INAUGURAL EAST ASIAN LAW AND SOCIETY CONFERENCE

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- Title of the panel

"Judicial System Reform and Popular Participation in Japanese Criminal Justice"

A brief **description of the panel** in not more than 300 words

Since 2001 Japan has embarked on a third wave of comprehensive reforms to its judicial system, following the Meiji reforms over a century ago and the reforms during the Allied Occupation after World War II. One aim is to make civil courts more accessible while bolstering Alternative Dispute Resolution services, especially those provided by private suppliers. This is part of a shift away from ex ante regulation by public authorities, towards more indirect socio-economic ordering achieved thanks to a more credible threat of private action against deviants. Measures to facilitate administrative law suits against public authorities are consistent with this objective. All these reforms suggest the need for a larger and more diverse legal profession, which is also emerging along with changes to Japan's legal education system.

More lawyers, judges and prosecutors will also be needed if criminal justice reforms are to make significant differences in practice. One aim here also appears to be to bring criminal justice closer to the people, even if this means cases taking more time to be argued out in court. A prime example is Japan's recent re-implementation of a quasi-jury "saiban'in" system, where randomly selected lay citizens join with career judges to try serious criminal cases.

This panel will offer several critical perspectives [mainly] on this particular reform, drawing partly on comparative developments. However, it will also locate these issues in the context of other reforms underway to promote popular participation in Japan's legal process, and therefore pose more theoretical questions about why and how such participation is or should be promoted.

1. "Who Judges Japan? Popular Participation in the Japanese Legal Process"

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This first presentation sets the stage for our panel by introducing a forthcoming book with the same title – "Who Judges Japan? Popular Participation in the Japanese Legal Process" - co-edited by Wolff, Nottage and Anderson. The book will be published around December 2010 by Edward Elgar (UK), but the ten manuscripts are being prepared by 31 January 2010.

The book comprises essays by leading legal scholars and sociologists from Australia, Japan and the US on the issue of popular participation in the legal process more broadly in Japan. Following the landslide victory of the Democratic Party of Japan (DPJ) in the recent elections, DPJ leader and new Prime Minister Yukio Hatoyama has promised a democratic revolution for Japan, engaging Lincoln's famous aphorism of "government for the people, of the people and by the people." This promise tapped into the electorate's increasing despair and anger over mishandling of both economic and social policy by Japan's elite (but unaccountable) cadre of public officials.

This book explores the legal dimensions of Japan's "democratic revolution". Has judicial reform led to greater participation in judicial processes, thereby fostering greater public confidence in the administration of justice? Have administrative reforms provided a greater voice for citizens in policy-making initiatives? Are weaker groups in society, such as women and the elderly, making greater use of law to foster equity and diversity in society? In short: is there and will there be "law for the people, by the people and of the people"? And should there always be - even at the risk of populism, complexity, or inefficiencies?

Our presentation will suggest that we must ask these bigger questions and maintain a broader perspective to understand where recent initiatives come from, such as this year's re-implementation of a quasi-jury "saiban'in" system for serious criminal cases, and how they are likely to become embedded in Japanese law and society.

2. "Japan's New Criminal Jury Trial System: In Need of More Transparency, More Access, and More Time"

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For over sixty years, meaningful public participation in criminal or civil trials has been a foreign concept in Japan. In August 2009, this drastically changed as Japan conducted its first trial involving lay judges. As part of its new "saiban-in seido" or quasi-jury trial system, Japan now conscripts registered voters to serve on mixed tribunals, comprised of professional and lay

judges, which hear serious criminal cases. Citizen participation in criminal trials is one of many revolutionary legal reforms intended to transform Japan from a society with excessive regulatory control to a global model based on transparent, after-the fact review. Based on these changes, it is expected that Japanese citizens will be converted from governed objects to governing subjects. Citizen participation in Japanese criminal trials is specifically geared to increase common understanding of the judicial process, promote civic responsibility, and enhance the tools of democracy available to society. Reformists also hope that citizen participation will infuse sound common sense into the judicial process as well as ensure justice, due process of law, and prosecutorial accountability. However, many see the new quasi-jury system as an expensive exercise in futility. Without significant public debate, Japan has spent hundreds of millions of dollars preparing for a ground-breaking system that runs counter to Japanese tradition as well as faces considerable doubt and opposition among many members of society and the legal community.

Notwithstanding, the new system has considerable potential to improve the criminal justice system and increase the public's awareness of important social issues, including the recent rash of wrongful convictions based on involuntary confessions. It also stands as a powerful vehicle for potentially ensuring justice and solidifying the democratic processes fostered by citizen participation in government. Going forward, Japan's new quasi-jury system will not only be closely scrutinized on a domestic scale, but it may also offer valuable lessons on an international scale to established and emerging democracies, both in its initial form and in subsequent iterations. In its initial form, the new quasi-jury trial system is imperfect and faces many challenging hurdles. To realize its full potential, the system needs to be fine-tuned in several respects. By statute, Japan has the opportunity to make adjustments to the quasi-jury system in three years.

This paper takes an in-depth look at three important areas that require immediate attention and reform by 2012 at the latest. More specifically, for the quasi-jury system to achieve its stated goals of judicial transparency, public education, preservation of justice, and increased credibility in the criminal justice system, Japan needs to: (i) increase transparency by eliminating punitive measures against lay judges for exercising their freedom of speech to discuss criminal trials; (ii) improve access by opening the doors to the interrogation of suspects and defendants; and (iii) limit the active participation of victims or victims' families to the sentencing phase of criminal proceedings. Unless these steps are taken, the effectiveness of the quasi-jury system will be significantly hampered. As such, this paper will analyze the above three issues as they affect the quasi-jury system and explore potential solutions that balance the interests and concerns of all parties.[1]

3. "Transparency and Publicity in Japanese Criminal Justice: Possible Influences from the New Saiban-in Trials"

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In August 2009, the Japanese media covered the first saiban'in trial with enormous attention and considerable acclaim. Subsequent trials are also being covered extensively. This is almost unheard of for Japan. Yet its criminal justice system retains many hidden problems. This paper discusses how the new saiban-in system could impact on such non-transparent aspects and on legal education for the general public in Japan.

The first major problem lies in the investigative process. The "Heisei" criminal justice reform tried to improve some important procedures. Examples included mandatory public defenders in the pre-trial process, to give sufficient legal advice for defendants, and introducing an official pre-trial preparatory process for organizing points of legal arguments and giving an opportunity for pre-trial disclosure. However, important and key issues for criminal defendants are still unchanged. Interrogation by the police is totally unrecorded, although the prosecutors' offices and the police have readied visual recording equipment in the interrogation room. The prosecutor has no legal obligation to disclose exculpatory evidence against the defendant, although in the pre-trial preparatory process each party has right to require disclosure from the other party. Such non-transparency in the pre-trial process could be making lay-judges uneasy about deciding on the voluntariness of alleged confessions and the reliability of interrogation process.[2]

The second problem is the death penalty process. This remains in complete obscurity regarding decisions about implementing executions, and the review process is closed even for the inmate. There is no suspension process from the inmate side for any reason. Such non-transparency could also discomfort lay-judges.

The third is a new trial review process. In the "Ashikaga Case", the most recent wrongful conviction case in Japan, the first review court for the new trial requirement had no opportunity for fact finding and hearings. The court lost the chance to exonerate the wrongfully convicted person and to punish the real perpetrator due to expiry of the limitation period for the crime, which was assault and murder of a four-year-old girl in 1991. The unreliability and non-transparency of the case review process from inmates could also damage the reputation of Japanese criminal justice.

4. "Japan's Lay Judge System: What comes next?"

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The long lead time between the passage of its enabling legislation in 2004 and the actual commencement in 2009 of trials under Japan's new lay judge system gave commentators of all stripes (this writer included) ample opportunity to analyze and, more often than not, criticize the new regime. The people of Japan do not actually want to participate in criminal trials; such matters should be left up to judges; the whole system is unconstitutional; well, it's not unconstitutional but clearly rigged to minimize any actual impact the average citizen might have on the results of a trial – the list of complaints about the new system was long and varied. Criticism was easy, of course, because the system had not yet actually done anything.

August in 2009 saw the first smattering of trials under the new system, with new cases continuing to make the news periodically. But it is still probably too early to say very much about how the system is functioning, or whether it will ever be possible to do so meaningfully without the input of people who have actually served as lay judges. They are subject to lifetime confidentiality obligations except, apparently, to the extent their "anonymous" participation was required in the press conferences held after the first two trials (the names of the lay judges were not disclosed, though their faces were shown on national television).

This paper will not, however, cover what is essentially old ground, other than to establish a starting point for a largely speculative discussion of what the lay judge system may mean to the Japanese legal system in the long run. On a procedural level, the system has already required the manner in which criminal trials (using the lay judge system) have to be held – concentrated proceedings rather than the never-ending series of monthly sessions which used to prevail and caused trials to drag on for years. This aspect of the process alone is causing lawyers and prosecutors to develop a new interest in trial skills – in arguing a case before a group of people who lack any serious knowledge of the law. Doubtless this will prove significant in forcing advocates and judges alike to rely less on written documents in dense legalese, and more on oral argument and readable prose.

My real interest, however, is first in whether the lay judge system will resolve what I consider to be a type of agency cost problem in the Japanese judiciary. As has been discussed at great length in Japanese and western literature alike, the Japanese judiciary is a career bureaucracy, and judges are high-level bureaucrats who must navigate this bureaucracy for a career spanning several decades. As a result, it is likely that many judges may come to pursue the interests of their bureaucracy first and their supposed constituents (litigants and the citizens in general) second. These interests are further complicated by institutional and personal relationships with the prosecutorial agency, the Ministry of Justice and other governmental constituencies that are much closer than they may have with bar associations or practicing attorneys. Various explanations have been given for Japan's famously high conviction rate in criminal trials (fewer have been offered for the shockingly high rate at which judges approve post-arrest detention), but the fact that it just may not be in the interests of any individual judge or of the judiciary in

general to acquit a defendant (despite, for example, a lack of evidence beyond a confession procured during prolonged police detention) may be one factor in some cases.

Enter the lay judge system. Will the lay judges provide an excuse for judges to start exercising more clout – by effectively letting the lay judges take the blame for acquittals and sentences alike? Most judges in common law systems that I have heard speak on the subject love the jury system – not just because it is a fundamental part of the system in which they are trained, but because jurors make the most difficult decision in the whole trial process. A common law trial jury is selected randomly and used only once (making it difficult to "hack"), has no past, no future, no ego and no interest whatsoever in the results of the trial (other than going home!). At the same time the jury acts as a readily identifiable nexus of blame for the result of the trial they decide, yet disappears immediately upon that result being announced.

By contrast, as a mixed system in which judges and lay judges participate in decision-making together, the Japanese lay judge system presents some problems for a judge who might wish to kick back and leave everything up the amateurs. Depending upon how this dynamic develops, it could prove to be one of the most significant long-term implications of the lay judge system. The system could potentially *strengthen* the judiciary by providing a "blame cushion" which results in individual judges being able to exercise greater autonomy.

Another long term implication of the system will hopefully be that the lay judge system encourages (or forces) more Japanese people to think more about the law, and not just "what is the law", but "why is it the law?" and "why is it being applied this way in this case?". The system appears designed to minimize this sort of inquiry on the part of lay judges (by prohibiting anyone likely to know much about law from becoming a lay judge), but many intelligent citizens will likely find themselves questioning the manner in which judges explain both the laws and the various norms they have developed in both applying the law and finding facts.

A very simple long-term implication could be that there are no long-term implications. The system could prove too burdensome or inconvenient to the judiciary (too much work!) or the prosecutors (too many acquittals!). If this happens, having presented it as a needful burden on the populace in the first place, it will likely to be politically easy for the government to get rid of the system again in the future. This would be a shame, of course, particularly if it is done at a time when some of the positive long-term consequences discussed above are starting to be realized.

5. "Law, harm and cultural recognition: An experiment with interactive cartoon"

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This study addresses a gap in the longstanding literature comparing litigiousness in Japan and the United States. Takeyoshi Kawashima is often associated with the theory that Japanese culture encourages nonlitigiousness. A number of writers have critiqued this claim, including John Haley, Setsuo Miyazawa, Mark Ramseyer and Thomas Ginsburg.

My goal is to address Kawashima's claim with reference not to Japanese culture on the aggregate level, but his less-examined claim that culture can lead to differences in legally-relevant cognitive approaches at the *individual* level. (Kawashima, *Nihonjin no hō ishiki* (Iwanami Shoten: 1967), pp. 6-14.) Critiques of Kawashima that stress that he overstated the role of culture at the societal level are open to attack by psychologists in the subfield of cultural cognition, such as Dov Cohen, Shinobu Kitayama, and Richard Nesbitt, who argue that the relevant frame is not the society, but the individual.

For example, the cultural cognition psychologists have demonstrated that Japanese subjects are less likely than Americans to commit the "fundamental attribution error" – the tendency to attribute an individual's action to his or her choice rather than his or her situation. These researchers have also shown that Japanese and other East Asian subjects are also less likely than Americans to attribute effects to a particular cause rather than the overall context, and that should impact law.

I test whether there is a cultural cognition-related difference in lay people's view of tort causation. Using a series of mostly nonverbal cartoons that depict tort scenarios, I test whether Americans would be more likely than Japanese to choose a single cause for harm. The experimental subjects indicate what they believe to be the "cause" or the "causes" of the harm. The subjects' choices provide data to test the hypothesis that culture affects the perception of causation at the individual level.

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[1] http://ssrn.com/abstract=1468552

[2] http://blogs.usyd.edu.au/japaneselaw/2009/09/japans_new_quasijury_system_an_1.html