring to the importance of their relationship with regard to understanding its impact on the world economy. While I do not have time to go into details, this understanding is also related to the recognition that private companies are the primary shapers of structures and processes in the world economy.

Framing the History of Japanese-German Relations in the Twentieth Century

In the previous section I have attempted to answer the questions, be they self-posed or otherwise, of why I have researched Japanese-German and Euro-Asian relations. So what exactly am I attempting to elucidate about Japanese-German/Euro-Asian relations? I would have to sketch an outline of my analytical framework, but I do not have enough time or space to do that here. Let me get straight to the point of Japanese-German relations in the twentieth century. First, I must explain briefly that for the purposes of my argument here, the twentieth century refers to the time period from 1914 to 1990. The starting point of 1914 requires no explanation as it is the year in which World War I erupted. Aside from 1914, 1890 and 1868-71 could be alternative starting points, but I would like to focus on the irreversible impact of World War I. I chose 1990 as the end point because it is the year the Cold War ended. One issue with these dates is that they do not correspond to events in Asia as clearly as they delimit European history, but if one assumes the end of the Cold War was a globally transforming event then once again differences among regions

should be discussed to develop our understanding of events as a whole.

The next question is why I choose to focus on the history of economic relations. As I mentioned earlier, my personal interests play a large part in this, of course, but that is not the only factor. The history of Japanese-German relations has many more ups and downs politically than it does economically and, in light of this, more research has been conducted on the political history of the relationship than its economic history. I try to incorporate the outcomes of political history research into economic history in order to further develop a political-economic history of relations between the two nations.

To achieve this I am currently preparing to publish a three-volume work entitled *Nijusseiki nichidoku keizai kankeishi* (The History of Japanese-German Economic Relations in the Twentieth Century, vol. I: International Orientation, vol. II: Business Systems and vol. III: Business) and a book titled *Nihon to doitsu: nijūisseiki nichidoku keizai kankeishi* (Japan and Germany: The History of Japanese-German Economic Relations in the Twenty-first Century). I began working on these books immediately after I published *Nijusseiki doitsu shihonshugi* (Twentieth Century German Capitalism) and *Gendai doitsu kagaku kigyōshi* (The History of Modern German Chemical Companies) in 1999. In my forthcoming work, I define Japanese-German relations in terms of international orientation and business systems, picking up where I left off in my earlier work on business relations. In the end the work grew to encompass three volumes. I have not reached a final conclusion on how to integrate the separate strands of inter-state relations and business relations, an issue that I touched on earlier. Therefore, I have not decided whether or not I will incorporate business relations into my aforementioned book on twenty-first century Japanese-German economic ties. In addition, I plan to publish *Japanese-German/European Economic Relations*, a collection of the papers that I have presented in English, as well as a collection of papers on the methodology of relationship history. Now I must also develop these projects, and every day I am reminded of the old proverb, "Art is long, life is short".

Be that as it may, ten years have passed since I began these projects and I was not able to finish them before retiring from the University of Tokyo's Institute of Social Science. Although I kept busy in the meantime co-editing volumes such as *Doitsu keizai* (The German Economy, co-edited with Tohara Shiro and Kato Eiichi, 2003), *German and Japanese Business in the Boom Years* (co-edited with Matthias Kipping and Harm G. Schröter, 2004), *Gendai Nihon kigyō* (Modern Japanese Companies, 3 vols., co-edited with Kikkawa Takeo and G. D. Hook, 2005-2006), *Kigyō bunseki to gendai shihonshugi* (Analysis of Enterprise and Modern Capitalism, co-edited with Ihara Motoi, 2008), and *Gendai sekai keizai no kōzu* (Composition of the Modern World Economy, co-edited with Baba Hiroji, 2009), I feel now I was neglectful.

Meanwhile, while I was preparing to publish the three volumes of *Nijusseiki nichidoku keizai kankeishi*, more topics that piqued my interest came to light. These included diplomatic relations, military relations, Japan and Germany's respective relationships with China, race issues, and mutual recognition between Japan and Germany. It became also clear that researching these topics was more than I could handle on my own, so I enlisted the help of Tajima Nobuo, the preeminent researcher of the political history of Japanese-German relations. Together we called on a host of researchers with significant achievements pertaining to these topics and co-edited *Nichidoku kankeishi, 1890-1945* (The History of Japanese-German Relations: 1890-1945, 3 vols., 2008). Several reviews have been written about this collection,

and as far as I can tell by reading these, the reviewers grasped the objective of this project, and assessed all of the chapters as high-quality work. Tajima and I are now planning to publish two collections of papers, *Ōa kankeishi, 1890-1945* (The History of Euro-Asian Relations: 1890-1945) and *Sengo nichidoku kankeishi* (The History of Post-war Japanese-German Relations) as extensions—although they are more than extensions since both works cover new issues—of *Nichidoku kankeishi, 1890-1945*. For this reason alone, we are very grateful for the positive reviews of the three-volume work.

Furthermore, Tajima and I, together with Erich Pauer, one of the contributing authors of *Nichidoku kankeishi, 1890-1945*, have recently published *Japan and Germany: Two Latecomers to the World Stage, 1890-1945*, 3 vols. (2009). This English language compilation contains several new chapters by German authors, and approximately one-third of the content differs from the original Japanese version. We would also like to publish English versions of *Ōa kankeishi, 1890-1945* and *Sengo nichidoku kankeishi*. Besides, quite some time has passed since I last published in English (*Japanese-German Business Relations: Cooperation and Rivalry in the Inter-war Period*, 1998). For these reasons, I hope that *Japan and Germany: Two Latecomers* is as well-received as its Japanese version was.

* This article is a partial transcription of "An Introduction to the History of Japanese-German/Euro-Asian Relations", a presentation given at the *Shaken* Seminar on March 16th, 2010.

Incentive Pay or Windfalls? A Change in Invention Remuneration Policies among Japanese Firms

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Judicial Activism in Interpreting the *Patent Law* on Invention Remuneration

In the early 2000s, Japanese firms were alarmed by a series of court rulings that went against defendant firms which were ordered to pay an unprecedented amount of compensation to the plaintiff employees for their inventions. The most notable damages award was in the 2004 *Nichia Corporation* case in which the district court ruled that Nichia Corporation should pay twenty billion yen to the inventor of a blue light-emitting diode (LED).¹

The rights and liabilities arising from employee

inventions are governed by Section 35 of the *Patent Law* in Japan. Section 35 assigns the rights to the employee's invention to the employee, but stipulates that: (1) the employer shall receive the non-exclusive license (i.e., the shop right) without paying compensation, as in the U.S.; and (2) the employee who vests the right to obtain a patent or the patent right in the employer shall have the right to receive a "reasonable" remuneration, as in Germany. However, "reasonable" was not clearly defined before the 2005 amendment except that the amount of such remuneration should be decided by reference to the employers' profits from an invention and the contribution made by the inventor. This ambiguity allowed business leaders to believe that their firms would be judged to be fully complying with the *Patent Law* if they had implemented formal provisions for invention remuneration, regardless of the amount to be paid, because employees had indicated their acceptance of the provisions by agreeing to work for the firm.

Therefore, it upset business leaders when the court deviated from this previously assumed legal principle. In the *Olympus* case, the Tokyo High Court (2001) and the Supreme Court (2003) held that the compensation plan that the firm had unilaterally determined was invalid and, irrespective of the existence of a compensation plan, the final authority to decide the amount of remuneration was vested in the court. The Supreme Court ruling in the *Olympus* case encouraged many other inventors to file lawsuits demanding additional compensation for their inventions. The annual number of such lawsuits filed in district courts had been zero to two until 2000, but increased to ten cases in 2004.

¹ Nichia Corporation and the inventor, Shuji Nakamura, eventually agreed on the payment of ¥840 million under a settlement coordinated by the Tokyo High Court. The amount is still the largest ever made to an employee of a company as compensation for an invention in Japan.

Economic Impacts of Invention Remuneration

Although there are a variety of compensation plans implemented by Japanese firms, a typical plan consists of two parts: (1) fixed and nominal payment at the time of filing a patent application or registration, and (2) contingent, revenue-based payments which depend on realized sales, profits or royalty income. Some plans have upper limits to payouts per year or per patent.

Until recently, many Japanese firms would pay only a nominal amount of compensation at the time of patent filing or registration to the inventors. It was only in late 1990s that most firms started upgrading their remuneration provisions in the belief that utilizing and defending their own intellectual property rights could reinforce their competitive advantage, the *1998 Amendment to the Patent Law* that raised the value of a patent by shortening the time it took to receive a patent grant and by making it easier to obtain relief for patent infringements, and the increase in lawsuit filings over remuneration for inventions in the late 1990s. According to a survey of 347 firms listed in the Tokyo, Osaka, and Nagoya Stock Exchange conducted by Onishi in 2005 under the sponsorship of the Institute of Intellectual Property (IIP), the number of firms with revenue-based compensation increased from 199 in 1995 to 299 in 2005 (Onishi 2006; 2010).

Onishi (2010), using the IIP firm survey, finds that: (1) the introduction of fixed payment per patent filing or registration has increased the number of patent filings but reduced their quality, and (2) the introduction of revenue-based compensation plans does not affect the quantity or quality of patents. The results generally suggest that compensation plans may have affected filing behavior, but have little impact on inventive efforts or productivity. Owan and Onishi (2010), using a survey conducted by the Research Institute of Economy, Trade, and Industry (RIETI) of over 5000 inventors who applied for patents between 1995 and 2002, evaluate the impact of revenue-based compensation policies on the R&D performance. The performance measures they use include the number of patents produced from a research project, the inventors' own evaluations of the economic value of their patents and the

commercialization of the patents. Again, they find little impact on either the quantity or quality measures of inventive productivity.

Why didn't monetary incentives improve R&D productivity?

There are three plausible explanations of why pay practices are little associated with any R&D productivity measures. First, rewards may be too small or too infrequent. The IIP firm survey asked the question "How many inventions will typically be eligible for remuneration of over one million yen per year" (Onishi 2006). 43 percent of the firms that answered the question chose "none." The true ratio may be even higher assuming that firms that pay only limited compensation or do so infrequently were much less likely to answer the question or chose the response "depends on the year" (11 percent) instead.

Second, it is possible that R&D researchers are motivated primarily by intrinsic rewards and not monetary incentives. Owan and Nagaoka (2010) confirm this view using the RIETI inventor survey. When asked what motivated their work, inventors tend to rank very highly "satisfaction from contributing to the progress of science and technology," and "satisfaction from solving challenging technical problems." These rankings are highly correlated with their R&D productivity. In contrast, monetary incentives are ranked very low and are little correlated with R&D productivity. But, it should be also noted that inventors might not be motivated by monetary incentives because the awards are too small and infrequent to be cared about.

Thirdly, R&D researchers are not well-informed on what kind of remuneration policies their firms have. According to a survey of firms conducted by the IIP in 2002, only 17 percent of IP managers believe that their employees "broadly understand their invention remuneration policy" or "know what types of remuneration exist in their firm." The rest believe that the employees are not well informed of their remuneration policy.

We have confirmed this third point in our employer-employee matched dataset. The 2005 IIP firm survey provides firm-level panel data on

the remuneration policies for employee inventions from 1990 through 2005, while the supplemental portion of RIETI's inventor survey asked what remuneration policies inventors believed were in effect as they developed the inventions leading to patent applications filed between 1995 and 2002. When we examine how closely inventors' beliefs matched their firms' actual policies, the discrepancies are enormous. For example, 40 percent of inventor-employees of firms in the IIP survey with revenue-based remuneration policies did not know those policies existed.

Why Do Firms Want to Offer Windfalls Rather Than Incentive Pay?

Business leaders and IP managers like to argue that they introduced revenue-based remuneration in order to encourage innovation, but the limited resources allocated to educating employees about remuneration policies contradicts their claim. Instead, many observers argue that most firms have created such policies primarily because they needed to comply with Section 35 of the *Patent Law*.

This widespread reluctance to disclose details of their pay policies may indicate either that firms believe their remuneration policies do not have much incentive effect (possibly due to small and infrequent payouts and long delays) or that they are concerned about some downsides to invention remuneration. Whatever the reason, it is obvious that there would be no incentive effect if many employee-inventors essentially perceive the remuneration for inventions as windfalls.

If firms are rational and had good reasons for not promoting remuneration policies as a means to motivate employees, changing the law to require firms to disclose these policies and explicitly negotiate with employees may have a downside. One possible concern might be equity. Many large firms are diversified and the revenue shares of divisions vary. If remuneration is proportional to the revenue an invention generates, then researchers in large divisions are likely to have an advantage over those in small ones. Furthermore, patenting inventions may be more difficult in some technological fields than in others. If the gaps in the remuneration payouts across divi-

sions become substantial, those in disadvantaged divisions may become demoralized. Another consideration is the contributions of non-R&D divisions. Successful commercialization often requires the coordinated efforts of many divisions, so why would a firm only reward those in the research group? Maintaining equal treatment encourages cooperation and promotes partnership.

Secondly, management might be concerned about what economists call the "multitasking agency problem" (Holmstrom and Milgrom 1991). Researchers might have other important tasks such as safety testing, producing materials for salespeople and customers, training new employees, etc. There might also be other aspects to inventive activities than the number of patents or revenue generated such as developing technical capabilities in the long run. Offering compensation schemes that depend only on the filing of patents or the revenue generated may cause the employees to distort their allocation of time, attention and energy away from the optimal mix over tasks for the employer. For example, researchers may prefer not involving new employees who need training because having more participants may dilute their share of remuneration if a project succeeds. Involving less trained employees, however, may be indispensable to developing new talent and passing technical know-how to younger employees in the R&D division.

Thirdly, as Owan and Nagaoka (2010) discuss, extrinsic rewards such as remuneration for inventions may crowd out intrinsic motivation, a problem similar to the multitasking agency problem. When presented with a compensation scheme that depends only on the success of projects, risk-averse agents may shift towards safer projects that will likely generate some patentable technology or focus more on incremental technology that is likely to be used in existing products. Such distortions are especially costly when researchers are already motivated intrinsically and pursuing risky but potentially highly profitable projects.

If these concerns are real, management will face trade-offs. On one hand, insufficient remuneration will reduce the incentive effect as well as raising the legal risks. On the other hand, paying

generous remuneration might cause the equity and incentive problems noted above. The survey conducted by the IIP in 2003 offers some clues. In answering the question, “What impacts would you expect if the amount of remuneration drastically increases?”, a majority of respondents chose “Increased dissatisfaction due to greater pay gaps between the research areas where patenting is easy and those where it is not,” and “Greater unfairness due to rewarding only inventors because successful commercialization depends on multiple factors.”

A Rise in Invention Remuneration after the 2005 Amendment of the Patent Law

Due to business leaders and policymakers' concerns that inventor lawsuits might negatively affect businesses, Section 35 was amended in 2004 and enacted in January 2005. Article 4 of the revised Section 35 provides that, for the amount of compensation paid to an inventor to be considered “reasonable,” an employer must ensure that: (1) a negotiation with the employee takes place to set standards for determining the value of an invention; (2) these standards are disclosed; and (3) the employees are consulted on the calculation of the value of an invention.

This revision is intended to require the court to put more weight on procedural rationality rather than the adequacy of the amount of compensation. Presumably, if the courts accept that compensation plans followed the above “reasonable” procedure, they cannot question the adequacy of the amount paid out unless the circumstances change drastically or if the invention in question

generates benefits much beyond what was expected.

Although the amendment will constrain judicial involvement in interpreting the *Patent Law*, it also requires more disclosure of firms' policies and more employee involvement. The 2005 amendment is a large-scale natural experiment. It caused many Japanese firms to change their ways of determining and implementing their remuneration policies for employee inventions. It certainly granted more bargaining power to employees in R&D divisions and requires more effort by firms to justify their pay policies.

Table 1 below shows how the actual payment of remuneration for employee inventions changed after the 2005 amendment. The average payout among 700 actively patenting firms increased from ¥7.4 million per firm in 2003 to ¥11.7 million per firm in 2007. This 59 percent increase in rewards for inventors within a few years and expectations of further increases in the future could have a significant impact on their behavior. More importantly, firms now believe they're legally required to explain to their employees how their invention remuneration policies are designed. Inventors can see how much monetary reward they could receive through successful R&D efforts and will not see the remuneration payouts as windfalls any more.

What will the impact be? Two plausible arguments

What will be the overall impact of the increase in remuneration for employee inventions? First,

Table 1. Firms paying invention remuneration and average payouts

Year	Total Number of Firms	Average Payout per Firm (¥million)	No. of Firms Paying Remuneration	Percentage of Paying Firms	Average Payout per Paying Firm (¥million)
2003	694	7.38	563	81.1%	9.10
2004	694	7.61	567	81.7%	9.32
2005	694	8.77	577	83.1%	10.55
2006	694	9.79	582	83.9%	11.68
2007	694	11.72	569	82.0%	14.30

Note: The table exhibits a balanced panel including only those firms that were surveyed every year from 2003 to 2007.

Source: Survey of Intellectual Property Related Activities, Japan Patent Office.

invention remuneration policies will now be designed more as incentive schemes rather than as measures taken to comply with the *Patent Law*. Employee involvement in designing compensation formulas might also help to enhance the effectiveness of the schemes. In the long run, it is also possible that the increased compensation will help to attract talented young researchers into industries. If such predictions are borne out, there will be a positive impact on the R&D productivity of Japanese firms.

The second possibility is that, if the concerns about monetary incentives for inventors discussed earlier are real and low-powered incentives for inventors are rather optimal, the legally enforced introduction of new remuneration policies will simply raise the costs or even adversely affect R&D productivity and firm profitability. This potential downside of the policy change could be a substantial blow, especially for small and medium-sized firms where the issue of equity and the multitasking agency problem could be substantial. It will take several more years to see the first reliable evaluations of the overall impact of the changes to the *Patent Law* and firms' practices on inventive efforts and R&D productivity given the time lags in every step of causal relationships between the changes in the law and R&D outcomes.

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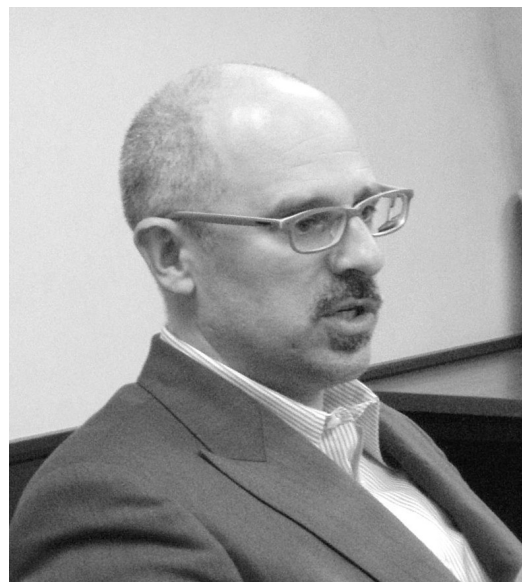
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Tom Ginsburg

Professor of Law at the University of Chicago

Legal Reform in East Asia: The Politics of Competitive Modernization

March 17, 2010

Abstract:

This paper analyzes the major structural legal reforms recently enacted in Japan, Korea and Taiwan. Over the past twenty years, all three countries have transformed their legal institutions to be more transparent and participatory. These reforms include the adoption of lay participation in criminal trials, legal training reform, expansion of administrative law regimes, and judicial change. We characterize these reforms as the products of competitive modernization, a distinct feature of the Northeast Asian region. Though the substantive reforms in the three jurisdictions are similar, the processes by which reforms were adopted also reveal important features of local political dynamics.

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Photo by Takahashi Satsuki (ISS)



Katherine Tegtmeyer Pak

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What makes a good citizen? Citizenship Ideals in Japanese Higher Education

May 13, 2010

Abstract:

Many different institutions craft ideals of good citizenship. Yet most of the civil society literature focuses exclusively on non-profit and non-governmental organizations. Japanese universities' reputations rest on various ranking systems that assess their success in their core missions of research and preparing students for the labor market. However, pursuing these top priorities does not preclude them from shaping participation in politics and civil society. Through dozens of narrative interviews at fourteen universities of varying status in Niigata Prefecture and the Tokyo area, I have learned how educators introduce students to active citizenship practices through courses and co-curricular activities. The programs are not universal, but they are expanding with support from university administrators and government agencies.

These programs coincide with many plans promoted by international civic engagement education advocates such as the OECD and the UN, even though the Japanese professors organizing them remain largely unaware of the international conversation. Likewise, the international debates overlook Japanese efforts in this area. Four ideals, in particular, are advocated repeatedly by these Japanese educators: social action should be based in knowledge; people should attend to issues close at hand; action should be embedded in social networks; and people should cultivate their individuality. I argue that understanding these ideals and the educational practices in which they are embedded gives us a richer, more complete understanding of Japanese citizenship in general.



Yuniya Kawamura

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Fashion as an Institutionalized System: Japanese High Fashion and Street Fashion as Case Studies

June 16, 2010

Abstract:

I treat fashion as an institutionalized system. This study is a macro-sociological analysis of the social organization of Japanese street fashion and a micro-interactionist analysis of teen consumers who form various subcultures

which directly and indirectly dictate some of the latest fashion trends. It shows the interdependence in the production process of fashion between institutions within the industries and Japanese teens. Street fashion in the fashionable districts of Tokyo, such as Harajuku and Shibuya, is independent of any mainstream fashion system and goes beyond the conventional model of fashion business with different marketing strategies and occupational categories that are becoming increasingly blurry. Fashion is no longer determined by professionally trained designers but also by the teens who have become fashion producers.

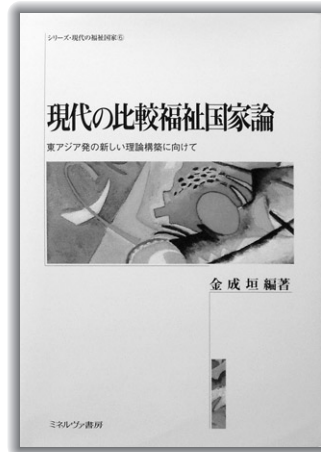
My work is influenced by Harrison White's study on the dealer-critic system in nineteenth century France and Howard Becker's work on art worlds that pays attention to individual networks within the art community. My current fieldwork on Japanese street fashion and subcultures is an extension of my previous research on high fashion focusing on Japanese outsider designers in the French fashion system. I compare and contrast the systems of high fashion and street fashion, and investigate the process of making street fashion happen. I am interested in how fashion is created, sustained and reproduced. I also explore why some Japanese youths choose to dress in distinctive and outrageous styles, what these styles represent and symbolize, and how the youths communicate and interact with each other to become a member of a specific subculture.

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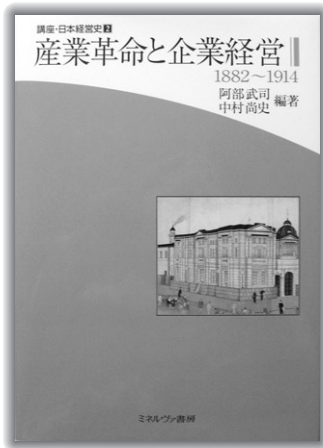
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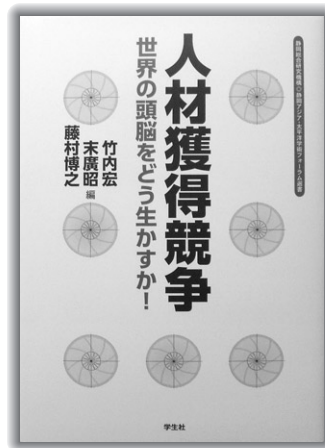
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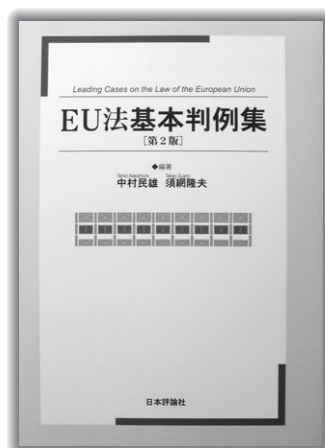


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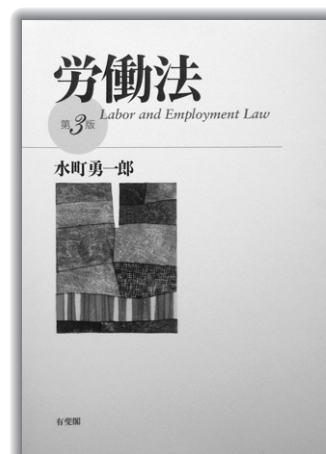
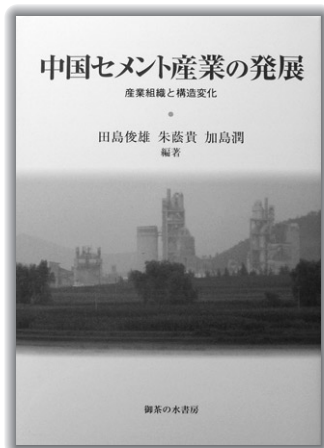


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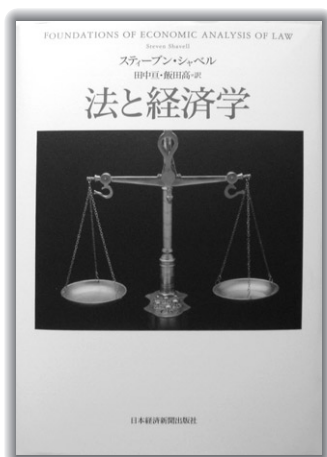


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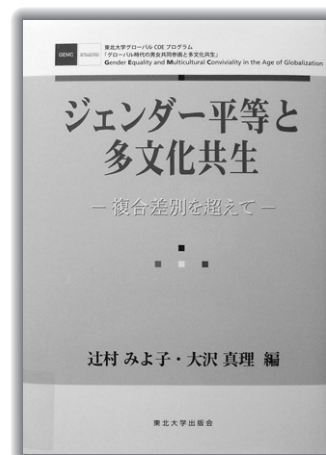


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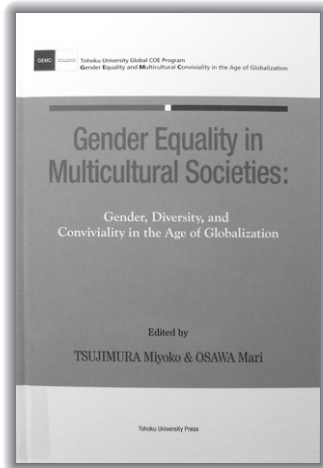
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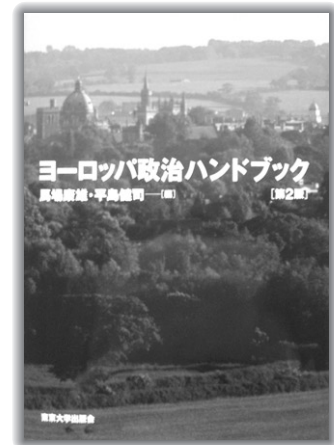
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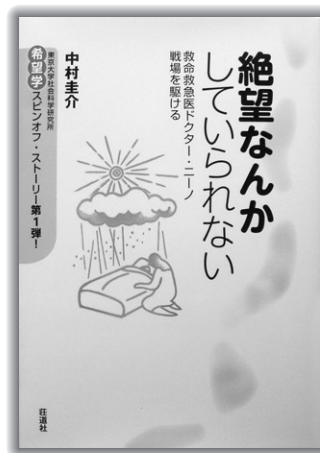
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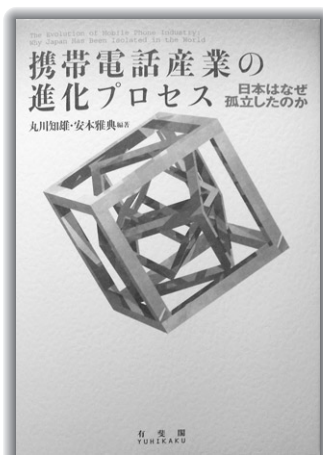


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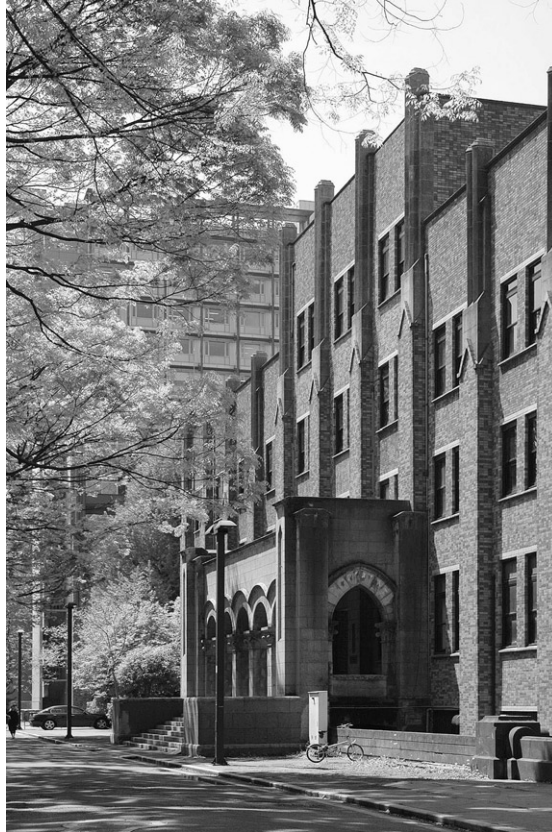


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