

**An earlier experience of lay involvement in court decisions  
in Japan – The Jury 1928–1943**

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**Published version**

WATSON, Andrew (2016). An earlier experience of lay involvement in court decisions in Japan – The Jury 1928–1943. *Journal of Japanese Law*, 21 (42), 153-178.

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## An Earlier Experience of Lay Involvement in Court Decisions in Japan – The Jury 1928–1943

*Andrew R. J. Watson\**

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### I. INTRODUCTION

Lay judge, or “*saiban-in*”,<sup>1</sup> courts try serious cases in Japan.<sup>2</sup> Sitting together, professional judges and lay judges decide guilt and sentence. Resembling Anglo-American jurors, and unlike lay judges elsewhere, *saiban-in* are selected at random and sit in only one case. Dissimilar to mixed tribunals in some countries, where they cannot, or do not in practice, Japanese lay judges question witnesses directly, giving them a more active role in fact finding than jurors.

Before their inception, in May, 2009, ordinary citizens’ participation in the criminal justice system was very limited.<sup>3</sup> A criminal jury system did exist from 1928 to 1943. It

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1 “Lay judge” and “*saiban-in*” are used interchangeably henceforth.

2 They hear about 3 percent of criminal trials. The remainder are dealt with by a single professional judge, or a panel of three professional judges.

3 It was restricted to the largely volunteer probation service and serving on Prosecutorial Review Commissions or *Kensatsu Shinsa-kai*. As a means of controlling the very wide discretion vested in prosecutors, decisions made by them not to charge suspects may be reviewed by Prosecution Review Commissions on the request of alleged victims of crimes or interested parties or on their own initiative. About two hundred Commissions exist around the country. Each is composed of eleven citizens selected at random from the electoral roll, who serve for one year. Its powers include summoning persons who have initiated the proceedings and others involved in the case and compelling prosecutors to attend, explain their conduct and produce relevant materials. When in agreement members of the Commission may decide that the prosecutor should prosecute an alleged offender. However, their decisions were only advisory and frequently not complied with by prosecutors. After a revision of the

was not, however, a success. This article tells of the creation of the jury system in the 1920s and examines reasons for its failure including the law itself, opposition by the judiciary, cultural elements (taken by some to confirm that under no circumstances could jury trial work in Japan) and political factors such as descent into authoritarianism, militarism and war.

## II. THE RECEPTION OF WESTERN LAWS AND CONSIDERATION OF JURIES

In 1867 the Shogunate feudal system of government, which had existed since 1603, when the Tokugawa family effectively deprived the Emperor of all but ceremonial functions, collapsed. The main cause was the turmoil that had followed the arrival in 1853 of the United States Naval Delegation, Commodore Perry's famous "black ships", determined to open Japan to Western trade and influence.<sup>4</sup> In this period, other powers, including Great Britain, were also intent on concluding advantageous trading agreements with Japan which had been in self-imposed isolation for almost 230 years and had remained a largely agricultural nation, but with extensive urbanisation and a highly developed market economy.

In place of the Shogunate, rule by the Emperor was restored. Emperor Meiji's hold on the country was consolidated by the introduction of a cabinet system, enactment of a Constitution in 1889, heavily modelled on that of Prussia, and the opening of a Diet, albeit with a tiny electorate, in 1890. The Meiji Constitution was based on the principle that sovereignty resided with the Emperor; it set out the rights and duties of the people, but made their exercise subject to "the limits of the law". Architects of the Meiji regime viewed popular involvement through a powerful parliament, local autonomy and party government as a threat to national cohesion and the development of urban industrialisation.

Under the Tokugawa Shogunate laws were unsystematic and different from area to area. Many had become obsolete. The new order needed a coherent legal system to solidify its political control over the country. It also required laws which would assist in creating rapid industrialisation which, together with plans to strengthen the army, would be a bulwark against further unwanted foreign interferences. Before its fall the Shogunate had little choice but to sign treaties with foreign powers which imposed unequal trading terms on Japan. Also, under these treaties, the Western nations refused to recognise the jurisdiction of the Japanese government over foreign nationals in Japan, claiming her traditional legal system was insufficiently developed to protect their rights and

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Code of Criminal Procedure in 2004, which became effective in 2009, Commissions may now order that prosecutions be commenced. See H. FUKURAI, *The Re-birth of Japan's Petit Lay Judge and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, in: *Cornell Int'l L. J.* 40 (2007) 315, 323–328.

4 W. BEASLEY, *The Modern History of Japan* (Weidenfeld and Nicholson 1973).

safety. Instead, foreigners were subject to the laws of their own countries applied by consuls. Unsurprisingly, this was seen as a humiliating intervention in national affairs.<sup>5</sup> Removal of foreign extra-territoriality by modernising the legal system to a standard acceptable to Western powers was regarded as a priority. Extra-territoriality was formally ended in 1894 after completion of the main Meiji legal reforms. For a country rapidly seeking equal military and economic strength with Western powers, Continental Europe appeared a sensible place to search for models of law. Their codified logical nature, buttressed by scholarly writings, allowed swifter adoption than Common Law with its disparate sources and apparent less certainty. By the 1890s, enactment of the major Codes of law had taken place: Criminal Law and Criminal Instruction (procedure) in 1880, both heavily French influenced; Civil Procedure and Commercial Code in 1890; and the Civil Code in 1896. The last three codes were very much based on German Law.

Japan fleetingly experimented in the 1870s with the participation in trials not of randomly chosen lay persons but a panel of government officials appointed by Counsellors of State. This was employed in only two matters: the Makimura Incident, 1873, for which it was devised, as a means of avoiding a possible conflict between the Ministry of Justice, which administered the judicial system, and the Ministry of Internal Affairs; and the trial in 1875 of those charged with murdering Masaomi Hirosawa, a Counsellor of State. In 1873 the Ministry of Justice did discuss establishing a Western style lay jury to try the Makimura case. However, the idea was soundly rejected by the Great Council of State on the grounds such a system required careful deliberation and was not to be hastily instituted. Instead it said Japan should introduce its own unique method of trial, the *sanza* system involving government officials appointed by the Council to decide guilt and judges passing sentences.<sup>6</sup>

The first draft of the Code of Criminal Instruction, was completed in 1878 by a French adviser, Gustave Boissonade and was based much on that in France. However, distinct from France, he did not recommend adoption of nine lay people and three judges sitting together forming a mixed panel, but proposed criminal trial by three judges and a separate panel of ten jurors.<sup>7</sup>

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5 See P. K. CASSEL, *Grounds of Judgement: Extra-territoriality and Imperial Power in Nineteenth Century China and Japan* (Oxford University Press 2012), especially Chapters 1 and 6. For a consideration of the British extra-territorial regime in Japan see C. ROBERTS, *Extra-territoriality in Japan, 1859–1899* (Brill 2013).

6 The short history of this form of special jury, the *sanza* system, is recounted by A. DOBROVOLSKAIA, *Japan's Past Experiences with the Institution of Jury Service*, in: *Asian Pacific Law and Policy Journal* 12-1 (2010) 6–9.

7 Jurors were to be chosen by lot from those eligible to serve, required to listen to cases and then answer questions submitted by the judges going to the existence of facts necessary to establish guilt in offences. Juries were to operate in district courts and courts of appeal. Boissonade also recommended their employment in the High Court of Justice when dealing with offences such as those against the Emperor and the Imperial Household, those concerning instigation of internal disturbances and foreign aggression, and alleged crimes commit-

Boissonade believed it was important to adopt the jury to put the Japanese legal system on a par with other civilised nations.<sup>8</sup> Some members of the government supported him but opponents argued it was premature for Japan to introduce juries.<sup>9</sup>

Others objected it would always be wrong to leave fact-finding to laymen and also jurors would be too lenient and acquit those who were guilty. Those against the jury prevailed and the relevant provisions were removed.<sup>10</sup> Dissatisfied, Boissonade, some years later, at the time of drafting the Meiji Constitution, again advised the government to accept juries. Prince Itō, however, refused to assent. In the 1890s discussion and debate about jury trials, particularly amongst lawyers and some politicians, resumed.

A document, entitled “Concerning the Establishment of the Jury System”, was submitted to the Councillors of the Japan Federation of Bar Associations (JFBA) annual meeting in 1900. Its authors, two attorneys, Shirō Isobe and Taizō Miyoshi, described juries abroad and advocated establishing a jury system in Japan. The JFBA Councillors adopted their proposal. In 1909 the General Meeting of the Federation approved setting up juries. Following this JFBA members who were members of the House of Representatives began to build political support for the idea and in 1910 the Friends of the Constitutional Government Party (*Rikken Seiyū-kai*) put a proposal before the House of Representatives to adopt a jury system, which it said would enhance judicial independence and strengthen the impartiality of justice.

The Emperor Meiji died in 1912. The period of his rule had seen the replacement of a semi-feudal political federation by a single unified nation state and modernization enabling Japan to stand equally with those of the West as an imperial power. The country had a modern industrial economy, constitutional government and beginnings of a colonial empire. By the end of his reign, Japan was experiencing a new era in politics with political parties becoming more coherent and focused on issues rather than simply clubs for parliamentarians. Popular opinion turned against the militarization of the state and towards genuine parliamentary democracy. Emperor Meiji was succeeded by a son who reigned in the name of Taishō between 1912 and 1926. This period, often named Taishō-democracy, saw the rise of professional politicians and development of cabinet govern-

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ted by judges of the Grand Court of Judicature and by prosecutors, DOBROVOLSKAIA, *supra* note 6, 10.

8 K. TAKAYANAGI, *A Century of Innovation: The Development of Japanese Law 1868–1961*, in: von Mehren (ed.), *Law in Japan: The Legal Order in a Changing Society* (Harvard University Press 1963) 5, 21.

9 Boissonade’s proposals were approved by the *Genrō-in*, a quasi-legislative national assembly established in 1875, with powers to review draft legislation and make recommendations, and replaced by the Imperial Diet in 1890, but rejected by Great Council of State on the grounds firstly that they did not guarantee sufficiently educated and financially stable persons would serve as jurors – seen as important because it was believed juries could not be influenced by judges – and secondly because they were not seen as vital to Japan’s modernization as not all European countries used juries.

10 H. ODA, *Japanese Law* (Oxford University Press 1999) 74.

ment supported by political parties in the Diet. Cabinets were considerably influenced by *zaibatsu*, industrial and financial conglomerates which dominated the economy. The original four were Mitsui, Mitsubishi, Sumitomo and Yasuda (new *zaibatsu*, including Nissan, emerged in the 1930s).<sup>11</sup>

Progressive impulses led to universal manhood suffrage, for those aged over 25, in 1925<sup>12</sup> and moderate social legislation to protect those in weaker social positions.<sup>13</sup> In the spirit of the times, a new Code of Criminal Procedure, based on that in Germany and paying more regard to suspects' rights, was introduced in 1922. Takashi Hara, who served as Prime Minister from 1918 until his assassination in 1921,<sup>14</sup> was receptive to the idea of introducing juries in criminal trials, and supported research into the way trials were conducted in France, Germany, England and the United States. Before his death, he sponsored a Bill which became the Jury Act (*Baishin-hō*) 1923.<sup>15</sup> Days after its enactment, the Legal News (*Hōritsu Shinbun*),<sup>16</sup> which had strongly campaigned for the introduction of the jury and in its columns followed the protracted legislative process to

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11 The period, perceived by many historians as a window of calm in the middle of a century of war and struggle in Japan, witnessed the emergence of a new middle class, in swiftly growing urban centres, the birth of white-collared workers, the *salaryman*, and of salary women – office ladies or shop attendants – *moga* or *modern girls*. In contrast to the old, the new middle class was depicted as liberal, free, job mobile and enjoying consumer trappings of modern life. The era also saw adoption of American pastimes, games and music and the writing of literature about individual and cultural identity in Japan's rapidly changing society. Avant-garde poetry and art thrived. "One yen" books appeared in great number and national and local newspapers flourished to cater for an ever wider and increasingly educated public, C. GOTO-JONES, *Modern Japan* (Oxford University Press 2009) Chapter 3.

12 *Futsū senkyō-hō* [General Election Law], Law No.47/1925. Before this reform only 1.1 percent of the population could vote for the Diet lower house. Women were not permitted to vote until after the Second World War.

13 BEASLEY, *supra* note 4, Chapters 11 and 12.

14 Hara was the first commoner and Christian Prime Minister of Japan. His period of office was the only time in pre-1945 Japan when the post of prime minister was held by the leader of the largest party (*Rikken Seiyū-kai*) in the Diet, not a bureaucrat, soldier or noble.

15 Law No 50/1923. Below is a brief chronology of the legislative history of the Jury Act:

1919: An extraordinary Legislative Council was established which approved General Principles Concerning the Jury System on 28 June 1920.

1920: Work drafting a Jury Bill was completed on 4 December.

1921: On 1 January the Privy Council began to consider the draft Bill but rejected it on 4 May. Hara resubmitted it twice again, but without success. The draft was supported by Takashi Korekiyo, who succeeded Hara as Prime Minister. After several revisions, including selection of jury candidates by lot and the important compromise that decisions of jurors were not to be binding on judges, the draft finally passed the Privy Council on 27 February 1922.

1922: A Jury Bill was passed by the House of Representatives on 1 March. However, it was later rejected by the House of Peers.

1922: A fourth draft Jury Bill was approved by the Privy Council on 20 December.

1923: The House of Representatives (Lower Diet) passed the Jury Bill on 2 March.

1923: The Bill cleared the House of Peers on the 21 March and became an Act.

achieve it, produced a celebratory editorial which proclaimed the new law fulfilled the hopes of the people and was the “most important reform in the history of protecting human rights” in Japan.<sup>17</sup> Amongst the chief drafters and supporters of the Bill were Ichirō Kiyose, a leading member of the bar, Toshimichi Hara, a famous civil trial attorney, who in 1927 became the first lawyer to become Minister of Justice, and Tazuzo Hanai, a well-known criminal lawyer and politician. They were part of an elite corps of liberal reformers within mainstream Japanese politics<sup>18</sup> and of a democratisation movement which sought to strengthen the accountability of the legal system to the people who they believed it should serve. Amongst those who in the second decade of the Twentieth Century robustly opposed the creation of a jury system were Ki’ichirō Hiranuma<sup>19</sup> and Kisaburō Suzuki.<sup>20</sup> Neither were liberal reformers: very much the opposite and determined to resist liberal and foreign notions. Remarkably, however, soon after the appointment of Takashi Hara as Prime Minister in 1918 both men not only abandoned their resistance but actively supported the introduction of juries. Why such an astounding change took place is intriguing and has never been explained. Whatever the cause, it did much to make possible the passing of the Jury Act, a matter noted by the *Hōritsu Shinbun* in its editorial shortly afterwards.<sup>21</sup>

### III. THE JURY

Although enacted in 1923, the Act, which blended features from a number of countries, did not come into effect until 1928. Juries of twelve persons were chosen by lot from literate male citizens over 30 resident in the area covered by the court and who had paid

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16 This publication was established in 1900 by the lawyer Masutarō Takagi with the principal object of spreading legal information of benefit to the general public.

17 “Celebrating the Passage of the Jury Bill”, *Hōritsu Shinbun*, 28 March 1923.

18 J. HALEY, *The Spirit of Japanese Law* (University of Georgia Press 1998) 52.

19 Baron Ki’ichirō Hiranuma (1867–1952) later served on the Great Court of Judicature (1921–1923), and subsequently as Minister of Justice and eventually Prime Minister. He was a prominent right wing leader and remembered for his role in establishing the *Kokuhon-sha* nationalist society in 1924 which aimed to combat the spread of liberal and foreign ideas and to promote what it saw as Japan’s traditional national spirit. In office he did much to develop the thought police. After the Second World War he was sentenced to life imprisonment.

20 Kisaburō Suzuki (1877–1940) became prosecutor for the Court of Cessation in 1912, Prosecutor General in 1921, Minister of Justice in 1924 and Home Minister between 1927–1928 and again in 1932. Very much associated with Ki’ichiō Hiranuma at the Ministry of Justice, he was also very active in the *Kokuhon-sha* nationalist society.

21 “Celebrating the Passage of the Jury Bill”, *Hōritsu Shinbun*, 28 March 1923. It is worthy of observation that both Ki’ichirō Hiranuma and Kisaburō Suzuki participated in the foundation of the Japan Jury Association in 1928 with its goal of educating the general public about the jury system. It can at least be speculated that their conversion to the cause helped to soften demands for the most democratic aspects of the jury including non-interference by judges with its verdict. The conjecture arises that they may have decided to join the movement to limit the attainment of its objectives.

not less than ¥3 in direct national taxation during the preceding two years.<sup>22</sup> Like the jury then in France, decisions were by simple majority. This was intended to avoid hung juries which were believed to be common in England. The jury did not return a general verdict of “guilty” or “not guilty”. It responded to questions submitted by the judge on the existence of facts.<sup>23</sup> This was designed to prevent jurors reaching verdicts against the weight of evidence because they opposed a particular law, *jury nullification*, or had generous sympathies for the accused.<sup>24</sup> Significantly, not all defendants were entitled to a jury trial. This was only guaranteed for offences where the maximum penalty was death or life imprisonment and could be waived on the accused’s application.<sup>25</sup> An accused could request trial by jury where the maximum penalty exceeded three years and the minimum punishment was not below one year.<sup>26</sup> Thus many crimes, including simple theft, embezzlement, gambling, adultery and obscenity were excluded because they did not fall within the Act’s penalty parameters.<sup>27</sup> The Act specifically excluded certain crimes from jury trial:<sup>28</sup> treason, military crimes, violation of the Peace Preservation Act, penalising those wishing to change the national Constitution or deny private property and other serious offences against the state.<sup>29</sup>

In spite of liberal inclinations waning rapidly in Japan,<sup>30</sup> the Ministry of Justice began a policy of support for the introduction of juries. In 1926, following the publishing of 2,800,000 explanatory pamphlets the year previously, the Ministry of Justice issued a set of guidelines entitled *Preparing for the Enforcement of the Jury Act*. Presidents of ward courts and members of prosecutors’ offices were instructed to meet municipal heads, explain about the importance of the Jury Act and enlist their help distributing pamphlets about the jury to residents of cities, towns and villages. Ward court presidents and prosecutors were also expected to arrange informative sessions for the general public about juries. Many law professors from the national universities were asked to travel

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22 Jury Act, Artt. 12, 23 and 27. It was calculated that between 1.7 and 1.8 percent of the population were eligible for jury service.

23 Jury Act, Art. 88. See JAPAN JURY ASSOCIATION, *Jury Guide* (1931) section 19, for an explanation of the meaning and significance of the three types of questions that a judge could ask the jury: “main questions” (*shumon*), “supplementary questions” (*homon*), and “other questions” (*betsumon*). A. DOBROVOLSKAIA, The jury system in pre-war Japan: an annotated translation of the jury guidebook, in: *Asian Pacific Law & Policy Journal* 9 (2008) 269–270.

24 T. KATSUTA, Japan’s Rejection of the American Criminal Jury, in: *American Journal of Comparative Law* 58 (2010) 504 and JAPAN JURY ASSOCIATION, *supra* note 23, section 6, 251–252.

25 Jury Act, Art. 2.

26 Jury Act, Art. 3.

27 M. URABE, A Study on Trial by Jury, in: Tanaka (ed.), *The Japanese Legal System* (University of Tokyo Press 1968) 482–491.

28 Jury Act, Art. 4.

29 J. BENSON/T. MATSUMURA, *Japan 1868–1945: From Isolation to Occupation* (Longman 2001) Chapter 2.

30 See subsection on Historical Explanations, *infra*.



around the country to explain to the public about the jury system. In the years before the commencement of jury trials, judges were sent to seven countries in Europe and the United States to study the criminal jury.<sup>31</sup>

Further, as a result of the guidelines, newspaper advertisements appeared and special radio programmes were produced. A total of eleven films were used to promote the jury system in Japan, four of which were foreign and seven were made within Japan.<sup>32</sup> Newspaper articles about juries also appeared. A prominent source of these was the *Hōritsu Shinbun*, whose editors strongly backed the new law. This newspaper reported details of mock trials that took place in various cities across the country, the construction of new jury courtrooms, and published reviews of the films used to promote the jury. It also ran seminars to foster discussion about the jury system amongst academics, lawyers, and government officials. Court seating arrangements and whether chairs used by prosecutors and attorneys should be the same height were debated. Discussion in its pages also took place<sup>33</sup> about how the judicial system might be affected by the introduction of juries and whether pre-trial investigations by examining magistrates, under the Criminal Procedure Code of 1922, much modelled on that in Germany, were compatible with trial by jury.<sup>34</sup> Just after the start of jury trials the Japan Jury Association was established with the aim of supporting the new system.<sup>35</sup>

The Jury Act operated from 1928<sup>36</sup> until 1943, when it was suspended in wartime conditions. In the first full year (1929) after it was put into effect, 143 cases were put to

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31 T. MARUTA, *The Criminal Jury System in Imperial Japan and the Contemporary Argument for its Reintroduction*, in: *International Review of Penal Law* 72 (2001) 216.

32 DOBROVOLSKAIA, *supra* note 23, 234, 235.

33 DOBROVOLSKAIA, *supra* note 23, 236, 237.

34 For a clear explanation of this procedure see DOBROVOLSKAIA, *supra* note 23, section 8, 258.

35 The Japan Jury Association was formed in 1928 to educate the public about the jury system and its key importance. At its height in the early 1930s it had some 50,000 members. The Association distributed pamphlets and other materials about the jury system amongst its members. For their benefit, and of other potential jury members, it arranged visits to courts, in Tōkyō, Chiba, Yokohama, Urawa, Maebashi, Niigata and other areas, and prisons, organised lectures and seminars and viewings of promotional films, DOBROVOLSKAIA, *supra* note 23, 279. During 1931, the Association published the *Jury Guidebook*. In addition to providing, in plain language, a summary of the main points of the Jury Act and a record of the Association's activities and aspirations, it also contained impressions about how the new system was functioning.

36 Mr. Kameji Fujioka, charged with attempted murder of his mistress, was the first defendant to be tried by a jury. His trial took place between the 23 and 25 October 1928 in the Ōita Prefecture district court. The *Hōritsu Shinbun* reported the case in an edition published on 3 November and declared it a success. Jurors were earnestly involved in the trial and asked questions during the hearing. In reply to the judge's first question whether the defendant had an intention to kill they answered "No", but answered "Yes" to his second question: "Did the defendant inflict injury without the intention to kill?" Upon this the judge found him guilty of bodily injury (under Art. 204 of the Penal Code) and imposed a sentence of six months imprisonment.

juries. The jury system appeared to be gaining public support and that of lawyers. Potential jurors approached their duties very seriously and only a very few failed to report to court. A record, one of several surviving from the jury era, in *Hōritsu Shinbun* of the first jury trial in Tōkyō in 1928, that of a young woman indicted for attempted arson, shows jurors used their right to question witnesses, expressed their opinions in open court and even reprimanded a police witness.<sup>37</sup> Indicating enthusiasm for lay participation, in 1928 and 1929 there was discussion about creating an indictment jury (*kiso baishin*), rather like a grand jury in the Anglo-American legal world, or an indictment lay assessor (*kiso sanshin*) system, but neither materialised.<sup>38</sup> Indeed the number of jury cases in the next full year, 1930, fell to 66 and then decreased annually.<sup>39</sup> In 1942 there were only two cases. The total number of jury cases was 484, of which 24 involved trial by a second jury after an answer by the original jury had not been accepted by the judge at first instance. Some 230 cases were homicide and 214 concerned arson.<sup>40</sup> Overall, 611 defendants chose jury trials. Some 94 were acquitted, amounting to an acquittal rate of 15.4 percent.<sup>41</sup> This compares with a rate of between 1.3 and 3.7 percent for cases tried by judges in those years.<sup>42</sup> The national acquittal rate by juries masks significant regional variations, for instance the criminal court in Sendai tried 16 cases by jury during the Jury Act's period of operation. Ten of these cases resulted in acquittal, whilst in three others defendants were found guilty of a lesser offence, giving a combined full and par-

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37 The Japan Jury Association noted that at the start of the jury system jurors exercised their right to ask questions, the pertinence and acuity of which often surprised judges, prosecutors and attorneys, but fewer were doing so by 1931, the time the *Jury Guidebook* was published. Reminding them that they were not mere observers, the Association strongly urged jurors to fully participate in trials by asking questions, which it described as their *unique weapon*, see DOBROVOLSKAIA, *supra* note 23, 267, 268.

38 DOBROVOLSKAIA, *supra* note 6, 16, 17.

39 The number of cases tried each year by jury was as follows:

1928: 31; 1929: 143; 1930: 66; 1931: 60; 1932: 55; 1933: 36; 1934: 26; 1935: 18; 1936: 19; 1937: 15; 1938: 4; 1939: 4; 1940: 4; 1941: 1; 1942: 2. From M. OKAHARA, *Baishin-hō no teishi ni kansuru hōritsu ni tsuite* [On the Act to Suspend the Operation of the Jury Act], *Hōsō-kai Zasshi* 10 (1943) 21–24.

40 J. NOMURA, *Nihon no bengoshi* [Japanese Lawyers] (Tōkyō Waseda Keiei Shuppan 1992) 248.

41 The most striking comparison lies in murder and arson cases. Juries gave answers to judges that led to a murder acquittal rate of 63 percent. During the same period, not guilty verdicts were recorded in 0.07 percent of murders before judges only. Maruta, a prominent advocate for the restoration of jury trial in Japan, interpreted this huge disparity as showing juries placed less weight on confessions by defendants, obtained by police, and much more on other evidence presented at court: Where criminal intent was not clear, stricter proof was required by them from prosecutors, MARUTA, *supra* note 31, 218. The detailed report by the *Hōritsu Shinbun* of the first jury trial in Tōkyō, in 1928, referred to earlier, shows how the prosecution's case, which was principally based on confession evidence, collapsed in the face of determined questioning.

42 N. TOSHITANI, *Minshi to Hōritsu-ka* [The Populace and Lawyers], in: *Gendai no Hōritsu-ka* 6 (1966) 11.

tial acquittal rate of 81 percent.<sup>43</sup> No reasons have been put forward to account for area differences.

460 (95 percent) of the cases heard by juries finished within three days. The longest lasted seven days. Length of trial averaged about two days (1.9 days) – much quicker than non-jury trials, which usually took fourteen months to complete, because of frequent and lengthy adjournments. Surviving court records from Sendai show jurors took less than two hours to decide answers that led to a guilty verdict and about twenty minutes for those resulting in an acquittal.<sup>44</sup>

The vast majority of accused persons either waived their right to jury trial in grave matters or did not choose it for less serious offences. The Jury Act, welcomed by many as introducing an element of democracy, “a palladium of liberty”<sup>45</sup> and lay participation in criminal justice, rapidly came to be seen as an irrelevance and a failure.<sup>46</sup> Why this happened is considered next.

#### IV. EXPLANATIONS FOR THE FAILURE OF JURIES

Some accounts centre on features peculiar to the Jury Act itself. Answers given by the jury were not binding on the court. A judge could remand the case for retrial before another jury as many times as he wished until the verdict conformed to his opinion.<sup>47</sup> In effect, juries were consultative bodies only and, understandably, this may well have deterred some defendants from using them.<sup>48</sup> Attorneys sometimes advised clients to avoid jury trial as a way of expressing piety to the judge’s authority in the hope of a lighter sentence.<sup>49</sup> Although appeals on law (*jōkoku*) were permitted to the highest court, the Great Court of Judicature,<sup>50</sup> appeals on fact (*kōsu*) by defendants to the court above

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43 M. HAYASHI, *Sendai no baishin ni tsuite* [Sendai Juries], in: *Hanrei Taimuzu* (1987) 17.

44 MARUTA, *supra* note 31, 218.

45 TAKAYANAGI, *supra* note 8, 22.

46 For an account of the history of Jury trial in Japan, especially its political background, see T. MITANI, *Kindai Nihon no shihō-ken to seitō* [Judicial Power and Political Parties in Modern Japan] (Hanawa Shobō 1980).

47 Jury Act, Art. 95. This occurred in only 24 cases (5.2 percent of the total number of jury trials). All of them concerned answers that would have led to not-guilty verdicts. However, in eight of these cases, new jurors still returned answers against the judges’ wishes, MARUTA, *supra* note 31, 221. Although rejection of answers and putting cases before a new jury was rare, the fact it could happen weighed seriously on defendants and their attorneys.

48 Writing in 1936, Professor Yukioki Takigawa, an eminent legal scholar at Kyōto Imperial University, concluded the main reason why juries were chosen little was the jury’s limited power in trials, rendering the role of lay people little more than a formality. Prophetically, he predicted, with sadness, the disappearance of the Jury Act. Y. TAKIGAWA, *Baishin-hō* [The Jury Act] (Nihon Hyōron-sha 1936) 42, cited by DOBROVOLSKAIA, *supra* note 6, 16.

49 URABE, *supra* note 27, 490.

50 Grounds for appeal included: procedural errors in the course of trial; where an ineligible person served as a juror and if a judge expressed in his instructions to them an opinion about

were not. Prosecutors, by contrast, could appeal there. Because sentences were usually reduced on appeal, attorneys would advise defendants not to lose their right of appeal even if it meant waiving the right to jury trial. The attractiveness of jury trial was diminished by a requirement that those found guilty had to pay all or part of the expenses of the jury which included jurors' travel, loss of jurors' pay and, when incurred, cost of their lodging.

As in trials without juries, judges had the opportunity to read and inspect all evidence presented by the prosecutor before and at the trial. They frequently questioned defendants in detail about the facts charged.<sup>51</sup> The Jury Act did not allow questions to the judge's instructions to the jury.<sup>52</sup> Similar to English and Welsh judges, they commented not only on the law to be applied but also on the evidence. Often attorneys, and sometimes prosecutors, criticised instructions given by judges "as soliciting answers that could lead to the guilt of the accused".<sup>53</sup> Such steering of jurors by judges may, however, have required some subtlety, as expressing an opinion on whether facts to be decided by a jury were proved would have amounted to grounds for an appeal on law (*jōkoku*).

The Act did nothing to alter the arrangement in court by which prosecutors sat on a raised dais alongside judges trying a case. Attorneys believed this put them and their clients at a psychological disadvantage in the eyes of jurors.<sup>54</sup>

The law provided jury trial was only available for cases that had been through preliminary examination by a judge, *yoshin kettei-sho* (a key feature of the 1922 Code of Criminal Procedure). In less serious cases, therefore, prosecutors could, and sometimes did, avoid an accused's request for jury trial by sending matters directly to the Ward

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facts jurors were to determine. If appeals were accepted by the Great Court of Judicature it either sent the case back to the same or to another court for a new trial. The *Jury Guidebook*, published by the Japan Jury Association in 1931, reported, in section 23, that since the inception of jury trial verdicts in two cases tried in the Chiba District Court had been quashed on appeal and new trials ordered in the Tokyo District Court. See translation by DOBROVOLSKAIA, *supra* note 23, 272.

51 A. NAGASHIMA, *The Administration of Criminal Justice in Japan*, in: von Mehren (ed.), *supra* note 8, 227–323.

52 Jury Act, Art. 78.

53 URABE, *supra* note 27, 490.

54 The lay out and seating arrangements in jury trial courts were that the presiding judge sat in the centre of a raised platform. To his left and right were associate judges. The court secretary sat to the right of the judges. To their left, also on the platform, was the prosecutor. On floor level the defence attorney sat at right angles to him. In front of attorney was the defendant surrounded by guards. The jury sat on the opposite side of the room facing the defence attorney and the defendant. A moveable witness stand was located in the middle of the courtroom. Below the presiding judge's seat was an evidence display case. Judges, prosecutors and attorneys wore Nara period style clothing. From collar to shoulders and chest were decorated with arabesque pattern embroidery, the colour of which was purple for judges, red for prosecutors and white for attorneys.

Court (the predecessor of the present Summary Courts, though with greater powers of punishment), a course of action requiring no preliminary judicial investigation.

Unless special circumstances existed,<sup>55</sup> evidence obtained in interrogations carried out by prosecutors and in preliminary hearings conducted by judges was not admitted in jury trials which were to be decided by testimony heard before them and real evidence received. However, at the beginning of the trial the judge asked the prosecutor to state the facts of the alleged crime. In doing so the prosecutor put forward the conclusion of the preliminary investigation report. The fact that a judge, after careful examination, had found there were reasons to suspect the defendant committed the offence could have prejudiced jurors against defendants. This may have been compounded by members of the jury reading a newspaper report of the preliminary investigation – the press frequently carried such events – some time before. It is perhaps not unrealistic to suggest that fear jurors would form preconceptions of guilt could have deterred some defendants from seeking trial by jury. Their lawyers may certainly have been aware of this danger and advised accordingly.<sup>56</sup>

Contemplating the precipitous decline of the jury so soon after its birth, some scholars<sup>57</sup> saw the content of the Jury Act as the outcome of an unworkable compromise between those who favoured juries and others in government who were anxious to prevent too many justified acquittals, a concern dating back to the 1870s, when juries were first considered, see earlier. As mentioned previously, prominent supporters of the jury included Ichirō Kiyose, a leading member of the bar, Toshimichi Hara, who became the first lawyer to be appointed Minister of Justice in 1927, and Tazuzo Hanai, a well-known criminal lawyer and politician. It may have been that these liberal reformers, known to champion juries as an expression of democracy, were prepared to accept the Jury Act, which they helped to draft, as a first step towards a more far-reaching and powerful jury system. However, as will shortly be seen, just the opposite to a political climate sympathetic to further liberal reform of the law prevailed during the jury's brief life in Japan.

Professor Toshitani<sup>58</sup> went beyond seeing the jury's lack of success as the unintended consequence of an unworkable compromise in government between supporters of juries and those anxious about unmeritorious verdicts. He wrote of the remarkable success of the various devices deliberately built into the jury system by opponents to prevent its

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55 These included: when a co-defendant or a witness could not attend trial due to death, illness, or other reason; when the testimony of defendant or a witness given at hearing differed from that given before trial on important points and when a defendant or witness refused to testify during trial.

56 The Japan Jury Association in *The Jury Guidebook*, published in 1931, advised potential jurors that the preliminary investigation report did not mean with certainty that the facts of the crime were proved. See translation by DOBROVOLSKAIA, *supra* note 23, 176.

57 For example ODA, *supra* note 10, 74.

58 TOSHITANI, *supra* note 42, 387–389.

smooth working. The “miserable state of affairs which developed had all along been planned and was aided by the increasingly darkening political background”. Toshitani identified these devices as: “rules concerning instructions by judges to juries; the power to set aside the answers of the jury without cause; the admission as evidence of testimony taken at the prosecutor’s office and the handling of evidence which was taken in advance of the trial to the jury”.

## V. JUDGES, PROSECUTORS AND LAWYERS

The attitude of the judiciary was significant. Their role in jury trials was very different from other trials where, under the Criminal Procedure Code 1922, their main function was to review the paper findings of the preliminary investigating judge rather than try the case afresh. Some judges tried hard to make the jury system work. One was Judge Ikeuchi, interviewed in the 1960s,<sup>59</sup> who recalled running jury trials as much as possible in the manner of civil trials, because of their qualities of adversarialism and procedural fairness, and of paying close attention to instructing juries in an unbiased way. The majority of judges, however, made no serious efforts to make the jury a success.<sup>60</sup> Indeed many found it uncongenial and a threat to their position – an invasion by laypersons of territory granted to them by the Emperor (*Tennō*).<sup>61</sup> The Jury Act<sup>62</sup> obliged judges to inform defendants they could waive the right to jury trial. Evidence exists that a number of judges advised defendants to change their minds and do so.<sup>63</sup> Perhaps to discourage their use, a number visited heavier sentences upon those convicted after jury trial than would otherwise have been the case. Whilst some judges were criticised by attorneys for giving instructions which led the jury to return answers showing guilt, others attracted censure from public prosecutors for failing to adequately instruct jurors of the evidence against the accused.

Negativity towards the jury trial was not confined to judges. Some prosecutors were annoyed because it made their basic preparation for cases more difficult and time consuming.<sup>64</sup>

The role of attorneys was also important. Many had supported the idea of juries but felt disappointed by the substance of the Jury Act and professionally obliged to advise the vast majority of their clients against trial by jury because of concern about: the risk of prejudice against them because of the conclusion of the preliminary investigation revealed to jurors; judges’ powers to order retrials; loss of the right of appeal on convic-

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59 URABE, *supra* note 27, 489.

60 See TAKAYANAGI, *supra* note 8, 5–40, and TOSHITANI, *supra* note 42, 387–389.

61 Judges were required to render judgement in the name of the Emperor. ODA, *supra* note 10, 53.

62 Jury Act, Art. 41.

63 MARUTA, *supra* note 31, 219.

64 MARUTA, *supra* note 31, 219.

tion; the risk of heavier sentences; and additional expense involved. It has been suggested, mindful of these factors, most lawyers would only broach the possibility of jury trial with clients if their cases seemed strong and that this helps to explain the higher rate of acquittals before juries than judges alone. Suspicions have been raised that some lawyers navigated their clients towards trial by judges alone because they felt uncomfortable with having to perform as advocates before juries, an area in which they frequently had no experience or training.

It is at least possible some judges and lawyers were not wholly convinced about the constitutional propriety of the jury.<sup>65</sup>

## VI. REDUCTION IN PROMOTION TO THE PUBLIC

In a preface to the *Jury Guidebook* published in 1931, the Japan Jury Association acknowledged that the number of juries held in Japan had been considerably less than had been expected by the authorities and that “the spirit of the Jury Law has not yet completely reached all of the Japanese society and that the true virtues of trial by jury have not yet been understood”.<sup>66</sup> The Guidebook suggested that one reason for this was that although the government spent “an enormous amount” of money<sup>67</sup> to prepare for juries, the amount of financial support diminished greatly after they were introduced. The authors argued that “drums and flutes should play loudest not before the dance starts – a period during which the objective is only to attract people – but after the dance has started”. The reduction in financial support to publicise and explain trial by jury may well have been a reflection of changed political priorities and concerns.

It is further commented in the *Jury Guidebook* that “[u]nfortunately, the number of people who do not know what the Jury Act is or what jurors should do is still far from being small.”<sup>68</sup> If an accurate observation, there must be some uncertainty about the effectiveness of measures taken to publicise the jury before its implementation.

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65 Art. 24 of the Constitution of the Empire of Japan 1889 (“The Meiji Constitution”) stated: “No Japanese subject shall be deprived of his right of being tried by the judges determined by law.” It was argued that jury trial conflicted with this. The majority said the jury system was entirely compatible with the Article as defendants in serious matters could waive trial by jury, or not request it in more minor matters, and thus be tried solely by judges. Uncertainty also surrounded Art. 58 which specified judges should be appointed from those with proper qualifications according to law. It was argued jurors, who decided facts, and hence were functioning in part as judges, did not satisfy this requirement. Against this it was said that judges were ultimately responsible as they could reject a jury’s findings and place the matter before another.

66 DOBROVOLSKAIA, *supra* note 23, 244.

67 The Association put forward a figure of five million. This presumably included the cost of altering courts to accommodate jurors.

68 DOBROVOLSKAIA, *supra* note 23, 247.

## VII. CULTURAL FEATURES

Cultural factors contributed to the unpopularity of the jury. An important and noted feature of Japanese society is its hierarchical nature. This is reflected in language: honorific to superiors; neutral polite forms to acquaintances; and plain type to family, friends and broad equals. It also manifests itself in bowing between persons just introduced. Inferiors should bow lower than superiors; inferiority and superiority being determined by age, rank and occupation. Seating arrangements on special occasions often further show social hierarchy. Associated with hierarchy is a widespread trust in the competence, opinions and actions of professionals and highly educated officials combined with a strong tendency to distrust and disregard the views of ordinary people. This feature, *kanson minpi* (“respect officials and downgrade the people”), is said to be much influenced by Confucianism with its strong sense of deference to superiors.<sup>69</sup> Respect for officials was much increased during the rapid economic and social modernisation of Japan in the late nineteenth century led by revered figures in government and by admired officials acting in the name of the Emperor.<sup>70</sup> Government and officialdom were generally regarded as positive and progressive forces rather than necessary evils requiring constant control by the people. Judges in that and subsequent periods were esteemed because of general respect for public officials serving the Emperor and for their zealously guarded high moral standards. In short, they had the confidence of the people.<sup>71</sup> Many scholars agree<sup>72</sup> that inclination to defer to officialdom, in the form of trusted judges, and lack of confidence in the abilities of their peers, caused many Japanese to distrust juries from the outset and defendants to prefer trial solely by judges. By 1931 some journalists were writing in articles that juries did not fit the Japanese national character.<sup>73</sup> Perhaps in an attempt to enhance the status of jurors, and increase public confidence in their abilities to decide questions of fact, the authors of the *Jury Guidebook*, published in 1931 by the Japan Jury Association, which tirelessly supported the jury, wrote: “Serving as a juror in the divine courts of justice that carry out proceedings, most humbly, in the name of His Majesty the Emperor of Japan is a great honour and a duty comparable to that of serving in the Imperial army.”

In seeking to account for the lower than expected number of jury trials since their inception, the writers of the *Jury Guidebook* identified as significant what they described as traditional and deep seated indifference to law. Before the promulgation of the Meiji

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69 F. AOYAGI, *Baishin-sei sanshin ni tsuite no ichi kōsatsu* [A View on the Jury System and Assessor System], in: *Jōchi Hōgaku Ronshū* 4-1 (1960) 27.

70 BEASLEY, *supra* note 4, Chapters 7 and 8.

71 There is a view that, due to their close relationship with the Ministry of Justice, public prosecutors were regarded as having even more status than judges, ODA, *supra* note 10, 53.

72 Including C. A. FORD, *The Indigenisation of Constitutionalism in the Japanese Experience*, in: *Case Western Reserve Journal of International Law* 28 (1996) 3.

73 See, for example, R. YASUSHI, *The Defects of the Jury System*, *Hōritsu Shinbun*, 3 August 1931, cited by DOBROVOLSKAIA, *supra* note 6, 16.



Constitution in 1889, law, according to them, was coercively imposed on the people. Because of this it was widely regarded as something to be followed, not known and studied.<sup>74</sup> Persistence of this social trait was not conducive to selecting trial by jury.

#### VIII. HISTORICAL EXPLANATIONS

Inimical historical conditions have been advanced as contributing to the failure of the jury system. The nationwide movement towards democracy during the Taishō era assisted the then Prime Minister, Takashi Hara to successfully sponsor the Bill, which became the Jury Act, 1923, allowing citizens to participate directly in administering criminal justice. However, by the time the jury system was first used in 1928 the political climate had changed markedly. Agricultural unrest became more frequent, focused on tenant farmers' demands for rent decreases in the wake of poor harvests; during the 1930s they became centred on the nature of the landlord-tenant relationship itself. A financial panic in 1927 had aggravated rural conditions. Concern about communist and socialist activity, mainly in the urban industrial work force, led the Katō Cabinet, sometimes referred to as the "Mitsubishi Cabinet" because of that industrial empire's influence upon it, to pass the Peace Preservation Law of 1925, under which those who organised or knowingly participated in an organisation which aimed to change the state constitution or deny private property could be punished by up to ten years' imprisonment. (A substantial force behind the enactment of this law was Ki'ichirō Hiranuma, who had served as Minister of Justice in the latter part of 1923 and early 1924.) Laws enabling the feared *Tōkubetsu Kōtō keisatsu* (TOKKO, Special Higher Police, founded in 1911), to control "dangerous thoughts" were also considerably strengthened.<sup>75</sup> Under the next government, headed by Tanaka, a retired army general, these extensive powers were much used. In 1928, 3,426 communists were arrested, of whom 524 were prosecuted.<sup>76</sup> Also, in that year, as part of Tanaka's clampdown of the left, the Peace Preservation Law was amended to include the death penalty and all outdoor meetings were prohibited. In 1929, Tanaka, pushed by events driven by the army in Manchuria, resigned and was replaced by Hamaguchi as Prime Minister and head of a liberal cabinet. He soon faced the crash of the Wall Street stock market and the Great Depression which followed.<sup>77</sup>

Persisting until the mid-1930s in Japan, it wrecked the country's foreign markets and prevented villagers augmenting rice income with that of silk, then a principal export.

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74 DOBROVOLSKAIA, *supra* note 23, 246, 247.

75 TOKKO, formed within the Home Ministry, expanded to include branches in every Japanese prefecture, major city, and overseas locations with a large Japanese population. Also, under the Ministry of Education, a Student Section was established to monitor evidence of socialist and communist activities by university professors and students.

76 R. LAMONT-BROWN, *Japan's Dreaded Military Police* (Sutton Publishing 1990).

77 In the aftermath of the Wall Street Crash the Yen was taken off the gold standard and slumped by 50 percent against the dollar. Unemployment rose rapidly to over 20 percent.

Society became increasingly polarised and riven with class conflict. Strong resentment was felt by poor labourers and peasants, suffering acute poverty, against the *zaibatsu*'s great wealth, much publicised currency speculations and selfish influence on governments. Occasional corruption of Diet representatives was also much disliked, as was their supposed neglect of Japan's trade markets in China. The bourgeoisie and landowners, on the other hand, were concerned to strengthen the state against threats from the disaffected.<sup>78</sup>

Trial by jury was waived, or not requested, by the wealthy partly because they feared their unpopularity would work against them through the jury.<sup>79</sup> Workers being much alienated from the courts and law generally had little interest in opting for jury trial. In a very class divided society they might also have been concerned about from which section of society jurors would be drawn.<sup>80</sup>

During the Great Depression, the notion that expansion through military conquest would solve Japan's economic problems gained strength. Modernism of the Taishō era came to be seen by many as an infection threatening the soul and well-being of Japan, rather than a material boon. Instead preservation of traditional Japanese values and rejection of "Western" influence was considered paramount. Frustrations turned against political parties. Secret political movements began to agitate.

Many military leaders were irritated about restrictions placed on them by civilian governments. When, in 1931, Japanese forces in Manchuria occupied the whole country following the "Manchurian incident", the civilian government in Tōkyō was unable to stop it. The army soon afterwards announced it would no longer accept cabinet party government. They were accordingly replaced by "national unity" cabinets, which sought to bring political harmony amongst a variety of groups. Effectively, the remains of fledgling democracy in Japan were removed by 1932. Interference by the military on government grew and the Diet gradually turned itself into a ceremonial body supporting

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78 BENSON/ MATSUMURA, *supra* note 29, especially Chapters 4 and 6.

79 See L. KISS, *Reviving the Criminal Jury in Japan*, in: *Law and Contemporary Problems* 62 (Spring 1999) 261, 268.

80 The Japan Jury Association *Jury Guidebook*, 1931, section 27, exhorted jurors not to be "swamped by emotions and to rid themselves of favouritism and being influenced by public opinion". See translation by DOBROVOLSKAIA, *supra* note 23, 276–277. Interestingly a retired High Court Judge, interviewed on 13 July 2015, now a Professor at Dōshisha University Law School, who is researching the history of the jury in Japan, had an impression that attorneys perceived most educated persons as likely to be pro-prosecution and that they used their powers of peremptory challenge, i.e. without the need to present reasons to court, under the Jury Act 1923, Art. 64, to prevent them sitting as jurors. In his view Attorneys were able to make stronger emotional appeals to less educated jurors and concentrate less on evidence when it was not in defendant's favour. He contrasted the greater powers of peremptory challenge, to remove potential jurors, under the Jury Act with those in the Saiban-in Act, 2004, Art. 36, and the lesser opportunity of modern attorneys to know the background of potential jurors.

the invasion of China in 1937 and eventually the attack on Pearl Harbor in 1941.<sup>81</sup> Particularly during the period 1931–1936 violent acts of terrorism occurred. They were mainly committed by elements inside and outside the army who wanted to precipitate martial law. Factionalism in the army deepened resulting in assassinations. In 1936 a very serious uprising (the “February 26<sup>th</sup> incident”), costing the lives of many prominent politicians, took place in Tōkyō led by the “Imperial Way” faction intent on introducing direct rule by the Emperor – a “Shōwa Restoration”. Following the crushing of the insurrection the opposing and more cautious “Control faction”, which had less sweeping plans for internal reform but shared many of the Imperial Way’s foreign policy objectives, held sway in government. Foreign policy and domestic politics geared more and more towards preparation for total war, with a five-year plan to co-ordinate main industries introduced in 1937 and national mobilisation the following year.<sup>82</sup>

In 1935, the “organ theory” of government was suppressed.<sup>83</sup> Put forward in the 1910s by Tatsukichi Minobe, a distinguished constitutional theorist, it introduced the idea that under the Meiji Constitution sovereignty belonged to the “nation” as a corporate body and that the Emperor was an organ of this sovereign corporate body that exercised state power, rather than a sacred power beyond the state itself.<sup>84</sup> Sharply attacked by constitutional scholars with a conservative slant as contrary to the national essence of the Japanese state (*kokutai*), the theory nonetheless exerted considerable influence in the time of the Taishō democracy and had stimulated currents of thought.<sup>85</sup> The concept that sovereignty belonged to the nation, not solely the Emperor, was adopted by those who advocated widening the electoral franchise. Many lawyers, politicians and academics who argued for juries saw them as an expression of corporate sovereignty and of democracy. The sale of Professor Minobe’s works on constitutional law were prohibited and they were removed from public libraries. Public reference to his theory was outlawed until after the Second World War. The ban on the organ theory of the Emperor was but one aspect of aggressive national promotion of an official Imperial creed from which deviation was not tolerated. The Emperor was projected as a sacred entity, a descendant

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81 For a brief introduction to the rise of pre-war militarism in Japan, see M. HANNEMAN, *Japan Faces the World 1925–1952* (2nd ed., Routledge 2013) especially Chapters 1–5.

82 By 1938 military spending took nearly 75 percent of the national budget. See GOTO-JONES, *supra* note 11, Chapter 3, 79.

83 See H. BIX, *Hirohito and the Making of Modern Japan* (Harper Collins 2000) 287.

84 See F. O. MILLER, *Minobe Tatsukichi – Interpreter of Constitutionalism in Japan* (University of California Press 1965).

85 Professor Minobe’s constitutional model had circulated at the same time as the writings of intellectuals and activists such as Sakuzō Yoshino who promoted a form of democracy called *minpon shugi* (rule/politics for the people) which they saw as compatible with Japanese constitutional monarchy. Yoshino’s most significant work on this subject, an essay entitled “On the Meaning of Constitutional Government,” was published in *Chūō Kōron*, an influential literary magazine. Later, in 1918, Yoshino helped found the *Reimei-kai* society which sought to distribute democratic ideas in society.

of the Shintō sun goddess Amaterasu, creator of Japan, who as father of the Japanese family demanded the selfless devotion of all its members.<sup>86</sup> Judges carried out their duties in the name of the Emperor. It may be that in the climate of extreme imperial veneration lawyers would have advised clients contemplating jury trial that many jurors would find it incomprehensible that an accused would not submit to be judged by an esteemed servant of the Emperor and therefore be pre-disposed against him.<sup>87</sup> There may also have been concern about jurors giving too much weight to the evidence and opinions of the public prosecutor, a representative of the Imperial state who sat next to judges and dressed like them.

The Peace Preservation Law of 1925, amended in 1928, described earlier, was increasingly invoked by the Special Higher Police, TOKKO, who throughout the 1930s chiefly targeted students, farmers, socialists, communists, foreign workers and those who showed any irreverence to the Emperor, TOKKO and their military equivalents, *kenpei-tai*, frequently pressured suspects by detaining them in custody over and over again without formal charges. In 1929, there were 269,000 detentions, 473,000 in 1931 and 1.2 million in 1933.<sup>88</sup> The actions of the Special Higher Police were not subject to any formal legal appeal and some people were held as long as two years. Between 1933 and 1936, the Japan Times newspaper noted that 59,013 people had been formally arrested by TOKKO and *kenpei-tai* for harbouring “dangerous thoughts”.<sup>89</sup> Some 5,000 were brought to trial and half of them given prison sentences. As seen earlier, the Jury Act specified that no crime of a political nature was to be heard before a jury. Arguably, persons tried for thought (*shisō jiken*) and other political crimes were those who needed the safeguard of jury trial most. Some did state a desire for it.<sup>90</sup> Whether the jury would have provided any real protection for these people, by carefully scrutinising evidence and even deciding against it out of sympathy for the accused, must be open to question, particularly in the 1930s’ political atmosphere of veneration for the Emperor and those acting in his name, and with great activity by the Special Higher Police. It is not fanciful to suggest that acquitting jurors might have attracted their attention. The point, however, remains that trial by jury was not available to dissidents. Consequently, the majority had little or no concern about the fate of the jury system.

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86 BENSON/MATSUMURA, *supra* note 29, Chapter 4.

87 From the 1890s, school children and students were required to recite the Imperial Rescript of Education, intended to be a national ethical code, which required loyalty to the Emperor, respect and obedience to parents and willingness to courageously offer oneself to the state in times of emergency. See R. STORRY, *A History of Modern Japan* (Harmondsworth 1982) 119. Universal conscription for all men over 20 was introduced in 1873. Most jurors would have performed national military service. During this time they would have been exposed considerably to Emperor reverence.

88 E. TIPTON, *Japanese Police State: The Tokko in Interwar Japan* (University of Hawaii Press 1990).

89 LAMONT-BROWN, *supra* note 76.

90 See KISS, *supra* note 79, 270.

With the proviso it was to be re-instated after the war, the Jury Act was suspended by legislation<sup>91</sup> in 1943 to conserve time, money and material resources. It has been suggested that judges urged defendants not to choose jury trial in time of war.<sup>92</sup>

The jury has not been revived. In 1949, Richard Appleton,<sup>93</sup> referring to the destruction of progressive legal measures, including the Jury Act, by reactionary trends in Japanese politics, wrote, “the history of any nation’s criminal procedure is closely related to the evolution of political conditions”. In 1959 Professor Kikuchi, who had been a judge during the years of the jury system, spoke of a basic incompatibility between the jury, based on democratic principles and mounting, ultimately overwhelming, militarism.<sup>94</sup> Reflecting in 1966, Professor Toshitani<sup>95</sup> considered the Jury Act might have had some limited meaning in 1923 but “was soon lost totally under the fierce storm of fascism”.<sup>96</sup>

In assessing why the jury system in Japan failed, three central explanations emerged: shortcomings within the Jury Act itself; cultural characteristics of Japanese society; and the unstable and abnormal times when politics flourished that were the antithesis of those likely to promote people’s involvement in criminal justice and juries. Those who in later times argued for the jury stressed the first and third accounts whilst those opposed to its return lay weight on the second.

#### IX. THE POST-WAR YEARS

After the Second World War the Allied Occupation strove to achieve a “fundamental change of the criminological attitude” in Japan (Supreme Commander of Allied Powers, SCAP 1948) by establishing a broad set of constitutional protections inter-related to more specific statutory provisions. The Occupation also sought to foster a vigorous adversary system and to ensure the formal trial itself would be the key step in the criminal justice process.<sup>97</sup> To this end the judge’s preliminary examination of suspects was abolished and strict rules against the use of hearsay evidence introduced. The first draft of

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91 Law No. 88/1943, Schedule 3 of which provided that the Jury Law would operate after the War.

92 T. KATSUTA, Japan’s Rejection of the American Criminal Jury, in: *The American Journal of Comparative Law* 58 (2010) 506.

93 R. APPLETON, Reforms of Japanese Criminal Procedure under Allied Occupation, in: *Washington Law Review* 24 (1949) 401–430.

94 H. KIKUCHI, *Baishin seido ni tsuite* [On the Jury System] (Nihon Hōritsu-ka Kyōkai Series No. 14, 1959).

95 TOSHITANI, *supra* note 42, 387–389.

96 Kiss also emphasised how the political environment suffocated the jury. See KISS, *supra* note 79, 270.

97 D. FOOTE, The Benevolent Paternalism of Japanese Criminal Justice, in: *California Law Review* 80 (1992) 317, 331.

the Code of Criminal Procedure also included provisions for jury trial.<sup>98</sup> In debates about the new Constitution in the Diet Lower House (the Japanese government was allowed to function during the Occupation under supervision by the Supreme Commander of Allied Powers), at least one member, Shungo Abe, a socialist, but speaking in an individual capacity, asked for a right to trial by jury to be included.<sup>99</sup> Abe was possibly partly motivated by a widely shared feeling on the left that many judges had shown enthusiasm in applying pre-war repressive measures such as the Peace Preservation Law and could not, therefore, be safely trusted to uphold fundamental rights.

Charles Opler,<sup>100</sup> then a young SCAP American legal adviser, recalled strong opposition from Japanese members of the Code of Criminal Procedure drafting committee to the revival of the jury. Their objections were primarily based on the pre-war failure of the jury which they mainly attributed to cultural reasons, rather than to the content of the Jury Act 1923 and the abnormal times in which it operated. Richard Appleton<sup>101</sup> reported Japanese concern about expenses a jury system would entail, “a potent consideration in difficult economic times”.<sup>102</sup> Certainly the country was enduring great financial hardship: out of a population of 76 million in 1946, 10 million were unemployed. The Americans were principally persuaded by the argument that the jury was an institution “rooted in very different soil”<sup>103</sup> to that in Japan and abandoned their efforts to include it in the new Code of Criminal Procedure, although the idea of jury trials in the future was not rejected. Indeed the Court Organisation Law which simultaneously came into force with the Code of Criminal Procedure, provided: “The provisions of this law shall in no way prevent the passing of other statutes to create a jury system for criminal cases”.<sup>104</sup> As the Cold War unfolded, the Occupation authorities started to concentrate on attacking communism rather than what they saw as feudalism.<sup>105</sup> Labour unrest, led by the communists and socialists, increased in the late 1940s and early 1950s.<sup>106</sup> Though lacking any proof, it has been speculated that the authorities would not have welcomed acquittal of strike leaders charged with criminal

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98 Also a draft Constitution written by SCAP early in 1946 did include an article that capital offences be tried by a jury and that jury trial be available on request by those charged with felony. This was removed from later drafts. See translation by DOBROVOLSKAIA, *supra* note 6, 18.

99 H. QUIGLEY/J. TURNER, *The New Japan* (University of Minnesota Press 1956) 138.

100 C. OPLER, *Legal Reform in Occupied Japan: A Participant Looks Back* (Princeton University Press 1976).

101 APPLETON, *supra* note 93, 404.

102 The strength of opposition to a jury system is a notable exception to the general conclusion of immediate post war history that the Japanese were seldom reluctant to accept measures advocated by the occupying powers.

103 OPLER, *supra* note 100, 146–148.

104 *Saiban-sho-hō* [Court Organisation Law], 1947, Art. 3 para. 3.

105 BENSON/MATSUMURA, *supra* note 29, Chapter 7.

106 SCAP released many leading communists from gaol in 1945 and in the same year legalised the Japanese Communist Party.

offences by juries and partly because of this did not later press for jury trials during the remainder of the Occupation, which ended in 1952.

Prosecutorial Review Commissions, involving eleven randomly selected citizens, were, however, introduced by the Code of Criminal Procedure. Though not capable of indicting an accused and restricted to making a public finding of a purely advisory nature on whether a prosecution should be brought, they were regarded by American commentators at the time as embryonic Grand Juries.<sup>107</sup> There were, however, no signs of any further development until, following a recommendation made by the Judicial Reform Council (JRC) in 2001, the Code of Criminal Procedure was revised in 2004 to give Commissions power to order that prosecutions be commenced.<sup>108</sup>

Worthy of note is that criminal and civil juries were introduced during the American governance in Okinawa. The criminal jury began in 1963 and ceased when the Ryūkyū Islands, of which Okinawa is one, were re-incorporated into Japan in 1972. In total 89 jury trials were held in courts that had jurisdiction not only of American citizens, but also Ryūkyūans and Japanese where a United States citizen was involved, for example as victim. Jurors were randomly selected and deliberations took place in a separate room. The qualification for jury service was three months' residence in the Ryūkyū Islands and the ability to read and speak English. Without a nationality qualification, Ryūkyūans, Japanese, Filipinos and Chinese sat together as jurors. Little research on how these juries operated exists. However, an investigative report was published in 1992 by the Japan Federation of Bar Associations. It concluded that, despite a lack of history of lay participation and jury trials in the Ryūkyū Islands and linguistic, inter-racial and inter-cultural challenges, jurors undertook their duties responsibly and with diligence.<sup>109</sup> The Okinawa experience demonstrated to those who were beginning to imagine a return of the jury system to Japan that no inherent barriers, cultural or otherwise, stood in its way. Others said that because of its peculiarities no such deduction could be made.

In the 1950s and 1960s re-instatement of juries was simply not on the distant horizons of either the Ministry of Justice or the Supreme Court, neither were there popular calls for its return. What attention there was in the jury was largely confined to universities, where a small number of academics and others analysed, discussed and wrote about

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107 APPLETON, *supra* note 93, 407.

108 FUKURAI, *supra* note 3, 323–328.

109 JAPAN FEDERATION OF BAR ASSOCIATIONS, *Jury Trials in Okinawa; An Investigative Report on the Jury System in Pre-Reversion Okinawa* (Takachiho Chobō 1992). Chihiro Isa gave an account of being a juror in Okinawa in 1964. A prolific author and critic of criminal justice in Japan, Isa wrote, with much praise about the considerable debate that took place between members of the jury on which he sat, in an award winning narrative of his trial experience, entitled “*Gyakuten*” (“Reversal”), editions of which sold in great numbers. It was also made into an NHK drama. See C. JONES, Still dreaming of a Japan with Juries – and without U.S. Bases, in: *Japan Times*, 18 June 2014. From a historical perspective a comparison between Okinawan juries with those created by the Jury Act 1923 would be of great interest.

its short life and fate. For example, in 1957 Professor Hirano of Tōkyō University wrote that one of the reasons for the unpopularity of jury trials was people's preference for trial by "those above the people" rather than their contemporaries.<sup>110</sup> In 1959 former Judge Kikuchi wrote a paper considering factors contributing to the jury's failure.<sup>111</sup> Views on the subject were put forward the following year by Professor Aoyagi in an article proposing the adoption of a mixed system of justice, of judges sitting together with citizens as in Germany, rather than the jury.<sup>112</sup> In 1961, a roundtable discussion of the jury system took place during which Mr Baba, a former Procurator General, expressed the opinion that since the Jury Act was suspended after such a short period of time it was impossible to argue whether or not it was successful.<sup>113</sup> Five years later, in 1966, Professor Toshitani argued "the miserable record of the Jury Act", severely handicapped by various inbuilt devices to ensure its failure and functioning in a fiercely hostile political climate, had "created the myth that the jury system does not fit the character of the Japanese people".<sup>114</sup> Two years afterwards this saw the publication by Professor Urabe of a review of literature on the Jury Act and a summary of interviews with fifteen lawyers (twelve judges, one public prosecutor and two attorneys) who had taken part in jury trials.<sup>115</sup>

Greater interest in lay involvement in criminal justice, spurred by revelations of serious miscarriages of justice, occurred during the last two, or so, decades of the past century, but never achieved major political importance. To the surprise of many, the Judicial Reform Council, established in 1999 to examine the legal system, made outline recommendations (which were built upon by a government task force over the following two years) for a "mixed court" of judges and laypersons to try serious cases, rather than adopting an Anglo-American jury model. After five years of preparation such a system was introduced in May 2009. Confounding dire predictions, some arising from Japan's experience with the Shōwa jury, it is generally seen as successful on many levels, although a number of concerns do exist. Why this new system of lay participation appears to be flourishing, in contrast to the fate of juries between 1928–1943, is lush for research.

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110 R. HIRANO, *Shoku-gyō saiban-kan to shirōto saiban-kan* [Professional Judges and Lay Juries], in: *Hōritsu Jihō* 29-4 (1957).

111 KIKUCHI, *supra* note 94.

112 AOYAGI, *supra* note 69, 27.

113 Y. BABA, *Zadan-kai: Baishin seido ni tsuite* [Roundtable Discussion on the Jury System], in: *Hō no Shihai* 4 (1961).

114 TOSHITANI, *supra* note 42, 387–389.

115 URABE, *supra* note 27, 482–491.



## SUMMARY

*In August 2009, after much planning and accompanied by great publicity, mixed, or saiban-in, courts, in which professional judges and randomly chosen lay judges together decide guilt and sentence in serious criminal cases, began. This was not Japan's first major experience of popular participation in the administration of criminal justice. A jury system operated from 1928 to 1943. It was not, however, a success.*

*This article describes the reasons for the reception of Western laws in Japan in the late 19<sup>th</sup> Century, the growth of interest in a jury system, and the campaign, principally led by lawyers, that resulted in its creation in 1923.*

*Main features of the 1923 Jury Act and also the steps taken by the government, jury supporters and the press to promote knowledge of it and smooth its introduction are set out.*

*An account of the operation of the jury from its commencement in 1928 until 1943, when it effectively ceased, is presented. After a promising start during the first two years the number of cases heard by juries fell precipitously and in 1942 amounted to only two. The Jury Act 1923, welcomed by many as introducing an element of democracy, a "palladium of liberty", rapidly came to be seen as an irrelevance and a failure. An interplay of factors involved in why this happened is considered next.*

*A number of aspects peculiar to the Jury Act itself lessened its attractiveness to defendants. Notable amongst these was that judges could remand cases for retrial before another jury as many times as they wished. The Act has been seen by some scholars as an unworkable compromise between those who favoured juries and others in government anxious to prevent unjustified acquittals, a concern dating from the 1870s when juries were first considered.*

*The attitude of the judiciary, whose role in jury trials was very different than in other types, was significant. Some tried hard to make the new system work. Feeling their position threatened, the majority, however, made no serious effort to make it succeed. Negativity towards jury trial was not confined to judges but extended to many prosecutors and even some attorneys.*

*Cultural features contributed to the unpopularity of the jury. Inclination to defer to officialdom in the form of trusted judges and lack of confidence in the abilities of their peers led many Japanese to distrust juries from the outset and defendants to choose trial solely by judges.*

*Inimical historical conditions are chief amongst the causes of failure. By the time the jury system was used first in 1928 the political climate had already markedly changed from the comparatively liberal Taisho years. Japan thereafter descended into militarism, totalitarianism and war, suffocating the jury based on democratic principles.*

*This article then looks at attempts to restore a jury system in the immediate aftermath of the Second World War and the reasons this did not materialise.*

*The functioning of juries between 1963 and 1972 established in Okinawa, during the period of United States administration, is noted. Discussions held in universities in the 1960s*

*about the possible return of juries to Japan are recounted. The wider debate on the subject in the last two, or so, decades of the 20<sup>th</sup> Century, spurred by revelations of miscarriages of justice, is also referred to.*

*Finally, it is suggested that the sharp contrast between the apparent flourishing of mixed, saiban-in, courts and the fate of the 1928–1943 jury system is worthy of further research.*

#### ZUSAMMENFASSUNG

*Im August 2009 wurden nach langer Vorbereitung und mit großer Öffentlichkeitswirkung gemischte, saiban-in Gerichte eingeführt, bei denen Berufsrichter und zufällig ausgewählte Laienrichter in Prozessen, die schwere Straftaten zum Gegenstand haben, gemeinsam über Schuld und Strafe entscheiden. Diese Gerichte stellen nicht Japans ersten Versuch dar, die Öffentlichkeit an der Entscheidung in Strafprozessen zu beteiligen. Bereits von 1928 bis 1943 gab es ein Jury-System, welches jedoch nicht erfolgreich war.*

*Dieser Beitrag befasst sich mit den Gründen für die Rezeption westlichen Rechts in Japan am Ende des 19. Jahrhunderts, dem wachsenden Interesse an einem Jury-System sowie der von Anwälten angeführten Bewegung, welche letztlich die Einführung eines solchen Systems bewirkte.*

*Der Beitrag beschreibt die wesentlichen Merkmale des Jury-Gesetzes von 1923 sowie die von Regierung, Befürwortern des Jury-Systems und der Presse eingeleiteten Maßnahmen zur Bekanntmachung in der Öffentlichkeit sowie der reibungslosen Einführung des Jury-Systems. Ebenso wird die Funktionsweise des Systems von dessen Beginn 1928 bis zu dessen Ende 1943 vorgestellt. Nach einem vielversprechenden Beginn in den ersten beiden Jahren sank die Zahl der von Jurys entschiedenen Fälle merklich und lag im Jahr 1942 bei lediglich zwei Fällen. Das Jury-Gesetz von 1923, welches noch bei seinem Inkrafttreten von vielen als bedeutend für die Demokratie sowie als „Palladium der Freiheit“ angesehen wurde, galt nunmehr als irrelevant und als Fehler. Im Anschluss werden die verschiedenen miteinander zusammenhängenden Faktoren beschrieben, welche zu dieser Entwicklung führten.*

*Einige Charakteristika des Gesetzes selbst sorgten dafür, dass das System für Angeklagte wenig attraktiv war. Insbesondere konnten Richter so oft es ihnen beliebte, bestimmen, dass der Fall von einer anderen Jury erneut gehört werden sollte. Das Gesetz wurde von einigen Wissenschaftlern als nicht funktionsfähige Kompromisslösung derjenigen beschrieben, die sich für Jurys aussprachen, sowie derjenigen in der Regierung, die Sorge vor ungerechtfertigten Freisprüchen hatten. Diese Sorgen gingen bis auf die 1870er Jahre zurück, in denen die Einführung von Jurys das erste Mal diskutiert wurde.*

*Bedeutend war auch die Haltung der Justiz, deren Rolle eine ganz andere war als in anderen Verfahren. Einige Richter bemühten sich, dem neuen System zum Erfolg zu verhelfen. Die Mehrheit jedoch fühlte sich in ihrer Stellung als Richter bedroht und gab sich nur wenig Mühe. Eine negative Haltung gegenüber dem Jury-System beschränkte sich zudem nicht allein auf Richter, sondern fand sich auch bei vielen Staatsanwälten und teilweise auch Anwälten.*

*Kulturelle Besonderheiten trugen zusätzlich zur Unbeliebtheit des Systems bei. Eine Neigung, sich dem Beamtentum in Form der Richter anzuvertrauen, sowie ein fehlendes Vertrauen in die Fähigkeiten der Mitbürger führten dazu, dass Japaner dem Jury-System von Beginn an misstrauten und die Angeklagten sich für Verfahren vor dem Richter entschieden.*

*Dem Jury-System nicht zuträgliche historische Bedingungen spielten ebenso eine große Rolle für den Misserfolg des Systems. Als 1928 zum ersten Mal von diesem Gebrauch gemacht wurde, hatte sich das politische Klima gegenüber den vergleichsweise liberalen Jahren der Taishō-Epoche bereits erheblich gewandelt. Japan begann seinen Abstieg in den Militarismus, Totalitarismus und Krieg und erstickte das auf demokratischen Prinzipien basierende Jury-System so bereits im Keim.*

*Der Beitrag befasst sich im Folgenden mit den Versuchen, das Jury-System unmittelbar nach Ende des Zweiten Weltkriegs wiederzubeleben, und beleuchtet die Gründe, aus denen dieser Versuch scheiterte.*

*Auch auf die Funktionsweise des Jury-Systems von 1963 bis 1972 auf Okinawa zu Zeiten der Verwaltung durch die USA wird hingewiesen. Über die Diskussionen an Universitäten in den 60er Jahren über eine mögliche Wiedereinführung des Jury-Systems wird berichtet. Auch auf die von Enthüllungen über Fehltritte angefachte breitere Debatte der letzten ca. zwei Jahrzehnte des 20. Jahrhunderts wird Bezug genommen.*

*Abschließend wird darauf hingewiesen, dass der große Kontrast zwischen dem augenscheinlichen Funktionieren des gemischten, saiban-in, Gerichts und dem Schicksal des Jury-Systems von 1928 bis 1943 weitergehende Untersuchungen verdient.*

*(Die Redaktion)*