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THE JAPANESE JUDICIAL SYSTEM:
INTRODUCTION AND CONTEMPORARY ISSUES

ABSTRACT

This paper introduces Japan’s judicial system and court hierarchy, outlining the structure of its three-tiered court system, main court processes and the qualification and appointment of judges and other court officials. This paper considers the participation of citizens in the judicial process, most notably through the saiban’in (lay judge) and conciliation systems. It also introduces some key contemporary issues and challenges facing the judicial system in Japan.

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1. INTRODUCTION TO THE JAPANESE JUDICIAL SYSTEM

STRUCTURE OF JAPAN’S JUDICIAL SYSTEM AND THE PLACE OF THE COURTS IN THE CONSTITUTIONAL SYSTEM

Japan is a bicameral, unitary state with a population of 125.9 million people (Statistics Bureau of Japan, 2020a).¹ There are regular elections for both national and local levels of government in Japan and it is recognised as a parliamentary democracy, although the Liberal Democratic Party (LDP) has held power, either alone or as part of a coalition, for almost the entire time since its establishment in 1955 (Stockwin, 2018).² Japan joined the Organization for Economic Co-operation and Development (OECD) in 1964 (OECD, 2019).

The modern Japanese legal system has its foundations in the Constitution of Japan (nihonkoku kenpō), which was adopted on 3 May 1947 and was drafted to reflect Japan’s obligation to implement democratic principles under the terms of its surrender after World War II (Kawashima, 1983: 54). Japan’s legal system is a product of its history: indigenous legal traditions remain influential in certain areas and yet it may be classified as a civil law tradition fashioned on European legal systems, particularly German and French law, whilst certain areas of law also bear a significant imprint of the law of the United States, having come under its influence during and after the Allied Occupation.³

The Constitution of Japan replaced the Constitution of the Empire of Japan (dai nippon teikoku kenpō), also known as the Meiji Constitution. The Meiji Constitution of 1889 established a limited constitutional monarchy with sovereignty vesting in the emperor

¹ Current as of 1 January 2020.
² The LDP lost power between August 1993 and June 1994 and between September 2009 and December 2012.
³ For further discussion on the classification of the Japanese legal system, see Marfording, 1997.
(art. 4). As the sacred and inviolable head of the Japanese nation-state, the emperor exercised a great deal of power under the Meiji Constitution. Courts of law were to administer justice ‘in the name of the emperor’ (arts. 3 and 57). By delinking the emperor from the official functions of the state by vesting sovereignty in the Japanese people, the 1947 Constitution of Japan enhanced judicial independence.\(^4\) Moreover, the Constitution of Japan establishes the exclusive powers of the Diet (legislative), the Cabinet (executive) and the Supreme Court and other lower courts established by law (judicial). Finally, it gives the Supreme Court the power of judicial review.\(^5\)

**ORGANISATION AND STRUCTURE OF THE COURTS OF JAPAN**

**Court Hierarchy**

The Supreme Court of Japan is at the top of the Japanese court hierarchy, as the constitutionally established superior court and primary organ of judicial power. The inferior courts were established by the Court Act (saibansho hō) which was passed by the Diet on 16 April 1947. The Court Act lays the foundation for the rest of the court hierarchy, namely the high courts, district courts, family courts and summary courts.\(^6\)

Japan’s ‘three-tiered’ judicial system consists of a court of first instance and two levels of appeal. There are four levels of courts within this structure: (i) summary courts; (ii) district and family courts; (iii) high courts and (iv) the Supreme Court.

A brief summary of the functions of the courts which comprise the Japanese judicial system is provided below. Demonstrating the relative transparency of the Japanese court system, information about Japanese courts is readily available in English and the Supreme Court of Japan has published a very comprehensive overview of the jurisdictions of – and relationship between – the various Japanese courts in English.\(^7\)

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4 Article 9 of the Constitution of Japan provides that ‘All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws’.

5 Art. 81; ‘The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act’. Previously under the Meiji Constitution, jurisdiction in matters relating to the exercise of executive power was designated to a specially constituted court of administrative litigation, which was separate from the courts of law and established by statute. Standing in these cases was limited (see Kawagishi, 2007: 78-79).

6 The establishment of any extraordinary courts is prohibited under the Constitution of Japan (art. 76).

Supreme Court of Japan (saikō saibansho)

The Supreme Court predominantly exercises appellate jurisdiction. The Supreme Court also has judicial review powers, however these are limited to determining the constitutionality of a law in the context of a particular appeal; it is not a stand-alone review power (Supreme Court of Japan, n.d.a: 2). The Court also has original and final jurisdiction in proceedings relating to the impeachment of National Personnel Authority Commissioners (Supreme Court of Japan, n.d.a: 2).8

The Chief Justice and fourteen other justices sit on the Supreme Court. The court is divided into three Petty Benches, which hear most appeals. A Petty Bench requires at least three judges to be sitting.9 Matters involving questions of constitutional interpretation or opinions contrary to prior judicial decisions of the Supreme Court are referred to the Grand Bench of the Supreme Court, which is made up of all fifteen justices.10

Japan does not have a statutory equivalent of the common law principle of stare decisis, which creates binding precedent. In practice, however, institutional and other factors mean that the decisions of higher courts, in particular the Supreme Court, are highly authoritative and tend to be followed by the lower courts (Itoh 2011: 1633–34).

High Courts (kōtō saibansho)

Japan has eight high courts located in its major cities: Tokyo, Osaka, Nagoya, Hiroshima, Fukuoka, Sendai, Sapporo, and Takamatsu. There are also six branch courts.11

High courts have appellate jurisdiction over decisions by district courts, family courts, and summary courts.12 They are generally the court of final appeal in relation to judgments in the second instance by district courts and judgments by summary courts in matters other than criminal law.13 The high courts also have original jurisdiction in

8 Three National Personnel Authority Commissioners lead the National Personnel Authority, whose role it is to oversee national public service personnel, particularly their recruitment, appointment and dismissal, as well as to make recommendations to the Diet and Cabinet on national public service personnel remuneration and other working conditions (see arts. 3 and 4 National Public Service Act [kokkakōmuin hō]).

9 Art. 9(2) Court Act.

10 Arts. 9(2) and 10 Court Act.

11 Art. 22(1) Court Act.

12 For further details see art. 16 Court Act.

13 Appellants are able to make application to the Supreme Court as the ‘court of last resort’ from
criminal cases related to insurrections, as well as other original jurisdiction provided by various statutes, including over administrative actions pertaining to elections and petitions for revocation of decisions of quasi-judicial agencies, such as the Japan Marine Accident Tribunal (Supreme Court of Japan, n.d.a: 5-6).14

Branch courts exercise the same jurisdiction as their headquarter courts, with two qualifications: (i) a branch court is limited to handling cases in a designated area of its headquarter court’s territory; and (ii) a branch court does not have jurisdiction over final appeals against a judgment in the second instance rendered by a district court or a judgment rendered by a summary court, other than those concerning criminal cases, and a branch court does not have original jurisdiction over litigation involving insurrection, or preparing or being an accessory to an insurrection.15

Each high court comprises a president and several other judges, although branch courts do not have their own president. The number of judges at each high court is determined by the Supreme Court of Japan and varies according to location. Most cases before high courts and their branches are heard by a panel of three judges.16

In addition to the high courts and their branches, the Intellectual Property High Court is established as a special branch of the Tokyo High Court (Supreme Court of Japan, n.d.a: 5). The Intellectual Property High Court exercises greater independence than the other high court branches, and has its own president (unlike the branch courts) (Shinohara, 2005: 133). The Intellectual Property High Court has appellate jurisdiction over district court judgments in matters relating to intellectual property rights and decisions made by the Japan Patent Office, and also hears cases where a specialised knowledge of intellectual property is called upon to examine the major points in dispute (Supreme Court of Japan, n.d.a: 5-6).17 The establishment of the Intellectual Property High Court in April 2005 reflected a broader national strategy to stimulate industry and the economy through the promotion of intellectual property rights (Shinohara, 2005: 133).

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14 See also art. 16(iv) Court Act.
15 Art. 1(2) Court Rules for the Establishment of a Branch of the High Court (kōtō saibansho shibu secchi kisoku).
16 Art. 18 Court Act.
17 See also art. 2 Act for Establishment of the Intellectual Property High Court Act (chiteki zaisan kōtō saibansho secchi hō).
District Courts (*chihō saibansho*)

There are 50 district courts; each prefecture has a district court, although Hokkaido, geographically the largest prefecture, has four. There are also 203 branch courts throughout Japan (Supreme Court of Japan, n.d.a: 6). District courts have jurisdiction as the court of first instance in a wide range of civil, administrative and criminal cases. Generally speaking, district courts also have jurisdiction over appeals arising from summary court judgments and rulings.\(^{18}\)

District court cases are usually heard by a single judge, except where they are designated to be heard by a three-judge panel, including appeals and a range of criminal matters carrying the death penalty or punishable by imprisonment for more than one year.\(^{19}\)

Summary Courts (*kan’i saibansho*)

Japan has 438 summary courts (Supreme Court of Japan, n.d.a: 8). All summary court matters are heard by a single judge.\(^{20}\)

Generally speaking, summary courts have civil jurisdiction where the sum in dispute is not in excess of 1.4 million yen (approximately AU$18,600),\(^{21}\) and criminal jurisdiction where the offence in question is punishable by a fine or lighter punishment or the court has been otherwise given jurisdiction by law, including receipt of stolen goods and embezzlement.\(^{22}\) Summary courts may impose sentences of imprisonment for up to three years for set offences, including breaking and entering and theft.\(^{23}\) Any matters considered to warrant a heavier sentence are to be transferred by the summary court to the district court for hearing.\(^{24}\)

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18 Art. 24 Court Act.
19 Art. 26 Court Act.
20 Art. 35 Court Act.
21 Based on a JPY/AUD exchange rate of 0.75; the same rate applies throughout this paper.
22 Art. 33(1) Court Act.
23 Art. 33(2) Court Act.
24 Art. 33(3) Court Act.
Family Courts (*katei saibansho*)

Family courts are found in the same places as the district courts and their branches. There are also 77 local offices of the family court throughout Japan.

The family court was established in 1949 as part of a raft of post-war amendments to Japan’s family law system. These amendments were aimed at democratising the family structure by curtailing the influence of the household system (*ie seido*), characterised by stem-family relations and paramountcy of lineage (Ronald and Alexy, 2011: 1, 3). The new system was designed to favour the nuclear family structure (Fuess, 2004: 146).

Family courts have exclusive jurisdiction over the adjudication and conciliation of domestic relations matters (disputes relating to relationships between husband and wife, parents and children, and other relatives, including disputes over inheritance), personal status litigation at first instance (widely relating to the determination of divorce, paternity and adoption) and juvenile criminal and delinquency matters. Family court cases are heard by a single judge or panel of three depending on the subject matter.

**INTRODUCTION TO KEY CATEGORIES OF PARTICIPANTS IN JAPANESE PROCEEDINGS**

**Court Personnel**

**Judges**

The chief justice of the Supreme Court of Japan is appointed by the emperor upon cabinet recommendation. Other justices of the Supreme Court of Japan are appointed by the Parliamentary Cabinet. In practice, appointments to judicial vacancies are guided by the Supreme Court itself, because the chief justice recommends candidates to the cabinet based on a selection made by the Japan Federation of Bar Associations (Hasebe, 2007: 296). Justices of the Supreme Court are usually about sixty years of age.

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26 Art. 2 Personal Status Litigation Act (*jinji soshō hō*).

27 See Supreme Court of Japan, n.d.a: 7-8; art. 31-3 Court Act; art. 3 of the Juvenile Act (*shōnen hō*).

28 Art. 31-4 Court Act.
age when appointed and their retirement age is seventy (Hasebe, 2007: 296). The average age of the current Supreme Court is 66.6 years (Supreme Court of Japan, 2020d). It has been customary since the 1960s for six of the fifteen justices to be 'promoted' from lower court appointments, four to be appointed from attorneys, four from bureaucratic backgrounds (such as prosecutors) and one to be an academic lawyer (Hasebe, 2007: 296). There are also approximately thirty research judges (saikō saibansho chōsakan) appointed from the ranks of lower court judges to assist the Supreme Court (Haley, 2007: 103-4). These research judges help to manage the heavy case load of the Supreme Court’s fifteen justices by undertaking work such as preparing case notes and memoranda, attending justices’ conferences (where judgements are discussed and formulated), and assisting to select decisions to be published as hanrei (which may be characterised as a very limited form of precedent) (Kamiya, 2011: 1606).

Lower court judges (save for summary court judges who are discussed below) are generally appointed through a ‘career system’, serving first as assistant judges. Assistant judges are appointed from applicants who have passed the national bar exam (shihō shiken) and completed training at the Legal Training and Research Institute (shihō kenshūjo) (Haley, 2007: 102-3). Assistant judges are formally appointed by the cabinet from a pool of nominees put forward by the Supreme Court, but the process is in practice controlled by the central personnel bureau of the General Secretariat of the Supreme Court (Haley, 2007: 103). Assistant judges (as distinct from full judges) are not permitted to hear matters alone, but may be authorised to do so after five years of service upon nomination by the Supreme Court (Secretariat of the Judicial Reform Council, 1999). After ten years of service, assistant judges are eligible for promotion to the position of judge (Haley 2007: 103). Judges of the high courts, district courts and family courts must retire at the age of 65.30

In addition to fulfilling appointments to the district, high and family courts, career judges are also appointed to administrative positions which oversee the functioning of the judicial branch, including within the General Secretariat of the Supreme Court (Haley, 2007: 103). Judges may also undertake rotations in various ministries, including the Ministry of Justice and Ministry of Foreign Affairs. In recent years, judges may also be sent on secondment to the legal departments of corporations, to serve as lecturers in university law faculties and overseas on research and training programs (see Steele, 2020).

Summary court judges are not required to qualify in the same way as other judges. While high court judges, as well as assistant judges, public prosecutors, attorneys and high-ranking academics with at least three years’ experience may be appointed to the office of summary court judge, the majority are drawn from the ranks of experienced

29 As of 31 July 2020.
30 Art. 50 Court Act.
court secretaries and clerks, or former career judges or prosecutors who have reached retirement age in their previous occupations (Haley 2007: 100). Summary court judges are appointed by the Selection Committee for Summary Court Judges, which is regulated by the Supreme Court.

In addition to judges, conciliators (chōteikan) are appointed to assist the court from amongst attorneys with at least five years’ practicing experience. Conciliators act as part-time judicial officers to conduct conciliation in civil and family law disputes and have the same level of authority as judges within the conciliation process (Supreme Court of Japan, n.d.a: 32).

Other Court Officers

According to the Supreme Court, as of 2019, there are approximately 22,000 court officers (other than judges) working throughout Japan’s network of courts (Supreme Court of Japan, n.d.a: 33). These include judicial research officials, family court investigating officers, court execution officers, court clerks, court stenographers and court secretaries.

Judicial Research Officials (chōsakan)

Judicial research officials are appointed to the Supreme Court, and the district, family and high courts. They assist judges by undertaking legal research and drafting judgments. Judicial research officials may be experienced career judges or otherwise have expertise in a particular field relevant to the court’s work (Supreme Court of Japan, n.d.a: 33). For example, judicial research officials in intellectual property matters provide research on scientific and technical matters (Tsukahara, 2013: 10). In recent times, the position of Chief Judicial Research Official of the Supreme Court has been a pathway to promotion to the Supreme Court bench (Kawagishi, 2007: 89).

Family Court Investigation Officers (katei saibansho chōsakan)

Family court investigating officers are employed by the court to conduct investigations of family relationships in family law disputes, personal status cases (such as adoption or guardianship), juvenile criminal matters, and return applications under the Hague Convention on the Civil Aspects of International Child Abduction. The family court probation officer submits a report to the judge, who refers to it in the conduct of the hearing (Supreme Court of Japan, n.d.a: 33-34). Family court probation officers undergo two years of training at the Training and Research Institute for Court Officials.

31 See art. 45(1) Court Act. While the retirement age for summary judges is 70 (art. 50 Court Act), the retirement age for prosecutors is seven years earlier, at 63 (art. 22 Public Prosecutor’s Office Act [kensatsuchō hō]). In a recent controversy, the Japanese Cabinet allowed chief of the Tokyo High Public Prosecutors Office, Hiromi Kurokawa, to continue in his role past the age of retirement, when he turned 63 in February 2020 (Kyodo News, 2020).
(saibansho shoku’in sōgō kenshūjo) in Tokyo, which is affiliated with the Supreme Court (Ichimiya, 2012: 2). Candidates are admitted to the training course by passing an employment examination in human sciences. The course covers the study of relevant laws; human sciences, such as clinical psychology, developmental psychology, family sociology, criminal sociology, pedagogy, social welfare studies and psychiatric medicine; and practical skills, such as investigation practice and interview technique exercises (Supreme Court of Japan, n.d.e).

**Court Execution Officers (shikkōkan)**

Court execution officers execute civil judgments and undertake the service of documents for the court. Court execution officers are appointed at each of the district courts; the district courts handle all petitions for execution in civil matters, regardless of the court which issued the judgment. Candidates must as a general principle have at least 10 years’ experience in a law-related field, pass an examination on the constitution and various legislation, and attend an interview to assess their character, suitability and specialist abilities necessary for the role (Supreme Court of Japan, n.d.d).

**Court Clerks, Court Stenographers and Court Secretaries**

Court Clerks attend hearings, prepare and manage court records and assist parties to understand court procedures. They also assist judges with research tasks and manage litigation timetables for the court (Supreme Court of Japan, n.d.a: 33; n.d.f). Court clerks play a key role in the smooth operation of the courts and have been characterised as undertaking a role equal to court manager (Taniguchi, 2007: 91-92) or even magistrate, noting that they essentially run more procedural hearings, such as enforcement or bankruptcy proceedings (Jones, 2018). Candidates must first undertake a set period of employment as a court official and complete a course of training at the Training and Research Institute for Court Officials (Supreme Court of Japan, n.d.e). During their training, they study legal subjects, including the constitution, the Civil Code, the Penal Code and procedural law. They also learn practical skills such as managing complaints, co-coordinating court schedules and document preparation (Supreme Court of Japan, n.d.e).

Court secretaries undertake administrative work in the court and court stenographers are responsible for producing court transcripts (Supreme Court of Japan, n.d.a: 34).

32 Art. 62(2) Court Act.

33 Art. 62(1) Court Act. Article 3 Civil Execution Act (minji shikkō hō) provides that for a disposition of execution made by a court execution officer, the execution court shall be the district court to which the court execution officer belongs.
Other Participants – Attorneys and Prosecutors

Attorneys (bengoshi)

Japanese attorneys are permitted to appear in any court in Japan (Supreme Court of Japan, n.d.a: 35). There is no distinction between advocates who argue matters in court and solicitors who work on matters outside of court, as in so-called barrister-solicitor systems.

Reforms to legal education took effect from April 2004 and were designed to provide enhanced practical legal training and produce a greater number of attorneys to expand access to legal representation (Matsui, 2013). The reforms saw the establishment of graduate-level professional law schools in Japan. Prior to this time, aspiring attorneys could undertake an undergraduate law degree prior to sitting the National Bar Examination, however a degree was not a pre-requisite to sitting the examination (Matsui, 2013: 4). The current system for qualifying attorneys in Japan requires graduation from a post-graduate law school or passing of the extremely competitive preparatory examination (yobi shiken), followed by successful completion of the National Bar Examination and a one-year training course at the Legal Training and Research Institute. Once they have completed the training course at the Legal Training and Research Institute and passed a final examination (nikai shiken) administered by the Institute, attorneys must register with a local bar association in order to practise (Supreme Court of Japan, n.d.a: 35).

The National Bar Examination pass-rate system was revamped as part of the 2004 reforms with the aim of recasting it as a licensing test and increasing the number of candidates passing (Tanikawa, 2011). The old National Bar Examination was completely phased out in 2012 and the new National Bar Examination has seen a significant increase in the number of candidates passing, although the large majority of candidates still fail. The pass rate for the old National Bar Examination in 2004 was just 3.4% compared to a pass rate of 33.6% for the new National Bar Examination fifteen years later in 2019 (Ministry of Justice, 2019a, table 5-3). One trend discernable after the reforms took effect was the rise in the fail rate for the final examination administered by the Institute; in 2004, the fail rate was negligible at only 0.2%, but it increased in subsequent years, reaching 18.6% and 23.5% in 2009 and 2010 respectively (Ministry of Justice, 2019a, table 5.1). In the years since, the pass rate has rebounded and, in 2018, 99% of candidates passed the final examination administered by the Institute (Ministry of Justice, 2019a, table 5-1). One important, albeit unintended, consequence of the 2004 reforms to legal education has been the shift in focus of students to passing the preparatory examination, presumably to avoid the costs associated with graduating from law school. While the pass rate for the preparatory exam remains low (it has never exceeded 4.8%), the number of candidates sitting the examination increased almost 80% from 2011 to 2018, jumping from 6,477 to 11,136 (Japan Federation of Bar Associations, 2019a: 64 [see subcategory hōkadaigakuinsei, reference 1-2-18]).
The shift toward aspiring attorneys taking the preparatory examination rather than graduating from a law school has been one of the reasons the legal education reforms have not met their aims. More than half of the law schools opened since 2004 have since shut down, due to declining enrolments and cuts to government subsidies on account of poor student performance in the National Bar Examination (Japan Times, 2019). In 2015, the Japanese government slashed its target for the number of successful bar examination applicants in half, to 1,500 (Japan Times, 2019). A key area of concern with the pre-reform system of legal education was the focus on technical, exam-centric knowledge to the detriment of practical legal experience and more broader pedagogy, such as ethics and professional responsibility (Vanoverbeke and Suami, 2014: 70). Even early in the implementation of the reforms commentators noted that the continued focus on a National Bar Exam remained problematic and could lead to a reversion back to a 'cram school' culture (Steele, 2005: 265-66; Kashiwagi, 2010: 192-94; Steele and Taylor, 2010: 11-12).

In any event, the legal education reforms have met one goal – that is, the reforms have resulted in a significant boost to the numbers of attorneys in Japan. The attorney population has more than doubled in the fifteen years since the reforms from 20,224 in 2004 to 41,118 in 2019 (Japan Federation of Bar Associations, 2019a: 44 [see subcategory bengoshi sū no suikei, reference 1-1-2]). There has not, however, been any significant correlating increase in the number of judges over that time; the number of judges has risen only 16.3% from 2,385 to 2,774 (Japan Federation of Bar Associations, 2019a: 62 [see subcategory saibankan sū, reference 1-2-13]). According to judicial statistics published by the Supreme Court of Japan, litigation has decreased, with the exception of family law litigation which increased more than 50% between 2004 and 2018 (Supreme Court of Japan, 2004a: 2; 2004b: 2; 2004c: 2; 2004d: 2; 2018b, table 1; 2018c, table 1; 2018d, table 1; 2018e, table 1-1).

**Public Prosecutors (kensatsukan)**

Public prosecutors have the power to institute the investigation and prosecution of crimes. They also appear in court and supervise the execution of judgments handed down by the court. Prosecutors also provide support for victims of crime and have additional administrative functions where it is deemed to be in the public interest as stipulated by law, for example acting as the opposing party in cases for the acknowledgment of a child (Secretariat of the Judicial Reform Council, 1999).

The Public Prosecutors Office (kensatsuchō) is the agency which directs all work of the public prosecutors and it falls under the control of the Ministry of Justice (Ministry of Justice, n.d.b). Public prosecutors offices are organised in four levels which correspond to the courts hearing criminal matters: the Supreme Public Prosecutors Office in Tokyo, high public prosecutors offices, district public prosecutors offices and local public prosecutors offices. Like assistant judges and attorneys, public prosecutors must pass the National Bar Examination and complete the one-year training course at the Legal Training and Research Institute (Supreme Court of Japan, n.d.e).
Other Participants – Citizen Participation

Lay Judges (saiban’in)

The lay judge system commenced in May 2009 and operates in criminal trials in the district courts involving offences punishable by death or life imprisonment and offences that have otherwise caused a victim to die by an intentional criminal act. The lay judge system may be regarded as a hybrid system, mixing elements of the common law jury system with those of the German and French lay assessor systems (Miyazawa, 2014: 74).

Citizens aged 20 and over are selected at random from electoral rolls to be saiban’in (Supreme Court of Japan, n.d.a: 37). As in many common law jury systems, permanent residents are not eligible to serve as lay judges; this excludes participation by the population of ethnic Chinese and Korean permanent residents in Japan (Nolan and Anderson, 2007: 49). Six saiban’in work on a panel with three professional judges to hear a case. Unlike members of a common law jury, saiban’in are permitted to ask questions of the accused and witnesses during the trial (Ministry of Justice n.d.a). However, decisions on the interpretation of laws and regulations and court procedures lie only with the professional judges. The panel determines the guilt of the accused and decides a sentence by majority vote; the majority vote must, however, be supported by one of the professional judges.

34 Art. 2(1) Act on Criminal Trials with the Participation of Saiban’in (saiban’in no sankasuru keiji saiban ni kansuru hōritsu). Although an accused does not have the right to choose whether their case will be heard by saiban’in, some cases are excludable from the saiban’in system (art. 3).

35 A number of provisions apply to exclude certain citizens from sitting as saiban’in. For example, people who have not completed nine years of compulsory education and those who have been sentenced to imprisonment are unable to act as saiban’in. See arts. 13 to 19 Act on Criminal Trials with the Participation of Saiban’in.

36 This may be reduced to a panel of four saiban’in and one judge in cases where it is apparent from pre-trial conferencing that there is no dispute on the alleged facts; see art. 2(3) Act on Criminal Trials with the Participation of Saiban’in.

37 Art. 6(2) Act on Criminal Trials with the Participation of Saiban’in.

38 Art. 67 of the Act on Criminal Trials with the Participation of Saiban’in. The effect of this provision is that a majority decision to acquit without a professional judge’s vote would regardless result in a not guilty outcome, while a majority decision of guilt without a professional judge’s vote would also result in a not guilty outcome (Anderson and Saint, 2005: 276). Where the division of opinion occurs in relation to the quantum of a sentence, the votes for the least favorable option are added to the votes for the next least favourable option until a majority (including the vote of a professional judge) is achieved. The verdict is then taken to be the most favorable option from that majority (art. 67(2)).
In 2018, district courts heard the criminal cases of 69,028 people in ordinary first instance proceedings, and 1,090 (1.6%) of these were heard by way of saiban’in trial (Supreme Court of Japan, 2019a: 2).

In 2011, the Supreme Court of Japan confirmed the constitutionality of the saiban’in system, after a Filipino woman appealed a term of imprisonment for drug smuggling arguing, among other things, that the system amounted to a denial of access to courts, impeded the independence of the judiciary, and created an illegal extraordinary tribunal.\(^{39}\)

**Committees for the Inquest of Prosecution (kensatsu shinsakai)**

A Committee for the Inquest of Prosecution (also known as a Prosecution Review Commission)\(^{40}\) reviews whether it is appropriate in a given case for a public prosecutor to decide against prosecution. If the committee decides with a special majority of eight that prosecution is appropriate, the matter is returned to the public prosecutor for review (Supreme Court of Japan, n.d.a: 41; Miyazawa, 2014: 71). If the prosecutor again decides not to prosecute and the committee again considers prosecution is appropriate, an attorney appointed by the court will instigate the prosecution. There are 165 such committees throughout Japan and they are made up of 11 citizens over the age of 20 who are eligible to vote in the House of Representatives’ elections for the Diet (Supreme Court of Japan, n.d.a: 41).

The committees have been in place since 1948, as part of a post-war effort to introduce democratic oversight of prosecutorial decisions (Supreme Court of Japan, n.d.b; Miyazawa, 2014: 71). They were, however, only advisory in function. Along with the legal reforms introduced in May 2009 which established the saiban’in system, the committees were given a significant boost in stature by being given the power to direct mandatory indictments (Imaseki, 2013; Miyazawa, 2014: 71).

As of the end of 2019, the committees had reviewed the cases of approximately 170,000 suspects (Supreme Court of Japan n.d.b). The committees determined that prosecution was appropriate in 1.4 % of cases, that failure to prosecute was inappropriate in 9.1% of cases, and that the decision not to prosecute was appropriate in 59.2% of cases (Supreme Court of Japan n.d.b). Approximately 1,600 suspects have been prosecuted as a result of committee decisions that prosecution was appropriate or that failure to prosecute was inappropriate, with 14 being prosecuted as a result of a second-stage

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39 Kakuseizai torishimari hō ihan kanzei hō ihan hikoku jiken (Prosecution of Accused in Breach of the Stimulants Control Act and the Customs Act; described in English as, “Judgment concerning the Constitutionality of Citizens’ Participation in Criminal Trials”). Case number 2010 (A) 1196. Decided 16 November 2011.

40 An alternate translation often used in English academic literature is ‘Prosecution Review Commission’.
review (Supreme Court of Japan n.d.b).

Johnson and Hirayama undertook a review of the performance of the committees ten years after the reforms in 2009 (2019). While they evaluated the committees positively as a check on discretionary prosecutorial decision making, they noted that the committees had not led to more aggressive charging practices by prosecutors or a lowering of the conviction rate in Japan; that is to say, that decisions regarding guilt or innocence were still overwhelming being made at the prosecution stage, rather than at trial (2019: 96-97). This conclusion was attributed in part to the low rate of mandatory prosecutions initiated by the committees, and the low rate of conviction for those mandatory prosecutions which went ahead, leading to vindication on the part of prosecutors that their decision-making was sound (Johnson and Hirayama, 2019: 96-97). A high-profile instance of this type of outcome was seen in the 2019 acquittal of three former TEPCO executives on charges of criminal negligence in relation to the meltdown of the Fukushima Daiichi nuclear power plant on 11 March 2011 (Johnson, Fukurai and Hirayama, 2020). In their assessment of three key mechanisms of lay participation in the Japanese criminal justice system, Steele, Lawson, Hirayama and Johnson also note the role that the committees play in legitimising extant practices, and the potential of the committees to be influenced by their administrative structures (2020). The committees’ administration is affiliated with the Supreme Court of Japan and they may receive legal advice from a party who is not a member of the committee (Steele et al., 2020: 175). Johnson and Hirayama also aired a number of areas for potential reform, including a focus on the potential harmful effects of the committee decisions, including on suspects, which could be ameliorated by suspects having the opportunity to speak to the committees, and the provision of more legal advice to the committees on the possible consequences of their decisions (2019: 97). Further possible areas of reform included making committees more accountable for the reasons for their decisions, and revitalising the committee system by putting more cases before the committees and increasing their utility as gatekeepers of appropriate prosecutorial decisions. However, these reforms would face significant political, cultural and jurisprudential challenges (Johnson and Hirayama 2019: 97-98).

In addition to the Committee for the Inquest of Prosecution, the Japanese Code of Criminal Procedure provides for a ‘quasi-prosecution procedure’ for certain offences involving public officials whereby complainants or accusers unhappy with a decision not to prosecute may apply to the local district court to commit the matter for trial.41

**Conciliation Commissioners (chôtei i’in)**

Conciliation commissioners are citizen conciliators who work in a conciliation committee (chôtei i’inkai), comprising a judge or conciliator and two or more conciliation commissioners, to facilitate discussion and settlement in civil and family law disputes

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41 Art. 262 Code of Criminal Procedure (keiji soshō hō); Supreme Court of Japan, 2019: 16-17.
Conciliation commissioners are selected based on their life experience and/or specialised knowledge (Supreme Court of Japan n.d.a: 27). Conciliation commissioners are recruited from the community at large and differ from conciliators (chōteikan, discussed above), who are officers of the court with legal qualifications.

Conciliation occupies a particularly prominent place in the family court, which adopts a 'conciliation-first' principle in the majority of family cases.43

**District and Family Court Committees**

Since 2003, each district court and family court has had a court committee, made up of community leaders with relevant knowledge and experience and members of the legal profession, including judges, attorneys and public prosecutors. The committees facilitate discussion about the operation of their respective courts with the aim of ensuring that public opinion is taken into account in the running of the court (Supreme Court of Japan, n.d.a: 42).

**Expert Advisors**

The Japanese judicial system engages with professionals in various fields to access specialised knowledge for specific categories of cases.

Since April 2006, a labour tribunal (rōdō shinpan) has operated within the district court to mediate and adjudicate employment disputes (Supreme Court of Japan, n.d.c). The labour tribunal is conducted by a labour tribunal judge and two labour tribunal commissioners (rōdō shinpan’in), who are lay people selected for their particular expertise and experience in labour relations (Supreme Court of Japan, n.d.a: 39).

Another judicial panel engaging professionals from the community relates to the mental health of offenders. Under a system set up in 2005, people who have committed a serious crime and are not prosecuted, or are acquitted or given a reduced sentence, due to insanity or diminished capacity, are assessed by a judge and a mental health adjudication commissioner (seishin hoken shinpan’in) to determine any special treatment required with the goal of ensuring appropriate treatment, reducing recidivism and integrating offenders (Japan Federation of Bar Associations, 2018: 101).44 The panel may also call on the opinion of a mental health counsellor (seishin hoken san’yo’in) to

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42 Supreme Court of Japan, n.d.a: 37-38.

43 See art. 244 Domestic Relations Case Procedure Act (kajijiken tetsuzuki hō).

44 Art. 1 Act on Medical Care and Treatment for Persons Who Have Caused Serious Cases under the Condition of Insanity (shinshin sōshitsu nado no jōtai de jūdai na tagai kōi wo okonattamono no iryō oyobi kansatsu nado ni kansuru hōritsu).
assist with the decision (Supreme Court of Japan, n.d.a: 39). Both commissioners and counsellors are selected from the community; commissioners are psychiatrists while counsellors are selected from mental health and welfare professionals (Supreme Court of Japan, n.d.a: 39).

Other experts involved in the judicial process are technical advisors (senmon i’in) and appraisal commissioners. Technical advisors may be called upon by the court in civil matters to clarify matters relating to a suit, including in the fields of medicine, construction and intellectual property. Appraisal commissioners, individuals with expertise and experience in law and real property, may also be called upon to form an appraisal committee of three or more commissioners to provide an opinion to the judge in a tenancy dispute (Supreme Court of Japan, n.d.a: 41).

**Other Lay Participants**

Judicial commissioners (shihō i’in) are selected from the community and assist the court in civil matters in the summary court. Judicial commissioners can assist the judge in attempts to resolve a dispute or attend a hearing to express their opinion. There are also counselors, selected from the community for their knowledge and life experience, who attend hearings in the family court and provide their opinions to the judge (Supreme Court of Japan, n.d.a: 40).

**2. JUDICIAL PROCESS**

**CIVIL CASES**

A brief summary of the types of civil proceedings heard by Japanese courts and the litigation process is provided below.

The Civil Code of Japan (minpō) is Japan’s primary body of private law. It was enacted in 1896 and 1898 during the Meiji era (1868—1912), a period marked by rapid modernisation following the fall of the Tokugawa Shogunate in 1867 and the restoration of imperial rule. The Civil Code drew on German civil law traditions and underwent significant amendment after World War II, predominantly to its provisions pertaining

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45 Art. 92-2 of the Code of Civil Procedure (minji soshō hō); see also Supreme Court of Japan, n.d.a: 40.

46 Art. 279 of the Code of Civil Procedure; see also Supreme Court of Japan, n.d.a: 40.

to family law and succession. On 1 April 2020, amendments to the provisions relating the law of obligations came into effect; the most large scale set of amendments in over seventy years (Ministry of Justice, 2019c). These amendments were designed to clarify ambiguous provisions and codify principles and concepts which had evolved through case law (Ministry of Justice, 2019c). Another major amendment to the Civil Code is due to take effect from 1 April 2022, when the age of majority will lower from 20 to 18 (although the legal age for activities such as drinking, smoking and gambling will remain at 20) (Ministry of Justice, n.d.b; Steele and Kano, 2018).

Japanese courts hear civil matters in accordance with the Code of Civil Procedure (disputes involving property rights between individual or private entities known as ‘ordinary litigation’) and administrative case litigation under the Administrative Case Litigation Act (gyōsei jiken soshō hō) (involving disputes between individual or private entities and public authorities; broadly equivalent to ‘judicial review’ under common law) (Supreme Court of Japan 2020a: 4). Aside from litigation, courts in Japan also conduct provisional remedy proceedings (applications to preserve the status quo between the parties until the disposition of the matter), civil execution proceedings, insolvency proceedings, protection order proceedings (relating to spousal violence), and labour tribunal proceedings.

### Litigation

Summary or district courts have jurisdiction in the first instance over ordinary litigation; which court civil proceedings are filed in depends on the quantum, with claims over 1.4 million yen falling under district court jurisdiction (Supreme Court of Japan, 2020a: 6). District courts also have jurisdiction in the first instance in administrative case litigation unless otherwise provided by law (Supreme Court of Japan, 2020a: 6). Many cases do not reach judgment and are instead resolved by way of judicial settlement (where the parties are encouraged by the court to settle and settlement is recorded by the court and is final and binding), waiver or acknowledgment of the claim (also recorded by the court and final and binding in nature) or withdrawal from the action by either of the parties (Supreme Court of Japan, 2020a: 16-17).

### Civil Conciliation (minji chōtei)

Conciliation is a form of alternative dispute resolution utilised prior to or during civil litigation. Conciliation is most common at the summary court level, but is also available in the district and high courts (Supreme Court of Japan, 2020a: 31). Conciliation may be conducted by a conciliation committee (discussed above) or by judge alone. Conciliation is also used by specialised labour tribunals (discussed above) to attempt

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48 See, for example, art. 74-2(9) of the Local Autonomy Act (chihō jichi hō).

49 Art. 5 Civil Conciliation Act (minji chōtei hō).
Regulated by the Code of Civil Procedure, civil conciliation is commenced on the petition of a party (art. 2), and is concluded either by the parties coming to an agreement which is recorded and has the effect as a judicial settlement (art. 16), the conciliation committee finding that there is no likelihood of an appropriate resolution and closing the case (art. 14), or the conciliation committee making an order to resolve the case (order in lieu of conciliation), including for the payment of money or delivery of an object (art. 17). If neither party raises an objection to the other within two weeks of being notified of it, the order will have the same binding effect as a judicial settlement. Special conciliation (tokutei chōtei) is a particular type of civil conciliation which brings together creditors and debtors in cases where debtors are having trouble meeting their obligations.

**Litigation Costs, Timeframes and Trends**

Court costs (saiban hiyō) in civil proceedings, such as filing and service fees, travel expenses and administrative costs of preparing documents for filing, are in principal borne by the unsuccessful party. Court costs do not, however, normally include legal fees, such as attorney’s fees. This exclusion can make litigation a prohibitively costly endeavour even when a claimant has a strong case.

According to statistics published by the Supreme Court of Japan, 35.6% of ordinary litigation matters at first instance in the district court in 2017 were concluded within three months, while 19.6% took up to six months and 19.9% took up to one year (Supreme Court of Japan, 2018e, table 9). By contrast, 92.7% of the same types of matters were disposed of within three months in the summary courts (Supreme Court of Japan, 2018e, table 12).

The number of new filings in first instance civil litigation matters in the district courts has been relatively steady over the past 30 years, save for a spike between 2006 and 2010 (Supreme Court of Japan, 2020a: 8). This period has been termed Japan’s “litigation bubble” and been linked to a period of ambiguous regulation of the overpayment of interest on loans during which the courts frequently offered favourable outcomes to borrowers, providing an impetus to litigate (Columbo and Shimizu, 2016).

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50 See the Labor Tribunal Act (rōdō shinpan hō).

51 See Act on Special Conciliation for Expediting Arrangement of Specified Debts (tokubetsu saimu nado no chōsei no sokushin no tame no tokutei chōtei ni kansuru hōritsu).

52 Art. 61 Code of Civil Procedure.

53 See the Act on Costs of Civil Procedure (minji soshō hiyō ni kansuru hōristu). The unsuccessful party may be ordered to pay a portion of their opposition’s legal fees in tort cases (Tago, Uenishi and Guesdon, 2019).
CRIMINAL CASES

A brief summary of criminal procedure in Japan is provided below.\textsuperscript{54}

The criminal law of Japan is codified in its Penal Code (\textit{keihō}). The administration of criminal law by the courts is principally governed by the Code of Criminal Procedure (\textit{keiji soshō hō}), the current incarnation of which was promulgated in the period after World War II and drafted to reflect the democratic protections enshrined in the Constitution of Japan. Criminal trials in Japan have features of European and Anglo-American systems and may be considered ‘pseudo-adversarial’ in nature (Keiichi and Toshikuni, 2019; UNAFEI, 2019: 26; Supreme Court of Japan, 2019b: 45).

\textbf{Process of a Criminal Matter}

\textit{Investigation and Pre-Indictment Detention}

Police officers are generally the first to canvass a potential prosecution and then refer the matter to a public prosecutor’s office. While the police and the public prosecutors are independent offices, the public prosecutor may instruct the police to undertake certain actions to assist the prosecution.\textsuperscript{55}

The police must obtain a warrant from the court to search or arrest an individual or enter their property, or to seize property.\textsuperscript{56} Once arrested, a suspect must be either referred to the public prosecutor along with the relevant documents and other items of evidence within 48 hours, or released if continued detention is not considered necessary.\textsuperscript{57} The public prosecutor may hold the suspect for a further 24 hours before requesting a judge authorise a 10-day period of detention, at the end of which the prosecutor may apply


\textsuperscript{55} Art. 193(1) Code of Criminal Procedure.

\textsuperscript{56} The Constitution of Japan provides for arrest prior to obtaining a warrant where the individual is involved in the commission of a crime at the time (art. 33). This proviso has been codified by the Code of Criminal Procedure with various qualifications, relying on the facts of a given disposition (for example urgency and gravity of the offence, or degree of certainty as to the guilt and identity of the offender). For further discussion of the law on warrants, see Foote, 1991.

\textsuperscript{57} Art. 203(1) Code of Criminal Procedure.
for a further 10-day extension to the detention period (Leo, 2002: 207). In effect, police and prosecutors in Japan may hold a suspect for questioning for up to 23 days, during which time they are held in ‘substitute prisons’ (*daiyō kangoku*; holding cells of police stations) (Leo, 2002: 207). Moreover, the allowable detention period applies per charge, so prosecutors who need more time to investigate need only arrest a suspect on another minor charge to have the detention period start over (Leo, 2002: 207). Under Japanese law, suspects have formal rights to silence and a private interview with their defence counsel. However, the lengthy time periods and lack of legal regulation surrounding interrogation of suspects under the pre-indictment detention associated with the *daiyō kangoku* system has attracted criticism by human rights bodies such as Amnesty International (Amnesty International 2014: 14-15) and the United Nations Human Rights Office of the High Commissioner (OHCHR, 2014). The issue attracted worldwide attention in 2019 when high-profile former Chairman and CEO of Nissan, Carlos Ghosn, was held for 130 days in pre-indictment detention in Tokyo (see, for example, Bouquet, 2020; Denyer, Sly and Khattab, 2020).

**Minor Offences**

Minor crimes may be disposed of on an uncontested basis by way of summary proceedings in a summary court upon the request of the public prosecutor if the facts are not in dispute and the accused agrees to it. Without holding a hearing, the court examines documents and other material submitted by the prosecution and issues a summary order (*ryakushiki meirei*) ordering a fine of not more than 1 million yen, suspending the sentence, ordering confiscation or taking other action as appropriate. If either party objects to the summary order within fourteen days, the matter will be transferred to a hearing at first instance.

Under the Code of Criminal Procedure, expedited proceedings are also available upon the request of the public prosecutor in matters involving a plea of guilty where the facts are clear and the offence is minor (that is, not punishable by a sentence graver than imprisonment for one year or more) (arts. 350-2(1) and 350-8). The accused must also agree to the expedited proceedings (arts. 350-2(2) and 350-6). Rules of evidence are relaxed, allowing pre-prepared statements in lieu of viva voce evidence (art. 350-12), and judgements are to be issued within one day to the extent possible, with any disposition for imprisonment to be suspended by the court (arts. 350-13 and 350-14).

58 See art. 208 Code of Criminal Procedure.


60 See articles 461 to 470 Code of Criminal Procedure.
General Trial Process

Once a prosecution has been initiated, the court may conduct a pre-trial arrangement proceeding (kōhanmae seiri tetsuzuki) with the parties to confirm the charges, facilitate the examination of evidence and plan the trial; such a proceeding is mandatory if the saiban’in system is being used for the trial (Supreme Court of Japan, 2019b: 18). Pre-trial arrangement proceedings were introduced to coincide with the introduction of the saiban’in system, to expedite trial preparation (previously, there was no obligation for prosecutors to disclose evidence to the defence in the absence of a court order) (Ibusuki, 2010: 35). The suspect may also apply to the court for bail prior to the first trial date.

At trial, there is no arraignment and any admission of guilt must be corroborated by the other facts. Any written confession made by the suspect in the investigation stage is able to be adduced into evidence, although only after all of the other evidence establishing the facts has been examined. There are constitutional and legislative protections against the use of confessions obtained under duress, however confessions are rarely suppressed in practice in Japanese courts, regardless of their method of extraction, particularly where it would result in a seemingly guilty suspect being set free.

The Code of Criminal Procedure provides that the court must find a suspect not guilty when the case brought by the prosecution does not constitute a criminal act or there is no proof of the crime (art. 336). The burden of proof which lies with the prosecution is one of ‘beyond reasonable doubt’. Judges may also gather and examine evidence

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61 See arts. 316-2 to 316-12 Code of Criminal Procedure.

62 Art. 88 Code of Criminal Procedure. Whether or not bail is granted depends on a variety of factors including the gravity of the crime, prior offences, pattern of offending, and the risk the suspect may conceal or destroy evidence or harm the victim or related parties or their property.

63 See art. 38(3) Constitution of Japan: ‘No person shall be convicted or punished in cases where the only proof against him is his own confession’; see also arts. 319(2) and (3) Code of Criminal Procedure.

64 Art. 301 Code of Criminal Procedure.

65 See art. 38(2) Constitution of Japan; also see Fox, 2018; Johnson, 2002: 243-75; Johnson, 2015; Leo, 2002: 208.

66 The scope of the burden of proof was recently expounded upon by the Supreme Court in October 2007. For discussion of this case, see Haley, 2011: 403.
on their own motion. Judges are not bound by any particular method in evaluating the probative value of evidence (art. 318).

There is no separate sentencing hearing in criminal trials in Japan. The court hears both facts on the guilt of the suspect and any aggravating or mitigating factors to consider in sentencing in the one hearing (Supreme Court of Japan, 2019b: 18).

**Conviction Rate and Sentencing**

Japanese courts record a high number of convictions compared to acquittals. In 2018, only 0.06% of all suspects were found not guilty by summary courts in ordinary trials (excluding summary proceedings) in Japan, while district courts returned a not guilty verdict in only 0.15% of all first instance trials (Supreme Court of Japan, 2018c, tables 9 and 12). In the three years from 2015 to 2017, an average of only 3.2% of people who pleaded not guilty in the district court had a not guilty verdict returned, and the number was only slightly higher in the summary courts at 4.5%. The saiban’in system does not appear to have had any significant impact on overall conviction rates in Japan to date, based on a comparison between pre-reform and post-reform sentencing statistics (Steele et al., 2020).

### 3. CONTEMPORARY ISSUES IN THE JAPANESE JUDICIAL SYSTEM

**INTRODUCTION**

The contemporary Japanese judicial system faces a number of significant challenges moving into the future. Some of these challenges are firmly embedded in systems and practices which have been built up over decades. In the criminal justice system, these include human rights issues at the investigative stage, such as lengthy periods

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68 Art. 198-3 Rules of Criminal Procedure (keiji soshō kisoku) provide that efforts shall be made to separate as much as possible examination of facts which are related and unrelated to the alleged crime. For further discussion of this method of trial, see Foote, 2014: 762-63.

69 Of those suspects who did not receive a not guilty verdict in the district court, 71.1% were found guilty, 26.9% had their charges consolidated with other matters, and the remainder fell into the categories of ‘abandoned prosecution’ (0.22%), ‘wrong jurisdiction’ (.001%) or ‘other’ (1.53%). Of those suspects who did not receive a not guilty verdict in the district court, 77.3% were found guilty, 18.1% had their charges consolidated with other matters, and the remainder fell into the categories of ‘abandoned prosecution’ (0.48%) or ‘other’ (4.0%) (Supreme Court of Japan, 2018c, tables 9 and 12).

70 See Supreme Court of Japan, 2019b: 31.
of pre-indictment detention for suspects and the lack of legal representation during interrogation (referred to as ‘hostage justice’; Japan Federation of Bar Associations, 2019b), as well as the consistently high conviction rate in criminal matters which can imbue trials with a sense of redundancy. Japan’s continued use of the death penalty is another key issue involving its criminal justice system, for which it faces criticism both domestically and internationally (see, for example, Japan Federation of Bar Associations, 2019d; Amnesty International, 2019). The lowering of the age of majority to 18 has also created debate over whether the Juvenile Act (shōnen hô) should also be amended to lower the age at which an accused may be tried as an adult (Ellis and Kyo, 2017; Kiyonaga, 2019). The perceived conflict of interest arising from alleged close links between judges and prosecutors, including shared training at the Legal Training and Research Institute and personnel exchanges, has also been debated at length (Haley, 1998: 58-9).

In the civil arena too, challenges arise from long-standing practices and structures, such as the lack of efficacy in court-ordered enforcement, perhaps seen most acutely in the inability of parents with return orders under the Hague Convention on the Civil Aspects of International Child Abduction to have those orders enforced (see Carney, 2019: 267-76).

Other key discussion points in the contemporary Japanese judicial system involve changes in the way disputes are handled. For example, the expansion of alternative dispute resolution and the establishment of tribunals removing some matters from the jurisdiction of the courts call for a re-examination of the court’s role in these types of matters. Also, the emphasis on the quick disposition of matters before the courts (for example, the so-called ‘speedy trial procedure’ for minor criminal matters introduced in 2006 and labour tribunal matters) raise questions of fairness and quality in decision-making by the courts. Further the emergence of a limited style of class action in the form of lawsuits with multiple petitioners under the Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers,71 the first of its kind in Japan, has introduced a new set of practical and theoretical issues for the Japanese judiciary.

Other challenges for the Japanese judicial system are closely linked to changes in Japanese society. In this final section, this paper identifies three key challenges of this kind which loom large in the future of the Japanese judicial system: declining interest and support for the saiban’in system, the effect of the ageing society on the judicial system and the adoption of technology by the courts. These challenges are particularly important as they reflect broader issues in Japanese society, as it comes to face an historical drop in population, record numbers of elderly citizens and an increasing global reliance on technology.

71 Shōhisha saiban tetsuzuki tokureihō.
ISSUE 1: DECLINING PUBLIC INTEREST AND SUPPORT FOR THE
SAIBAN’IN SYSTEM

What Is the Issue?

The first trials undertaken using the saiban’in system of combining professional judges and lay members of the public adjudicating criminal trials took place just over ten years ago in 2009. The system was introduced along with a number of other reforms with the broad aim of increasing citizen participation in the criminal justice system to enhance the public’s understanding of criminal justice and build trust in the institutions and processes which support it.\(^\text{72}\)

A key issue which has emerged during the saiban’in system’s decade of operation is the rate of people declining to become a lay judge. Self-exclusion requires an application to be excused for a prescribed reason,\(^\text{73}\) but many people simply do not attend as required and there do not appear to be any consequences for non-attendance (Steele et al., 2020: 171-72). The rate of people self-excluding from the saiban’in system once they have been selected has risen from 53.1\% in 2009 to 66.7\% in 2019 (Supreme Court of Japan, 2020b: 5, table 4). The overall rate of candidates who have self-excluded from 2009 to the end of March 2020 is 63.1\% (Supreme Court of Japan, 2020: 5, table 4). This result is despite an overwhelming positive response by saiban’in when reflecting on their experience; 96.7\% of participants surveyed in 2019 said they felt the experience was an ‘extremely good’ or ‘good’ experience (Supreme Court of Japan, 2020c: 8).

Why Is Declining Public Interest and Support for the Saiban’in System an Issue?

At its most fundamental level, the rising rate of people declining to participate as saiban’in threatens to undermine the purpose of the system’s introduction; that is, to promote understanding of the criminal justice system and build trust in it.\(^\text{74}\)

The fact that the rising self-exclusion rate gained attention in the Japanese media on the tenth anniversary of the introduction of the saiban’in system in 2019 (see, for example, Sankei News, 2019; Yomiuri Shimbun, 2019) underscores the potential for

\(^{72}\) For discussion of the content, background and context to these reforms, see Steele et al., 2020.

\(^{73}\) Art. 16 Act on Criminal Trials with the Participation of Saiban’in.

\(^{74}\) See article 1 of the Act on Criminal Trials with the Participation of Saiban’in: the saiban’in system is premised on the view that the involvement of saiban’in in criminal procedures together with professional judges ‘helps to promote the citizens’ understanding of and enhance trust in the judicial system’.
this issue to corrode the faith of the public in the efficacy of the system and, perhaps, willingness to become involved.

The Supreme Court of Japan has analysed the trend and considered the reasons behind the rising self-exclusion rate (Supreme Court of Japan, 2019c: 3-4). In a report produced in 2019, it listed some of the possible causes as: (i) increasingly long estimates for the duration of trials; (ii) changing employment patterns; (iii) an ageing population; and (iv) loss of public interest in the saiban’in system (Supreme Court of Japan, 2019c: 3).

The psychological burden of adjudicating the most serious criminal trials, and determining someone’s liberty or life, should also not be underestimated; as at March 2020, 39 people have been sentenced to death by lay judge panels since 2009 (Supreme Court of Japan, 2020b: 4). This sentencing process is a heavy responsibility, particularly for citizens not exposed to the concept of a trial by one’s peers since 1943, when the old, limited system of jury trials was abolished in Japan. Finally, there is the financial cost of serving as a lay judge. While a lay judge who fails to attend court when required faces a non-criminal fine of 100,000 yen, this amount may be more economical for some to simply pay, particularly those with well-paying employment, noting that lay judges are only paid a daily allowance of up to 10,050 yen (approximately AUD$134). More importantly, it appears that the fines are rarely, if ever imposed; there is a dearth of information about enforcement of this provision and the Supreme Court of Japan’s annual reports on the status of the saiban’in system do not make mention of these fines.

The declining willingness to participate may also result in people who end up acting as saiban’in being concentrated in particular pockets of society; in particular those with the time to spare to participate. The number of days required for a saiban’in trial has increased from 3.5 days in 2009 to 6.9 days in 2018 (Supreme Court of Japan, 2010a: 10; 2019a: 8). There has been a decrease in the number of younger people, in their twenties and thirties, participating (Supreme Court of Japan, 2010b: 3; 2020c: 4). This finding perhaps reflects the employment and caregiving obligations of people in those age brackets. The rate of participants (those having served as a lay judge, replacement lay judge or lay judge candidate) without any caregiving duties increased from 59.8% in 2009 to 67.8% in 2019 (Supreme Court of Japan, 2010b: 4; 2020c: 4).

75 For further discussion of the former jury system in Japan, see Inouye, 2018: 75-76.
76 Rule 7, Rules Relating to Criminal Trials with Lay Judge Participation (Saiban’in no sankasuru keiji saiban ni kansuru kisoku).
77 Art. 112, Act on Criminal Trials with the Participation of Saiban’in.
Who Is Most Affected?

The decline in public participation and the concomitant perceived declining support for the lay judge system raises both practical and policy concerns for Japanese courts. While the Japanese Supreme Court does not currently consider it to be an issue which jeopardises the operation of the saiban’in system, the Court has flagged these concerns as an issue in its ten-year review of the system (Supreme Court of Japan 2019c: 2-4). The greater problem posed by the declining rates of participation is arguably linked to the policy basis for the introduction of the system and the ‘optics’ of public fatigue. That is to say, without enough participants from diverse backgrounds, the saiban’in system will struggle to retain relevance as a mechanism of the Japanese justice system – particularly given its raison d’être was to increase citizen participation in the criminal justice system and build trust and understanding in it. Further, while not an explicit reason for the introduction of the lay judge system, there is public sentiment that the saiban’in system infuses the criminal justice system with an element of ‘common sense’ from the perspective of the average citizen (see, for example, Yomiuri Shimbun, 2019), which is undermined if the pool of lay judges lacks diversity. The Supreme Court also acknowledges the lay judge system’s role as a ‘microcosm of citizens’ (kokumin no shukuzu; Supreme Court of Japan 2019c: 2). These developments have led some legal commentators to ask if the saiban’in system is really necessary (see, for example, Oda 2020).

What Are the Possible Solutions?

There have already been reforms to the legislation governing saiban’in trials to ease the burden on lay participants. In 2015, the Act on Criminal Trials with Participation of Saiban’in was amended to allow courts to exclude saiban’in participation in trials where their appointment or service is deemed to be difficult on account of the anticipated length of the trial, number of trial dates required, or amount of necessary preparation work (art. 3-2(i)). As of 2018, the provision had not been relied upon, despite one case taking 207 days (Supreme Court of Japan 2020b: 7; Inouye, 2018: 84). Further, while the amendment potentially addresses the temporal burden on lay participants, it ignores the psychological burden imposed by dealing with very serious criminal cases. There appears to be a lack of political appetite or agreement to allow exclusion of some of the most serious cases from the saiban’in system (Kano and Steele, 2016: 3). Perhaps a converse way to approach the issue of public aversion to serving as saiban’in would be to open eligibility for saiban’in participation to a wider range of cases, to negate the notion that saiban’in service is intrinsically linked to serious, and probably stressful, trials.

Other possible avenues to boost public support for the saiban’in system could be to incentivise employers to give employees time off to serve (Yomiuri, 2019) or increase

78 For further discussion of the amending legislation, see Kano and Steele, 2016.
the amount of the participants' allowance. These may not be palatable from a budgetary perspective for the government. Alternatively, the fines imposed for non-attendance could be more effectively enforced or possibly increased, but this would be politically unpopular and unlikely to generate citizen goodwill.

It may be, in 2020, that there is an undue level of anxiety surrounding the function of the *saiban’in* system in light of its fundamental purpose of increasing engagement in the legal system (Steele et al., 2020, 181-82). The rapid digitalisation of judicial systems and wider systems of work around the world, accelerated by the COVID-19 pandemic, perhaps offer other opportunities for public engagement with the legal system. Whether or not such opportunities are to be considered depends on just how highly physical interactions with the judicial system, such as personal attendance at court as *saiban’in*, are valued. Further, technology continues to merge with the administration of justice around the world, offering new potential in sentencing and the collection and analysis of evidence, and Japanese courts too have been set upon a path to digitalisation; just how these developments could affect the *saiban’in* system is yet to be seen (Grayson-Morison and Steele, 2020; Steele et al., 2020, 181-82).

**ISSUE 2: THE IMPACT OF JAPAN’S AGEING SOCIETY ON THE JUDICIAL SYSTEM**

**What Is the Issue?**

Japan is an ageing society. People 65 and over make up 28.9% of the population, and this rate is expected to increase to 38% over the next 45 years (Statistics Bureau of Japan, 2020b: 8). Twin forces of a rapidly declining birth rate and an ageing demographic profile mean Japan’s population size is also shrinking. The latest forecast from the Statistics Bureau of Japan indicates that Japan’s population could fall from 127 million in 2015 to 88 million by 2065, representing a reduction of 30.7% in 50 years (2020: 8). Such a rapid decline has not been recorded in world history, at least not since the Industrial Revolution (Lincoln, 2011, 456–57).

Along with increasing longevity, the shrinking population is putting pressure on the productive population. Japan’s dependency ratio is forecast to reach 93% by 2050, meaning it will have approximately only one working adult for each dependent person (Lincoln, 2011, 459). While the rapid ageing of the demographic has obvious long-term macro-level concerns such as falling economic growth and pressure on social security systems and health and care facilities, there are myriad practical ramifications right though Japanese society, seen in the large number of abandoned houses (*akiya*), particularly in rural areas,79 the remodelling of shops and other public places to make

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79 The Japanese government promulgated revisions to the Basic Act for Land (*tochi kihonhō*) in March 2020 to try to tackle this problem by delineating the duties of land owners, including with regard to land registration, and introducing restrictions on owner’s property rights in the
them accessible to mobility aids, the evolution of car design to make them safer for an increasing number of elderly drivers (Collinson, 2010), and debates over the placement of nōkotsu-dō (charnel houses) in urban residential areas (Nihon Keizai Shimbun, 2017). Elderly people in Japan, as in many countries around the world, are also increasingly vulnerable to the growing social problem of financial fraud, such as ore (it’s me, it’s me) which refer to phone scams involving fake relatives and the overselling of insurance products (Jiji Press and Kyodo News, 2019; Obe, 2020). The law has a key role in navigating these practical social challenges. In recognition of these challenges, the Japanese government enacted a Basic Law on Measures for the Ageing Society (kōrei shakai taisaku kihonhō) in 1995, which provided a number of broad policy statements and established an Ageing Society Policy Council chaired by the prime minister.

One key challenge for Japan’s ageing society is managing the way its elderly will be cared for and ensuring the wishes of those who lose capacity are respected. Official forecasts estimate that the number of people over 65 years of age suffering from dementia will climb from 15.0% in 2012, being approximately one in seven people in that age bracket, to 24.5% in 2025, being approximately one in five (Cabinet Office, Government of Japan, 2017, table 1-2-11). Japan’s system of adult guardianship was overhauled in 2000, but some Japanese scholars have pointed out that it is under-utilised and does not provide enough support in day-to-day decisions for elderly people, particularly with regard to decisions about medical treatment (see, for example, Arai and Homma, 2005; Arai, 2019).

Why Is Japan’s Guardianship System an Issue?

Japan’s guardianship system consists broadly of two mechanisms: statutory guardianship and voluntary guardianship. Statutory guardianship (hōtei kōken) involves a family court making a determination that an individual lacks capacity to make sound decisions and appoints an ‘advisor’ (hojonin), ‘curator’ (hosanin) or ‘guardian’ (kōken’nin), depending on the level of incapacity of the proposed ward and the context of the decisions to be made. Voluntary guardianship (nin’i kōken) is a contract-based arrangement entered into by a donor who has capacity in preparation for a possible loss of capacity in the future, equivalent to an enduring power of attorney.80 Voluntary guardianship instruments must be registered with a designated legal affairs bureau under the auspices of the Ministry of Justice,81 and in order to take effect, the principal, guardian or family member must

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81 Arts. 3 and 5 Act on Guardianship Registration (kōken tōki dado ni kansuru hōritsu).

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apply to a family court for the appointment of a third party supervisor (kantokunin) once the donor loses decision-making capacity.\textsuperscript{82} Voluntary guardianship in Japan is considered to be a ‘third-generation’ legal mechanism, meaning it has a highly evolved framework of regulation and monitoring compared to power of attorney arrangements available in other jurisdictions which have no registration requirements or continuing oversight mechanisms (Ryan, 2014: 243). Both statutory and voluntary guardianship in Japan involve oversight by the family courts, which play a key role as ‘gatekeepers’ or supervisors for elderly people who require or desire assistance with their legal decision-making.

The guardianship system is focussed on financial transactions and does not, as a matter of course, include decisions regarding consent to medical treatment, although a guardian may enter into a contract regarding medical treatment (Arai and Homma, 2005; Ohgaki, 2016: 1; Ryan, 2014: 246-7).

The uptake of adult guardianship, in all of its forms, in Japan is very low. In 2010, the Ministry of Justice recorded just 27,034 judgements for the commencement of guardianship (statutory guardianship), 8,904 registrations of voluntary guardianship contracts, and 7,264 judgements for the appointment of a third party supervisor under a voluntary guardianship (Ministry of Justice, 2011, table 22-00-71). The rate had increased in 2019 to 33,344 judgements for the commencement of guardianship (statutory guardianship) (up 23.3%), 14,102 registrations of voluntary guardianship contracts (up 58.3%), and 17,123 judgements for the appointment of a third-party supervisor under a voluntary guardianship (up 135.7%) (Ministry of Justice, 2020b, table 19-00-70). In the intervening period, the Japanese government enacted a law in April 2016 for the promotion of the use of the adult guardianship,\textsuperscript{83} recognising that the system was under-utilised and calling on the co-operation of individual citizens, local and municipal governments, courts, relevant organisations and the national government to improve the system. While usage has increased, it represents a very small fraction of the number of elderly Japanese citizens, and survey results released by the Japanese Cabinet Office in 2020 indicate that 19.9% of people aged 60 to 69 surveyed had no knowledge of the concepts or terminology related to adult guardianship, while the same applied to 25.8% of people over 70 who were surveyed (Cabinet Office of Japan, 2020: 14).

The possible reasons behind Japan’s reluctance to embrace guardianship, particularly voluntary guardianship are myriad and complex, including a lack of public awareness, dislocation with traditional social norms and aversion to formal legal regulation of private family matters, cost, lack of available guardians and judicial preference for

\textsuperscript{82} Art. 4 Act on Voluntary Guardianship Contract (nin’i kōken keiyaku ni kansuru hōritsu).

\textsuperscript{83} Seinen kōken seido no riyō no sokushin ni kansuru hōritsu (Act on Promotion of Use of Adult Guardianship System).
more paternalistic forms of guardianship.\textsuperscript{84} There is also a public perception that the guardianship system is prone to abuse by guardians acting in bad faith (see, for example, Japan Times, 2016).

\textbf{Who Is Most Affected?}

Those most obviously affected by the lack of engagement with the guardianship system and the routine exclusion of medical treatment decisions from guardianship arrangements are those individuals whose wishes may not be respected after they lose capacity. Such a lack of engagement and representation is a vital issue, not only in the context of Japan’s own ageing society, but in the international movement to recognise and protect the rights and agency of elder people over the past thirty years, from the United Nations Principles for Older Persons adopted by the UN General Assembly in 1990, to the more recent articulation of the particular vulnerability of older people through the legal and social recognition of a set of behaviours labelled ‘elder abuse’, the adoption of the Convention on the Rights of Persons with Disabilities by the UN General Assembly in 2006 and the push for a specific international convention protecting the rights of the elderly.\textsuperscript{85} Further, the issuing of the Yokohama Declaration, the first international declaration specifically addressing adult guardianship, by the World Congress on Guardianship Law 2010 (which included Japan) was a landmark occasion highlighting the importance of making available to adults who lack capacity a form of nuanced, transparent and inclusive guardianship (Arai, 2019: 13).

In addition, the lack of any established and clear line of decision-making power for an incapacitated patient puts pressure on doctors and other health professionals in ascertaining consent for medical treatment and results in decisions being made by parties selected based on inconsistent criteria (Arai and Homma, 2005).

\textbf{What Are the Possible Solutions?}

Pursuant to the Act on Promotion of Use of Adult Guardianship System, the Cabinet of Japan released a master plan to promote the usage of the guardianship system in March 2017.\textsuperscript{86} The master plan provides a five-year statement of actions to be taken with the aim of improving the guardianship system so users feel it offers them benefit, establishing local networks to provide support for guardians and wards/donors,

\textsuperscript{84} For a detailed discussion of the possible reasons for the lack of uptake in voluntary guardianship in Japan, see Ryan, 2014.

\textsuperscript{85} For a detailed discussion of the international legal framework surrounding adult guardianship, see Arai, 2009.

and striking a balance between prevention of fraud and ease of use. Under the plan, consideration is to be given to developing guardianship beyond a solely financial focus to encompass other decision-making support and personal care, and support systems are to be established at a local level to promote and provide consultation about guardianship and support guardians, and to organize local experts to build ‘teams’ for those under guardianship. The plan also allows for consideration of how banks and other specialist organisations tackle the issue of fraud, how to support wards/donors in articulating their wishes in relation to medical treatment and care, and the setting of parameters for guardian authority. The master plan envisaged a shift in care methodology from medical to social, whereby guardians are regarded as ‘life escorts’ (Arai, 2019: 18). To this end, the plan highlighted the importance of promoting the use of curatorship and advisorship, which are less intrusive arrangements than full guardianship, improving flexibility between the different types of statutory guardianship to accommodate progressive senile dementia, as well as encouraging uptake of the mechanism for advanced planning provided by voluntary guardianship (Arai, 2019: 18).\footnote{87}

Bolstering the usage and operation of Japan’s guardianship system is a complicated process requiring a mixture of legislative, institutional and social change. Boosting the number of people applying for statutory or voluntary guardianship will increase the workload of the family courts and require greater capacity for processing and adjudicating these matters, particularly if the understanding and operation of guardianship in Japan is expanded to include more subjective elements such as personal and medical care. Already, adult guardianship is becoming more visible in Japanese society at a local level, for example through the establishment of organisations designed to provide practical assistance, such as adult guardianship assistance centres; by 2019, organisations of this kind were established in 429 locations throughout Japan (Social Welfare and War Victim’s Relief Bureau, 2019: 3). How long it will take for such efforts to translate into a significant boost in the number of people applying for guardianship or making a voluntary guardianship arrangements remains to be seen.

\footnote{87} For a detailed analysis of the master plan, see Arai, 2019: 75-81.
ISSUE 3: DIGITALISATION OF JAPAN’S JUDICIAL SYSTEM

What Is the Issue?

Japan is still at an early stage of its adoption of technology within its judicial system. These early stages have focused on the civil jurisdiction, with a view to expanding to the family and criminal jurisdictions at a later date (Grayson-Morison and Steele, 2020).

While amendments to the Code of Civil Procedure in 2014 allowed for the possibility of petitions and other documents in connection with civil proceedings being filed by way of electronic data processing systems (art. 132-10), the Supreme Court Rules were not sufficiently developed to permit this type of filing to be widely used. In 2017, the Japanese Cabinet Secretariat set up a committee to investigate the IT conversion of judicial proceedings (saiban tetsuzuki nado no IT ka kentōkai). The committee released its report in March 2018 setting out the key elements of IT conversion, namely, the ‘Three E’s’: e-filing, e-case management and e-court (Supreme Court of Japan, 2018a). In August 2019, the Supreme Court committed to a policy of facilitating online filing of documents and evidence in civil matters by as early as 2021, including approximately 150 million yen for the construction of specialist systems and other preparation in its budget request for 2020 (Jiji Press, 2019). Then in February 2020, web-based conferencing for civil litigation, using Microsoft Teams, was introduced into courts in major district courts and the Intellectual Property High Court (Grayson-Morison and Steele, 2020; Microsoft Asia News Center, 2020). Despite these steps towards digitalisation, the Japanese judicial system remains very much ‘analog’ in nature. Face-to-face (taimen) dealings, affixing one’s seal (ōin) and paper-based (shomen) transactions are long-established cornerstones of the judicial system and, more broadly, the business world in Japan (Grayson-Morison and Steele, 2020). Most civil complaints are initiated under seal, parties and their lawyers more often than not attend in court for dates set for oral argument, and the payment of court costs requires attendance at a registry, as there are no facilities for credit card or bank transfer transactions (Grayson-Morrison and Steele, 2020; Tokyo High Court, 2020). Detention houses, custody centres and jails are not equipped to deal with web conferencing with lawyers and courts (Grayson-Morrison and Steele, 2020). As a result, the traditional Japanese judicial scene is one of wholesale movement of people, documents and things.

Why Is the Lack of Digitalisation in Japan’s Judicial System an Issue?

Generally speaking, the lack of digitalisation in Japan comes at the expense of convenience and efficiency for court users, the judiciary and staff. The benefits of the ‘three E’s’ are clear and have been experienced in multiple jurisdictions around the world. Japan’s institutional lag in embracing a more digitalised society jars with its image of a modern, technically forward-looking nation. The cause of the delay is multi-faceted, but some reasons include inflexible regulation necessitating widespread amendment, opposition from politically important interest groups, and labour practices which prioritise time at work over outcomes (Takenaka, 2020).
Japan’s delay in adopting technology in its courts has been brought into stark relief by the COVID-19 pandemic, whose unprecedented effects became apparent in Japan in March 2020. In 7 April 2020, a state of emergency was declared for seven prefectures, extending to all prefectures one week later. In line with the public health advice on social distancing, courts in Japan were forced to adjourn or vacate a wide range of matters. In the case of the Tokyo High Court, all civil and administrative matters were adjourned or vacated, save for civil preservation matters, domestic violence and personal protection matters, and urgent civil execution and bankruptcy cases (Tokyo High Court, 2020). Regarding criminal matters, while custody and warrant applications and more serious criminal trials proceeded, summary criminal matters were pushed out (Tokyo High Court, 2020). In the Tokyo District Court, trials involving saiban’ in were also postponed and scheduled to be gradually re-introduced from June 2020 (NHK News 2020). The Tokyo Family Court also cancelled return dates except in matters involving temporary custody applications, return applications under the Hague Convention on the Civil Aspects of International Child Abduction, and other urgent child custody matters. While this reaction by the Japanese courts was echoed in courts around the world, what characterised the Japanese situation was the inability to pivot quickly to online adjudication (Grayson-Morison and Steele, 2020). The adverse consequences manifested in a number of ways but were particularly acute from a human rights perspective in the criminal jurisdiction. As some criminal trials were proceeding, and due to the lack of web-based or other remote conferencing facilities, remandees have continued to be transported to and from detention houses, corrections staff have continued to work onsite, and judges have continued to preside over matters despite the risk posed by COVID-19 in enclosed courtrooms that are often windowless with poor ventilation (Grayson-Morrison, 2020; Jiji Press, 2020a). Court filing continues to be done by mail or over the counter (see, for example, Tokyo High Court, 2020). The constitutional right to a public trial (art. 82(1)) means members of the public are still permitted into court to observe proceedings, compounding the problem. Defence lawyers must physically attend prisons or detention houses if they are to be able to meaningfully interview their clients (Grayson-Morrison and Steele, 2020). Prolonged detention due to the adjournment of trials means an increased risk of infection for remandees and the prospect that their time in custody may be disproportionate to their eventual sentence. What was once an issue of public convenience has become an issue of public health; the underdevelopment of the ‘Three E’s’ has exposed the judicial system to the ‘Three C’s’ of coronavirus transmission, closed spaces, crowds and close contact, which the government has consistently employed in its warnings to the public (see, for example, Prime Minister’s Office of Japan and Ministry of Health, Labor and Welfare, 2020).

Looking beyond the pandemic, engaging with technology to permit remote adjudication of matters is essential to Japan being able to operate in international jurisdictions. For example, Japan’s participation in the Hague Convention on the Civil Aspects of Child Abduction cannot reach its full potential if parties are barred from participating in mediation and proceedings due to an inability to be physically present in Japan on each
occasion; the physical and financial toll of this requirement is a significant impediment for parents making these types of applications. In the commercial space, the recent push to position Tokyo as a modern centre of international arbitration (Eto, 2018) runs counter to the lack of modernisation in the domestic Japanese judicial system.

Who Is Most Affected?

From an outside perspective, the lack of technology in Japanese courts seems to have created an inconvenience for parties wanting to issue proceedings in the court or otherwise use the courts to resolve a dispute. Those awaiting trial in the criminal jurisdiction and their attorneys have also faced difficulties in accessing and providing legal advice, and the reliance on paper and physical attendance seems to have increased the burden on court users. Despite these ostensible problems, there has been a lack of stakeholder or public pressure for the courts to modernise, including from the Japan Federation of Bar Associations. The lack of public pressure may be attributable to a culture of cautiousness and risk aversion in business and decision-making (Taplin, 2005: xiii); as the introduction of technology inevitably speeds up courts process and allows for greater public access to the court, thereby potentially overwhelming the court system. There are also concerns regarding the privacy of data once it goes online (Nakamura and Suzuki, 2019: 164; Grayson-Morrison and Steele, 2020). Practical issues linked to questions of court resourcing have also been raised (Grayson-Morrison and Steele, 2020), as well as concerns about access to justice, such as ensuring that parties have adequate access to technology and that a new system does not somehow jeopardise fairness (Japan Federation of Bar Associations, 2019c).

The COVID-19 crisis has meant the lack of technology in the judicial system affects more people than ever, from judges through to members of the public coming to watch, particularly from a health and human rights perspective.

What Are the Possible Solutions?

It is well-accepted by the Japanese national Government and the Supreme Court that digitalisation of the judicial system is a desirable development, that will deliver benefits to the court, the judiciary and court staff, as well as court users, through increased efficiency and convenience (Supreme Court of Japan, 2018a: 2-3). Technology has developed globally to such an extent that the judicial system must integrate it to remain viable (Supreme Court of Japan 2018a: 2-3).

While a plan has been set in place by the Supreme Court of Japan for IT conversion in the civil jurisdiction and web-conferencing pilots have already been rolled out, the COVID-19 pandemic has resulted in calls for the process to be accelerated (Nihon Keizai Shimbun, 2020a). For the ‘Three E’s’ of technological adoption to be implemented in the civil jurisdiction, amendments to the Code of Civil Procedure are required; the Code is due for revision in 2022 (Grayson-Morison and Steele, 2020). More broadly, regulating the recording of remote hearings, ensuring equal access to technological
infrastructure and protecting the right to a public trial are also concerns which need to be addressed (Grayson-Morison and Steele, 2020). Such issues have already been aired in jurisdictions outside Japan conducting IT-supported trials, in a fast-developing 'coronavirus jurisprudence', which may prove instructive for some of the issues Japan faces (see, for example, Judicial College of Victoria, 2020).

More broadly, the move towards IT conversion of the Japanese judicial system requires a holistic shift in Japanese business practices. Calls for business to abandon its predilection for paper, *hanko* seals and fax machines have come from workers, the media, and even former Prime Minister Abe Shinzo, after a lack of modernisation was blamed for the slow dissemination of information and the continuing presence of workers in offices and on public transport during the pandemic (Dooley and Inoue, 2020; Lee and Sano, 2020). Although coronavirus has been credited with ‘yanking corporate Japan into the 21st century’ (Lee and Sano, 2020), there is still a long way to go, with one survey at the start of the pandemic shutdown in March 2020 finding that less than 13% of workers nationwide were able to telework (Dooley and Inoue, 2020). Significantly, however, the gradual shift to telework during the pandemic has been touted as a way to promote regional revitalisation and combat the falling birth rate (Nihon Keizai Shimbun, 2020b).
REFERENCES


Kiyonaga, S (2019) “‘Shōnenhō ‘kaisei’, nenrei hikisage giron no yukikata wa” (jiron kōron)’ [Juvenile Act amendment, the course of the argument to lower the age (current public opinion)], NHK, 27 February. http://www.nhk.or.jp/kaisetsublog/100/315271.html.


——— (2019b) ‘Minpō kaisei, seijin nenrei no hikisage, wakamono ga iki’iki to katsuyakusuru shakai e, 2022 nen 4 gatsu tsuitachi kara, seijin nenrei wa 18 sai ni narimasu’ [Civil Code revision, reduction in the age of adulthood, towards a society where young people can actively participate, from 1 April 2022 the age of adulthood will be 18]. Accessed 2 August 2020. http://www.moj.go.jp/content/001300586.pdf.


—— (2020a) ‘Shihō no onrainka nao tōku, kaigai senkō, nihon mo kyūmu ni’ [Adoption of online justice still far off, overseas is leading, a pressing need for Japan too], 31 May (morning edition). https://www.nikkei.com/article/ DGKKZO59798500Q0A530C2EA1000/.


KEY LAWS

Act on Criminal Trials with the Participation of Saiban’in [Saiban’in no sankasuru keiji saiban ni kansuru hōritsu], act no. 63 of 2004.


Code of Criminal Procedure [Keiji soshō hō], act no. 131 of 1948.

Constitution of Japan [Nihonkoku kenpō], 3 November 1946.

Court Act [Saibansho hō], act no. 59 of 1947.

Penal Code [Keihō], act no. 45 of 1907.
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