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WATSON, Andrew <<http://orcid.org/0000-0002-9500-2249>>

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ANNA DOBROVOLSKAIA

**The Development of Jury Service in Japan.
A square block in a round hole**

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Kunitake Kume, a member of the Iwakura Embassy (1871–1873), the early Meiji great fact finding mission to the West, observed a jury trial in the Court d'Assizes, Palais de Justice, Paris in 1873. Later he cautioned against introducing something similar in Japan saying it would be “like trying to fit a square block of wood into a round hole”. This imagery explains the front cover this book with a wooden painted square block partly in a round hole. The rest of this work is in perfect shape, filled with rigorous and clearly expressed scholarship that expands what is known about Japanese lay participation in criminal trials. Those interested in this area have previously benefitted from Anna Dobrovolskaia's illuminating works on the subject including, *The Jury System in Pre-War Japan: An Annotated Translation of 'The Jury Guidebook'*¹.

In the Introduction the author identifies two key questions in the debate about the origins and nature of law. Firstly, why does legal reform happen? Secondly, what are the determinants of success and failure of a particular legal initiative undertaken? To address them she proposes study of various attempts to institute forms of jury service in Japan. In documenting Japan's experiences with juries, good use is made of existing literature, and also recently discovered documents and trial records. To aid examination of Japan's past and present encounters with juries, contending theories of legal change are succinctly and clearly set out starting with those that do not see law as the natural product of a particular society, influential amongst them being Alan Watson's theory of legal transplants, followed by opposing socio-legal theories that maintain law is socially determined. Between these polar positions theories based on cross-border flows are also offered. Next the body of theoretical literature identifying factors determining success or failure of a legal initiative is summarised. These include the prestige and power of an “exporter” society, attitudes of interest groups, for

1 Asian-Pacific Law and Policy Journal 9-2 (2008) 231–296.

example bar associations, economic reasons, the political regime, the capacity of institutions such as courts, law schools and the legal profession to implement reforms and compatibility of reforms with society's institutional culture. The author observes both Alan Watson's theory of legal transplants and the socio-legal approach have been applied to explain legal change in Japan and these are used to help analyse why the jury was introduced at different times during its history, the determinants of its success or failure and prospects for the mixed lay and professional judge courts (*saiban-in system*) which began in 2009.

Chapter Two discusses arrival of the concept of jury service in Japan against the background of modernisation and westernisation of the legal system. First attempts to introduce jury trials in the Meiji period with a jury composed of selected bureaucrats (*sanza* system 1873–1875) – used only twice in civil courts, and several times in military tribunals, in extra ordinary complex cases – and later one comprising twelve judges, employed in 1880, are described. Interestingly the rules of the *sanza* court are reproduced. Resistance to proposals by Emile Gustave Boissonade, the French legal scholar and adviser to the government, for an all layperson jury, as part of the Code of Criminal Instruction, is next described. The key opposing role to them taken by Kowashi Inoue, grand secretary to the Great Minister of State, is explained. Perhaps less known, is that of Robert Brader, a British jurist and consultant to the Meiji government, who also advised against introduction of a jury system. Lack of appreciation of the benefits of the lay person jury amongst major actors and interest groups is posited as the major reason why western jury models were not transplanted in Meiji Japan.

After a valuable short history of society in the late Meiji and Taishō periods, especially the movement towards democracy, Chapter Three deals with developments specific to the legal system that led to Japan's pre-war twelve lay man criminal jury system, a unique combination of the Anglo-American jury and the Continental-European mixed court. These include establishment of the Japan Federation of Bar Associations, several high profile cases which raised doubts about the quality and integrity of trials, commitment to the project by Friends of Constitutional Government political party (*Rikken Seiyūkai*) and the steadfast support of the Prime Minister Takeshi Hara. Discussion over the years about the possible introduction of a jury system, the drafting process of a Jury Act and debates about it in the Imperial Diet, the House of Peers and the Privy Council are recounted in useful detail. A summary is made of the Jury Act promulgated in 1923, which came into force in 1928, and is followed by discussion of steps to promote it by the Ministry of Justice, local bar associations, journalists and various organisations, including the Japan Jury Association, a semi-government organisation. An account of the operation of the jury in the years 1928–1943 is presented including

evidence of its initial popularity and that jurors actively participated in proceedings. Journalists' accounts of two jury trials, one in Ōita (the first in Japan), the other in Tōkyō in 1928, are given. However, contrary to Ministry of Justice predictions of thousands of jury trials annually, only 484 cases were tried by jury. The majority of these cases involved homicide (215) and arson (214). During 1929 143 cases were heard before juries, but thereafter the number steadily decreased and in 1942, the year before the jury system was suspended, just two took place.

In explaining why the great majority of defendants in serious cases waived their right to trial by jury, and those facing less grave charges did not request it, in effect rendering the pre-war jury largely superfluous, or at best ornamental, two principal factors are considered: the movement in the 1930s and 1940s to militarisation, fascism and nationalism and aspects of the Jury Act itself, the most important of which were that findings of the jury could be ignored by the judge, who could order a retrial, lack of appeal to a higher court on facts, additional expense for defendants and that, due to an amendment in 1929, defendants, often socialists and communists, prosecuted under the Peace Preservation Act became ineligible for jury trial. As jury trials lost popularity their shortcomings became highlighted in academic debate. These undermining features are seen as the result of excessive adaptation by the government to fit the judicial, political and culture of Japan.

In the book's Appendix, adding very much to this Chapter, are translations of reports from the *Hōritsu Shinbun* of the first ever jury trial, in the Ōita District Court, and the first jury trial in Tōkyō, also in 1928. These are accompanied by illustrations of front pages from the newspaper. Other translations from *Hōritsu Shinbun* concern accused members of the Communist Party and a juror who unlawfully leaked information about jury deliberations. Further illustrations include a sketch of a machine to decide candidates for jury service and rare photographs of a mock trial, court clothing and jury accommodation at Tōkyō District Court.

Acquisition of an empire made Japan an exporter of legal concepts as well as an importer from the West. Chapter Four deals with the little known topic of attempts to introduce the jury system in Japan's colonies. After a concise history of Taiwan and its laws before and after it came under Japanese rule in 1895, discussions and proposals put forward by members of the Taiwanese elite and the Taiwan Popular Party in the late 1920s and early 1930s for a jury system are recounted. Belief that its introduction might lead to challenges to colonial authority, and was a step to achieve political emancipation, explains its rejection as not in the interests of the Japanese government. The only colony where the Japanese form of jury was established was Karafuto, the southern part of nearby Sakhalin, acquired from Russia in 1905. The court system in the colony was essentially identical to

Japan, the vast majority of the population were Japanese and no demand for greater autonomy existed. The Chapter mentions a mock trial in the Karafuto District Court in 1928, as preparation for the coming into force of the Jury Act, only days later, and gives an account of the first real trial later in the year. The Chapter then turns to colonial people as criminal defendants in cases tried by jurors in mainland Japan. The Ebara Policeman Murder incident trial of 1932, involving two Korean brothers charged with murdering a special police force (*Tokkō*) detective, is presented as an example. Coloured press reports of the case, in which the suspects' associations with the Communist Party were emphasised, highlight the nationalist and militaristic direction of society in the years juries operated.

Chapter Five begins with an overview of the chief legal reforms carried out under the Allied occupation of Japan during 1945 to 1952. The point is made that the Supreme Commander for the Allied Powers (SCAP) tried to balance introducing Anglo-American concepts with Japan's pre-war Continental-European legal traditions and to involve Japanese experts in a process of change that they sought to inspire rather than force. Various representations from organisations and individuals for the insertion of jury trial into the revised Constitution, a matter debated in government and the Diet, are described in some detail. Although incorporated into first SCAP drafts for the Constitution mention of jury trial was later deleted and never entered the Constitution in 1946. Attempts to include it in the new Court Organisation Law were also unsuccessful, save for inclusion of an article stating it would be possible to introduce jury trial in the future. Interestingly, in her research, the book's author discovered a document that may well have been SCAP's proposal for a thorough revision of the pre-war jury. Reasons why the jury system was not introduced in occupied Japan are set out including expense in difficult economic times, absence of adequate courtrooms, want of enthusiasm amongst lawyers and politicians, little support amongst the general public and lack of agreement amongst occupation lawyers whether to insist on adopting it.

The Chapter's second section deals with criminal and civil juries introduced in Okinawa respectively in 1963 and 1964 and which functioned until 1972 when the period of American occupation ended. During this time the U.S. Civil Administration of the Ryūkyū Islands (USCAR) and Government of the Ryūkyū Islands (GRI) each maintained their own court systems. The former for Americans, whilst the latter, operating in Japanese and in accordance with Japanese law, had jurisdiction over all other residents. Juries were established to protect the Sixth Amendment Constitutional Rights of US citizens in USCAR courts. Unlike in the United States no nationality requirement was imposed enabling Americans, Ryūkyūans, Japanese, Filipinos, Chinese and others proficient in English to serve as

jurors. Persons other than Americans could be and were tried in cases “of particular importance affecting the security, property or interests of the United States as determined by the High Commissioner”. A total of ten trials took place. Summaries of a criminal case and a civil case tried before jurors are presented together with a rare photograph of names being drawn for the first jury panel in Okinawa. There is evidence jurors approached their task with much responsibility and that trials ran smoothly. The author explains the introduction of juries in Okinawa reflected objectives of the U.S. administration, rather than those of the local population, and, being accustomed to the jury system, American members of the legal profession working in Okinawa were able to ensure its proper functioning.

Chapter Six concentrates on attempts to introduce a jury system since the end of the Allied occupation. It commences with a review of developments in society and the Japanese legal system during the period. Weight is correctly given to the ambitious recommendations made by the Judicial System Reform Council (JSRC), composed of lawyers, prosecutors, legal academics, legal service users and others, established by the Cabinet in 1999 to debate and make proposals for legal change. Wide ranging reforms, described as revolutionary and compared in scale by some to those in the Meiji Restoration and Allied Occupation, resulted from its recommendations published in 2001. One such radical change was the introduction of a new lay judge system by the Lay Judge Act 2004. The Chapter then sets the background to this legislation including academic discussion in the 1950s and 1960s about the constitutionality of reintroducing the jury system, public debate from the 1980s about the return of juries, instigated by various citizens’ groups, some of whom made specific proposals to amend the pre-war Jury Act, study of jury systems in the United States and Britain by the Supreme Court and growing interest in juries and lay judges by local Bar Associations, the Japan Federation of Bar Associations and, in the 1990s, from amongst the ruling Liberal Democratic Party. Fuelling interest in instituting juries was growing dissatisfaction with the judge only system, especially in the wake of four much publicised miscarriages of justice cases, involving defendants who had been on death row for decades after conviction on confession evidence, which they had later withdrawn, and belief juries would make erroneous convictions less likely and check abuses by police and prosecutors. The Chapter then describes JSRC deliberations, its Final Report recommending a mixed court of six lay and three professional judges (the *saiban-in* system), reactions to it by the Supreme Court, Ministry of Justice and Office of Prosecutor, drafting the Lay Justice Act and its passage in the Diet.

There follows a clear and helpful summary of the *saiban-in* system, a unique mixture of Continental-European and Anglo-American models of

jury trial for trying criminal cases, where the maximum sentence is death or indefinite imprisonment, in which both professional and lay judges decide guilt and sentence, but the latter are appointed for only one case. Lay judges, like pre-war jurors may question witnesses, the defendant and victim. Also similar to the Jury Act 1923, the Lay Judge Act provided for a five year period before coming into force. During this time necessary supplementary legislation was passed, 170 courtrooms were altered to accommodate lay judges and detailed training for judges, lawyers and prosecutors undertaken. An extensive programme to familiarise the public with the new system also took place including promotional films, pamphlets, public meetings, advertisements in newspapers, magazines, on the television and the Internet, design and widespread use of a distinctive logo, and a catchphrase competition. Independently guidebooks for prospective lay judges were published. Mock trials were also held. The Chapter describes the public debate that followed the passing of the Lay Judge Act. Those in support stressed the democratic and empowering value of citizen participation in the justice system. One set of opponents favoured judge only trials while a second believed public participation would little more than ornamental value and called for introduction of the Anglo- American jury system immediately to counter prosecutors' heavy reliance on confessions and documentary evidence. A third group saw mixed courts as a stepping stone to all layperson jury trials. Views and material published by those opposed to the *saiban-in* system are produced in translation. Their opposition did not prevent its introduction in 2009 and an account of the first trial in Tōkyō, one of 142 that year, is given. The widespread view after six years is that the system is functioning effectively. Less than three percent of defendants are acquitted. In contrast to those by judges only, trials are conducted in a concentrated form without frequent adjournments and there is greater orality in proceedings and evidence. Attitudes of those who have served as lay judges are positive and some have been willing to share their thoughts and experiences with prospective lay judges, while others have joined groups to promote and improve the system, including calling for greater psychological support for lay judges. Former lay judges have also highlighted the issue of the death penalty.

The Chapter maintains that the proposal to introduce *saiban-in* trials was successful because it was presented as central in plans, published at a time of agreement amongst politicians, business and the legal profession that a major change was necessary, to radically reform Japan's legal system. Part of these plans were to replace imprecise administrative guidance by clear rules and were supported by business. A sense of urgency was added by a perceived need to equip the legal system for increasing international competition and, in the area of criminal justice, continued concern about the

possibility of miscarriages of justice. Further, the start of a new millennium and the change from the *Shōwa* to the *Heisei* era provided psychological motivation for reform. In contrast to the fate of the pre-war jury, it is argued that prospects for the *saiban-in* system are good because: it is based on the Continental-European mixed court model which is more compatible with inquisitorial elements of Japanese criminal procedure; adaptations for Japan, unlike those made to the Anglo-American jury in the inter-war years, do not undermine its performance and indeed may strengthen it; it was introduced and operates in a democracy, free from rising fascism and militarism in which the pre-war jury operated; and broad acceptance, if not eagerness, to serve as lay judges. Interestingly it is contended that although significant alteration in presentation of evidence and the manner in which prosecutors and attorneys argue cases has resulted, this is less than the transformation that would have occurred had lay judges been able to reach decisions independently of professional judges.

Chapter Seven summarises the findings of previous chapters. Regarding the two questions set in Chapter One, why does legal reform happen and what are the determinants of success or failure when it does?, the first section discusses why the jury was introduced at certain times whilst at others proposals to do so were not pursued. It then closely examines factors determining success or failure of jury systems introduced and, by these historical lights, considers how contemporary mixed courts/the *saiban-in* system may fare. The author finds Alan Watson's "legal transplant" approach helpful in explaining the excessive adjustments made to the Anglo-American jury in Japan, which did much to undermine it, and long running opposition to lay persons deciding cases independently of judges. However, the author asserts, elucidating the introduction of the jury system, and how it operated, also requires socio-legal explanations including the movement towards democracy in the late Meiji and early Taishō period and the later drive in the opposite direction to militarism and fascism. The socio-legal approach also helps account for establishment of the *saiban-in* system at a time of increasing demands for deregulation and citizen empowerment and predictions of its secure place in a democratic society in which serving as a lay judge is widely accepted. It is hoped that assessment of the *saiban-in* system will be continued in a future edition of this book.

Rich in primary and secondary sources and written in solid readable prose throughout, this impressive work provides a comprehensive investigation of past and present efforts to introduce lay participation in criminal trials in Japan. Its coverage of less known aspects, including the early Meiji period bureaucratic (*sanza*) system and twelve judge juries, discussions about introducing juries in Taiwan, operation of the pre-war jury in Karafuto, Korean nationals tried by jury in Japan and juries in Okinawa, is par-

ticularly valuable and highly welcome. Strengthened by introductory sections to each chapter on relevant historical and legal developments, this work will appeal to students of Japanese history and Japanese law who want to know more about lay participation in Japanese criminal courts. Its broader analysis of why legal reforms occur and the determinants of their success or failure will attract considerable attention from scholars of socio-legal studies and comparative law. Those whose interests straddle all of these areas will, of course, be especially pleased by this book.

*Andrew R. J. Watson**

* Senior Lecturer, Department of Law & Criminology, Sheffield Hallam University.