Asian Journal of Law and Society, 3 (2016), pp. 327–349
doi:10.1017/als.2016.52
© Cambridge University Press and KoGuan Law School, Shanghai Jiao Tong University
First published online 11 August 2016

Deliberative Democracy and the Japanese Saiban-in *(Lay Judge) Trial System*

Noboru YANASE*
College of Law, Nihon University

Abstract
Since May 2009, public participation in the criminal justice system, known as *saiban-in seido* (trial system by lay judges), has been implemented in Japan. The purpose of this paper is to analyze the law-making process of the *saiban-in* system and present an evaluation of the system from the perspective of deliberative democracy. This paper concludes that, contrary to criticism from those who want to introduce a purer form of jury trial dominated by lay jurors, the current *saiban-in* system, which mixes three professional judges with six *saiban-ins*, should be viewed positively from the perspective of deliberative democracy.

Keywords: *saiban-in* (lay judge) trial system, deliberative democracy, constitutional theory, law-making process, Japan

1. INTRODUCTION

Since May 2009, public participation in the criminal justice system (*Saiban-in Seido*)[1] has been implemented in Japan. It allows the general public to participate in criminal trials, deliberating and making decisions with professional judges regarding the defendants' guilt or innocence, as well as on sentences. Under this system, most serious crimes are handled by a panel composed of three professional judges and six *saiban-ins*, randomly chosen from those with the right to vote for members of the House of Representatives. This system is prescribed in the Act on Criminal Trials with Participation of *Saiban-in* (*Saiban-in no*

* Associate Professor of Constitutional Law, College of Law, Nihon University. LL.M. Keio University, 2002; Ph.D. Keio University, 2009. This research is supported by the Japan Society for the Promotion of Science (JSPS), Grant-in-Aid Scientific Research (KAKENHI #257800166 and #16K03301). An earlier version of this paper was partly presented as "Concepts of Democracy in the Legislative Process of the Saiban-in System" at the fourth East Asian Law & Society Conference in Tokyo, Japan, held on 4–6 August 2015. The author would like to thank Setsuo Miyazawa for organizing the session on "Democracy and the Lay Judge System in Japan." The author is also grateful to Malcolm Feeley, Satoru Shinomiya, and Dimitri Vanoverbeke for their detailed comments and suggestions. The author would like to thank three anonymous reviewers for their thorough reviews, and highly appreciates their comments and suggestions, which contributed to improving the quality of this paper. Correspondence to Noboru Yanase, 2-3-1 Misaki-chou, Chiyoda-ku, Tokyo, 101-8375, Japan. E-mail address: yanase.noboru@nihon-u.ac.jp.

1. In Japanese, "*saiban-in(s)*" means (a) lay judge(s) and "*seido*" means system. Although there are numerous papers on the *saiban-in* system, not only in Japanese but also in English, the author provides complete reference for only those articles directly quoted in this paper. Levin & Mackie (2013) is a useful bibliography of works on the *saiban-in* system written in English from 2001 to 2011, and the most notable work published recently is Vanoverbeke (2015), which contains discussions about historical background, policy-making process, and recent practices of the *saiban-in* system.

https://doi.org/10.1017/als.2016.52 Published online by Cambridge University Press

sanka-suru Keiji Saiban ni kansuru Houritsu) (Act No. 63 of 2004, hereafter the *Saiban-in* Act).[2] As of April 2016, 50,603 *saiban-ins* have participated in trials and 8,791 defendants have been tried by *saiban-ins*.

The purpose of this paper is to analyze the law-making process of the *saiban-in* system and present an evaluation of the system from the perspective of deliberative democracy. This paper concludes that, contrary to criticism from those who want to introduce a purer form of jury trial dominated by lay jurors, the current *saiban-in* system, which mixes three professional judges with six *saiban-ins*, should be viewed positively from the perspective of deliberative democracy.

2. LAW-MAKING PROCESS OF THE *SAIBAN-IN* ACT AND THE RATIONALE FOR PUBLIC PARTICIPATION IN CRIMINAL TRIALS

2.1 Two Different Rationales for Public Participation in Criminal Trials

Why should the public take part in criminal trials as *saiban-ins*? Various reasons have been proposed and most of them are reasonable, though not all. Kent Anderson and Mark Nolan present various reasons for lay participation in the Japanese judicial system, including producing more just verdicts, promoting a more democratic society, fostering international competitiveness in the twenty-first century, and making trials shorter and more efficient.[3] In their analyses, they carefully considered judicial system reform in Japan; however, they do not focus on the *Saiban-in* Act.[4] Japanese people consider the *saiban-in* system from different perspectives.[5] For practitioners, it is most important that the system functions; they do not often consider its rationale. However, scholars should pay attention and seek to identify the rationale of the system.

The author's research into the law-making process of the *Saiban-in* Act reveals that the rationales for public participation in criminal trials can be categorized into two main types.

---

2. The Japanese government does not provide official English-language translations of Japanese legal texts. According to the Japanese Law Translation Database System (http://www.japaneselawtranslation.go.jp), the title of this Act is "the Act on Criminal Trials with Participation of Saiban-in" (tentative translation). The Japanese Law Translation Database System notes that all the translations contained therein are unofficial, and that only the original Japanese legal texts have legal effect. Although they state that they only provide unofficial translations, these should be treated as quasi-official texts, since this database system was originally promoted by the Headquarters for the Promotion of Judicial System Reform of the Cabinet and managed by the Ministry of Justice. Therefore, these texts have degrees of completeness and credibility, and, in this paper, the author will use that system for reference purposes. According to the website of the Supreme Court of Japan (http://www.courts.go.jp/english/), the same title is translated as "the Act on Criminal Trials Examined through Participation of Saiban-ins (Lay Judges)." However, the Court provides only a partial translation of this Act. Australian scholars have distributed a full translation of this Act for research purposes and they translated the title of this Act as "the Act Concerning Participation of Lay Assessors in Criminal Trials." See Anderson & Saint (2005), p. 233.

3. Anderson & Nolan (2004), pp. 941–6.

4. It makes sense that they do not refer to the Act, since, in their paper, they do not describe the law-making process of the *Saiban-in* Act; however, they attempt to propose benchmarks for testing the *saiban-in* system in the domestic historical and international psychological contexts.

5. Keiichi Muraoka describes the background of the introduction of citizen participation into the justice system in the Justice System Reform Council. This includes: (1) economic reasons, demanded by the Japanese business community from the bar association, to support an increase in the number of lawyers in return for accepting the participation of citizens; (2) the necessity of changing the way Japanese people think, to accord with the global standard; and (3) the accountability of Japanese courts, by including ordinary people in criminal trials. Muraoka (2011), p. 16.

https://doi.org/10.1017/als.2016.52 Published online by Cambridge University Press

The first category involves democracy. In Japan, public participation in the criminal justice system had been non-existent, with the exception of the suspended jury system[6] and the ongoing system of the Prosecution Review Commission (*Kensatsu Shinsa-kai*). Most major countries in the world have a judicial system that involves public participation. Although Japan is a democratic country, it did not have such a system. Some supporters of the *Saiban-in* Act had strong complaints regarding the practices of criminal trials, and they thought that the absence of citizen participation caused judicial problems. This type of rationale could be described as "democracy-based theory."

The second rationale for promoting public participation in criminal trials is that it strengthens the judiciary. Until 2009, most ordinary people had poor knowledge of the judiciary and felt unfamiliar with it. It was true that most citizens did not have opportunities to make contact with legal professionals. However, as Japanese civil society matured, many people came to participate in the governance of their society more positively, and the judiciary was expected to be accountable to citizens as well as the Diet and Cabinet. Therefore, bringing the public into the trial process and reflecting common sense in trial results would help ordinary people to better understand the justice system and enhance their trust in the system. This type of rationale could be described as "promoting understanding and enhancing trust theory."

Each of the two theories has been supported by a wide array of people. In addition, the different theories are based on different valuations of practices in current criminal trials.

Progressive scholars and criminal defence attorneys have advocated the democracy-based theory. They stress that Japan's criminal trial system has a serious structural problem. In Japan, almost all defendants accused and tried are found guilty. Proponents of the democracy-based theory argue that innocent people have been wrongly imprisoned; this problem is called *Enzai* (miscarriage of justice).[7] *Enzai* results from investigations conducted on unreasonable grounds by police officers, as well as prosecutions by prosecutors who fail to pay suitable attention to the given case, and condemnation by judges who fail to listen carefully to a defendant and defence counsel. Most professional judges are drawn from an elite group that includes those who grow up in affluent families, graduated from famous universities, and passed bar examinations with excellent scores. Their backgrounds often prevent them from having clear insights into the lives of ordinary people, which renders them ignorant in matters regarding civil society. Thus, if the power of judges is reduced and courts have access to the wisdom of laypeople, the rate of acquittals should increase. Proponents insist that public participation in the justice system, similar to a jury system, will reduce *Enzai* and lead to the democratization of the undemocratic Japanese judiciary. Based on this

6. Japan had a limited jury system for 15 years prior to World War II. The Jury Act (Act No. 50 of 1923) was introduced in 1923, and it went into effect in 1928. Under this jury system, in principle, juries handled serious crimes and 12 jurors were chosen from among rich, intelligent Japanese males who were high-income taxpayers over the age of 30. We should not forget that this jury system did not foster adequate participation because it excluded all females, as well as males who paid little or no tax. Even so, this old jury system should be recognized as a kind of democratic system, although Japan was not at that time a democratic country, but an imperial sovereignty. The policy-making process and practices of the old jury system are described in Saikou Saiban-sho Jimu Soukyoku Keiji Kyoku (1995) and Vanoverbeke, *supra* note 1, pp. 60–87.

7. For the purposes of this paper, it is not necessary to discuss the adequacy of current practices of criminal trials in Japan in detail.

https://doi.org/10.1017/als.2016.52 Published online by Cambridge University Press

opinion, over several decades, the Japan Federation of Bar Associations (JFBA) has repeatedly advocated for the establishment of a jury system.[8]

By contrast, mostly conservatives have argued for promoting understanding and enhancing trust theory; this theory is based on positive attitudes toward current practices in criminal trials. Most mainstream scholars of criminal law and procedure support this theory, as do the Ministry of Justice and the Supreme Court. They, of course, do not deny the current practices of criminal trials; instead, they affirm that the accuracy of the Japanese judiciary has been strongly supported by citizens. The term *Seimitsu Shihou*, meaning precision justice,[9] represents a symbol showing the recognition of judges and prosecutors who proudly run criminal trials with confidence. They believe the reason for the low acquittal rate is efficient screening by prosecutors. In their view, most Japanese people have faith in the judiciary. Nonetheless, they accept the fact that Japanese trials are detail-oriented and that ordinary citizens are unfamiliar with the process. Therefore, they think judicial reform based on popular support is necessary. To promote ordinary people's understanding of the justice system, they should be involved in criminal trials.

In the law-making process of the *Saiban-in* Act, opposition groups that stood behind the two disparate theories both supported public participation in criminal trials as a step toward an ideal legal system, but they did so for different reasons.

2.2 The Law-Making Process of the Saiban-in *Act*

The Japanese government established the Justice System Reform Council (*Shihou Seido Kaikaku Shingi-kai*) (hereinafter called the JSRC) under the Cabinet in July 1999, with a mandate to make recommendations for a comprehensive reform of the justice system in Japan. The JSRC presented its recommendations to the Cabinet in June 2001, and they contained a broad range of reforms, including internationalization of the Japanese judicial system, improvement of public access to legal services, expansion of the legal population, and establishment of a new system to nurture the legal profession (i.e. a Japanese-style law school).[10] Public participation in the criminal justice system is one of the most striking.

The law-making process of the *Saiban-in* Act consisted of three stages: (1) discussion in the JSRC, from June 1999 to June 2001; (2) discussion in the Expert Committee on the *Saiban-in* System and the Criminal Justice Reform (*Saiban-in Seido/Keiji Kentou-kai*) of the Headquarters for the Promotion of Judicial System Reform (*Shihou Seido Kaikau Suishin*

8. The JFBA is the national bar association in Japan, and every practising attorney is required to join it. The JFBA examined public participation in justice in its official journal *Jiyu to Seigi* [*Liberty & Justice*] in October 1979. Regarding the introduction of a jury system, the JFBA held symposiums and issued some recommendations. It should also be noted that civic activists had pursued the introduction of the jury system in Japan. Their contributions are briefly described in Fukurai (2007), pp. 317–19.

9. After the judicial reform, *Seimitsu Shihou* was changed to *Kakushin Shihou* (core-seeking judiciary) by the Supreme Court, Ministry of Justice, and mainstream scholars. The implication of the new phrasing is that only the core facts should be targeted. It requires intensive, comprehensive, expeditious trials focusing on the true points of a dispute through pre-trial conference procedure for lay *saiban-ins*. This term was originally proposed in 1999 by Professor Ryuchi Hirano, who advocated the mixed-jury system.

10. Judicial reform policy other than the introduction of public participation into the justice system is also discussed in Miyazawa (2007). Miyazawa (2013) gives an overview of the outline and political process of the judicial reform in Japan, and especially focuses on the active role of the *Keidanren* (the Japan Business Federation) and the Liberal Democratic Party.

https://doi.org/10.1017/als.2016.52 Published online by Cambridge University Press

Hombu), from June 2001 to March 2004; and (3) deliberation in the National Diet from March to May 2004.

In the first stage, 13 members of the JSRC discussed whether or not to introduce a system of public participation into trials. The JSRC consisted of three law professors, three law practitioners, and seven people who were not legal experts. Professor Koji Sato at Kyoto University, one of the most influential scholars in the field of Japanese constitutional law, was the chairman of the JSRC. The member representing the JFBA passionately insisted that Japan introduce a jury system. However, one former judge and one former prosecutor were not amenable to that proposal.

Although, early on, most of the members agreed in principle to introduce public participation, they held fierce discussions regarding the specifics. The JFBA, which argued for citizen participation in trials from the standpoint of the democracy-based theory, advocated a pure jury system consisting of only laypeople. In contrast, the Ministry of Justice and the Supreme Court, which supported the promoting understanding and enhancing trust theory, thought a mixed-jury system with laypeople and professional judges[11] would be superior to one of laypeople alone. Outside the JSRC, these three actors of the judicial community aggressively stated their own opinions. Inside the JSRC, members aligned with these actors excitedly discussed the proposals. During the last phase of the JSRC discussions, they reached a consensus that Japan should adopt a unique participation system, different from both the pure jury and mixed-jury system,[12] in which *saiban-ins* appointed from among the people engage in criminal trials in co-operation with professional judges.

In the second stage, the issue of how many *saiban-ins* and judges should be included on the panel was discussed. To solidify the judicial reform policies according to the JSRC's recommendations, the Cabinet set up the Headquarters for the Promotion of Judicial System Reform and organized expert committees. The Expert Committee on the *Saiban-in* System and the Criminal Justice Reform were responsible for public participation in criminal trials. Two attorneys, one incumbent prosecutor, and one incumbent judge were appointed to this group.[13] Four professors specializing in criminal procedure were also included. The chairman, Professor Masahito Inoue at the University of Tokyo, is an eminent professor specializing in criminal procedure in Japan.

Since the JSRC had previously recommended that the panel include professional judges, it was impossible to establish a pure jury system (a panel consisting of only lay citizens without any professional judges). Therefore, those who insisted on a pure jury system in the previous stage now insisted that the panel consist of many *saiban-ins* and a minimal number of judges. Another party, who supported the mixed-jury system, argued that the number of professional judges not be reduced and that additional *saiban-ins* not be numerous.

Along with discussion in the Expert Committee, politicians also discussed the structure of the panel of the *saiban-in* system. The Liberal Democratic Party, which was the largest ruling party, supported the plan the Supreme Court and the Ministry of Justice accepted. Komeito,

11. They favoured a system in which judges and citizens would work together to deliberate and make decisions both on guilt and sentencing. This type of participatory system is used in Germany and France.

12. In this paper, the mixed-jury system means the German lay judge system (Schöffengerichtssystem), in which professional judges and politically appointed citizens work together to decide sentences in criminal trials.

13. In order to discuss topics other than the *saiban-in* system, one journalist, one police bureaucrat, and one local politician were also appointed members of the Expert Committee.

https://doi.org/10.1017/als.2016.52 Published online by Cambridge University Press

which had formed a coalition with the Liberal Democratic Party, favoured a plan similar to that proposed by the JFBA. Because the Expert Committee failed to reach an agreement on the number of *saiban-ins* and judges on the panel, politicians belonging to the governing parties made the decision regarding the structure of the panel during the final phase of the second stage. As a result, it was decided that the panel would consist of three judges and six s*aiban-ins*.

The Bill of the *Saiban-in* Act was drafted based on the agreement in the previous stage by the Task Force, and was submitted to the Diet by the Cabinet. The Diet's deliberations on the Bill constituted the third stage. Governing parties supported the Bill, and opposing parties provided questions and comments in the committees on judicial affairs in both houses of the National Diet. After questions and answers in the Diet, the meaning and details of the *saiban-in* system became clear. In the early period of the Diet deliberation, opposition parties insisted that the new trial system be similar to the plan advocated by the JFBA. During deliberations, the governing parties accepted the secondary revised proposal by the Democratic Party of Japan, which was the largest of the opposing parties. At the last minute, during Diet deliberations, the Japanese Communist Party proposed a drastic revision to the Bill without negotiation; however, this attempt was in vain. The parties put aside their differences and approved the Bill, allowing the *Saiban-in* Act to pass almost unanimously. The Act was established in the Diet on 21 May 2004, promulgated on 28 May 2004, and put into effect on 21 May 2009.

2.3 Debates on the Rationale for the Saiban-in *System in the JSRC*

Two rationales for public participation in criminal trials were discussed in Subsection 2.1 above; these include the democracy-based theory, and the promoting understanding and enhancing trust theory.

The democracy-based theory was originally strongly supported in the first stage of the law-making process of the *Saiban-in* Act. According to a report entitled "The Points at Issue in the Justice Reform" (*Ronten Seiri*),[14] issued by the JSRC on 21 December 1999, the purpose of public participation in criminal trials is as follows: "In such conditions where involvement of the people as the sovereign is going to expand in many ways, we must also study the ideal way of participation of the people in the justice field *as the sovereign*" (emphasis added).

In addition, at the 17th (17 April 2000) and 31st meetings (18 September 2000) of the JSRC, former judge Kouzo Fujita, a member of the JSRC and former president of the Hiroshima High Court, attempted to justify introducing public participation into the justice system using the democracy-based theory.[15]

Going against Fujita's opinion, Professor Morio Takeshita,[16] vice chairman of the JSRC, first proposed promoting understanding and enhancing trust theory at the 32nd meeting (26 September 2000). He stated that it takes a great leap of logic to think that popular sovereignty or principles of democracy directly require public participation in justice.

14. Shihou-seido Kaikaku Shingi-kai (1999), p. 10. The English translation of this paper is available online at < http://japan.kantei.go.jp/policy/sihou/singikai/991221_e.html > (last accessed 1 July 2016).

15. Although he was a former judge, his views differed from those of the Supreme Court.

16. Takeshita is a famous professor of civil procedure.

https://doi.org/10.1017/als.2016.52 Published online by Cambridge University Press

He also proclaimed that the involvement of the people in criminal procedures would contribute to building an understanding of and enhancing the people's trust in the justice system, and, as a result, a much firmer popular base would be established for the justice system. Gradually, many members of the JSRC came to support the promoting understanding and enhancing trust theory, which affirms rather denies traditional Japanese trials.

Although a few descriptions consistent with the democracy-based theory[17] remained in the JSRC's interim report, published on 20 November 2000, the theory championed by the vice chairman was dominant.

During the 45th meeting (30 January 2001), when Tsuyoshi Takagi[18] insisted that all trials should be legitimized by public participation in states where governance is based on popular sovereignty, Takeshita criticized this opinion, stating that "If Takagi's understanding was right, Japanese people would have to participate in all the trials without any exception. (There is no way we can!)."

The debate was over. Supporters of the democracy-based theory had no choice but to absolutely deny the existing trial system in Japan, which lacked substantial public participation. In addition, the supporters could not help but require public participation in all criminal trials thereafter. However, it was certainly impossible to involve people in a huge amount of criminal cases as lay judges.[19]

As a result, the JSRC published the final report, entitled "Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21st Century (*Shihou-seido Kaikaku Shingi-kai Ikensho: Nijuiseiki no Nihon wo Sasaeru Shihou-seido*)," on 12 June 2001. The promoting understanding and enhancing trust theory was adopted as the only rationale for participation of the public in criminal trials. This report recommended the introduction of public participation into the justice system as follows:

> If the people become more widely involved in the administration of justice together with legal professionals, the interface between the justice system and the people will become broader in scale and deeper, public understanding of the justice system will rise, and the justice system and trial process will become easier for the public to understand. As a result, a much firmer popular base of the justice system will be established.[20]

2.4 Rationale Described in the Saiban-in *Act*

Because the *Saiban-in* Act was drafted according to the JSRC's recommendations, the promoting understanding and enhancing trust theory was, unsurprisingly, presented as the impetus for public participation in the Japanese judicial system. Article 1 of the *Saiban-in* Act stipulates the purpose of this system as follows:

> This Act sets forth special provisions to the Court Act (Act No. 59 of 1947) and the Code of Criminal Procedure (Act No. 131 of 1948) and other necessary items for criminal trials with the

17. "Popular participation in the trial proceedings is relevant to the principle of the sovereignty of the people," Shihou-seido Kaikaku Shingi-kai (2000), p. 62. The English translation of this report is not provided by the government.

18. Takagi was the vice president of the Japanese Trade Union Confederation, which always supports the Democratic Party of Japan.

19. After introducing public participation into criminal trials, the least serious offences were still treated in the traditional manner, decided only by professional judges. This would probably be difficult for the democracy-based theory to accept.

20. Shihou-seido Kaikaku Shingi-kai (2001), p. 101. An official translation of this report is available online at <http://japan.kantei.go.jp/judiciary/2001/0612report.html> (last accessed 1 July 2016).

https://doi.org/10.1017/als.2016.52 Published online by Cambridge University Press

> participation of *saiban-ins*, considering that the involvement of *saiban-ins* appointed from among the people in criminal procedures together with judges contributes to promote the understanding of the people and to enhance their trust on the justice.

Based on this language, the purpose of the *saiban-in* system is only to promote an understanding by the people of, and enhance their trust in, justice.[21] References to neither democracy nor popular sovereignty appear in the *Saiban-in* Act. According to the official explanation, the system was established to enhance the power and authority of the judiciary rather than democratize the judiciary.

At the 15th meeting (8 April 2003) of the Expert Committee on the *Saiban-in* System and Criminal Justice Reform, the Headquarters for the Promotion of Judicial System Reform, Inoue,[22] fiercely criticized another member's opinion consistent with the democracy-based theory:

> [In the situation against a member who represented the JFBA] you mentioned popular sovereignty, but this was excitedly discussed in the JSRC. You must understand that the purpose of introducing the *saiban-in* system is not necessarily derived straightly from the principle of popular sovereignty. That is to say, the JSRC hotly discussed the relationship between popular sovereignty or democracy and the essence of the judiciary. Though some members expressed opinions like yours, the JSRC as a whole never stood behind the point. This was obviously described in the JSRC's recommendations, so you need to read it carefully.

In his commentary on the *Saiban-in* Act, former judge Osamu Ikeda, a member of the Expert Committee, stated that

> Under the discussion leading toward introducing it, some took the view that the present criminal trial system by professional judges was terrible and said that it was time to renew this system, in which lay citizens participated as a sovereign. However, the *Saiban-in* Act has never been planned from such an ideological standpoint.[23]

Another member of the Expert Committee, Professor Tadashi Sakamaki,[24] stated that

> A delicate tension lies between the judiciary guaranteeing fundamental rights or freedom and the principles of democracy under the checks and balances system in the modern democratic states. This is common knowledge for the constitutional law. … It is impossible to seek the purpose or meaning of introducing the *saiban-in* system in the unsophisticated criticism against current situation or the principles of democracy ("trials by the citizen").[25]

2.5 *The Dilemma of a Democratic Judiciary*

Sakamaki's harsh criticisms of arguments presented by supporters of the democracy-based theory are related to a classic theoretical issue known as "dilemma of a democratic judiciary."

21. Hiroyuki Tsuji, a Counselor at the Headquarters for the Promotion of Judicial System Reform and one of the drafting members of the *Saiban-in* Act, accepted additional benefits aside from the main one described in the Act. In his commentary on the *Saiban-in* Act, he wrote that trials would be expected to be managed more promptly and become more easily comprehensible with the introduction of the *saiban-in* system. Tsuji (2007), p. 55.

22. Inoue is the only person who served on both the JSRC and Expert Committee, and he was the chairman of the Expert Committee. He was, therefore, expected to communicate the essence of the JSRC's recommendations to the Expert Committee.

23. Ikeda (2009), p. 4.

24. Together with Inoue, Sakamaki is an outstanding authority on Japanese criminal procedures.

25. Sakamaki (2006), p. 10.

https://doi.org/10.1017/als.2016.52 Published online by Cambridge University Press

Hajime Kaneko first proposed this issue in Japan over 70 years ago. He was the most influential professor of civil procedure at the time, and he authored a section on the judiciary in the first full-scale commentary on the Japanese Constitution. He wrote:

> In democratic states, since people have the sovereignty of the state, it should be required that all government institutions are linked to people and all public officers are servants of the whole community and derived from people's trust. Judicatory exercising judicial power should be required to be established democratically and judges belonging to a court must be appointed democratically. … On the other hand, since the mission of the judicatory is to act as a safety valve for the stifling effect against a minority's freedom attacked by a majority's pressure, and playing a role of an adjustment machine for extreme distortion of the national politics, it is doubtful that the same majority will work in the judicatory. This is a dilemma that the judicial system in democratic states ruled by law should inevitably encounter. … In this sense, paradoxically, democracy functions rationally in the circumstance where judicatory does not become extremely democratic.[26]

In response to Kaneko's assertion, most constitutional law professors think the dilemma of a democratic judiciary would cease being a problem if a certain conception of democracy were adopted.[27] That is to say, democracy in the Constitution of Japan is not a majoritarian but a constitutional democracy that substantially guarantees fundamental human rights and freedom. Interpreted as such, a court is not a majoritarian but a constitutionally democratic institution that guarantees human rights. If the definition of democracy were altered, then the dilemma would vanish.[28]

However, it is doubtful that democracy always clings to the principles of respect for human rights. The core of democracy should be majoritarian, and guaranteeing human rights is fundamentally based on the principle of liberalism. Distinguishing between democracy and liberalism, political branches (legislation and administration) should respect democracy, and the judiciary should practise liberalism. Sato notes:

> On the one hand, both the Diet and the Cabinet are expected to fulfill the people's will actively and positively by uniting the people politically. On the other hand, the Court should be a passive institution, expected to solve a filed conflict by pursuing the objective meaning of the law and executing it onto the conflict, and then to attempt to maintain the law and to carry through the legal rules and principles. From this point of view, the Court has a character that we should refer to as an anti-political and anti-power-oriented institution (it is appropriate to call it as the "Legal Rules and Principles Branch" against the "Political Branches").[29]

Many have subscribed to constitutional democracy theory, which includes a guarantee of fundamental human rights, and many scholars can no longer deny this concept of democracy. However, in a constitutional democracy, the only term that guarantees human rights is "constitutional." The word "democracy" itself does not ensure any rights. The essential part of this mixed concept can be called "liberalism." In addition, it should be recognized that pure democracy sometimes leads to abuses of the rights of minorities, in accordance with the majority's will. Assume an evil criminal exists who committed a brutal crime and everyone detests. If everyone except the criminal strongly desired capital punishment, and the

26. Kaneko (1947), pp. 236–7.
27. Higuchi (1995), p. 53.
28. Hasebe (2000), p. 140.
29. Sato (2011), p. 575. See also Oishi (2014), p. 206.

https://doi.org/10.1017/als.2016.52 Published online by Cambridge University Press

defendant could not find a defence attorney, should the punishment be immediately decided, based on overwhelming public opinion? Obviously not. Naked democracy consists in majoritarian democracy. The original meaning of democracy is different from that of liberalism. This dichotomy points towards the significance of the dilemma of a democratic judiciary.

When seriously considering the dilemma of a democratic judiciary, it is difficult to legitimate the *saiban-in* system with a simplistic democracy theory. Instead, in the current form, the *saiban-in* system appears more justifiable from the perspective of deliberative democracy. The next section explains deliberative democracy and evaluates the *saiban-in* system from that perspective.

3. EVALUATION OF THE *SAIBAN-IN* SYSTEM FROM THE PERSPECTIVE OF DELIBERATIVE DEMOCRACY

Both constitutional and political theorists pay considerable to the theory of deliberative democracy. The claim it drastically altered democratic theory in the twentieth century is widely accepted. This theory respects the value of the well-informed deliberations of people, and requests that they consider decisions bearing on public affairs from the perspective of their refined preferences resulting from deliberation.

Yanase (2009) reviews European and American theories of deliberative democracy and points out the essential element of this theory. Based on this new theory of democracy, the author then interprets the meaning of the *saiban-in* system. In this section, the author will offer views on deliberative democracy and elucidate noteworthy points about the *saiban-in* system.

3.1 The Deliberative Turn in Democracy Theory

Robert Goodin's analysis reveals that democratic theory progressed in three broad waves during the twentieth century. The first wave was democratic elitism, which rejects populist theories of democracy because of their impracticality, as Joseph Schumpeter proposed. The second wave was called participatory democracy. Leading thinkers advocating this wave were Jane Mansbridge, Carol Pateman, and C.B. Macpherson. The third wave, which Goodin called "[the] most recent wave of innovation in the theory of democracy," is deliberative democracy, which this paper explores.[30]

Because deliberative democracy and participatory democracy are often erroneously conflated,[31] the differences between these two forms of democracy should be emphasized, to correctly understand the history of democracy theory as Goodin stated.

As Iris Marion Young argues, two models of democracy stand centre-stage in contemporary political theory: the aggregative model and the deliberative model. She states that the aggregative model interprets democracy as a process of aggregating the preferences

30. Goodin (2005), pp. 3–4.

31. Some theorists claim deliberative democracy is a kind of participatory democracy. A thorough reading of academic papers concerning deliberative democracy shows that this claim is false. For example, Hajime Shinohara, one of the most familiar theorists of deliberative democracy in Japan, writes that participatory democracy overlaps deliberative democracy considerably. Shinohara (2007), p. 15.

https://doi.org/10.1017/als.2016.52 Published online by Cambridge University Press

of citizens in choosing public officials and policies. In this model, "[t]he goal of democratic decision-making is to decide what leaders, rules, and policies will best correspond to the most widely and strongly held preferences" and "[d]emocracy is a competitive process in which political parties and candidates offer their platforms and attempt to satisfy the largest number of people's preferences." She also states that this is similar to a way of thinking about democracy some have called pluralist or interest group pluralist, and casts democratic political processes as similar to market economic processes.[32] Because the aggregative model of democracy has several problems, an alternative model of democracy, namely deliberative democracy, has come to the forefront of political theory.[33]

Amy Gutmann and Dennis Thompson attempt to show the advantages of deliberative democracy in politics. They state that deliberative democracy serves four related purposes: (1) promoting the legitimacy of collective decisions; (2) encouraging a public-spirited perspective on public issues; (3) promoting mutually respectful processes of decision-making; and (4) helping correct mistakes which citizens and officials inevitably make when taking collective actions.[34]

Many theorists of deliberative democracy have attempted to define this theory. For instance, Gutmann and Thompson define it as

> a form of government in which free and equal citizens (and their representatives), justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of reaching conclusions that are binding in the present on all citizens but open to challenge in the future.[35]

The following quote provides the most well-known definition:

> The notion of a deliberative democracy is rooted in the intuitive ideal of a democratic association in which the justification of the terms of conditions of association proceeds through public argument and reasoning among equal citizens. Citizens in such an order share a commitment to the resolution of problems of collective choice through public reasoning, and regard their basic institutions as legitimate insofar as they establish the framework for free public deliberation.[36]

Many theorists of deliberative democracy have tried to identify the elements of deliberative democracy. For example, Jon Elster describes the robust elements of deliberative democracy instead of defining it:

> This theory includes collective decision making with the participation of all who will be affected by the decision or their representatives, and also includes decision making by means of arguments offered *by* and *to* participants who are committed to the values of rationality and impartiality.[37]

32. An application of public choice theory to the *saiban-in* selection process can be found in Yanase (2010).

33. Young (2000), pp. 18–22. In her book, four problems are explained: first, this model takes preferences as given, whatever happens; second, it lacks any distinct idea of a public formed from the interaction of democratic citizens and their motivation to reach some decision; third, it carries a thin and individualistic form of rationality; finally, it is sceptical about the possibility of normative and evaluative objectivity. Therefore, this model offers only a weak motivational basis for accepting the outcomes of the democratic process as legitimate (*ibid.*, pp. 20–1).

34. Gutmann & Thompson (2004), pp. 10–12.

35. *Ibid.*, p. 7.

36. Cohen (1997), p. 72.

37. Elster (1998), p. 8, emphasis in original.

https://doi.org/10.1017/als.2016.52 Published online by Cambridge University Press

James Gardner proposes four basic, mutually supporting features of deliberative democracy: deliberation, diversity, openness, and consensus. First, this theory institutes a form of government by discussion, under which political outcomes are produced through an extended process of deliberation and discussion. Second, it requires diversity among the points of view expressed by the participants of deliberation. Third, citizens of a deliberative democracy are duty-bound to approach the dialogic process in a spirit of open-mindedness and flexibility. Fourth, this theory commits to consensus, although this consensus is elusive and the target of Gardner's critique.[38]

In light of these theoretical developments, deliberative democracy should be construed as requiring refined preferences formed through the processes of internal deliberation by individual citizens and external deliberation with other citizens, based on sufficient information.[39] Such preferences should be respected when public matters are considered and decided. This theory is opposed to one of aggregative democracy based on pluralism, which attempts to look at only the raw and naked preferences of selfish individuals, making decisions about public affairs consistent with people's instinctive feelings. The elements of deliberative democracy are openness of deliberation, equal right of free speech, giving grounds for arguments, the changeability of citizens' preferences, and mutual acceptability of dissent.

3.2 Two Theories of Deliberative Democracy

John Dryzek states that "around 1990 the theory of democracy took a definite deliberative turn."[40] This phenomenon occurred in not only Western countries, but also Japan.[41] Many theorists support deliberative democracy, although they present widely different opinions about it.

Some theorists insist that a citizen's participation in everyday conversation should be valued more than anything, and it should exist apart from but intend to influence government decision-making. From this standpoint, it is irrelevant in deliberative democracy to fulfil deliberation in government institutions. In short, supporters of this theory think an ordinary person's discussion of various topics regarding civil society is essential for deliberative democracy, and that the government's decisions should obey a conclusion resulting from such deliberations. They tend not to limit participants' deliberation and manner of conversing, and they usually believe deliberation should occur for the sake of consensus (even if such discussions never achieve agreement).

This participation-oriented type of deliberative democracy is somewhat exclusive, since its advocates want to displace other types of deliberative democracy. For instance, Dryzek points out that an assimilation of deliberative democracy to liberal constitutionalism is undesirable, and he strongly criticizes liberal constitutionalist deliberative democracy, which clings to formal rules and the constitutional institution. He believes such a view is faulty because a Constitution cannot solve all political problems.[42] He also criticizes Jürgen

38. Gardner (1996), pp. 428–30.

39. For more detail, see Yanase (2009), pp. 150–201.

40. Dryzek (2000), p. 1.

41. Shinohara (2004) is a pioneering work that introduced this new democracy theory to Japan. Despite this, it evidences a one-sided interpretation of the relationship between deliberative democracy and representative democracy. Tamura (2008) and Yanase (2015) are academic books published in Japan, which focus on deliberative democracy.

42. Dryzek, *supra* note 40, pp. 17–20.

https://doi.org/10.1017/als.2016.52 Published online by Cambridge University Press

Habermas for seeming like a constitutional theorist: according to Dryzek, Habermas is much more concerned with how communicative processes of civil society influence the legislative and policy-making processes of the state, and highlights judicial discourse concerning how to put collective decisions into legal practice in a way that will not conflict with established rights and other policy programmes.[43] Another theorist of participation-oriented deliberative democracy, Mark Warren, strictly criticizes other types of deliberative democracy: Warren claims he "shall not … count theorists as 'deliberative democrats' if they simply emphasize the deliberative functions of representative bodies," stating that "theories that emphasize deliberations among political elites can even be anti-democratic."[44] In summary, it is difficult to apply this type of deliberative democracy in interpreting an action by a government or government system, because it tends not to respect the system designed by the Constitution.

The other type of deliberative democracy gives serious attention to existing governments, based on their Constitutions. Supporters of this theory have a great deal of representative democracy and constitutional democracy and accept that deliberation occurs in not only civil society, but also parliament and constitutionally legitimated courts (on the contrary, supporters of participation-oriented deliberative democracy never consider deliberation in existing governmental institutions). According to them, qualifications for participation in deliberation are important, and rational arguments using lawful and fair means are required in deliberations.

The most prominent supporter of this type of democracy is Cass R. Sunstein. His common refrain is that "the American Constitution was designed to create a deliberative democracy." In one of his books, he states:

> Under that system, public representatives were to be ultimately accountable to the people; but they would also be able to engage in a form of deliberation without domination through the influence of factions. A law based solely on the self-interest of private groups is the core violation of deliberative ideal.[45]

His perspective draws on James Madison's description in Federalist No. 10. According to Madison, the system of national representation is defended as a mechanism with which to

> refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may discern the true interest of their county and whose patriotism and love of justice will be least to sacrifice it to temporary or partial considerations.

Sunstein also emphasizes the fact that, in their aspirations for deliberative government, the framers modernized the classical republican belief in civic virtue.[46]

Sunstein contends that "[A] constitution should promote *deliberative democracy*, an idea that is meant to combine political accountability with a high degree of reflectiveness and a general commitment reason-giving." He also states that "Deliberative democrats emphatically reject the view that a government should be run on the basis of popular referenda" and says that "[t]hey seek constitutional structures that will create a genuine republic, not a direct democracy."[47] From this passage, it is clear that his understanding of deliberative democracy

43. *Ibid.*, pp. 20–7.
44. Warren (2002), p. 174.
45. Sunstein (1993), pp. 19–20.
46. *Ibid.*, p. 20.
47. Sunstein (2001), pp. 6–7, emphasis in original.

https://doi.org/10.1017/als.2016.52 Published online by Cambridge University Press

is quite distinct from participatory democracy and a participation-oriented type of deliberative democracy, which sometimes affirms popular referenda about public affairs.

However, deliberative democrats who emphasize constitutional democracy are not monolithic. For instance, Bruce Ackerman's view of deliberative democracy seems rather narrow. He believes the drafting and adoption of the US Constitution are exemplars of deliberative democracy. He distinguishes normal politics from constitutional politics, and attempts to demonstrate that people's deliberation appears only in great crises, such as the Constitutional Founding, Great Depression, and Civil War. According to his dualist Constitution theory, two different decisions are made in the democratic process. One is a decision by the people and occurs rarely, and the other is by their government and occurs daily. A government accountable to the people should take a broad view of the public interest, without undue influence from narrow interest groups. Unless the normal law-making system by elected politicians operates well, people should discuss consistently in the deliberative fora provided for higher law-making under special constitutional conditions.[48] Although it might appear as though Ackerman thinks people can only deliberate in constitutional politics, he also pursues people's deliberation in normal politics. Agreeing with Sunstein, Ackerman hopes that, in normal politics, people are encouraged to elect enlightened statesmen and to give them incentives to govern according to their conscientious definitions of public interest.[49]

So far, two types of deliberative democracy have been outlined. Since it is not a goal of this paper to describe the internal conflicts of deliberative democracy in detail, it suffices here to say that the latter theory is better than the former, due to its legitimacy[50] and flexibility. In addition, the author especially agrees with Sunstein's conception of deliberative democracy, with civic republican constitutionalism.

3.3 Interpreting the Saiban-in *System Based on the Theory of Deliberative Democracy*

3.3.1 Grounds for Interpreting the Saiban-in *System Based on Deliberative Democracy*

As was explained in the preceding section, the Japanese government's original intention with the *saiban-in* system should not be understood from the perspective of democracy alone, having noted difficulties involved with legitimizing a system based on only majoritarian or participatory democracy, because of possible violations of a defendant's rights by the majority's impulsive will. Instead, a republican concept of deliberative democracy offers an alternative, more appropriate lens in terms of which to interpret the *saiban-in* system.

To begin with, a new understanding of the purpose of the *saiban-in* system, based on deliberative democratic theory, can be supported through an examination of its law-making process.

First, the fundamental philosophy of and directions for reform of the justice system described in the JSRC's recommendations are similar in nature to republican constitutionalism. The JSRC's recommendations stated that recent government reforms,

48. Ackerman (1991), pp. 6–7.

49. *Ibid.*, pp. 197–8.

50. According to Estlund (1993), p. 1477, the term "deliberative democracy" was first coined by Joseph Bessette with reference to interpreting the Constitution. See Bessette (1980).

https://doi.org/10.1017/als.2016.52 Published online by Cambridge University Press

including judicial reform, "assume as a basic premise the people's transformation from governed objects to governing subjects and at the same time seek to promote such transformation" and requested that the judicial branch be a pillar to support the "space of the public good" along with the political branches. In addition, the JSRC expected that a foundation supporting the development of Japan in the twenty-first century should embrace "creative cooperation, free development of personality and a sense of responsibility deeply based on sympathy with others, by each and every person, each of whom is a governing subject and a subject of rights" and demanded that people "support justice by participating in the administration of justice autonomously and meaningfully and by making efforts to form and maintain places for rich communication with the legal profession." In the author's opinion, these phrases should not be understood from a liberal perspective, guaranteeing maximum individual freedom, but through the lens of republicanism, encouraging broad public engagement. In the case of the *saiban-in* system in particular, the JSRC's recommendations stated that "it is incumbent on the people to break out of the excessive dependency on the state that accompanies the traditional consciousness of being governed objects, develop public consciousness within themselves, and become more actively involved in public affairs." Obviously, the JSRC's recommendations assume that active citizens are eager to participate in society.

Second, Sato, who promoted judicial reform as the Chairman of the JSRC, has expressed sympathy for deliberative democracy. He led judicial reform with reference to democratic deliberation. In addition to the political branches, Sato has stressed that the judicial branch should be a forum for public deliberation according to popular sovereignty, and he has insisted that political and judicial branches be two pillars that support the "space of the public good." In his textbook, Sato mentions the author's interpretation of the *saiban-in* system in terms of deliberative democracy.[51] In a recent academic book, Sato agrees that public participation in justice is aligned with deliberative democracy based on republican constitutionalism, quoting the author's research paper.[52]

Third, the Japanese government has officially recognized the *saiban-in* system as providing an opportunity to enhance people's recognition of public affairs and that it is the collateral purpose of this system. In the Diet deliberations on the *Saiban-in* Act, Daizo Nozawa, the Minister of Justice, and Ushio Yamazaki, a Director-General of the Secretariat of the Headquarters for the Promotion of Judicial System Reform, stated that the *saiban-in* system would present people with a chance to think about social order, public peace, crime victims, and human rights, which they usually view as irrelevant.[53]

The above considerations allow for an interpretation of the *saiban-in* system from the standpoint of a republican concept of deliberative democracy. Most laypeople do not often think about criminal justice as their own problems but, if appointed as *saiban-in*s, they would serve as members of a judicial body and make judicial decisions through deliberation with judges. It thus follows that such experiences with actual judicial decision-making could naturally increase the public's familiarity with an interest in criminal justice.

51. Sato, *supra* note 29, p. 580.

52. Sato (2008), p. 133.

53. 9 Diet Record of Committee on the Judicial Affairs of the House of Representatives, the 159th session, 3 (2 April 2004), and 15 Diet Record of Committee on the Judicial Affairs of the House of Councillors, the 159th session, 14 (11 May 2004).

https://doi.org/10.1017/als.2016.52 Published online by Cambridge University Press

Consequently, the *saiban-in* trial system can be understood as establishing a sort of forum for public deliberation on criminal cases. Furthermore, there have been studies suggesting the effects of this participation could extend beyond judicial to broader social affairs.[54] Therefore, public participation in the criminal justice system has the added function of cultivating people's civic virtues through their deliberations.

This interpretation of the *saiban-in* system, from the standpoint of a republican concept of deliberative democracy, differs from the version of liberal democracy favoured by many Japanese constitutional law professors and is different from the official explanation provided by the Japanese government. However, according to the above analysis, this perspective is reasonable, in terms of the hidden intentions of the founding fathers of this system.

Although many suggestions are derived from the deliberative democratic view, two conclusions are provided below.[55]

3.3.2 The Superiority of the Saiban-in *System Compared to Trial by Jurors or Judges*

The introduction of the *saiban-in* system, coupled with partial abandonment of trials conducted exclusively by professional judges, enhances the Japanese criminal justice system from the standpoint of deliberative democracy.[56] This is a particularly important and appropriate measure for Japan, considering its history and experience of public participation in justice.[57]

For some supporters of participatory democracy and participation-oriented types of deliberative democracy, the pure jury system would be a preferred approach, superior to the *saiban-in* system. In the mixed-jury system, they fear laypeople might hesitate to express their own opinions to professional judges. Others worry about the influences of or possible manipulations by professional judges of *saiban-ins*' opinions in the secret deliberation rooms of the court. Due to these concerns, advocates of the pure jury system argue that a pure jury system would enable *saiban-ins* to participate in free deliberation without constraint by judges. To them, a pure jury system represents true democracy.[58]

It might be reasonable to assume a pure jury system, excluding any professional judges, is the best option. However, the author disagrees with this argument, from the standpoint of deliberative democracy, based on republican constitutionalism, due to the following reasons.

---

54. One possible effect of serving as a juror or *saiban-in* is an increase in political consciousness. According to their research in the US, John Gastil and his collaborators discovered that the experience of serving on a criminal jury increased voting, although only for certain groups of jurors (those who had voted infrequently prior to their service and had a conclusive deliberation experience in a criminal trial). See Gastil et al. (2010), pp. 26–51. Although this research concerns the American jury rather than the Japanese *saiban-in* system, it is nonetheless very interesting.

55. For further details on points mentioned in this paper and other suggestions based on the deliberative democratic view, see Yanase, *supra* note 39, pp. 254–78.

56. Differing from the author's viewpoint, some lawyers familiar with the American jury system admire the structural advantage of the *saiban-in* system, because the Japanese system allows *saiban-ins* to directly question witnesses, victims, and defendants. Senger (2011), pp. 761–2; Owens (2016), p. 207. Douglas Levin notes that the Japanese judicial participation system promotes democracy to a greater extent than the American and most other systems, because it encourages the active participation of *saiban-ins* (compared with the passive role of American jurors), and because it allows *saiban-ins* to come closer to deciding legal as well as factual issues (where professional judges listen to the opinions of *saiban-ins*). Levin (2008), pp. 221–3.

57. Japan has limited experience in maintaining a jury system and almost no tradition of substantial public participation in criminal trials. Deliberative democracy does not always recuse the jury system. The situation would be different in a country with a long history of a jury system and people's trust in it.

58. Ishimatsu & Isa (2009), pp. 246–51.

https://doi.org/10.1017/als.2016.52 Published online by Cambridge University Press

First, some advocates of the pure jury system (or a panel that consists of *saiban-ins* as its majority with a minimal number of judges) tend to view and assume, inaccurately, that the relationship between lay *saiban-ins* and professional judges is adversarial.[59] In fact, the JSRC's recommendations requested that "a new system should be introduced in criminal proceedings, enabling the broad general public to cooperate with judges by sharing responsibilities, and to participate autonomously and meaningfully in deciding trials." Furthermore, advocating for a system in criminal trials where laypeople have a monopoly discourages lay-professional co-operation and is wholly inconsistent with the fundamental philosophy for judicial reform.[60] Such a system in criminal trials is wholly astray.[61] According to an official survey based on a questionnaire completed by 21,000 ex-*saiban-ins*, there was almost no manipulation by judges in *saiban-in* trials.[62]

Second, when establishing a new deliberation system, the problem of group polarization should be considered—a point Sunstein raises. As much as Sunstein admires the significance of deliberation, he is also conscious of the most troubling issue associated with deliberation: group polarization, noting that "after deliberation people are likely to move toward a more extreme point in the direction to which the group's members were originally inclined." In other words, groups of like-minded people engaged in discussion with one another risk pushing their thoughts in more extreme directions.[63] Indeed, Sunstein points to social psychological studies that document group polarization observed in the American juries. As for Japan, whose history of public participation in criminal procedures is still limited, the pitfall of group polarization needs to be taken into consideration in determining the design of public participation in the criminal justice system. In addition, Sunstein notes that

> [i]f a court consists of three or more like-minded judges, it may well end up with a relatively extreme position, more extreme in fact than the position it would occupy if it considered of two like-minded individuals and one of a different orientation.

As mentioned above, despite their high levels of competence, professional Japanese judges have been accused of homogeneity in thought,[64] and the fresh viewpoints of citizens are required for

---

59. Likewise, the notion that lay *saiban-ins* play a leading role and professional judges play a supporting role is incorrect, because it is inconsistent with lay-professional co-operation as the fundamental philosophy for judicial reform, described in the JSRC's recommendations.

60. For example, American judge Antoinette Plogstedt made some reform recommendations concerning the Japanese *saiban-in* system, one of which was the separation of deliberation. She worries about the likelihood of professional judges dominating *saiban-ins*' deliberation in their panel, and she insists that *saiban-ins* should deliberate separately from professional judges. Plogstedt (2013), pp. 427–8. However, the author disagrees with her proposal, because it would result in a situation quite different from that of the JSRC's original intentions, consisting of rich communication between legal professionals and people. Whereas the author acknowledges that deliberation between professional judges and lay *saiban-ins* would not be easy, it must be possible. The success of deliberation among judges and *saiban-ins* depends on whether both sides trust each other.

61. Although not all advocates of a pure jury system believe that the relations between laypeople and professional judges are always adversarial, in the process of designing the *saiban-in* system, some strongly expressed the view that the relationship should be adversarial. Takagi's is a typical opinion, and other members recognized it at the 51st meeting (13 March 2001) of the JSRC.

62. Saikou Saiban-sho Jimu Soukyoku (2012), p. 81.

63. Sunstein (2007), pp. 60–1.

64. Insofar as it helps to alleviate the homogeneity of professional judges' perspectives in the courtroom, the *saiban-in* system would be also welcomed by those who criticize Japanese judges for other reasons. Some scholars have argued a large number of people are wrongly convinced in Japan and that these wrongful convictions stem from the systematic and intentional disregard for and neglect of the rights of defendants by Japanese judges. According to this opinion, "the infusion of non-bureaucratic legal participants into the traditional judicial process may create the potential to alter the

https://doi.org/10.1017/als.2016.52 Published online by Cambridge University Press

judicial procedures, which are currently only handled by professional judges. Applying Sunstein's view, a *saiban-in* panel consisting of lay *saiban-ins* and professional judges is not homogeneous, but heterogeneous. The constant exchange between the viewpoints of citizens and expertise of legal professionals will prevent potential polarization in criminal procedures.

3.3.3 The Significance and Indispensability of the Saiban-in*'s Obligation of Confidentiality*

The significance of paragraph (2) of Article 9 of the *Saiban-in* Act, or simply the confidentiality clause, should be also noted. The confidentiality clause forbids *saiban-ins* from divulging the secrecy of deliberations and any other secrecy that they come to know in the course of executing their duties. The confidentiality of deliberations is defined by paragraph (1) of Article 70 as

> [t]he process of the deliberations conducted by the Member Judges and the *saiban-ins* and the deliberations conducted only by the Member Judges that the *saiban-ins* are permitted to observe, and opinions of respective judges and the *saiban-ins* and their number.

If they divulge the secrecy of deliberations, then paragraph (1) of Article 108 stipulates that they shall be punished by imprisonment with work for not more than six months or fined not more than 500,000 yen. Paragraph (2) of Article 108 provides that ex-*saiban-ins* shall be punished for violating the court's confidence, even after their assigned trials have concluded.

These stipulations are collectively referred to as the *saiban-in*'s obligation of confidentiality. According to Ikeda, this confidentiality clause aims to guarantee people's trust in justice, the *saiban-ins*' right of free deliberation, and privacy or confidentiality of the people involved in the incident.[65]

Although no one has been punished for violating this obligation to this date, certain people[66] strongly criticize this obligation and insist that it be abandoned or reduced. According to critics, people will hesitate to participate in criminal trials because of the confidentiality clause and worry about being punished for inadvertently divulging confidential information. For the sake of encouraging participation and assuaging worries, they insist on weakening this obligation of confidentiality.

In addition, some progressive democrats think this obligation is inappropriate from the perspective of democracy. They worry that the confidentiality rule will prevent ex-*saiban-ins* from either discussing the deliberation process or expressing their opinions regarding verdicts. For example, Akira Goto points out that the most important issue for the *saiban-in* system is "the heavy burden of [the] confidentiality clause imposed on ex-[*s*]*aiban-in* members, which, if broken, entails a heavy penalty." He also notes that "The confidentiality rule prevents ex-[*s*]*aiban-in* from either speaking about the deliberation process or expressing their opinions on the verdict itself."[67] To nurture the development of democracy,

---

(F'note continued)
nature of trial processes, the quality of deliberations, and thus fair and equitable decisions of criminal cases." Fukurai & Kurosawa (2010), p. 18.

65. Ikeda, *supra* note 23, pp. 92–3.

66. Negative views regarding the confidentiality clause are supported by mass media, progressive thinkers, and civic activists. For example, see Nihon Shinbun Kyokai (2004); Levin & Tice (2009), pp. 4–13; Azusazawa (2010), pp. 55–65. In addition, the JFBA is the strongest supporter of this view, and it has repeatedly requested to reduce the obligation. Nihon Bengoshi Rengou-kai (2004), pp. 6–8.

67. Goto (2014), p. 126. With respect to the confidentiality clause, the author partially agrees that the extent of confidentiality should be better clarified; however, the author also acknowledges the importance of closed deliberations.

https://doi.org/10.1017/als.2016.52 Published online by Cambridge University Press

they argue that *saiban-ins* should be allowed to speak about their experiences broadly. Therefore, they seek to reduce the obligation of confidentiality.

Despite these criticisms, *saiban-ins* who have participated in the proceedings are, in fact, supportive of the clause. It has been clearly proven, for instance, that most *saiban-ins* approve of their obligation of confidentiality. The Verification Report of the Practices of the *Saiban-in* Trials, published by the General Secretariat of the Supreme Court in December 2012, clearly shows that most ex-*saiban-ins* understood the necessity of confidentiality and felt little burden from it.[68] With a few of exceptions from ex-*saiban-ins* who found it difficult to understand the exact definition of confidentiality and level beyond which punishment would apply, nine times more ex-*saiban-ins* thought the confidentiality clause was necessary than those who requested reducing it.[69] A few members of the Investigative Committee on the *Saiban-in* System (*Saiban-in Seido ni kan-suru Kentou-kai*), established by the Ministry of Justice, suggested reducing the obligation of confidentiality,[70] but the Committee concluded revising the confidentiality clause was unnecessary, as most ex-*saiban-ins* endorsed the confidentiality clause, did not express feelings of stress, and thought it was necessary to protect them.[71]

The confidentiality clause is also crucial for upholding deliberative democracy. When the *saiban-ins*' free deliberation is respected more than anything, the *saiban-ins*' obligation of confidentiality should be maintained. If the *Saiban-in* Act did not have regulations in place for *saiban-ins* to keep information regarding deliberations secret, it is likely that some *saiban-ins* would worry and hesitate to participate in trials. If a *saiban-in*'s opinion in the deliberation room was disclosed, it could lead to an understandable fear of unjustified resentment by people involved in the incident (e.g. victims and defendants) or public outcry (in high-visibility cases). Therefore, to assure the security of *saiban-ins* and guarantee their right to speak freely without fear of reprisals in the deliberation room, the confidentiality clause must be upheld to promote deliberative democracy.[72]

4. CONCLUSION

One hundred and eighty years ago, the French political theorist Alexis de Tocqueville observed American jury trials, and wrote that the American jury system was a political institution and "one form of the sovereignty of the people."[73]

---

68. According to 592 ex-*saiban-ins* in 95 discussion meetings, 324 ex-*saiban-ins* referred to the confidentiality clause, but 179 felt no (or little) stress from it. Only 26 felt burdened by it. Saikou Saiban-sho Jimu Soukyoku, *supra* note 62, p. 118.

69. *Ibid.*

70. The Investigative Committee on the *Saiban-in* System was established so the Ministry of Justice could obtain information to potentially revise the *Saiban-in* Act. It consisted of 11 members, comprising three elements of the judicial community, law professors, and other specialties, and Inoue was appointed chairman. It started in September 2009, analyzed practices of the *saiban-in* trials, held hearings, fostered in-depth discussions, and compiled the final report for the improvement of the system in June 2013.

71. Saiban-in Seido ni kansuru Kentou-kai (2013), pp. 26–8.

72. It is remarkable that Ikeda also notes that one of the purposes of the confidentiality clause is guaranteeing *saiban-ins*' free deliberation. Ikeda, *supra* note 23. The author's opinion concerning confidentiality and deliberation is basically the same as that of the major opinion in the law-making process of the *Saiban-in* Act.

73. Tocqueville (1835 = 1945), pp. 280–7. However, he also mentioned that the institution of the jury is always in danger if it is confined to criminal cases (*ibid.*, p. 284).

https://doi.org/10.1017/als.2016.52 Published online by Cambridge University Press

Although his attention was focused on practices of American civil juries in the 1830s, the same holds true of modern practices of public participation in the criminal justice system in other countries today.

Ethan Leib argues that "deliberative democrats often look to the jury as a proximate example of a deliberative institution in our polity, where the voices of ordinary citizens speak about the laws that govern them."[74] He also notes that deliberative democrats look to juries as a tool in the creation of better citizens, who subscribe to Tocqueville's assertions regarding the beneficial effects of the jury system.[75]

In contemporary Japan, the introduction of the *saiban-in* system has the potential to serve a similar function. In this paper, the author interpreted the purpose of recent participation by the Japanese public in the criminal justice system in terms of deliberative democracy.[76] From the perspective of deliberative democracy, Japan's unique system of public participation in justice should be evaluated positively.

REFERENCES

Ackerman, Bruce (1991) *We the People 1: Foundations*, Cambridge: Belknap Press of Harvard University Press.

Anderson, Kent, & Emma Saint (2005) "Japan's Quasi-Jury (Saiban-in) Law: An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials." 6 *Asian-Pacific Law and Policy Journal* 233–83.

Anderson, Kent, & Mark Nolan (2004) "Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (saiban-in seido) from Domestic Historical and International Psychological Perspective." 37 *Vanderbilt Journal of Transnational Law* 935–92.

Azusazawa, Kazuyuki (2010) "*Saiban-in Seido to Koukai*" ["*Saiban-in* System and Openness"]. 5 *Yamanashi Gakuin Law Journal* 37–68.

Bessette, Joseph M. (1980) "Deliberative Democracy: The Majority Principle in Republican Government," in R.A. Goldwin & W.A. Schambra, eds., *How Democratic Is the Constitution?*, Washington: American Enterprise Institute for Public Policy Research, 102–16.

Cohen, Joshua (1997) "Deliberation and Democratic Legitimacy," in J. Bohman & W. Regh, eds., *Deliberative Democracy: Essays on Reason and Politics*, Cambridge: The MIT Press, 67–91.

Corey, Zachary, & Valerie P. Hans (2010) "Japan's New Lay Judge System: Deliberative Democracy in Action?" 12 *Asian-Pacific Law & Policy Journal* 72–94.

Dryzek, John S. (2000) *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*, Oxford: Oxford University Press.

Elster, Jon (1998) "Introduction," in J. Elster, ed., *Deliberative Democracy*, Cambridge: Cambridge University Press, 1–18.

Estlund, David M. (1993) "Who's Afraid of Deliberative Democracy? On the Strategic/Deliberative Dichotomy in Recent Constitutional Jurisprudence." 71 *Texas Law Review* 1437–77.

74. Leib (2004), p. 89.

75. *Ibid.*, p. 90. In addition to Tocqueville, other scholars have used the American jury system as a prime example of democratic deliberation; one of the staunchest supporters of this idea was John Gastil. See Gastil et al., *supra* note 54.

76. This new interpretation of the *saiban-in* system offers a set of possibilities for further research concerning the judicial system and its roles in democracy. For example, foreign scholars Zachary Corey and Valerie Hans explore the Japanese *saiban-in* system through the lens of deliberative democracy, predicting that this "system in Japan has potential to create legitimizing and civic engagement effects" that are as beneficial as similar systems in other countries (Corey & Hans, 2010, p. 72). Unfortunately, it seems that they could not show sufficient cause to interpret the Japanese unique public participation in criminal trials (different from American jury system) as a system of deliberative democracy. The argument developed in this paper would supplement their work on the Japanese system.

https://doi.org/10.1017/als.2016.52 Published online by Cambridge University Press

Fukurai, Hiroshi (2007) "The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and U.S." 40 *Cornell International Law Journal* 315–54.

Fukurai, Hiroshi, & Kaoru Kurosawa (2010) "Impact of the Popular Legal Participation on Forced Confessions and Wrongful Convictions in Japan's Bureaucratic Courtroom: A Cross-National Analysis in the U.S. and Japan." 7(7) *US-China Law Review* 1–18.

Gardner, James A. (1996) "Shut Up and Vote: A Critique of Deliberative Democracy and the Life of Talk." 63 *Tennessee Law Review* 421–52.

Gastil, John, E. Pierre Deess, Philip J. Weiser, & Cindy Simmons (2010) *The Jury and Democracy: How Jury Deliberation Promotes Civic Engagement and Political Participation*, Oxford: Oxford University Press.

Goodin, Robert E. (2005) *Reflective Democracy*, Oxford: Oxford University Press.

Goto, Akira (2014) "Citizen Participation in Criminal Trials in Japan." 42 *International Journal of Law, Crime and Justice* 117–29.

Gutmann, Amy, & Dennis Thompson (2004) *Why Deliberative Democracy?*, Princeton: Princeton University Press.

Hasebe, Yasuo (2000) *Hikaku-funou na Kachi no Meiro [The Labyrinth of Incommensurable Value]*, Tokyo: University of Tokyo Press.

Higuchi, Yoichi (1995) "*Saiban no Dokuritsu*" ["Independence of Judiciary"], in Y. Higuchi, ed., *6 Kouza Kenpou-gaku* [*Lectures on Constitutional Study*], Tokyo: Nippon Hyoron Sha, 41–66.

Ikeda, Osamu (2009) *Kaisetsu Saiban-in Hou: Rippou no Keii to Kadai* [*Commentary on the Saiban-in Act: Legislative History and Agenda*], 2nd edn, Tokyo: Koubundou Publishers.

Ishimatsu, Takeo, & Chihiro Isa (2009) *Saiban-in Hikkei: Hihan to Taiou no Shiten kara [Companion to Saiban-in: From the Perspective of Criticism and Accommodation]*, Tokyo: Chikumashobo.

Kaneko, Hajime (1947) "*Shihou Seido*" ["Judicial System"], in Kokka Gakkai, ed., *Shin-kempou no Kenkyu* [*Study on the New Constitution*], Tokyo: Yuhikaku Publishing, 229–43.

Leib, Ethan J. (2004) *Deliberative Democracy in America: A Proposal for a Popular Branch of Government*, Pennsylvania: The Pennsylvania State University Press.

Levin, Douglas G. (2008) "*Saiban-in-Seido*: Lost in Translation? How the Source of Power Underlying Japan's Proposed Lay Assessor System May Determine Its Fate." 10 *Asian-Pacific Law and Policy Journal* 199–234.

Levin, Mark, & Adam Mackie (2013) "Truth or Consequences of the Justice System Reform Council: An English Language Bibliography from Japan's Millennial Legal Reforms." 14 *Asian-Pacific Law and Policy Journal* 1–16.

Levin, Mark, & Virginia Tice (2009) "Japan's New Citizen Judges: How Secrecy Imperils Judicial Reform." 7-19-6 *Asia-Pacific Journal/Japan Focus* 1–13.

Miyazawa, Setsuo (2007) "The Politics of Judicial Reform in Japan: The Rule of Law at Last?," in W. P. Alford, ed., *Raising the Bar: The Emerging Legal Profession in East Asia*, Cambridge: Harvard University Press, 107–62.

Miyazawa, Setsuo (2013) "Successes, Failures, and Remaining Issues of the Justice System Reform in Japan: An Introduction to the Symposium Issue." 36 *Hastings International and Comparative Law Review* 313–47.

Muraoka, Keiichi (2011) "*Saiban-in Seido to sono Tanjou: Hou no Keiju to Souzou no Kanten kara*" ["Saiban-in Sytem and Its Introduction: From a Viewpoint of Reception and Creation of Law"], in A. Goto, ed., *Higashi Ajia ni okeru Shimin no Keiji Shihou-sanka* [*Citizen Participation in Criminal Trials in East Asia*], Tokyo: Kokusai Shoin, 13–30.

Nihon Bengoshi Rengou-kai [The Japan Federation of Bar Associations] (2004) "*Saiban-in Seido, Keiji-saiban no Jujitsu, Jinsokuka oyobi Kensatsu Shinsa-kai Seido no Kokkaku-an ni taisuru Ikensho*" ["Comments on the Outline of the Saiban-in System, Improvement and Speeding Up of Criminal Trials, and Prosecution Review Commission System"].

Nihon Shinbun Kyokai [The Japan Newspaper Publishers & Editors Association] (2004) "*Saiban-in Seido Kokkaku-an ni taisuru Kenkai*" ["Comments on the Outline of Saiban-in System"].

https://doi.org/10.1017/als.2016.52 Published online by Cambridge University Press

Oishi, Makoto (2014) *Kempou Kougi* [*Japanese Constitutional Law*], Vol. 1, 3rd edn, Tokyo: Yuhikaku Publishing.

Owens, Harrison L.E. (2016) "Trial by One's Peers: The Need to Expand Japan's Lay Judge System." 25 *Washington International Law Journal* 191–221.

Plogstedt, Antoinette (2013) "Citizen Judges in Japan: A Report Card for the Initial Three Years." 23 *Indiana International & Comparative Law Review* 371–428.

Saiban-in Seido ni kansuru Kentou-kai [The Investigative Committee on the Saiban-in System] (2013) "*Saiban-in Seido ni kansuru Kentou-kai Torimatome Houkoku-sho*" ["The Final Report of the Investigative Committee on the Saiban-in System"].

Saikou Saiban-sho Jimu Soukyoku [The General Secretariat of the Supreme Court] (2012) "*Saiban-in Saiban Jisshi Jokyo no Kensho Houkoku-sho*" ["The Verification Report of the Practices of the Saiban-in Trials"].

Saikou Saiban-sho Jimu Soukyoku Keiji Kyoku [Criminal Affairs Bureau, the General Secretariat of the Supreme Court] (1995) *Waga-kuni de okonawareta Baishin Saiban: Shouwa Shoki ni okeru Baishin-hou no Unyou ni tsuite* [*Jury Trials Held in Japan: on the Administration of the Jury Act during the Early Showa Period*], Tokyo: Shihou Kyoukai.

Sakamaki, Tadashi (2006) "*Saiban-in Seido no Igi to Kadai*" ["The Meaning and Problem of the *Saiban-in* System"]. 308 *Hougaku Kyoushitsu* 10–5.

Sato, Koji (2008) *Gendai Kokka to Jinken* [*The Modern State and Human Rights*], Tokyo: Yuhikaku Publishing.

Sato, Koji (2011) *Nihon-koku Kempou-ron* [*On the Constitution of Japan*], Tokyo: Seibundo Publishing.

Senger, Daniel (2011) "The Japanese Quasi-jury and the American Jury: A Comparative Assessment of Juror Questioning and Sentencing Procedure and Cultural Elements in Lay Judicial Participation." 2011 *University of Illinois Law Review* 741–74.

Shihou-seido Kaikaku Shingi-kai [Justice System Reform Council] (1999) "*Ronten Seiri*" ["The Points at Issue in the Justice Reform"].

Shihou-seido Kaikaku Shingi-kai [Justice System Reform Council] (2000) "*Chuukan Houkoku*" ["The Interim Report"].

Shihou-seido Kaikaku Shingi-kai [Justice System Reform Council] (2001) "*Shihou-seido Kaikaku Shingi-kai Ikensho: Nijuiseiki no Nihon wo Sasaeru Shihou-seido*" ["Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21st Century"].

Shinohara, Hajime (2004) *Shimin no Seiji-gaku: Tougi Demokurashi toha Nanika* [*Citizen's Political Science: What is Deliberative Democracy?*], Tokyo: Iwanami Shoten.

Shinohara, Hajime (2007) *Rekishi Seijigaku to Demokurashi* [*Historical Political Science and Democracy*], Tokyo: Iwanami Shoten.

Sunstein, Cass R. (1993) *The Partial Constitution*, Cambridge: Harvard University Press.

Sunstein, Cass R. (2001) *Designing Democracy: What Constitutions Do*, Oxford: Oxford University Press.

Sunstein, Cass R. (2007) *Republic.com 2.0*, Princeton: Princeton University Press.

Tamura, Tetsuki, (2008) *Jukugi no Riyu: Minshushugi no Seiji-riron [Reasons for Deliberation: Democratic Theory in Reflective and Divided Societies]*, Tokyo: Keiso Shobo.

Tocqueville, Alexis de (1835 = 1945) *Democracy in America*, Vol. 1, New York: Alfred A. Knopf (Henry Reeve tr., Francis Bowen rev., & Phillips Bradley ed.).

Tsuji, Hiroyuki (2007) "*'Saiban-in no sanka-suru Keiji Saiban ni kansuru Houritsu' no Kaisetsu (1)*" ["Commentary on 'the Act on Criminal Trials with Participation of Saiban-in': Part 1"]. 59 *Houso Jiho* 33–121.

Vanoverbeke, Dimitri (2015) *Juries in the Japanese Legal System: The Continuing Struggle for Citizen Participation and Democracy*, London: Routledge.

Warren, Mark (2002) "Deliberative Democracy," in A. Carter and G. Stokes, eds., *Democratic Theory Today: Challenges for the 21st Century*, Cambridge: Polity Press, 173–202.

Yanase, Noboru (2009) *Saiban-in Seido no Rippougaku: Tougi-minshushugi Riron ni motoduku Kokumin no Shihou-sanka no Igi no Sai-kousei* [*Institutional Design of the Saiban-in System: Reanalysis of the*

https://doi.org/10.1017/als.2016.52 Published online by Cambridge University Press

Meaning of the General Public Participation in the Criminal Justice System based on the Theory of Deliberative Democracy], Tokyo: Nippon Hyoron Sha.

Yanase, Noboru (2010) "The Meaning of the Peremptory Challenge in the *Saiban-in* (Lay Judges) Selection System in Japan: Legal Interpretation and Game Theoretical Analysis," in Y. Kobayashi & S.J. Lee, eds., *Government and Participation in Japanese and Korean Civil Society*, Tokyo: Bokutakusha Publisher, 221–41.

Yanase, Noboru (2015) *Jukuryo to Tougi no Minshushugi Riron: Chokusetsu-minshusei ha Daigisei wo Norikoerareruka* [*Debating Deliberative Democracy: Can Direct Democracy Override Representative Democracy?*], Kyoto: Minerva Shobo.

Young, Iris Marion (2000) *Inclusion and Democracy*, Oxford: Oxford University Press.

https://doi.org/10.1017/als.2016.52 Published online by Cambridge University Press