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FOREWORD – A VIEW FROM THE BAR –

A LONG AND WINDING BUT LUCKY ROAD TO LAY
PARTICIPATION IN JAPAN

SATORU SHINOMIYA*

I want to tell a short story about a rural lawyer from Japan who encountered the American jury system and sought a way to realize it in his own country. I have told this story in a longer version before,¹ but I have been invited to tell it here because of its connection to the theme of this Symposium, “Juries in a Time of Crisis and Change.”² Times of crisis and change might lead courts to replace burdensome practices with more efficient ones. But as this Japanese lawyer learned, a jury system is an important pillar of democracy and of people’s sovereignty. We should not replace justice with efficiency. My hope is that this story, which took place at another time of crisis—when people distrusted judges’ independence in Japan—will help to highlight the importance of the jury system, particularly in times of crisis and change.

The Beatles’ song “The Long and Winding Road,” in their album *Let It Be*, is a song of regret about an important person who is gone. The song begins: “The long and winding road that leads to your door will never disappear”³

This song reminds me that a long and winding road can also lead to

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1. When I turned seventy in June 2022, my friends organized a *festschrift* volume to mark the occasion. See PROSPECTS FOR DEMOCRATIC JUSTICE, A FESTSCHRIFT IN HONOR OF PROFESSOR SATORU SHINOMIYA SENSEI’S 70TH BIRTHDAY (Tsuneo Osawa, Takeshi Nishimura, Takayuki Ii & Mari Hirayama eds., 2022) [hereinafter PROSPECTS FOR DEMOCRATIC JUSTICE]. I contributed a chapter (in Japanese), which is a long version of my short story. My friends also organized a special session at the Global Meeting on Law and Society in Portugal, where I delivered remarks based on my chapter. See Satoru Shinomiya, A Long and Winding but Lucky Road to the *Saiban-in* (quasi jury) System in Japan, Panel on Democracy in Justice, Respect for Individuals and Popular Sovereignty – Honoring Professor Satoru Shinomiya, Global Meeting on Law and Society, Lisbon, Portugal (July 15, 2022).

2. My special friends, Nancy Marder, Valerie Hans, and Shari Diamond, who were at that special session at the Global Meeting on Law and Society, invited me to contribute the essence of those remarks as a Foreword to this Symposium. I would like to express my sincere appreciation to the three of them for their warmest friendship.

3. THE BEATLES, *The Long and Winding Road*, on LET IT BE (Apple 1969).

“common justice” or “the people’s justice,” by which I mean justice for ordinary people, but such justice is not easy to reach. Whenever I listen to this song, I hear the lyrics about “your door” and think of common justice, though it might take a long and winding road to reach it.

The reason I became interested in common justice or the people’s justice was accidental. When I was a law student, I learned through law books that Japan’s Constitution and Code of Criminal Procedure were written under the strong influence of the United States when it occupied Japan from 1945-1952. Thus, our blackletter law is similar to that of the United States.

But when I stood in Japanese courtrooms, the procedure and atmosphere were quite different from that in the United States, and so were the judgments. I began my career as a local defense attorney and served as a court-appointed lawyer who represented many indigent criminal defendants. I had many cases in which the evidence showed that the defendants were not guilty, but judges routinely rendered guilty verdicts. After observing this for years, I developed a hypothesis: The Japanese Code of Criminal Procedure and the Evidence Code are very similar to those in the United States, but Japan’s professional judges play a role that is different than U.S. judges. In Japan, judges serve not only as gatekeepers of evidence but also as finders of fact. In contrast, in the United States, the judge’s responsibility in a trial is largely confined to the role of a gatekeeper. When the jury is the factfinder, as in the United States, professional judges rigorously interpret and apply the rules of evidence because they are concerned about the jury’s potential bias. However, when professional judges in Japan decide a case, they may relax evidence rules to allow more evidence to be considered because they are not concerned about their own potential biases.

In 1994, at the age of forty-two, I decided to go across the Pacific Ocean to examine my hypothesis. Fortunately, the University of California, Berkeley School of Law accepted me as a visiting scholar.⁴ I met Judge Michael Ballachey, a California state court judge who allowed me to observe and videotape jury trials for six months.⁵

4. I am grateful to Ms. Schmidt, who was in charge of visiting scholars at Berkeley, and to Professor Eleanor Swift, who introduced me to Judge Ballachey.

5. For a description of this U.S. study, see Valerie P. Hans, *Ardent Advocate for Citizens’ Voices: Satoru Shinomiya and the Development of Japan’s Saiban-in Seido*, in PROSPECTS FOR DEMOCRATIC JUSTICE, *supra* note 1, at 582, 584 (describing Shinomiya’s experiences in the United States), and Charles D. Weisselberg, *Shinomiya-sensei’s Journey to America and Back*, in PROSPECTS FOR DEMOCRATIC JUSTICE, *supra* note 1, at 592, 595-99 (providing another perspective on Shinomiya’s experiences in the United States).

I discovered that my hypothesis was half right. From my observation of jury trials, I learned that the use of juries helps everyone to follow the law rigorously. But another aspect of the jury, which I had been unaware of, was that the jury system is not just a judicial system but also a political one.⁶ I conducted many interviews with jurors after their verdicts, and I often asked them: “Why did you come to the court?” Most of these former jurors answered with words to the effect of: “We are responsible not only to the parties in this case but also to our society.” This made me see the political meaning of the jury system. The jury system is an important pillar of democracy and of people’s sovereignty. In this way, I was shown “your door” or “common justice” in the United States, and that it could be achieved in Japan, but only at the end of a long and winding road.

In 1999, three years after my return from my study in the United States, the Japanese government established a Justice System Reform Council (JSRC). One of its research topics was “lay participation in the justice system.” I worked at the Japan Federation of Bar Associations (JFBA) as a part-time staff member to develop this topic into one of the main agendas of the JSRC. The JSRC undertook global research about lay participation in legal decision making and shared its findings in meetings on lay participation.⁷ After two years of heated debate, the JSRC published a unanimous final report.⁸ The final report reconceived the judiciary as a vital and indispensable pillar of governance in our democracy, and it stressed the importance of the “Rule of Law.” The final report also recommended a new system of lay participation, the *Saiban-in* (quasi-jury) system. This is a system in which citizens participate not as observers but as independent and socially responsible subjects of sovereignty. Six randomly selected citizens serve on a panel with three professional judges and together they deliberate about the facts and reach a verdict.⁹ If they convict the defendant, then they also work together to determine the

6. Alexis de Tocqueville, the French writer, had come to this realization about the jury when he visited the United States in the 1830s and observed American institutions, including the jury. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 275 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1835) (describing the jury as “above all a political institution”).

7. See DIMITRI VANOVERBEKE, *JURIES IN THE JAPANESE LEGAL SYSTEM: THE CONTINUING STRUGGLE FOR CITIZEN PARTICIPATION AND DEMOCRACY* 124-27 (2015) (describing JSRC members’ travel to the United States, England, Germany, and France to learn about other systems of lay participation).

8. JUST. SYS. REFORM COUNCIL, KAGOSHIMA L. CTR., *RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL FOR A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE 21ST CENTURY* (2001), https://lawcenter.ls.kagoshima-u.ac.jp/shihouseido_content/sihouseido/en/judiciary/2001/0612report.html [<https://perma.cc/F446-PL9V>].

9. *Saiban’in no sanko suru keiji saiban ni kan suru hōritsu* [Law on the Participation of Lay Judges in the Criminal Procedure], Law No. 63 of 2009.

sentence.¹⁰ The final report provided “the door” down the long and winding road. What former jurors told me in U.S. courtrooms is now being expressed by ordinary citizens who have served as *saiban-in* in Japan.¹¹

In December 2001, to realize the JSRC’s objectives, the government established a Judicial Reform Implementation Headquarters (“Headquarters”), led by then Prime Minister Junichiro Koizumi. Under the auspices of the Headquarters, eleven task forces were established to turn the JSRC’s aims into law. I was appointed as a member of the task force on “The *Saiban-in* System and Criminal Procedure.” Within the JFBA, a new office was established, the Research Office for Judicial Reform, and I was appointed as its full-time director. Takeshi Nishimura, Takayuki Ii, and Eri Osaka were other important members of the Research Office for Judicial Reform. By November 2004, most of the agenda in the JSRC’s final report had been passed into law. The Headquarters had accomplished its mission.

My long and winding road then took a new direction. Another important pillar of judicial reform was to increase the number of lawyers in Japan by reforming Japan’s legal education system. To accomplish this, JSRC recommended the creation of law schools at the graduate level. These law schools started operating in 2004. After my jobs at the JFBA and the Headquarters, I became a professor of practice in charge of criminal defense at Waseda Law School. Clinical legal education is an indispensable method for teaching lawyers to ensure people’s justice and for ordinary citizens to understand their role as independent and responsible subjects of sovereignty. Waseda Law School also invited Setsuo Miyazawa, Charles Weisselberg, and Peter Joy to help law professors in Japan to understand and implement clinical legal education. These were exciting years because teachers and students worked together to create a new form of legal education in Japan. Clinical legal education did influence our community. After a five-year term at Waseda Law School, I moved to Kokugakuin University and Soka University, where I continued to advance the course of clinical legal education.¹²

Looking back on my long and winding road, I realize that I have been very fortunate to have held each of these jobs. The main reason I managed to keep walking this long and winding road is because of the generous

10. *Id.* However, the trial procedure is not bifurcated.

11. For a recent study of citizens’ experiences as *saiban-in*, and their “overwhelming satisfaction with the experience,” see Dimitri Vanoverbeke & Hiroshi Fukurai, *Lay Participation in the Criminal Trial in Japan*, in *JURIES, LAY JUDGES, AND MIXED COURTS: A GLOBAL PERSPECTIVE* 69, 77 (Sanja Kutnjak Ivković, Shari Seidman Diamond, Valerie P. Hans & Nancy S. Marder eds., 2021).

12. Throughout my time in academia, I was aided by Daniel Foote and David Johnson, who continued to provide deep insights about the *Saiban-in* system in particular and about the judicial system in general.

support of my friends. To paraphrase a different Beatles' song, "I g[o]t by with a [lot of] help from my friends."¹³

In the Beatles' "Long and Winding Road," a person is left alone and crying at the end of the day, but that is not what happened on my journey. When I was losing my way in my pursuit of a people's justice, and encountering forks in the road, my friends helped me to find the right path. Without them I would have been lost. With them, I have found the way to help bring about a people's justice through citizens' participation as *saiban-in* in Japan.

13. THE BEATLES, *With a Little Help from My Friends*, on SGT. PEPPER'S LONELY HEARTS CLUB BAND (EMI 1967).