

## Book Review

### Lay Participation in Japan, Korea, Taiwan, and Spain

Rieko Kage, *Who Judges? Designing Jury Systems in Japan, East Asia and Europe* (Cambridge: University Press, 2017) pp 264. Hardcover: \$74.00.

This is a fascinating, compellingly argued, carefully researched and beautifully written empirical analysis of how the relative strength of “new left” against traditional right and old left political parties impacts differently on the introduction and design of “jury” or “lay-judge” systems since the 1990s in East Asia and beyond. Kage’s mixed-method study convincingly shows how such political dynamics result in different degrees to which power is transferred away from professional judges and towards laypeople being involved in adjudicating criminal matters. This transfer of power, which reduces judicial independence vis-à-vis the public (by involving them in adjudication) during an era where independence has often been growing vis-à-vis politicians, is most extensive in Spain (where a jury system was introduced in 1995), quite extensive in Japan (with the *saiban’in* lay-judge system introduced in 2004, although not implemented until 2009), less extensive in South Korea (2007), and least extensive in Taiwan (comparing a “lay-observer” Bill submitted in 2012). Key benchmarks for such a comparative assessment (summarized in Table 1.2, p. 17) are whether professional judges retain powers to determine which cases end up being heard by lay judges and voting rules allow lay judges to dominate binding decisions (p. 15).

The significant differences in outcomes cannot be well explained by path-dependent legal traditions, particularly the (originally continental European) civil-law tradition versus the (Anglo-American) common-law tradition. Although all four jurisdictions are typically categorized as in the former tradition, Spain and South Korea adopted systems close to the Anglo-American tradition—involving laypeople deliberating separately from professional judges—whereas Japan adopted and Taiwan proposed a more continental-style “mixed-jury” system. (Anyway, Kage remarks that Japan’s criminal procedure law is basically more Anglo-American since extensive reforms during the US-led occupation over 1945–52.) The diverse outcomes are also perceived as sitting awkwardly with theories of “legal transplants” that emphasize cross-national policy diffusion (through competition, learning, or emulation), especially perhaps in states that are small and/or closely integrated into “world society” (p. 21).

Kage instead looks to insights mainly from political science (elaborated on further in Chapter 2). She rejects the hypothesis that (stronger) jury systems were introduced due to generalized public distrust in the judiciary, as this is least evident in Japan (Table 1.3, p. 28). Kage also queries the usefulness of principal-agent theories for when and how the legislature tends to delegate powers to other branches of government. For example, a version of “political insurance” theory could predict that “ruling parties that are more secure in power may be more willing to cede power to the juries/lay judges, since they may believe that the

public is on their side” (p. 31), yet Japan’s Liberal Democratic Party (LDP) tried to limit this power transfer—with only partial success—despite enjoying quite a strong electoral base in 2004. Another version could predict instead more power transfer in countries with higher judicial independence, yet Japan generally is ranked higher compared to Spain, Taiwan, or South Korea (which anyway have similar rankings yet very diverse lay-judge regimes: p. 32).

This leaves Kage’s core hypothesis (inspired partly by studies of voter suffrage, military conscription, and taxation) that partisan politics best explains the diverse outcomes. First, she expects lay-judge systems taking away more power from professional judges where there exist more “new left” (or “left-libertarian”) parties. Those are concerned about the environment, minorities, or values such as self-determination and participation, aiming not only to achieve policy *outcomes*, but also improvements in the quality of the *process* generating them (p. 35). Chapter 3 presents data estimating such political influences across the four jurisdictions, for example in Japan through expert opinions on the views of main parties on such issues (Figure 3.1, p. 61) or the party manifestos over 2000–05. Second, Kage observes that the strength of the “new left”-oriented parties needs to be assessed against the other parties. This is particularly important in Japan, as the conservative LDP has led the government for much of the postwar period. Yet, in a comparative summary (Table 3.4, p. 73), she notes how the new left parties were quite strong in Japan leading up to 2004, for example, because they gained control of the upper House of Councilors in June 1998 elections. The LDP regained control in October 1999 after forming a coalition with the Komeito (CGP), but the latter anyway had some moderate (new left) leanings.

Chapter 4 then examines the history of the lay-judge system debate in Japan until 1996, when it was put squarely on the policy agenda. Kage briefly outlines the weak and little-used jury system introduced from 1928 until 1943, and the Occupation-era deferral of the decision whether and how to introduce a new system. Her innovative contribution involves a quantitative content analysis of records from parliamentary debates over 1947–96, noting when and how politicians from different parties referred to “*baishin*” (Anglo-American-style juries) or “*sanshin*” (civil-law-tradition mixed juries, rarely singled out). Figure 4.3 (p. 91) illustrates the uptick in references in the more powerful lower House of Representatives (paralleled in the House of Councilors) particularly from new left parties from the 1980s. Parties like the Japan Socialist Party (JSP) and Japan Communist Party (JCP) had already recorded significant electoral success during the early to mid-1970s on an anti-pollution platform, and had submitted freedom-of-information Bills in the early 1980s. Kage further notes that many of their parliamentarians restarted debates about a jury system given concerns over the Supreme Court ordering retrials in a series of death penalty cases during the 1980s (p. 93).

Parliamentarians from the long-serving LDP also began mentioning juries, but mostly in response to opposition politicians’ concerns. This contrasts with the early 1950s, when some LDP parliamentarians did pro-actively raise the question of reintroducing juries to offset proclivities of professional judges. They were seemingly concerned that early-career judges would be tainted by “red thought” or communism (cited at p. 91).<sup>1</sup>

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1. Such concerns seem to have faded perhaps because, by the 1970s, courts no longer were such a battleground for social issues like environmental pollution or product safety. The reason for that transformation in turn could lie in the

Chapter 5 is a qualitative (historical process-tracking) analysis of “bringing the lay-judge system back in, 1997–2004.” One little-appreciated aspect is the genesis of the reform. Kage correctly highlights that already, by the mid-1990s, half way through Japan’s first “lost decade” of post-Bubble economic stagnation, some business groups and LDP politicians had started to press for better access to civil justice and legal professionals.<sup>2</sup> The Ministry of Justice (MoJ) also wanted to broaden the pool of legal professionals to generate more candidates as public prosecutors. When the government began preliminary deliberations on possible changes to the justice system, from 1998, the Japan Federation of Bar Associations injected their (long-standing) calls for changes to criminal justice—including lay participation.

A second intriguing aspect is the happenstance of the LDP temporarily losing control of the upper House of Councilors between June 1998 and October 1999.<sup>3</sup> This led it to accede to opposition calls in the lower House for an amendment to the Bill establishing the Judicial System Reform Council (JSRC), so that the JSRC mandate expressly mentioned investigating lay participation in criminal justice.

A third interesting aspect is that serving officials of the courts, prosecution, or bar associations were not members of the JSRC, due to perceived conflicts of interest (p. 107).<sup>4</sup> This may have allowed more scope for impact on the JSRC from individuals called to provide expert opinions. In particular, Kage sees University of Tokyo Professor Koya Matsuo (p. 111) as having had a persuasive influence by setting out specific design features for a “mixed-jury” system.<sup>5</sup>

A final interesting aspect revealed by Kage’s qualitative analysis of historical records is the debate within the JSRC over the numbers of lay versus professional judges. This question was not resolved by its 2001 Report recommending a mixed-jury system, and spilled over into conflicting proposals over 2003–04 from the LDP (favouring fewer lay judges) and more leftist parties (more critical of the present criminal justice system). A compromise in the 2004 Act required at least one professional judge to agree with decisions on both guilt and sentencing, but possible outvoting by the lay judges. Yet leftist calls for greater numbers of lay judges on each panel deciding cases may have been misguided, according to Kage: social

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(*F*note continued)

legislative and executive branches starting to address them better. Alternatively, and more controversially (as outlined by Upham (2005)), judicial independence may have begun to diminish as judgments fell more into line with preferences of the long-reigning LDP.

2. For further details, see also Kitagawa and Nottage (2007).

3. This highlights the strong element of chance in politics and law reform. It was also evident, for example, in the Product Liability Act just getting through Parliament in 1994, in the dying days of an unusual one-year period when the LDP was completely out of power in the lower House: Nottage (2004), Chapter 2.

4. This contrasts, for example, with the deliberative council administered by the MoJ that produced the recent reforms to the contract-law provisions of the Civil Code. Former judges were members, although seconded to the MoJ, creating a powerful coalition with civil-law professor members: Kozuka and Nottage (2013). Another unusual feature of the JSRC is that it was an ad hoc body answerable to the prime minister, not beholden to any line ministry—not even the MoJ.

5. A recently published Roundtable (2018, p. 187) commemorating the late Professor Matsuo confirms that he was the one who came up with the neologism *saiban'in*, as a compromise mixed-jury system for Japan. He reportedly was inspired by professors being called *kyo'in* in private universities, rather than *kyokan* as in public universities. His neologism therefore symbolized a new system that was no longer monopolized by professional judges (*saibankan*) and prosecutors, within the judicial and executive branches of government. (I am grateful for Professor Souichirou Kozuka for bringing this Roundtable discussion to my attention.)

psychology research suggests that “smaller groups are more conducive to active deliberation and reduce the power of factions compared to larger groups” (p. 115).<sup>6</sup>

Chapter 6 builds on this qualitative research through to 2004, and reinforces the broader thesis of the relative interest and influence of new left parties, through further content analysis. Kage examines records of the debates in both Houses when enacting the JSRC Bill in 1999. Curiously, however, no content analysis is provided of parliamentary debates around 2004 Act that actually introduced the *saiban'in* mixed-jury system (albeit with the further compromise of implementation being delayed until 2009).

Instead, Chapter 7 turns to another qualitative analysis, but of Taiwan, illustrating the weakness of the new left and resultant 2012 proposal for a “lay-observer” system. Chapter 8 combines the two other country studies, sketching how the strongest new left politics resulted in the largest shift of power from professional to lay judges (in Spain), whereas Korea ended up a mixed-jury system even weaker than Japan’s.<sup>7</sup>

Chapter 8 adds extensive data on Japan’s *saiban'in* cases since 2009 (with brief comparisons with the three other jurisdictions), suggesting that the new system has had considerable effects on the criminal justice system, largely in the direction hoped for by new-left-oriented politicians and lawyers. There have been more acquittals for serious crimes like murder (but still very few, as indicated by Figure 9.2, p. 184) and no general rise in stiffer sentences. More dramatically, there has been a drop in the proportion of prosecutions from among cases booked by police, and increases in the proportion of denied requests for detentions and of detainees released before final ruling. (Many of these tendencies started to become evident before the system was implemented, but perhaps were in anticipation of it.) Some data further indicate that Japan’s lay judges have had a positive experience in better understanding their justice system. That quite positive assessment of what has happened within and around *saiban'in* trials accords with more fulsome empirical evidence published recently elsewhere.<sup>8</sup>

The concluding chapter in Kage’s book suggests that the theory of relative power of new left parties could also be extended to identify or predict patterns for countries that either reform existing jury systems or delay introducing them at all.<sup>9</sup> The chapter also sketches three sets of broader implications from this book. Some relate to research into the new left generally, including the possibility of its cleavage *with* the right being more significant in generating law-reform outcomes than differences *among* the new left parties. A second set of implications concerns the roles of experts. Policy-making regarding the judicial system may be more like that perceived for economic policy-making, meaning “deep rifts among experts on the desirable course of action ... that typically reflect more fundamental ideological differences” and with their combined impact “highly contingent on political and institutional

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6. Perhaps this indicates a broader tendency for Japan’s deliberative councils to not give sufficient weight to a broad range of interdisciplinary perspectives on law-reform questions, despite impressive dedication and growing transparency in law-reform bodies: Nottage (2019).

7. The comparison between Korea and Japan is especially alluring, as some may think that contemporary Korea achieves quicker or more intense social change through its legal system. Yet other recent research from comparative political science (Arrington (2016)) has uncovered how Japan’s “accidental activists” have more effectively sequenced and combined court and legislative processes to achieve wide-ranging impact, across several similar areas of controversy such as redress for sufferers of Hansen’s disease (leprosy).

8. Fujita (2018). See the review by Kage, in this issue.

9. Taiwan has still not fully implemented a lay-judge system; see further Lewis (2018).

factors” (p. 218).<sup>10</sup> Third, Kage usefully ties her research to those interested in “developmental states,” like Japan and the other three compared in this book, suggesting that partisan dynamics can play a crucial role in shaping whether and how they dismantle features that favour state interests over citizen input and transparency—as they have done in determining “who judges” (p. 220).

Overall, this book presents a compelling account that accords first with recent studies by socio-legal scholars who have concluded that the JSRC reforms across multiple fields have indeed generated or at least reinforced a significant (but far from dramatic) shift away from the postwar focus on *ex ante* state intervention and direct regulation. This shift has generally been towards more participatory and indirect socioeconomic ordering, backed up by *ex post* relief offered through a more accessible judicial system.<sup>11</sup> Japan’s introduction of a relatively strong-form mixed-jury system is a particularly remarkable achievement, given the preference for “certainty” and “uniformity” (the rule-of-law value of “treating like cases alike,” even at the expense of more individualized justice) held widely among judges, prosecutors, even other legal professionals, and perhaps even the general citizenry in Japan.

Second, Kage’s research resonates with some overlapping studies into Japan’s “gradual transformation” in areas such as corporate governance, including calls to focus on (potentially changing or contingent) processes rather than just specific outcomes.<sup>12</sup> This book deftly uncovers and elaborates on some novel mechanisms that may help explain or predict new laws or amendments across many fields, and opens pathways to fruitful co-operation between political scientists and legal scholars.

In sum, Kage’s book is highly recommended for especially for researchers and policy-makers interested in empirically comparing law reform, politics, justice systems, or criminology, particularly in relation to Japan, but also other parts of East Asia and one part of Europe. (Hopefully, future research will examine also countries like Estonia, which Kage notes in Table 1.1, p. 9, had also introduced a mixed-jury system, but in the early 1990s when not yet an OECD developed country.) The book contains a wealth of careful analysis, beautifully presented (although I missed not having a separate List of Abbreviations), and it deserves a wide audience.

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10. Such fragmentation and “death of expertise” is arguably now even more acute in Western countries like the US: Nichols (2017).

11. One such collection is Wolff, Nottage, & Anderson (2015), which the editors had originally entitled “Who Judges Japan?”. See also Vanoverbeke, Maesschalck, Nelken, & Parmentier (2014).

12. Nottage, Wolff, & Anderson (2008), especially Chapter 2.

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