

Reflections on Citizen Participation in Criminal Justice in Japan: Jury, *Saiban-in* System and Legal Reform

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FOREWORD

In the morning of August 3, 2009, more than 2.300 people lined up outside the Tokyo District Court, to get their lottery ticket for a chance to sit in one of the 58 seats available in courtroom no. 104¹. The trial started at 1:28 pm, and those who could not win a seat in the courtroom had no difficulties in learning about it from the massive media coverage of the trial. On August 6, the defendant, who had pleaded guilty to the murder of his neighbor, was sentenced, quite unsurprisingly, to 15 years in prison².

Neither the facts, nor the victim or the defendant presented unusual or curious peculiarities. What made the trial of Mr. Fujii Kazuyoshi one of the most reported and cited Japanese trials of 2009 was the fact that it was the first to be held before a panel of

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1 A collection of links with detailed accounts of the first day of the trial can be found at <http://www.sankei.jp.msn.com/affairs/trial/trial-n090803.htm>.

See also T. KATAYAMA, *Dai-ichigo jiken ni miru atarashii hôtei no fûkei* [A Perspective of the New Court as Seen in the First Trial], in: *Hôgaku Seminâ* 660 (2009) 28; Y. OODE, *Saiban-in saiban dai-ichigo jiken o kenshô suru* [An inspection of the First *Saiban-in* Trial], in: *Kikan Keiji Bengo* 60 (2009) 85.

2 D.T. JOHNSON, *Early Returns from Japan's New Criminal Trials*, in: *The Asia-Pacific Journal* 36 (2009); available at http://www.japanfocus.org/-David_T_-Johnson/3212 notes that the sentence was harsher than expected.

three professional judges and six *saiban-in*, the lay members of the court called upon to deliver criminal justice pursuant to the *Saiban-in* Act approved by the Japanese parliament on May 21, 2004³. Observers of the event reported that the prosecutor and defense attorney adopted a new approach in the conduct of the trial, as they both focused more on the discussion of facts than on the dossier of the case. The simplification of the language used in court was thus hailed as “great change of era”⁴.

This article presents an outline of the several aspects related to the introduction of the *saiban-in* system. First, I will give an overview of the history of citizen participation in the administration of criminal justice in Japan and of the path that led to the introduction of the *saiban-in* system. Second, I will describe the structure of the *saiban-in* system itself and its structure within the contours of the Japanese criminal justice system. Finally, I will assess its criticism and the likely impact of the institution in the broader framework of the recent legal reforms concerning the administration of justice in Japan.

I. THE JAPANESE RECEPTION OF THE JURY: THE FIRST WAVE OF REFORMS

The Japanese translation of the English word “jury” is “*baishin*”. As many other modern Japanese legal terms, the combination of Chinese characters read in Japanese as “*baishin*” is a neologism introduced into the Japanese language in the second half of the nineteenth century.

The first report on the American jury appeared in Japan in 1854 in a Japanese translation of an introductory book to the United States originally published in China in 1838⁵.

The first record of the word “*baishin*” in a Japanese text dates back to a reprint for the Japanese market⁶ of a bilingual Chinese-English work published in 1864⁷. Fukuza wa Yukichi in his *Seiyô jijô* of 1866 did not use kanji to name the jury, but the katakana

3 *Saiban-in no sanko suru keiji saiban ni kansuru hôritsu*, Law No. 63/2004, as amended by Act 124/2007; Engl. transl.: K. ANDERSON / E. SAINT, Japan’s Quasi-Jury (Saiban-in) Law: An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials, in: *Asian-Pacific Law & Policy Journal* 6-1 (2005) 233. The word *saiban-in* is not translated in order to respect the terminological choice made by the drafters of the new legislation.

4 KATAYAMA, *supra* note 1, 28.

5 T. OSATAKE, *Meiji bunka-shi toshite nihon baishin-shi* [The History of the Japanese Jury as the History of Meiji Culture] (Tokyo 1926) 10.

6 *I.e.*, the text was written according to the Chinese syntactical order, with punctuation marks for the Japanese reading. T. MITANI, *Seiji seido toshite no baishin-sei* [The Jury System as a Political Institution] (Tokyo 2001) 93.

7 MITANI, *supra* note 6, 93. The work is titled in Japanese *Chikan keimo*. This is the English-Chinese version of “Graduated Reading; Comprising a Circle of Knowledge in 200 lessons”, the textbook used by the legendary James Legge during his activity as a missionary in Hong Kong.

transcription トライエル・バイ・ジューリ (*toraieru bai jûri*)⁸, and Tsuda Mamichi in his *Kaisei kokuhô-ron* referred to the jury with a neologism that did not take roots⁹.

The first contact of a Japanese with forms of participatory justice dates back to those years as well. When the Iwakura mission touched Paris in January 1873, Kume Kunitake visited the courts and reported in his diary the details of the trial held by the Cour d'Assises. He had the chance to watch these trials, and he, premonitory, remarks:

“[...] but difficulties might arise if one were to try to introduce it to Japan. No one is sufficiently familiar with the study of law in our country to enable them to appear in court as qualified lawyers. If a jury were to be nominated, the members would be terrified of authorities and do no more than submit tamely to their words”¹⁰.

In the same period French professor Gustave Émile Boissonade de Fontarabie was hired as a legal advisor by the Meiji government and was entrusted not only the task of working on the drafting of the civil code, but also on the reform of criminal justice. In 1877 he presented a draft of the precursor of the Code of Criminal Procedure, the *Chizai-hô*. This text contained provisions on a jury modeled on the example of the French Cour d'Assises of the time: the judicial body was designed as a board of three professional judges and ten citizens empanelled for three months, with decisions taken by majority¹¹. In 1879 the final draft of the *Chizai-hô* was presented to the Senate (*Genrô-in*)¹² for revision and did not encounter opposition. However, in the version revised by the Grand Minister (*Daijô Daijin*) Sanetomi Sanjô in 1880, all the provisions regarding the jury had been removed, and this was the version that eventually went into force in 1882. The main character behind the complete elimination of the provisions on the jury is thought to be the bureaucrat and statesman Inoue Kowashi. Kowashi in 1877 wrote two pamphlets against the introduction of the jury, containing most of the arguments that were to be brought against lay participation in justice in the 1920s and then, once more, in recent times.¹³

8 Y. FUKUZAWA, *Sei'yô jijô* [Conditions in the West], in: *Fukuzawa Yukichi zenshû* [Complete Writings of Fukuzawa Yukichi] 1 (Tokyo 1958) 357.

9 MITANI, *supra* note 6, 94 *et seq.* The expression coined by Tsuda for 'jury' was 断士又誓士; it is absent from modern dictionaries.

10 K. KUME, *Tokumei zenken taishi Beiô kairan jikki* [True Account of the Extraordinary and Plenipotentiary Ambassadors Mission of Observation through the United States of America and Europe] 3 (Tokyo 1878) 145; Engl. transl.: K. KUNITAKE/G. HEALEY/C. TSUZUKI (eds.), *The Iwakura Embassy 1871-73. A True Account of the Ambassador Extraordinary & Plenipotentiary Journey of Observation through the United States of America and Europe* 3 (Chiba 2002) 134.

11 G. BOISSONADE, *Projet de code de procédure criminelle pour l'Empire du Japon accompagné d'un commentaire* (Tokyo 1882) 611 *et seq.*

12 The *Genrô-in* was an institution established in 1875 and designated to assist and control legal reform.

13 MITANI, *supra* note 6, 101 *et seq.* explains that Inoue mentioned five reasons for his opposition to the jury. They can be summarized as follows: first, it is unfair that 12 citizens chosen

The enactment of the *Chizai-hô* without any provision on popular participation in the administration of criminal justice did not stop the debate on the introduction of the jury. Articles on the jury appeared in the newspapers of the time and many of the private drafts of the Constitution presented in the early 1880s had provisions on it¹⁴, although the Meiji Constitution of 1889 did not provide for any form of popular participation in the justice system.

The voices calling for the introduction of a jury system did not lose strength, despite the lack of governmental action for the introduction of the institution. In the first years of the 20th century, socialist movements and the Lawyers' Association published documents calling for the introduction of the jury¹⁵. After these first unsuccessful efforts, the situation changed in the late 1910's and 1920's, when the influential politician and Prime Minister of Japan from 1918 to 1921, Takashi Hara, used his leadership to bring the jury to the Archipelago¹⁶. On April 18, 1923, the Diet passed the Jury Act¹⁷, which entered into force five years later. In 1928, the first trial by jury was held in Japan.

II. THE JAPANESE JURY

The jury system adopted by Japan in 1923 was quite an original institution that incorporated elements of the Anglo-American models and elements of the continental European mixed juries. The basic features of the institution originated in the compromise reached between those who advocated the introduction of a strong and independent body of lay people to balance the great power of the procuracy, and those who opposed any form of popular participation to the administration of justice¹⁸.

at random, by a lottery, can act as representatives of the nation in judging another citizen; the jury is prone to be influenced by public opinion contrary to what should happen in a criminal trial. Inoue also maintained that it is impossible to distinguish a decision on the facts from a decision on the law, not to mention the risk that a jury may enter a verdict based on feelings rather than in accordance with the law. Finally, he claimed that professional judges are less influenced than jurors by the behaviour of the defendant during the trial and can render a better – and possibly harsher – decision.

14 MITANI, *supra* note 6, 99 *et seq.*; M. ÔTA, *Taishô baishin-hô seitei-ki – Seiji-shi no shiten kara* [Report of the Enactment of the Taishô Jury Act – From the Point of View of the Political History], in: SAEKI/SHIMOMURA/MARUTA (eds.), *Baishin-sei no fukkô – Shimin ni yoru keiji saiban* [The Renaissance of the Jury System – Criminal Trial Done by Citizens] (Osaka 2000) 107 *et seq.*

15 MITANI, *supra* note 6, 124 *et seq.*; ÔTA, *supra* note 14, 111 *et seq.*

16 MITANI, *supra* note 6, 125 *et seq.* According to Hara's diaries, the pivotal factors that contributed to his determination in introducing the jury were the methods used by the investigators in the so-called "High Treason Cases" (*tai-gyaku jiken*) of 1910.

17 *Baishin-hô*, Law No. 50/1923. Hara however did not have the chance to see his creation as he was assassinated by a right-wing nationalist in 1921.

18 MITANI, *supra* note 6.

The outcome of this conflict was the Jury Act. Its compromise provisions eventually led to the decline of the institution and, in 1943, to its suspension.

The jury comprised of 12 male literate citizens, who were registered for more than two years in the same local town registries and with a tax record of more than 3 yen per year. Art. 13 *et seq.* of the Jury Act provided for a long list of persons who could not qualify to serve as a juror: individuals related personally to the facts of the trial, persons who have been convicted, civil servants, members of the military, politicians and some categories of professionals, *e.g.* lawyers, priests, physicians. Every year in September, 36 citizens were drawn from a list prepared by the local municipalities and called to court. The jury selection process involved a *voir dire* procedure, giving both parties the right to reject candidate jurors, until a body of 12 was empanelled.

The jury was established only to try cases where the defendants were accused of a major crime. Law enforced establishment of a jury trial for crimes which were punished by death penalty or life imprisonment, while for crimes punished with more than three years of imprisonment, the defendant had the right to demand a trial by jury (jury on demand). Crimes against the imperial family, and other political crimes were outside the scope of application of the Jury Act¹⁹. The defendant could always waive the right to trial by jury and ask to be tried by judges alone²⁰; and in case of confession, the law provided automatically for a bench trial²¹.

Under this legislation, the jury did not have to reach a verdict on guilt, but rather on the existence of the facts alleged by the prosecutor. The jury could adopt its decisions by simple majority, since seven jurors were sufficient to support a verdict against the defendant.

The judge had a wide opportunity to influence the jurors. Beyond his own informal influence, he had the power to formally instruct the jury before it started discussing the verdict. Then, the judge was not bound by the verdict of the jury: if the verdict was “inappropriate”, he could dissolve the jury, form another and submit the questions to the “renewed” body²².

From the defendant’s point of view, a serious disadvantage of a jury trial was that the sentence rendered after jury trial, be it designated by law or on demand, could not be appealed²³. Moreover, a pecuniary reason made jury trials unattractive to defendants: in

19 *I.e.* crimes against the imperial family, crimes aimed at overthrowing the government, crimes against the *Chi’an iji-hô* (The Peace Preservation Act), leaking of military secrets. See Jury Act, Art. 4.

20 *Ibid*, Art. 6.

21 *Ibid*, Art. 7.

22 *Ibid*, Art. 95. The “renewal” (*kôshin*) of the jury was ordered in 24 of the 460 cases tried before the jury from 1928 to 1943. See M. FUJITA, *Shihô e no shimin sanko no kanô-sei* [Possibilities of Citizen Participation in Justice System in Japan] (Tokyo 2008) 170.

23 The defendant could appeal to the High Court only in limited cases, *e.g.* for irregularities in the formation of the jury.

case of conviction, the defendant faced the possibility to bear the costs related to the transportation, lodging and meals of the jurors.

In the first 15 months after the enactment of the law, of the 1737 total cases in which jury trial was designated by law, only in 161 cases a jury participated in the trial, and in 7 out of 23 cases, the defendants demanded a jury trial. After 1929, the number of jury trials began to plunge: in 1930, of the 1068 cases falling under the scope of the Jury Act, only 66 jury trials were held; in 1937, 99% of the defendants waived their right to jury trial (13 jury trials over 1288 cases), and in 1942, the year before the suspension of the Jury Act, only 1 jury trial was held in Japan. When the Act 88 of April 1, 1943 “suspended” the Jury Act, the jury had virtually disappeared²⁴.

To explain the failure of the Japanese jury, many Japanese authors suggest that the very idea of a jury trial, *i.e.* trying and being tried by peers, is not consistent with the Japanese “*kokumin-sei*”, *i.e.* the “national spirit”. However, this argument lacks a convincing basis²⁵. In part, the system failed because the possibility of being tried by the jury came at the price of bearing its costs, losing the chance to appeal, and at the risk of seeing a “renewed” body try the case again if the judge nullified the verdict of the first panel. Other causes for its failure include the system of selection of the jurors, according to which only wealthy and educated males were considered to be fit for jury duty. The reasons for the failure of jury trials stem from the fact that the Jury Act did not allow jury trials in the cases where it was most necessary, *i.e.* political crimes. Furthermore, the possibility to reach a verdict by majority, which undermined trust in the institution, and the lack of preparation of lawyers, who were unfamiliar with jury trials, caused most lawyers to advise their clients in waiving their right to a jury trial.

In the first months of the American occupation, the General Headquarters proposed to reinstate lay participation in criminal cases, but this was not a priority at the time, and eventually, the program failed because of the opposition from the Japanese side²⁶. Under the new Constitution and after the reforms of the occupation period, criminal justice in postwar Japan has thus remained for more than 50 years in the hands of professionals only²⁷.

24 *Baishin-hô no teishi ni kansuru hôritsu*, Law No. 88/1943.

25 FUJITA, *supra* note 23, 175 *et seq.*; 203 *et seq.*; 286.

26 Y. SAWAMURA, *Baishin seido ni taisuru hantai-ron to sengo ni okeru fukkatsu no soshi* [The Debate against the Jury System and the Prevention of Its Resurgence After the War], in: SAEKI/MORISHITA/MARUTA, *supra* note 14, 180 *et seq.*

27 The district of Okinawa is an exception in this regard. The Ryûkyû Islands were under U.S. military administration from the end of World War II until they were returned to Japan on June 17, 1972. From March 1963, a jury system modelled on the American jury was in force in Okinawa; the number of jury trials held between 1963 and July 31, 1967 is estimated to be ten, but the total number is not clear. When the Ryûkyû Islands were returned to Japan on June 17, 1972, Japanese law, including criminal law and procedure, was applied on the territory, thus putting an end to jury trials. Chihiro Isa, Japanese essayist, served as

III. LEGAL REFORM AND THE ADOPTION OF THE SAIBAN-IN SYSTEM

After years of preparation and discussions²⁸, the Japanese Parliament introduced once more in 2004 a form of lay participation in the justice system.

Since the 1980's, groups of scholars and lawyers advocated the reintroduction of a jury system. Despite the activism of many prominent figures of the legal profession and the academia, these movements did not have a significant impact on the public opinion²⁹.

Japanese criminal justice at that time was generally not thought to be in need of major reforms, despite significant criticisms brought forward against it. In particular, supporters of civil rights and progressive jurists pointed to the extreme power of the procuracy³⁰: the system of the "substitute prisons" (*daiyô kangoku*) and the related rules allowing for prolonged pre-trial detention, the central role of confessions in securing convictions and lingering doubts over their genuineness, as well as the extremely high conviction rate. Doubts about the fairness of the system were also raised because of widely known cases of miscarriage of justice, such as the Menda, Zaidagawa, Matsuyama, and Shimada cases of the 1980's³¹. Japanese procuracy and judges have thus been criti-

- juror in 1964 and won the Oya Soichi Prize for Non-fiction Works with his report of the trial in which he had participated as a juror, titled *Gyakuten: Amerika shihai-ka Okinawa no baishin saiban* [Turnaround: A Jury Trial in Okinawa under American Rule]. Isa has been a prominent advocate of the reintroduction of citizen's participation to criminal justice in Japan and the author of works on jury and on the *saiban-in* system. See A. DOBROVOLSKAIA, An All-Laymen Jury System Instead of the Lay Assessor (*Saiban-in*) System for Japan? Anglo-American Style Jury Trials in Okinawa under the U.S. Occupation, in: ZJapanR/JJapan.L. 24 (2007) 57; C. OTA/Y. TORIGE, *Amerika tōjika – Okinawa no baishin seido* [The Jury System in Okinawa – Under American Rule], in: Jiyū to Seigi 43-10 (1992) 62; K. SUGIMOTO, *Okinawa ni okeru baishin saiban shiryō* [Documents of Jury Trials in Okinawa], in: Hōsei Daigaku Kyōyō-bu Kiyō 67 (1988) 1; K. SUGIMOTO, *Okinawa ni okeru baishin saiban shiryō – 2* [Documents of Jury Trials in Okinawa – Part 2], in: Hōsei Daigaku Kyōyō-bu Kiyō 71 (1989) 43.
- 28 H. FUKURAI, The Rebirth of Japan's Petit Quasi-Jury System and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S., in: Cornell International Law Journal 40 (2007) 317 gives an account of the early discussions on legal reform and reviving of jury trial; see also L.W. KISS, Reviving the Criminal Jury in Japan, in: Law and Contemporary Problems 62 (1999) 261; I. SATŌ, Judicial Reform in Japan in the 1990s: Increase of the Legal Profession, Reinforcement of Judicial Functions and Expansion of the Rule of Law, in: Social Science Japan Journal 5-1 (2002) 71; D. VANOVERBEKE/J. MAESSCHALCK, A Public Policy Perspective on Judicial Reform in Japan, in: ZJapanR/JJapan.L. 27 (2009) 11.
- 29 On the associations and research groups active in Tokyo, Saitama, Kyoto, Kumamoto, Niigata and Osaka; see: S. SHINOMIYA, *Baishin saiban no jitsugen o mezasu shimin no katsudō* [Citizen's Movements Aiming at the Implementation of the Jury Trial], in: Hōgaku Seminā 508 (1997) 72; FUKURAI, *supra* note 28, 317.
- 30 D.T. JOHNSON, *The Japanese Way of Justice* (New York 2002) 21 *et seq.* gives a detailed account of the Japanese criminal justice as the "Paradise for a prosecutor". The absence of juries is cited among the reasons of the very wide powers of the procuracy.
- 31 In these four famous cases the accused were sentenced to death and then declared not guilty after retrial. On the whole, they spent more than 130 years in prison before being released.

cized³², in some cases even bluntly³³, for bearing responsibility for the weak protection of the rights of the accused, within a justice system that, in the eyes of a dispassionate observer, is characterized by the tendency to resort to “gentle authoritarianism”³⁴. Nonetheless, Japanese criminal justice was generally considered to be doing its work well. The crime rate of Japan was one of the lowest in the world, the Japanese public opinion showed high trust in judges³⁵, and there were no particular frictions between the political power and the procuracy or the judges. Until the mid-1990’s, no signs foreshadowed an imminent introduction of a system of popular participation in criminal justice³⁶.

A recent case that made the first pages of the newspapers involved Mr. Toshikazu Sugaya, who was sentenced to life in prison in 1993. The conviction was upheld by the Tokyo High Court in 1996 and by the Supreme Court in 2000, but new developments in DNA analysis proved his innocence, and he was released in 2009. See the interview with Mr. Sugaya in: *Kikan Keiji Bengo* 60 (2009) 4.

- 32 The stance of the media towards prosecutors is often considered to be too submissive: see JOHNSON, *supra* note 30, 262 *et seq.* However, things might be changing slightly, as two recent examples show. The first is the movie *Sore demo boku wa yattenai* [Even so, I didn’t do it], which presents the story of a young man falsely accused of molesting a high-school girl on a crowded train. The movie covers the case from the indictment through the trial and the verdict, exposing most of the problems of Japanese criminal justice. It won several awards and enjoyed some popularity, reaching 1.1 billion yen at the box office. The second is the periodical *Enzai File* [Dossiers of Miscarriages of Justice] that is dedicated to the problems of criminal justice. This publication discusses these problems with very sharp tones, by targeting episodes of false accusations and wrong convictions. First published in 2008, the magazine has a circulation of about 100.000 copies.
- 33 Ryū’ichi Hirano, President of the University of Tokyo from 1981 to 1985, wrote in 1985 that the abnormal, diseased aspects of the Code of Criminal Procedure and the inquisitorial character of the investigation made criminal trials in Japan “really quite hopeless”, and that the way out of the situation could have been the adoption of “a lay judge or jury system”. See R. HIRANO, *Diagnosis of the Current Code of Criminal Procedure*, in: *Law in Japan* 22 (1989) 142. Former judge Takeo Ishimatsu, lamenting the fact that criminal trials in Japan became “empty shells”, shared the same conclusions and advocated in 1990 what became one of the hot issues of these days: besides the introduction of the jury, he proposed more transparency for the investigations through rules of discovery and tape recording of the questioning of suspects. See T. ISHIMATSU, *Are Criminal Defendants in Japan Truly Receiving Trials by Judges?*, in: *Law in Japan* 22 (1989) 143. The special issue number 510 (1997) of the journal *Hōgaku Seminā*, entitled *Ima koso keiji shihō kaikaku o – Kenpō-teki keiji soshō-hō no jitsugen no tame ni* [Reform of Criminal Justice, Now It’s the Time – For the Realization of a Criminal Procedure in Accordance with the Constitution] gives an overview of how criminal justice was perceived by scholars and the legal profession in the late 1990’s, and of their calls for reform.
- 34 I. KITAMURA, *The Judiciary in Contemporary Society: Japan*, in: *Case Western Reserve Journal of International Law* (1993) 263.
- 35 J.O. HALEY, *The Japanese Judiciary – Maintaining Integrity, Autonomy, and the Public Trust*, in: D.H. FOOTE (ed.), *Law in Japan – A Turning Point* (Seattle and London 2007) 99.
- 36 Among the latest documents advocating for introduction of a jury system before the creation of the JSRC, see the special reports in number 10 (1992) and 4 (1997) of *Jiyū to Seigi* [Liberty and Justice], the journal published by the Japanese Federation of Bar Association, and in particular T. NISHIMURA, *Keiji baishin saiban 200X-nen, Nihon de* [Jury Trial in

The opportunity for change occurred as a consequence of the reforms of the 1990's, when the leading political party and the major socio-economic actors put on the political agenda a plan aimed at promoting economic recovery through the strengthening of the rule of law and the fostering of a deeper legal consciousness among the population³⁷. In 1999, Prime Minister Obuchi established the Justice System Reform Council³⁸ (the "JSRC"), a body entrusted with the mission to identify the "fundamental measures necessary for justice reform and justice infrastructure arrangement by defining the role of the Japanese administration of justice in the 21st century³⁹". On December 21, 1999, the JSRC published a document presenting the points at issue in the reform of Japanese justice⁴⁰: besides proposals to make justice more accessible to citizens, reform legal education, and increase the number of legal professionals, the Council mentioned the need to consider the adoption of a form of popular participation in the administration of justice through the introduction of jury trials or of a lay judge system⁴¹.

On June 12, 2001, the JSRC published its final report⁴². Chapter IV, entitled "Establishment of the Popular Base of the Justice System", put forth the basic features of the mixed panel of judges and common citizens. It also defined the structure, powers and duties of *saiban-in* and judges, the principles regarding the selection process, and the scope of application of the new system. The JSRC was then dissolved, and the next year, the "*Saiban-in Seido Keiji Kentô-kai*" (the "Committee for the *Saiban-in* System and Criminal Affairs"), a committee created under the Cabinet Office, was assigned the task of drafting the Act⁴³. Rather than focusing on the specific functions of the jury in the trial, the reasons given by official documents for the introduction of the *saiban-in*

Criminal Cases, in Year 200X in Japan], in: Jiyû to Seigi 4 (1997) 92; S. SHINOMIYA, *Naze "Nihon ni baishin-sei o" ka* [Why "Jury System in Japan"], in: Jiyû to Seigi 4 (1997) 102; H. SATÔ, *Naze "Nihon ni sanshin-sei o" ka* [Why "Mixed-Jury System in Japan"], in: Jiyû to Seigi 4 (1997) 108.

37 VANOVERBEKE/MAESSCHALCK, *supra* note 28, 30.

38 The JSRC was established by the *Shihô seido kaikaku shingi-kai secchi hô* [Act on the Establishment of the Justice System Reform Council], Law No. 68/1999 (hereinafter: JSRC Act). The 13 members of the JSRC included three professors of law and two of other disciplines, three legal professionals (an attorney, a former High Court judge and a former head of a High Prosecutor's office), and members of organizations representing the enterprises, workers, consumers. S. MIYAZAWA, *The Politics of Judicial Reform in Japan: The Rule of Law at Last?*, in: *Asian-Pacific Law & Policy Journal* 2-2 (2001) 106.

39 JSRC Act, Art. 2, cited in THE JUSTICE SYSTEM REFORM COUNCIL, *The Points at Issue in the Justice Reform*, December 21, 1999; available at <http://www.kantei.go.jp/foreign/judiciary/0620reform.html>.

40 JSRC, *Recommendations of the Justice System Reform Council – For a Justice System to Support Japan in the 21st Century*, 12 June 2001 (hereinafter: JSRC Recommendations); available at http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612_e.html, at I.1.

41 JSRC, *supra* note 40, at III.2 (4).

42 JSRC, *supra* note 40.

43 K. ANDERSON/L. AMBLER, *The Slow Birth of Japan's Quasi-Jury System (Saiban-in Seido): Interim report on the road to commencement*, in: *ZJapanR/J.Japan.L.* 21 (2006) 59 n. 22, lists the members of this committee.

system underlined in general terms the role of popular participation in the administration of justice and its importance for society as a whole. The key objectives of the reform were loosely described as making courts alert to the social dimensions of justice, and making citizens more familiar with the law and with the administration of justice, in order to achieve the “establishment of the popular base of the justice system⁴⁴”.

The political background of the adoption of the *Saiban-in* Act has already been presented in detail in this Journal⁴⁵. The actual structure of the system has been the result of the compromise between the three main stakeholders in the reform, namely the JFBA, which advocated a panel composed of nine citizens and one judge, the Supreme Court, which eventually supported a panel of three judges and three *saiban-in*, and the Ministry of Justice, with a position of compromise between the other two, that paved the way to the model finally submitted by the president of the Commission, Prof. Inoue, who proposed a panel of three judges and four to six citizens.

The negotiations came to an end when, on January 26, 2004 the coalition parties, that is the Liberal Democratic Party and the New Kômei-tô, announced that they would support a system providing for a panel of six *saiban-in* and three judges for contested cases and four *saiban-in* and one judge for non-contested cases. The proposal was accepted by the drafting group and this was the solution adopted by the final draft that the Cabinet presented to the Parliament on March 2, 2004.

On May 21, 2004, the Japanese Parliament approved the *Saiban-in* Act⁴⁶, and on May 28, it was promulgated. The new law provided for a 5-years vacancy so that all the necessary arrangements to the procedure could be made and all the individuals and the institutions involved in the criminal trial could adequately prepare. The period of vacancy was used also to advertise the *saiban-in* system among the population and earn some degree of popularity for it before its introduction⁴⁷.

44 In the words of the JSRC Recommendations, *supra* note 40, IV.1.1: “That is to say, through having the people participate in the trial process, and through having the sound social common sense of the public reflected more directly in trial decisions, the people’s understanding and support of the justice system will deepen and it will be possible for the justice system to achieve a firmer popular base.”. D.H. FOOTE, *Na mo nai kao mo nai shihô – Nihon no saiban wa kawaru no ka* [Justice without a Name and without a Face – Will Trials in Japan Change?] (Tokyo 2007) gives a detailed picture of Japanese judges and their world, which explains why they have long been blamed for their lack of contact with the real world.

45 ANDERSON/AMBLER, *supra* note 43, 58; VANOVERBEKE/MAESSCHALCK, *supra* note 28, 12; See also T. NISHIMURA/M. KUDÔ, “*Saiban-in seido*” *seido no sekkei no keika to gaiyô* [“Saiban-in System”: Progress and Outline of the designing of the system], in: *Jiyû to Seigi* 2 (2004) 14.

46 See ANDERSON/SAINT, *supra* note 3.

47 See ANDERSON/AMBLER, *supra* note 43, 71 *et seq.* on the various promotional activities launched to ensure the success of the new law.

The reasons for the adoption of the system given by the official institutions soon became widely accepted⁴⁸. In other words, popular participation to the administration of justice has been presented more as one of the “political” institutions central to a democracy, than a legal institution that lives – and dies – inside the trial, guarding the defendant from abuses of the judicial power wielded by the procuracy or by the judges⁴⁹.

The account of the reform process which is widely shared and seldom questioned leaves some doubts open. Of all the questions that one could raise, the most difficult one is probably the following: why did the coalition backed by the LDP and the New Kōmeitō reach a compromise with the opposition party and the JFBA, endorsing a stance conflicting with the Supreme Court and with the public opinion? In fact, after the laws of the 1990’s reforming administrative procedure, civil procedure, product liability, and freedom of information⁵⁰, the final step to complete the reforms after the “lost decade” could have been the reorganization of the legal education, rather than the introduction of a jury system for criminal proceedings. The stakeholders involved in such a reform would have been the same as those involved in the introduction of lay participation to justice, but on opposite sides: the JFBA has been pushing for lay participation in the justice system, but, in line with a long tradition, was resisting the increase of legal professionals, while the government was opposed to lay participation to the justice system, but pushing instead for a reform of legal education and a higher number of lawyers.

Besides the noble reasons declaimed by many for the introduction of the *saiban-in* system, a more mundane reason could therefore lie in a deal behind the scene between the JFBA, acting as the representative of the legal profession, and the political actors. The deal is simple and can be roughly explained as follows: the introduction of a form of jury as the concession granted by the government to the JFBA in return for the reform of legal education and the -promised- increase in the number of lawyers admitted to practice in Japan⁵¹.

48 K. MATSUO, *Keiji saiban ni okeru kokumin sanko* [Citizen Participation to Criminal Trial] Gendai Keiji-hō 27 (2001) 7 *et seq.*; T. MOMOI, *Keiji saiban e no kokumin sanko no igi* [The Significance of Citizen Participation to Criminal Trial], in: Gendai Keiji-hō 27 (2001) 20; A. ANDŌ, *Saiban-in no sanko suru keiji saiban ni kansuru hōritsu kei’i to gai’yō* [Events and Outline of the Act on the Participation of Saiban-in to the Criminal Trial], in: Hōritsu no Hiroba 57-9 (2004) 4; T. UETOMI, *Saiban-in seido dō’nyū no tame no hō-seibi* [Legal Adjustments for the Introduction of the Saiban-in System], in: Gendai Keiji-hō 67 (2004) 34; T. SADAMAKI, *Saiban-in seido no igi to kadai* [Significance and Issues of the Saiban-in System], in: Hōgaku Kyōshitsu 308 (2008) 10.

49 T. MITANI, *Saiban-in seido no seiji-shi-teki igi* [The Significance of the Saiban-in System in the History of Politics], in: Jiyū to Seigi 2 (2004) 26.

50 MIYAZAWA, *supra* note 38.

51 The situation is rapidly evolving, because despite the plans to increase the rate of successful applicants at the bar exam, the target number might not be reached. See “Govt may lower bar exam goal / Target of 3,000 passing law exam deemed risk to quality of lawyers”, in: Daily Yomiuri Online, January 1, 2010; available at <http://www.yomiuri.co.jp/dy/national/20100106TDY02305.htm>. This is hardly an unexpected turn in the light of the arrangements

IV. THE SAIBAN-IN SYSTEM: THE NAME AND THE KEY FEATURES OF THE INSTITUTION

The structure of the panel, the powers of its members and the functioning of the trial participated by the *saiban-in* are put forth in the *Saiban-in* Act. Before turning to its analysis, one should perhaps clarify what lies behind the choice of the word *saiban-in* in the title of the new law.

The first occurrence of *saiban-in* in modern legal terminology goes back to Act No. 137 of 1947 on the impeachment of judges⁵². In that Act, the word *saiban-in* denoted the members of both Houses of Parliament called to participate in the proceedings leading to the impeachment of judges⁵³. The comeback of the word in the debate on the reintroduction of the jury in Japan is said to have occurred in a speech delivered by Prof. Matsuo Kôya to the 43rd meeting of the JSRC held on January 9, 2001 (although its first written traces are in the minutes of the 45th meeting of January 30)⁵⁴.

In Japanese, members of juries following the Anglo-American model are called *baishin-in*, while lay assessors of mixed juries like those existing in France, Germany or Italy are usually called *sanshin-in* (参審員), with *jûzai-in* (重罪院) as the standard translation for the French *Cour d'Assises* and the Italian *Corte d'Assise*. The use of the word *saiban-in* in the Act of 1947 does not seem to be well known: therefore, the word is perceived by many Japanese citizens as a neologism.

The question then is why did the Japanese legislator decide to use a neologism to name the lay participants to the trial? Furthermore, how should it be translated to the English language? The English materials on this subject provide several translations of *saiban-in* and *saiban-in* system: juror, lay judge, lay assessor, and quasi-jury, mixed court and so on. None of them has yet become the standard translation. The English version of the recommendations of the JSRC is unhelpful, since it uses *saiban-in* as a loanword. The choice of a quasi-neologism with no linguistic reference to Anglo-American or to continental European models is revealing about the intention to convey the image of a system that did not just reproduce foreign models, and that can be proudly said to be original and tailored specifically for the Japanese people.⁵⁵

that bind legal education with the role performed by lawyers in society and in the administration of justice in Japan, see K. ROKUMOTO, Legal Education, in: D.H. FOOTE (ed.), *Law in Japan – A Turning Point* (Seattle and London 2007) 190; A. RILES/T. UCHIDA, Reforming Knowledge? A Socio-Legal Critique of the Legal Education Reforms in Japan, in: 1 *Drexel Law Review* (2009) 3.

52 *Saiban-kan dangai-hô*, Law No. 137/1947, as amended by Law No. 87/1991 and Law No. 39/1993.

53 See A. GOTÔ/S. SHINOMIYA/T. NISHIMURA/M. KUDO, *Jitsumu-ka no tame no saiban-in-hô nyûmon* [Introduction for Practitioners to the Saiban-in Act] (Tokyo 2004) 11.

54 See <http://www.kantei.go.jp/jp/sihouseido/dai45/45gaiyou.html>.

55 Concerning the use of loanwords and the role of translation from Western languages into Japanese, see I. KITAMURA, Problems of the Translation of Law in Japan, in: *VUW Review Monograph* 7 (Wellington 1993).

The *saiban-in* participate in the trial only in the most serious criminal cases, *i.e.* acts punishable by death, by life imprisonment or imprisonment with hard labor, or acts punishable by more than one year of imprisonment that caused the death of the victim as a consequence of the intentional action of the defendant⁵⁶. In other words, the panel will hear homicides, various criminal acts procuring personal injuries or death of the victim⁵⁷, arson, certain drug-related or counterfeiting crimes and few other serious crimes⁵⁸. Non-intentional acts that do not cause the death of the victim fall out of the scope of the reform.

If the *saiban-in* system had entered into force in 2008, among all 93,566 criminal cases indicted in the Japanese District Courts in the year, 2,324 cases, or 2.5% of the total, would have been submitted to a panel participated by citizens⁵⁹.

As a general rule, the panel is composed of nine members, of which three professional judges and six citizens. A smaller panel of one professional judge and four citizens can be appointed with the agreement of the parties in cases where the facts are not disputed (*e.g.* when there is a confession), on a case-by-case evaluation by the court.

The panel participates in the trial from the first hearing until the reading of the sentence. The defendant cannot avoid the participation of the *saiban-in* in the trial. As the right to waive jury trial has long been pointed out as one of the causes of the failure of the pre-war jury, it is not surprising that the recommendations formulated by JSRC make the participation of the *saiban-in* in the trial mandatory⁶⁰. However, Art. 3 of the law provides that the court has the possibility to exclude the *saiban-in* from the panel and have the case tried by the professional judges alone only in exceptional cases, when the threats of the defendant or of third parties to the *saiban-in* or their relatives' life or property interfere with a meaningful participation in the trial.

Much of the criticism targeting the system has been addressed to the heavy and unjustified burdens imposed by it on the citizens selected to serve as *saiban-in*. The selection process of *saiban-in* seems to have been designed to forestall such criticisms, which was surely on the mind of the drafters the law. The process seeks to minimize the inconveniences for prospective *saiban-in* on the one hand, and to guarantee the fairness of the selection and the impartiality of the resulting panel on the other hand.

56 Jury Act, Art. 2.

57 *E.g.* robbery, rape, or reckless driving resulting in death.

58 SAIKÔ SAIBAN-SHO [THE SUPREME COURT OF JAPAN], *Saiban-in seido nabigêshon* [Exploration of the Saiban-in System] (rev. ed. 2009) 11.

59 SAIKÔ SAIBAN-SHO, *supra* note 58, 51 provides the breakdown for the total figures for 2008: 590 robberies causing injuries, 543 homicides, 234 arsons of buildings, 189 rapes causing death, 173 injuries causing death, 136 indecent assaults causing death or injuries, 125 robberies and rapes, 116 cases related to illegal drugs and stimulants, 86 robberies causing death, 17 cases of reckless driving causing death, 115 others. It is worth noting the decrease in the occurrence of cases that would have been tried by the *saiban-in*: 3.800 in 2004, 3.633 in 2005, 3.111 in 2006, 2.645 in 2007.

60 See JSRC Recommendations, Ch. 4 I. 1(3).

During the fall season, every District Court draws by lottery a list of eligible persons, proportional to the number of *saiban-in* necessary for the following year's trials. Eligibility criteria include every person inscribed in the Lower House electoral roles⁶¹ who completed compulsory education up to junior high school, who has not been subject to imprisonment or greater penalties, and who does not have physical impairments that would make it difficult to discharge the duties of a *saiban-in*. Every selected person receives a letter with a survey that must be sent back to the District Court. Persons falling under categories that are excluded from serving as *saiban-in* are discarded at this stage. These categories include members of the Parliament or of the Cabinet, many high-rank public servants, legal professionals⁶², members of the police, the Ministry of Justice and of the Self-Defense Forces, as well as professors of law. Individuals who are accused of crimes punishable by imprisonment or greater penalties, or under arrest, are also prohibited to serve.

After this first screening, six to eight weeks before the trial a second list of 50 to 70 names per case is drawn by lottery among the eligible persons. Every candidate receives a letter from the court specifying the day scheduled for the selection in court and a second questionnaire that must be sent back to the court, listing the reasons for refusal, if any. Among those who can ask to be excused, there are persons over 70 years old, students, persons who have already served in the past five years as *saiban-in*, or in the Prosecutorial Review Commission⁶³, and all those who might find it difficult to appear to court to fulfill the duties of the *saiban-in* for personal reasons. Personal reasons include health reasons, the need to provide assistance to a member of the family, or to attend important social events. An excuse may be granted also to any prospective *saiban-in* who cannot leave work without risking serious damage to the business that needs his or her work.

On the day scheduled for the first hearing, the prospective *saiban-in* appear in court for the last screening. The president of the panel questions each candidate and ascertains whether he/she is fit to fulfill the duties connected to the trial, or whether there are circumstances preventing them to do so, such as personal connections with the parties or with the victim, or other reasons to be excused.

The prosecutor, the defendant and his attorney may ask the judge to put questions to the prospective *saiban-in*, and each party is entitled to peremptorily challenge up to four prospective *saiban-in*. In case of formation of a small panel, the number of peremptory challenges for every party is reduced to three. Since *saiban-in* will participate in cases involving the application of the capital sentence, one of the most important doubts concerning this phase of the selection was whether the parties should have been allowed to

61 This provision indirectly limits the eligibility to Japanese citizens older than 20 years.

62 The law provides for the prohibition of all persons who are, were, or have the qualification to become a lawyer, judge or prosecutor.

63 The *Kensatsu Shinsa-kai*; see FUKURAI, *supra* note 28.

ask candidates their stance on the death penalty and eventually discard non-death-qualified jurors. A “don’t ask” policy seems to have prevailed in the first trials.

After the last screening, the required number of *saiban-in* and reserve *saiban-in* are chosen by lottery among all eligible candidates. The president explains to those who are appointed their powers and their duties. They then swear to fulfill their duties fairly and honestly and according to the law. This procedure takes place in the morning, so that the trial can start with the first hearing in the afternoon.

Making false statements during every stage of the selection procedure or failing to appear in court are criminal offences⁶⁴.

Saiban-in participate in the trial⁶⁵ and are entrusted, together with the judges, with the duty to determine the facts, apply the law and, in case the defendant is found guilty, determine the sentence. *Saiban-in* are not involved in decisions on the procedure and on the admissibility of disputed evidence, including confessions⁶⁶. Moreover, the Act explicitly provides in Art. 6.2 that decisions on the interpretation of the law are taken by judges alone⁶⁷.

Decisions are taken by majority. However, the law provides that decisions against the defendant, *i.e.* a guilty verdict, must include at least the vote of one judge. Decisions on the sentence, if not immediately agreed to by a majority, are taken by adding the votes supporting the most severe sentence to the votes supporting the next more severe sentence, and so on, until a majority vote is reached. In this case, the sentence handed to the defendant shall be the last, *i.e.* the least severe sentence upheld by this procedure. *Saiban-in* participate in decisions on the suspension of the sentence, on probation, on the calculation of pre-sentencing detention and on the conversion of detention into monetary penalties, but not on restitution or compensation to be made to the victim and on the allocation of court costs⁶⁸.

The duties imposed to the *saiban-in* relate, first of all, to their conduct during and after the proceedings: they shall be honest and fair, avoid any act that may hinder public trust or dignity of the trial, and most of all, they have a lifelong duty to keep secret all the information they knew in the course of their functions. Other articles of the Act refer

64 Jury Act, Art. 110 *et seq.*

65 In order to allow for a fast trial, the Pretrial Arrangement Procedure (*Kôhan-zen seiri tetsuzuki*) was introduced in 2005 (Code of Criminal Procedure, Act. No 131/1948, Art. 316-2 *et seq.*). During this preparatory stage, details about the charges, the evidence, and in general all the issues to be presented and discussed during the trial, as well as the trial dates, are arranged by the parties with the participation of the judges. *Saiban-in* do not take part in these hearings, a fact that has raised concerns.

66 M. YOSHIMARU, *Saiban-in seido no shita ni okeru kôhan shinri oyobi hyôgi no purakutisu* [Public Proceeding and Discussion under the Saiban-in System in Practice], in: *Jurisuto* 1322 (2006) 108, 116; O. IKEDA, *Kaisetsu – Saiban-in hô – Rippô no kei’i to kadai* [Explanation – Saiban-in Act – Events and Issues in the Lawmaking] (Tokyo 2005) 31.

67 How *saiban-in* can apply written law, as they are required to do, without interpreting it, is a question beyond the scope of this article.

68 IKEDA, *supra* note 66, 31.

to duties instrumental to the participation in the trial: they have the duty to give their opinion at the end of the hearings, both on the question of the culpability of the defendant, and in case of guilty verdict, on the sentence, and they shall follow the interpretation of the law as decided by judges. *Saiban-in* are entitled to a daily allowance and a lodging reimbursement.

After the verdict is pronounced in court, the panel is dismissed and judges proceed to write the motives of the judgment.

Saiban-in participate only in trials of first instance before the District Court. Appeals are heard by the High Court sitting as a panel of three professional judges.

V. CRITICISM FROM BOTH SIDES

Although the introduction of the *Saiban-in* system was a theme that drew interest and spurred debate in Japan both within and beyond legal circles, it may still not be the reform which has the most far-reaching effects among those carried out in the last decade. The reform of legal education and the increase of the number of lawyers, if carried out without opposition by the Federation of Bar Associations, will surely have profound significance as well. With respect to criminal law and procedure, the reform of the Prosecutorial Review Commission with the introduction of a meaningful popular participation may have effects just as important as the *saiban-in* system⁶⁹.

The choice of a mixed system modeled on the European continental models was, again, the result of a compromise⁷⁰ first reached in the JRSC and then in the commission that drafted the Act. This compromise is between those who wanted the introduction of a strong and independent jury based on the Anglo-American model and those who opposed all form of popular participation in the justice system.⁷¹ As a result, the *Saiban-in* Act displeased both supporters of the introduction of citizen participation to justice, who were hoping for a fully empowered jury based on the Anglo-American model, and the opponents of any form of lay participation. The latter claimed that a jury

69 FUKURAI, *supra* note 28, 323 *et seq.* on this latter point.

70 The expression “result of a compromise” is usually used by detractors of the *saiban-in* system, who wish to underline its “spurious” nature. See K. NISHINO, *Saiban-in seido no shōtai* [The True Character of the Saiban-in System] (Tokyo 2007) 52 *et seq.*

71 T. MARUTA, *Saiban-in seido* [The Saiban-in System] (Tokyo 2004) 126, gives an account of the positions held by the members in the Commission: five members were in favor of the introduction of a mixed jury, or of maintaining the status quo; two members were in favor of any model of participation, be it the Anglo-American jury or the mixed European model; two members were in favor of introducing the Anglo-American model, and then there was one fervent backer of the mixed model and one opponent of any form of lay participation in the system. As could be expected, the mixed system, considered as a middle course between no participation at all (an impossible outcome considered the situation and the recommendations of the JSRC) and the strong and independent Anglo-American jury, was the final choice of the commission.

system would lead to a “rough justice” in contrast with the “precision justice” of the post-war era and thus diminish the quality of the Japanese criminal justice system, and eventually corrupt the Japanese society.

The *saiban-in* system sparked debate and spurred an uncommon hostility. Between 2004 and 2009, a number of paperbacks intended for wide circulation with titles like “Smash the *saiban-in* system!”⁷², “We don’t need the *saiban-in* system”⁷³ appeared in Japanese bookstores. Websites against the *saiban-in* system popped up, and associations were formed to oppose its introduction⁷⁴.

Former judge and current professor at Niigata University Law School, Nishino Kiichi, published “The true character of the *saiban-in* system”⁷⁵, a polemical tract that can be regarded as a real “*Saiban-in* system Opponent’s Handbook”, as it anticipates or takes up most of the arguments raised against the *saiban-in* system. Nishino argues that citizens’ participation in the justice system is useless and was not requested by the people; that it is unconstitutional⁷⁶, that it may cause a crude and unbalanced attitude towards defendants, giving rise to an excessive stress for them; that it does not help in seeking the truth while imposing excessive burdens on citizens called to jury duty. The author depicts a nightmarish picture of the *saiban-in* system and likens the letter from the District Court calling for jury duty to the “Red Letters” that called Japanese subjects to arms in World War II. At the end, Nishino gives some practical advice on how to avoid jury duty: one of the more amusing one is his advice to appear drunk in court on the morning of jury selection, pretending to be an alcoholic in order to be excused.

In general, critics of lay participation in the judicial process point to several issues of contention. First, they lament the fact that the reform was imposed by the government without a previous public debate. Second, critics blame the system for the burden on citizens who have to serve as *saiban-in*. Third, critics claim that participation of lay people is going to disrupt the administration of justice and violate the rights of defendants. Even critics who admit that Japanese criminal justice does have some problems maintain that the *saiban-in* system is not the answer to those problems⁷⁷.

The *saiban-in* system has also been criticized by advocates of a jury system along the lines of the Anglo-American model. One prominent commentator, Chihiro Isa, has

72 K. INOUE, *Tsubuse! Saiban-in seido* [Smash the Saiban-in System!] (Tokyo 2008).

73 S. TAKAYAMA, *Saiban-in seido wa iranai* [We Don’t Need the Saiban-in System] (Tokyo 2008).

74 See for example: *Saiban-in seido wa iranai! Dai undô* [We Don’t Need the Saiban-in System! Big Movement]; available at <http://no-saiban-in.org>. About this and other movements, see DOBROVLSKAIA, *supra* note 27, 62; JOHNSON, *supra* note 2.

75 NISHINO, *supra* note 70.

76 NISHINO, *supra* note 70, 77 *et seq.* In particular, the *saiban-in* system is said to be in contrast with the provision of Arts. 32 *et seq.* of the Japanese Constitution. For an early analysis of the constitutionality of lay participation to trial under the current Constitution, see M. TAGUCHI, *Sanshin seido no kenpô-ron* [Constitutional Doctrine of Systems of Lay Participation to Trial], in: *Gendai Keiji-hô* 27 (2001) 29.

77 DOBROVLSKAIA, *supra* note 27, 60 *et seq.*

questioned the viability of the *saiban-in* system⁷⁸. First, Isa doubts the *saiban-in* will be able to take an autonomous position instead of simply following the conclusions of the “professional” judges. Second, he predicts that the *saiban-in* system will have little effect on criminal justice if most of the other laws on investigation and trial remain the same. In a related co-edited work, Isa claims that the *saiban-in* system will increase false accusations and miscarriages of justice⁷⁹. The basic argument of the authors is that this reform does not sufficiently redesign criminal justice, and that *saiban-in* will work just as a “decoration” of criminal justice without fixing its fundamental flaws⁸⁰.

Some of this criticism against the *saiban-in* system seems too severe and misses the point. In particular, most, if not all of the critics of any model of lay participation to justice share a common point of departure, namely a highly paternalistic vision of the administration of justice⁸¹. The corollary of this view is a very low opinion of ordinary fellow citizens who are deemed unfit to participate in a trial⁸². In fact, the functioning of juries and experience with mixed jury systems in many countries demonstrates that participation in trial as a juror or as a lay assessor is not a task beyond any literate person’s reach. None of the works surveyed presents a sound and convincing reason why Japan should be an exception. Related criticisms stem from a narrow vision of the role citizens should play in society. For example, critics argue that jury duty will harm the economic structure of the Country, as companies will have to let their employees take a few days off in order to serve as *saiban-in*.

Other points of criticism, however, deserve greater attention.

The provisions regarding the duty of confidentiality are a serious target of criticism⁸³. The *Saiban-in* Act imposes a very strict duty of confidentiality on *saiban-in* about everything they learn during the course of the trial⁸⁴. According to Art. 108 of the Act,

78 C. ISA, *Saiban-in seido wa keiji saiban o kaeru ka – Baishin saiban o motomeru ri’yū (wake)* [Will the *Saiban-in* System Change the Criminal Trial? The Reasons for Requesting a Jury System] (Tokyo 2006). About Mr. Isa, see *supra*, note 27.

79 T. ISHIMATSU/K. TSUCHIYA/C. ISA (eds.), *Enzai o umu saiban-in seido – Baishin saiban no fukkatsu ni mukete* [*Saiban-in* System Giving Rise to Miscarriages of Justice – Looking at the Restoration of the Jury Trial] (Tokyo 2007).

80 K. TSUCHIYA, “*Kokumin*” o tate ni shita kanryō saiban no kyōka [The Strengthening of the Bureaucratic Trial with the Shield of the “Citizens”], in: H. KAMEI, *Shihō hōkai – Anata ga saiban-in wo shirareru riyū* [The Collapse of the Administration of Justice – The Reasons Why You Are Forced to Serve as a Saiban-in] (Tokyo 2008) 212.

81 D.H. FOOTE, The Benevolent Paternalism of Japanese Criminal Justice, in: *California Law Review* 3 (1992) 317.

82 On the “enduring myth of the immature Japanese public”, see I. WEBER, The New Japanese Jury System: Empowering the Public, Preserving Continental Justice, in: *East Asia Law Review* 4 (2009), 157.

83 M. LEVIN/V. TICE, Japan’s New Citizen Judges: How Secrecy Imperils Judicial Reform, in: *The Asia-Pacific Journal*, 19 (2009). As pointed out by the authors, *saiban-in* disclosing secrets of the deliberations face stricter penalties than professional judges doing so.

84 Art. 9 of the Act provides that “*Saiban-in* shall not disclose secrets of deliberations according to article 70 (1), or other secrets learned in the exercise of their duties”.

the penalty for revealing secrets concerning the deliberation or other secrets learned by the *saiban-in* in the exercise of their duties is imprisonment for up to six months and/or a fine of up to ¥ 500,000. Of course, the duty of confidentiality does not cover what is disclosed during the public hearings, but requires that discussions in the deliberation process shall never be revealed to anyone. These provisions must be coordinated with Article 102 of the Act limiting media contact with persons serving as *saiban-in*.

On the one hand, such a provision, while limiting drastically the free flow of information from the trial to public opinion, curb the worst aspects of media attention to the trial, preventing the transformation of the trial into a show or spectacle, and, most of all, allowing for a serene and sincere discussion between judges and *saiban-in* in the secrecy of the deliberation room. Many European legal systems adopt the same policy, while in the United States, the situation is different, and former jurors enjoy a wider freedom in post-verdict interviews⁸⁵. On the other hand, the provision reveals a contradiction between the proclaimed goals of the reform – that is, making citizens more familiar with tribunals and the law – and the actual design of the *saiban-in* system. After all, the JRSC, the Commission, and the government always stressed the “democratic” function of the *saiban-in* system, and its role for society at large. However, a provision that prevents up to 18.000 *saiban-in* that would serve per year⁸⁶ to share their experience with their families, friends, co-workers, and media will greatly limit the spreading of a new mentality towards law and the legal system. Even assuming that 18.000 *saiban-in* will serve in a given year, and that no *saiban-in* will serve twice, 20 years after the introduction of the system, only 360.000 persons (0.28% of the population of Japan) will have had direct experience in a *saiban-in* trial. In addition, strict confidentiality may make *saiban-in* more likely to follow uncritically the opinions of professional judges, without the opportunity for public scrutiny. Finally, the duty of confidentiality constitutes an impediment to research on the institution, curbing possibilities of analysis and improvements.

A second crucial criticism of the *saiban-in* system relates to the sentence: while *saiban-in* are involved in the decision on the verdict and in case of guilty verdict, on the deliberation of the sentence, they are not involved in the writing of the decision. In case professional judges are outnumbered by *saiban-in* and forced to deliver a verdict of not-guilty⁸⁷, they have the possibility to write a weak or illogical decision, in order to have

85 On the U.S. situation: N.S. MARDER, *Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors*, in: *Iowa Law Review* 82 (1997) 465. For a general comparative discussion of the relationship between media coverage and criminal trials, see G. RESTA, *Trial by Media as a legal problem: A Comparative Analysis* (Napoli 2009).

86 The calculation is made assuming that in a year, 3,000 cases will be presented to a six-*saiban-in* panel. Since the number of cases might be less than 3,000 and some of the uncontested cases might be tried before a small panel of five, with only four *saiban-in*, the actual number of persons who will serve as *saiban-in* in a year is likely to be lower.

87 Conversely, guilty verdicts must be supported also by at least one judge, who is the judge most likely to write the decision.

it overturned in the appellate phase of the proceedings. On appeal, of course, there is no popular participation to the proceedings.

A third point of criticism stems from the fact that *saiban-in* are involved in cases in which the sentence can be the death penalty. Some authors, in line with the paternalistic attitude mentioned above, emphasize the fact that participating in a capital sentence trial and deciding on death sentence might be a source of considerable stress for the average citizen, and therefore, this task should be limited to professional judges. Other authors focus instead on defendant's rights, and point out that since the system allows for majority decisions, a death sentence may well be decided on the basis of only five members of the panel supporting the decision, while the other four might also be convinced of the innocence. Although the votes supporting the sentence are not made public, and dissenting opinions are not published, the possibility that a death sentence might encompass such a high degree of disagreement inside the panel that decided for it is revealing of a "reasonable doubt" about the guilt of the defendant. This makes the choice of capital punishment seem inappropriate. Proposals for introducing the requirement of a qualified majority or of unanimity in case of death penalty have been advanced by some authors, but the law has not changed in this sense⁸⁸.

Besides these criticisms, other issues related indirectly to the *saiban-in* system deserve attention as well. The introduction in 2004 of a pre-trial procedure that shall be carried out before the start of the *saiban-in* trial marked an important change in criminal procedure⁸⁹. As one of the goals of the *saiban-in* trial is to move away from the lengthy and disperse trial in favor of a fast and concentrated procedure⁹⁰, it was necessary to provide an occasion for the parties to meet and decide the schedule of the hearings, identify the alleged facts and consequently the evidence that the parties will ask to admit to trial. The pre-trial procedure has been criticized mainly because the exposure of the judge to pieces of evidence before the opening of the hearings might prejudice the

88 See L. AMBLER, *The People Decide: The Effect of the Introduction of the Quasi-Jury System (Saiban-In Seido) on the Death Penalty in Japan*, in: *Northwestern Journal of International Human Rights* 6-1 (2007) 1; S. YANAGI, *Shikei teki'yô no kakudai o kangaeru – Saiban-in seido no hajimaru mae ni kentô suru beki koto* [Thinking on the Expansion of the Application of Death Penalty – Things That Must Be Looked at Before the Start of the Saiban-in System], in: *Jiyû to Seigi* 59-5 (2008) 139. Other proposals in case of death sentences include an automatic appeal, and the prohibition for the prosecution to ask for the application of death penalty in the appellate court in cases when in first instance the sentence was not the death penalty.

89 See *supra* note 65. The pre-trial procedure is mandatory for *saiban-in* trials, and optional in other cases.

90 Among Japanese scholars this switch is sometimes referred to as the transformation from a "dentist-style" trial that was the traditional way of conducting trials, with many short hearings spread over an extended period of time, to a "surgeon-style" trial, in which the judges shall open and close the trial as fast as possible, in consecutive sessions with no breaks.

defendant's rights⁹¹. Other criticism points out that the very fact of designing a fast and rigorous schedule for the trial⁹² limits the possibility of admission of new evidence, and that the "construction" of the case in the pre-trial stage, *e.g.* through informal agreements on the indictment and an accurate selection of evidence, might lead to the result of panels presented with cases where they cannot but take decisions in line with what had already been informally agreed to in the pre-trial procedure⁹³. In the case of a *saiban-in* trial, the procedure is carried out without the participation of *saiban-in*; this limits the risks of the formation of prejudices since the evidence shall be admitted in open court, but leaves unsolved all the other problems.

It must be noted as well that the shift towards a concentrated trial is not simply a matter of schedule, but has deep effects on the organization and on the specialization of lawyers. In the past, with one or two sessions per month, and trials lasting months or years, very few professionals could think of specializing in criminal counseling as their core legal career. In fact, most of the criminal lawyering was practiced on the side by professionals specializing in civil or corporate matters, where they received the majority of their earnings. Quite obviously, the structure of the trial and the 99.9% conviction rate were not incentives to take this career. With laymen in the courtroom, the perspective might be more attractive. With concentrated trials, this opens room for the birth of a category of lawyers specialized in criminal counseling and the emergence of an entirely specialized field of professional criminal lawyers. It is no coincidence, therefore, that legal education underwent reform at the same time as the introduction of the *saiban-in* system to place greater emphasis on substantive criminal law and criminal procedure. However, questions about economic incentives for defense work, and about the effective quality of students graduating from the new "law schools" still linger⁹⁴.

The introduction of the *saiban-in* system is also having an effect on media coverage of crime and court proceedings. The *Saiban-in* Act does not require that jurors be sequestered during the trial, a measure considered to place an excessive burden on *saiban-in*. However, this leaves room for the possibility that *saiban-in* might be inappropriately influenced by press reports and media coverage. Government and media associations discussed how to tackle the problem on several occasions. On January 16, 2008, the

91 K. SASAKURA, *Yodan haijo gensoku to kôhan-zen seiri tetsuzuki* [The Principle of Exclusion of Prejudices and the Pre-Trial Arrangement Procedure], in: *Kikan Keiji Bengo* 60 (2009) 48 *et seq.*

92 Art. 316-32. Since the days for the discussion of the facts and of the sentencing, as well as for the announcement of the verdict are decided in advance, serious problems may arise in case of unexpected circumstances calling for a longer discussion. See in particular T. KASUGA, *Jinsoku na saiban to kijutsu shitei no mondai-ten* [Problematic Points of a Fast Trial and the Designation of the Dates], in: *Kikan Keiji Bengo* 60 (2009) 19 *et seq.*

93 S. SAKANE, "Yamu o enai jiyû" to dangai shôko [Unavoidable reasons and evidence for the prosecution], in: *Kikan Keiji Bengo* 60 (2009) 31 *et seq.*

94 JOHNSON, *supra* note 2; E. FELDMAN, Legal Reform in Contemporary Japan, in: *ZJapanR/J.Japan.L.* 25 (2008) 14.

Japan Newspaper Publishers & Editors Association published guidelines on the reporting of *saiban-in* trials⁹⁵. The aim of these guidelines is to balance freedom of information with the right to a fair trial, which requires utmost care to avoid coverage that might portray the defendant as the culprit, such as reporting on the education or the schooling of the defendant, his or her criminal record, or any other unbalanced comment. It was followed on January 17 by a similar document of the National Association of Commercial Broadcasters in Japan that urges broadcasters to deliver balanced and reliable information in order to deepen public understanding of the criminal trial⁹⁶.

VI. LESSONS FROM THE FIRST TRIALS?

In 2009, 138 cases involving 142 defendants were held under the *saiban-in* system.

The ratio of Japanese people appearing in court for jury selection in the very first trials was surprisingly high: between 95% and 97%⁹⁷. Worries about the reluctance of *saiban-in* to actively participate in the trial were disproved by the fact that in most trials, all *saiban-in* spoke up and asked questions. In the press conferences after the trial, many *saiban-in* expressed satisfaction with the system and with the role they played.

All of the defendants in the 138 *saiban-in* trials held in 2009 were found guilty⁹⁸; one was sentenced to life in prison, 12 to prison terms of 15 years or more, 72 to terms between five and ten years. While some could have expected that the introduction of an element of unpredictability as laymen would have affected the most known characteristic of Japanese criminal justice so far, these outcomes are in line with the customary conviction rate. As the Japanese pre-war jury system had an average acquittal rate of 15%, with peaks of 60% in certain cities⁹⁹, it seemed safe to assume a decrease, also because it cannot rise higher than 100%. Be that as it may, the conviction rate in the trials of 2009 was of 100%. How will the indictment policies of the procuracy respond to the

95 *Saiban-in seido kaishi ni atatte shuzai hōdō shishin* [Guidelines on Covering and Reporting at the Time of the Start of the Saiban-in Seido]; available at <http://www.pressnet.or.jp/info/seimei/shuzai/0403saibanin.htm>;

S. TSUYAMA, *Kōsei na saiban to jiken hōdō o kangaeru* [Thinking on Fair Trial and Coverage of Criminal Cases], in *Jiyū to Seigi* 5 (2008) 13.

96 *Saiban-in seido shita ni okeru jiken hōdō ni tsuite* [About the Coverage of Criminal Cases under the saiban-in system]; see Y. MINOWA, *Minpō kisha ga kangaeru shihō to hōdō* [The administration of justice and the coverage that a journalist of a private broadcaster has in mind], in *Jiyū to Seigi* 5 (2008) 21.

97 JOHNSON, *supra* note 2; S. SAKANE *et al.*, *Zadan-kai – Saiban-in saiban no kei'i to kadai* [Round-Table Talk – Events and Issues of Saiban-in Trial], in: *Hōgaku Seminā* 660 (2009) 10.

98 *Kei 836-nin ga saiban-in keiken. Subete yūzai hanketsu, 28-nin kōso. Nennai no shinri shūryō.* [A total of 836 people experience being a saiban-in. All defendants found guilty, 28 appeals. End of hearings for this year], in: *Nishi-Nippon Shinbun*, December 19, 2009; available at http://www.nishinippon.co.jp/nnp/feature/2009/saibanin/kiji/kyushu/20091219/20091219_001.shtml

99 JOHNSON, *supra* note 2.

saiban-in trial? Will prosecutors be led toward even more conservative charging policies, or will the content of the indictment change? What will be the guidelines for appeal rulings participated by *saiban-in*?

Another praised aspect of Japanese criminal justice has been consistency. Participation of common citizens in sentencing is at odds with the careful analysis of the subtleties of the case¹⁰⁰, and put at risk the possibility of treating like cases alike. Moreover, in non-contested cases, where their task is only sentencing, *saiban-in* outnumber the professional judge by a ratio of 4:1. Will the judge, at least in part against the spirit of the Act, instruct the *saiban-in* on precedents and conviction policies or will he leave them free to bring in court the “common sense” of the average citizen, within the limits of the law?

After less than six months from the first *saiban-in* trial, it is too early to assess the effects of the reform on Japanese criminal justice, provided that any supposition can be done at all. The possibility to deliver a good guess of the effects of Japanese legal reform has been likened yet to the performance of dart-throwing chimps in at least two recent works¹⁰¹.

CONCLUSION

In the last several years, the administration of criminal justice in Japan underwent profound changes in a number of sectors. Besides the introduction of the *saiban-in* system, the Prosecutorial Review Commission has been significantly reformed¹⁰², victims of crimes can now participate in trials, a pre-trial procedure aimed at speeding up the trial has been introduced, legal education reforms have been introduced, and there are discussions and experiments on complete videotaping of interrogation of suspects. The introduction of the *saiban-in* system, by drawing the attention of the public opinion and of scholars to the issues concerning the administration of criminal justice has functioned as a catalyst for all these reforms, whether they were already made or expected.

The move towards a concentrated trial, the shift from a “trial by dossier” to a trial based on the oral proceedings, in which the evidence is admitted during the trial, in sum the move away from an inquisitorial model towards a model based on accusatory principles could hardly have been possible without the introduction of a highly symbolic institution as the jury, in the form that was eventually designed for Japan. Nevertheless, internal and external resistances to the system are strong, and having created the premises to make the shift possible does not mean that it will succeed¹⁰³.

100 JOHNSON, *supra* note 31, 66 *et seq.*; 149 *et seq.* offers an insightful account of how meticulous the research on sentencing can be in Japan.

101 FELDMAN, *supra* note 94, 24; JOHNSON, *supra* note 2.

102 FUKURAI, *supra* note 28.

103 The shift from inquisitorial to adversarial models in criminal law does not always succeed in the blink of an eye. Hints on the problem related to this transition may come from the

ZUSAMMENFASSUNG

Der Beitrag behandelt die Laienbeteiligung im japanischen Strafprozess sowohl in historischer Perspektive als auch mit Blick auf jüngste Reformen.

Im ersten Teil zeichnet der Autor die Geschichte der Rezeption ausländischer Modelle der Bürgerbeteiligung an der Rechtspflege nach. In der Meiji-Zeit wurde, ausgelöst durch den Kontakt mit der westlichen Rechtskultur, in die japanische Sprache der Neologismus „baishin“ eingeführt, mit dem in dieser Epoche erstmals die Geschworenengerichte bezeichnet wurde. Nachdem in der Meiji- und Taishō-Zeit zahlreiche Vorschläge gescheitert waren, wurden schließlich im Jahr 1928 durch das Gesetz über die Geschworenengerichte von 1923 Geschworenengerichte eingeführt. Der Beitrag erläutert die Grundstrukturen und Charakteristika des Systems der Laienbeteiligung, das in Japan vor dem Zweiten Weltkrieg bestand, und geht auf mögliche Gründe für das Scheitern dieses Systems ein, das schließlich im Jahr 1943 abgeschafft wurde.

Der zweite Teil des Beitrags befasst sich mit der aktuellen Situation der Strafjustiz in Japan. Der Autor analysiert die Auswirkungen der Einführung des sogenannten saiban-in-Systems durch den japanischen Gesetzgeber im Jahr 2004, durch das Laienrichter an Strafprozessen beteiligt werden. Er hinterfragt die Gründe, die für die Einführung des saiban-in-Systems genannt wurden und setzt die Reform in den Kontext der umfassenden Rechtsreformen, die seit den 90er Jahren in Japan umgesetzt wurden. Schließlich erläutert er die Struktur und Funktionsweise der durch das saiban-in-System geschaffenen Institutionen.

Die Einführung der Beteiligung von Laienrichtern an Strafprozessen provozierte vor wie nach der Umsetzung der Reform eine lebhaft Auseinandersetzung und heftigen Widerspruch. Bemerkenswert ist, dass die Reform nicht nur von Gegnern, sondern auch von Befürwortern der Laienbeteiligung kritisiert wurde. Letztere befürchteten, dass das saiban-in-System den Laienrichtern keine bedeutsame Funktion bei der Urteilsfindung in Strafverfahren zuerkennen werde.

Bisher lassen sich aus den saiban-in-Verfahren, die seit dem Inkrafttreten des Gesetzes im Jahr 2009 durchgeführt wurden, nur begrenzt Schlüsse ziehen, da das neue System nur in einer kleinen Zahl von Fällen eingesetzt wurde. Darüber hinaus ist das saiban-in-System nur eines von vielen Mosaiksteinchen der jüngsten gesetzgeberischen Reformen. Dies erschwert es, die tatsächlichen Änderungen, die in der Strafrechtspflege erfolgt sind, zu identifizieren, abzugrenzen und zu würdigen.

(Übersetzung durch die Red.)

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