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Juries in the Japanese Legal System

The continuing struggle for citizen participation and democracy

Dimitri Vanoverbeke



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Juries in the Japanese Legal System

Trial by jury is not a fundamental part of the Japanese legal system, but there has been a recent important move towards this with the introduction in 2009 of the lay assessor system whereby lay people sit with judges in criminal trials. This book considers the debates in Japan which surround this development. It examines the political and socio-legal contexts, contrasting the view that the participation of ordinary citizens in criminal trials is an important manifestation of democracy, with the view that Japan as a society where authority is highly venerated is not natural territory for a system where lay people are likely to express views at odds with expert judges. It discusses Japan's earlier experiments with jury trials in the late nineteenth century, the period 1923 to 1943 and, up until 1970 in US-controlled Okinawa, compares developing views in Japan on this issue with views in other countries, where dissatisfaction with the jury system is often evident, and concludes by assessing how the new system in Japan is working out and how it is likely to develop.

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Preface

The trial by jury has attracted the attention of popular authors and scholars for a very long period of time. It was Alexis de Tocqueville who in 1836 described the importance of the trial by jury in a democratic polity by observing the new institutions of America in the early nineteenth century. Scholars have analysed the trial by jury as a political institution while others have been looking at it from a legal perspective, but it is harder to come by analyses that combine the legal and political perspectives. This book seeks to remedy that deficit by covering the trial by jury as a dynamic system that unfolds over a longer period of time, integrating the modern and contemporary dynamics.

The participation of citizens in criminal trials ties together certain topics that have been at the core of Japanese studies worldwide, i.e. the long process of modernization that Japan experienced, the changing relationship between citizen and state, and the political process of the genesis, stability and changes in the institutions of the polity. This book seeks to contribute to this strand of research. The topics tackled in this book are therefore part of a wider picture, or actually of a movie, a narrative of Japan's history, rather than a snapshot describing one of the institutions of Japan. This book also tries to bring together points that have already been made by important and pioneering scholars of legal and political history in Japan – i.e. mainly Toshitani Nobuyoshi and Mitani Taichirō. Their works are the foundations of this book.

The discourse on the appropriateness of the trial by jury in today's society is salient not only in Japan but also in many other legal systems. Even those countries that may be labelled cradles of the trial by jury – England and France – are reforming this traditional institution which was always held to be the guarantor for the rule of law and for an efficient check on state power by the people. Moreover, the way in which trial by jury exists in today's society is under pressure by the legal professionals and not in the least by recent decisions by the European Court for Human Rights voicing concerns about the rights of defence. Reforming and even abolishing the trial by jury is the path that some countries, traditional advocates of the trial by jury, have embarked upon. Some Asian countries seem to take a different path. The calls for more transparency of government, accountability of the leaders and higher commitment of the people in state affairs have pushed judicial reforms up the political agenda. In societies where a turn

from traditional and so-called paternalistic states or Confucian state control seems to wane and where globalization and economic sustainability demands more individual initiative and responsibility, the role of the law is expected to increase in importance, and the need for more commitment by the citizens in the judicial institutions is seen as a condition for future development in highly competitive societies. The trial by jury is certainly a possible answer to the needs of today's Asian societies in transition and in the midst of a quest for a new identity, but what does it actually mean for Japan and Japan's role in a wider context?

The author of this book is grateful to, and would like to thank, all those who supported and helped directly or indirectly in its writing. They did so in various ways: providing access to sources, checking language, commenting in workshops where parts of this book have been presented, or just giving time and space for research and writing. I would in particular like to thank (in alphabetical order) Harald Baum, Ashina Fumi, Tom Ginsburg, Takahashi Hiroshi, Ozaki Ichirō, Satō Iwao, Béatrice Jaluzot, Iokibe Kaoru, Ikeda Kimihiro, Jeroen Maesschalck, Kadomatsu Narufumi, Stephan Parmentier, Hamano Ryō, Eva Schwitteck, Willy Vande Walle and Takahara Yoshie. I would also like to express special appreciation for the invaluable efforts of David de Cooman and Nicholas Peeters who helped at various stages in the preparation of the manuscript of this book. Last but not least I would like to thank Kinoshita Yukako, Yuri and Nina for tolerating my obsession with this work and I dedicate this book to them.

I hope that this book will inspire further academic debate and contribute to the wider discussion on the dynamics and role of legal and political institutions in Japan.

Dimitri Vanoverbeke

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Introduction

The mixed jury system (*saiban'in seido* 裁判員制度) came into effect in Japan in May 2009.¹ Scholars have used words such as ‘radical’, ‘epoch-making’ or ‘fundamental’ when appraising the changes that the introduction of this trial by jury into the criminal procedure entailed for the legal system in contemporary Japan. On the one hand, advocates of the trial by jury argue that the participation of citizens in criminal trials is an important first step in democratizing and adding transparency to a justice system with an extraordinary conviction rate. On the other hand, there exists considerable scepticism on the autonomous way in which *saiban'in* jurors participate in the trial; for example, as a result of the observation that in a society with a conformist nature and high respect for authority there is a huge barrier to be overcome before randomly selected citizens voice their opinion against experienced and respected judges. Moreover, Japan is finding itself swimming against the tide with its advocacy for a trial by jury contrasting growing worldwide critical voices against the trial by jury system. How, then, should we assess the timing of and the decision by Japanese leaders to establish a mixed jury system? What does the implementation of the *saiban'in* system essentially mean for Japanese society?

Chapter 1 aims to explain the context of judicial reforms of which the mixed jury system was one of the cornerstones. These reforms did not take place in one day. They were the product of a long period of dynamics between politics, law and other societal forces in Japan and the spillover from other fields. How was it possible for Japan to reform its judiciary involving citizens in the criminal procedure while the demand for a more democratic criminal justice system had been in existence since the end of the Second World War? This chapter will argue that political decisions are only made when the time is ripe, meaning that strong policy entrepreneurs can only push their solution to perceived problems when the mood in society is receptive to their message. The problems which were perceived in Japanese society leading up to the introduction of the jury trial were a conviction rate of 99.9 per cent and recurrent claims that the over-emphasis on confessions was resulting in miscarriages of justice, and even in capital punishment for innocent people. In view of the resilience of the professionalization of the judiciary in Japan and the long-time stability of the system, it seems surprising that major reforms only happened at the dawn of the twenty-first century.

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The *saiban'in* system was one of the most radical reforms together with the introduction of law schools.

Yet, the trial by jury as an answer to political challenges was not a novel approach for the Japanese government. The *Asahi Shimbun* newspaper, for example, regularly published articles on the 'trial by jury' (*baishin* 陪審) (see Figure I.1).

We will analyse the jury trial in Japan over a long period of time. The role of the legal institutions has always been of high concern to the leaders of Japanese society who are eager to build a stable and prosperous society with a prominent place in the international community. First, in the nineteenth century, as soon as society takes a turn towards modernity after the Meiji Restoration in 1868, the legal institutions are at the centre of policy-making to make a revision of the so-called unequal international treaties possible. In the first decades after the Meiji Restoration, the jury trial is the focus of political leadership. The introduction of trial by jury becomes an important issue in the negotiations between Japan and the Western nations about a revision of unequal treaties. The 1880s are the high watermark of this heated debate which ends in the defeat of the advocates of the participation of civilians in the criminal procedure. The discourse on the trial by jury at this time was not triggered by a genuine wish to modernize the legal system but by an ambition by the national leadership to reaffirm its power. This power was increasingly challenged at the domestic level, for example, by the judiciary offering protection of the citizens in court according to legal norms, and at the international level, by unequal treaties taking away the jurisdiction related to crimes committed by non-Japanese. Trial by jury as it was established

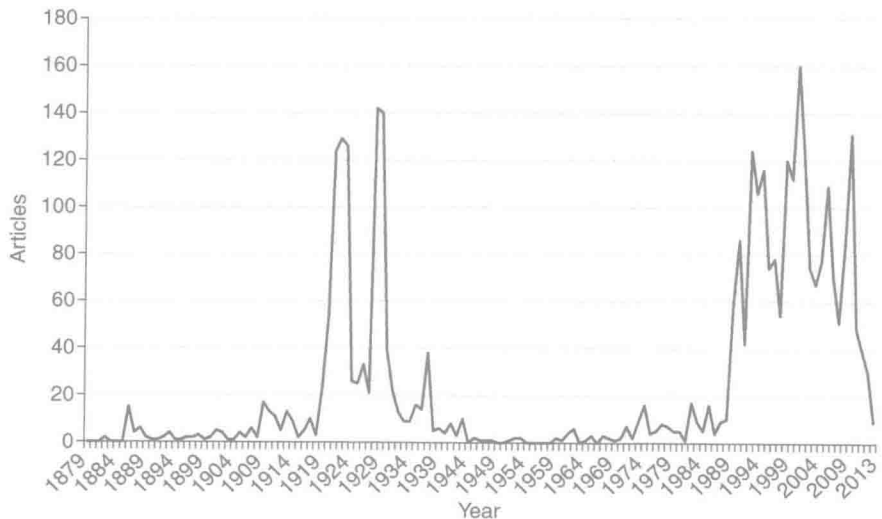


Figure I.1 Articles on the trial by jury in the newspaper *Asahi Shimbun* (1879–2013)
(source: own calculation from the database *Asahi Shimbun kiji kensaku* 朝日新聞記事検索 [Research for Articles in *Asahi Shimbun*]).

for the first time in Japan in 1873 was actually a political tool to maintain or restore the power equation in a Meiji society in turmoil. It prevented independent trials by professional judges and was a way to slow down the separation of powers to develop in a modernizing society. We will be taking a closer look at the first experiences of Japan with trial by jury in Chapter 2.

A loud discourse and a feeble experiment of a trial by jury gradually disappeared from the scene until the new civil movements popped up at the start of the twentieth century. An eloquent middle class and new centres of power – such as the prosecutors' and lawyers' associations – clashed in their search for space in modernizing society. Worried about the rising influence of the civil movements and the new middle class, the policy-makers were made aware of the dormant idea of trial by jury as, according to some, the ideal solution for Japan's difficult struggle with modernity. The second wave in the policy process towards a trial by jury was not only political but also a decisive step towards the growing legalization of society. Bridging the different worlds of law and politics was attempted by means of the trial by jury. Lawyers-turned-politicians were the first to realize the potential of the jury system but encountered fierce resistance by the traditional powerhouse worried about the increasing power of civil society and refusing to grant concessions to their opponents. Despite a lack of political consensus, the Jury Act was promulgated in 1923. This was to become Japan's second experience with the trial by jury and is the focus of the third chapter. The difficult and time-consuming path towards the Jury Act of 1923 reveals the dynamics in Japanese society in the first decades of the twentieth century. The citizens gradually took centre stage over politics; however, not all citizens could be successful in the changing tide of the times. Social cleavages became wider and the power struggle grew more intense, despite the hope of analysts of a new democratic wave after the trial by jury would become operative. A closer look at the content of the Jury Act quickly dashed this hope. As one of the most fervent advocates of the trial by jury – Hara Yoshimichi – explained, the 'special Japanese characteristics' of the jury system made it unlike any other existing jury system in the world. The Japanese citizen, so Hara argued, was not dissatisfied with politics and the judiciary, and therefore they would not be eager to use the trial by jury. It was expected that the number of jury trials would remain low and that the returns of the jurors and the professional judges' opinion would match. The trial by jury of 1923 was designed as an institution for increased control of the citizens through state power. Those citizens were becoming conscious of their 'rights' and demanded general suffrage, and they realized that they were strong if united, as was proven to them in labour strikes and farm tenancy disputes in the first decades of the twentieth century. The trial by jury was to slow down the demands of the people and at the same time educate them in the importance of state affairs. It was even described as a means to protect the Emperor, since justice was always rendered 'in the name of the Emperor'. Dissatisfaction with criminal trials and professional judges could turn into dissatisfaction with the Emperor and become a threat to the very foundations of the Japanese polity. The trial by jury provided the possibility for the people to

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confirm criminal justice in the name of the Emperor. Therefore the 1923 trial by jury was an ingenious instrument to control the people and confirm the status quo of the imperialistic state. Yet, political intention and operational reality did not always match. The jurors proved to be quite firm and independent in their returns, resulting in an unexpected percentage of acquittals. Despite the low numbers of trials by jury which is the main reason for assessing the jury in prewar Japan as a failure, it is an important stage in the preparation of postwar society. It indeed demonstrates that the citizens were not reluctant to challenge state power once they were called for jury duty.

The Second World War made it impossible for the trial by jury to be continued. The Jury Act was suspended in 1943 in expectation of better times. The postwar occupation brought the revival of the jury system onto the political agenda, again to no avail. Furthermore, the experience with the trial by jury in the Ryūkyū Islands (Okinawa) in the 1960s provides some insights for Japanese jurors as to the possibilities of trial by jury. One of these jurors would write a bestselling book on his experiences and publish it just in time for another surge in a growing consciousness of the flaws of the criminal procedure in Japan in the 1980s. In the 1980s a series of flagrant cases of miscarriage of justice and the awakening of critical political consciousness coincided. Four cases where people convicted decades earlier to suffer the death penalty resulted in exoneration, as new DNA technology proved that they could not have committed the crimes for which they were convicted. The 1980s was also the decade when the media grew increasingly critical of the government and the US asked for more competition and open markets instead of protective paternalism. The spillovers to the judiciary resulted in the formation of a fertile ground for reform.

The outcry for better justice for the people and for more democracy and individuality in a changing society heralded the advent of a new era. This era – the 1990s – indeed saw the discourse on the trial by jury catch fire. Numerous newspaper articles were published, movies released and theatre plays staged, all focusing on the revival of the trial by jury. Moreover, lawyers' associations and civil movements played an important role in awakening the dormant idea of the trial by jury. Again, in times of a growing gap between politics and society – between the state and civil society – the trial by jury moved to centre stage as a tool to close this debilitating gap. Several policy entrepreneurs referred to the previous experiences of Japan with the trial by jury but this did not become central to the debate on establishing a procedure for participation of citizens in the criminal procedure.

Newspaper articles hardly mentioned the existence of a trial by jury which was presented as new and foreign. Most seemed to have forgotten about the history of the trial by jury in Japan, despite many discussions being strikingly similar to those in the run-up to the Jury Act of 1923. The discourse may be divided into two general and overall tendencies: one in favour of the trial by jury because it would be an important affirmation of the citizens' capacity to be connected to the state; it would bridge the gap between citizens and state and would therefore be a necessary measure in the deepening of democracy. On the other

hand, media articles, scholarly works and policy papers revealed strong opposition to a foreign legal procedure that does not fit the Japanese context and is not in line with what they consider to be the role that the judiciary should play. The jurors, so the argument goes, would not be able to fulfil the expectations set for them. Mapping the post-1945 discourse on the trial by jury will be the aim of Chapter 4.

Finally, we will take a closer look at the design of the mixed jury system in the 63 sessions between 1999 and 2001 by the Justice System Reform Council. The members of the Council decided to establish a *mixed jury system* where professional judges decide alongside lay judges on guilt and sentence. This choice is surprising, because Japan still had the Jury Act of 1923 in place – suspended in 1943 – and could have decided to amend and revive the trial by jury. The Council was composed of thirteen people and was given a free hand in the design of a judiciary fit for a new Japan in the twenty-first century – as it was proclaimed. Bureaucratization of the discussion was carefully avoided and resulted in a very strong emphasis on the need to make sure that citizens would be involved in the criminal procedure as ‘autonomous’ (*shutai* 主体) citizens in opposition to passive citizens in a paternalistic state. Yet, the ideas of the Council did not fully find their way into the process of implementation of the suggestions made in the report by the Council. The result of this complex and increasingly bureaucratic process was the *Saiban'in* Act (also ‘mixed jury Act’, ‘lay judge Act’ or ‘law assessor Act’) which focused not on turning citizens into autonomous subjects controlling criminal procedure but more on educating people to be ‘good citizens’. Chapter 5 will not only look at the making of the *saiban'in* system but will also analyse the content and implications of the law, and will introduce some issues pointed out by a judge in charge of the several mixed jury trials in the early years when the system was in operation.

In the final chapter, we will analyse the first five years when the mixed jury system was in operation. Based on valuable sources recording explicit testimonies by former *saiban'in* jurors of the various stages of their experiences in the criminal courts, we will analyse whether the *saiban'in* system is succeeding in turning the jurors into good citizens. The stages of the experience of the jurors will be deconstructed into five parts – the pre-trial stage, the selection process, the trial, the deliberations, and the post-trial stage – and reconstructed according to the jurors’ testimonies and surveys published annually by the Supreme Court of Japan.

Note

- 1 Throughout this book, ‘lay judge’, ‘lay assessor’, ‘mixed jury’ or ‘*saiban'in*’ will be used to refer to the system of the participation of six citizens in the criminal trial as defined in the *Saiban'in* Act of 2004 and implemented in May 2009.

Part I

Trial by jury and judicial reforms in Japan

Setting the scene