

A Report on the First Lay Judge Trial in Tokyo, August 2009

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“I’d expected a large amount of material to get through the trial”

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In Japan’s first criminal jury trial in more than a half century, three judges and six jurors of the Tokyo District Court sentenced a Tokyo man accused of murder to 15 years in prison.¹ This inaugural case of the reintroduced jury system for criminal trials was observed with great interest as it unfolded in Tokyo from August 3 through 6, 2009. However, the new system has not been without its controversy: few Japanese want to serve as jurors themselves, and there have been protests against the new *Saiban-in* system.²

I. REVIEW

The first jury system was originally introduced in 1928 and existed until the middle of World War II. The system lasted just 15 years before it was terminated. The first trial using the jury system was in December 1928 at the Tokyo District Court, where a woman was accused of attempted arson in an alleged plot to collect insurance benefits. This pre-war system (*baishin seidô*) was similar to the jury system in the U.S. Though it was available until its eventual suspension in 1943, because of numerous flaws, the jury system was rarely used; it handled only 484 cases.³

1 *Tokyo District Court 104th Criminal Division 6 August 2009.*

2 See also A. OROTOLANI, Reflection on Citizen Participation in Criminal Justice in Japan: Jury, Saiban-in System and Legal Reform, in: ZJapanR/J.Japan.L 29 (2010) 153 et seq.

3 NICHIBENREN, available at http://www.nichibenren.or.jp/ja/citizen_judge/about/column2.html, [last visited 26 September 2010].

In the original jury system, the final 12 jurors were whittled down by the defence and prosecutors from more than 30 men; this 12-man jury decided on the guilt or innocence of the accused person. If the jury's decision was unacceptable, the judge could order a new jury to be formed, and the trial could be repeated until the verdict satisfied the judge.⁴

During the trial in 1928, newspapers articles described the jurors' professions and everyday lives and even commented on their behaviour when a conflict arose between the jurors and a judge over unclear circumstances of the defendant's situation. The jurors serving at the court were housed in accommodations adjacent to the court in the Kasumigaseki area and were separated from home and media during the whole trial. It was a kind of secret procedure, although the personal identity information of the jurors was disclosed. Upholding this official confidentiality with regard to the discussion during the deliberation process was considered sacrosanct. At the conclusion of the first trial, the jury found the woman not guilty.⁵

The newly adopted system was politically discussed and analyzed until it was passed by the Diet in May of 2004. The new system is different from its precursor. The lay judge system or *Saiban-in Seido* is a unification of a common law jury and a European mixed court.⁶

By 1999 the call for a system to connect citizens to legal decisions and enhance democracy by reintroducing the jury system had already begun.⁷ The Act Concerning Participation of Lay Assessors in Criminal Trials ("Lay Assessor Act"⁸) was the end result of one of the legal reforms by the Prime Minister's Judicial Reform Council (JRC) in 2001.⁹ Judges and prosecutors appear to have done better with the previous system. For example, with the introduction of the new system judges will lose their monopoly on delivering judgements, including sentences. The new system also means prosecutors will inevitably have to change their methods.¹⁰

4 Y. TAKATORI / S. UENO / C. MIURA / E. SHIBASAKI / M. CULVER, The New *Saiban-in* ("Lay Judge") System and Its Effect on the Working Environment, at <http://www.paulhastings.com/publicationDetail.aspx?PublicationId=1167>, [last visited 20 September 2010].

5 K. IDA, The Jury System in Pre-War Japan, in: *Asahi Shimbun* v. 4. April 2008, 5.

6 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) 55.

7 See also L.W. KISS, Reviving the Criminal Jury in Japan, in: *Law and Contemporary Problems* 62 (1999) 261.

8 *Saiban-in no sanku suru keiji saiban ni kansuru hōritsu*, Law No. 63/2004.

9 Judicial System Reform Council, Recommendations of the Justice System Reform Council for a Justice System to Support Japan in the 21st Century (12 June 2001) Chapter IV, Part 1 (1), at <http://www.kantei.go.jp/foreign/judiciary/2001/6012report.html> [last visited 20 September 2010].

10 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) 57.

After a great debate about the formation and mixture of jury trials¹¹ – how many jurors and how many judges should form a trial – the Lay Assessor / Penal Matters Study Investigation Committee (*Saiban-in keiji kentô-kai*),¹² composed by criminal procedure experts, proposed a trial by three professional judges and anywhere from four to six lay participants.¹³

In early 2004 the Liberal Democratic Party (*Jiyû Minshu-tô*) and the New Komeito (*Kômei-tô*) compromised on proposing three judges and six lay judges for cases that were controversial and one judge and four lay judges for cases without disputation. The official proclamation was issued on 28 May 2005 by the Upper House (*Sangi-in*).¹⁴

With the agreement that it would take effect in May 2009, the government requested the Supreme Court (*Saikô Saiban-sho*) to broadcast the new system, to explain the duties to the public, and to encourage them to affirmatively undertake this new duty. The Supreme Court made court and trial rules, provided advanced training, and introduced trial procedures and the existing judicial framework; the government took part as the promoter by sponsoring flyers and posters featuring Japanese artists,¹⁵ magazines, *Manga* and movies, special moot courts and seminars for lawyers and students.¹⁶ In response, individuals were encouraged to give feedback to the Supreme Court, the Ministry of Justice, and the JFBA. But the public feedback was not what the government had expected. Most average Japanese citizens said that they would not serve as jurors because of their lack of legal knowledge.¹⁷

In the new system, professional judges and Japanese citizens work together to determine the judgment of a case. The defendants do not have the right to choose jurors. The system is limited to the most serious of criminal cases.¹⁸ The jury is also allowed to directly question witnesses, victims and the accused. There are no secret procedures like there were in the old system. Jurors are not banned from exposure to media reports on the trials they are involved in, and they can return to their homes every day during the

11 Compare instead: ANDERSON / AMBLER (Fn. 4) 59.

12 Details of the Investigation Committee (*Saiban-in seido keiji kentô-kai*) available at: <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/06saibanin.html> [last visited 20 September 2010].

13 Investigation Committee, *Saiban-in seido ni tsuite*, available at: http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai13/13siryous_list.html [last visited 20 September 2010].

14 See *Kokkai kaigi-roku kensaku shisutemu*, available at: <http://kokkai.ndl.go.jp> [last visited 20 September 2010].

15 See Catchphrase *Saiban-in* promotion poster, Supreme Court, *supra* note 108, March 1, 2006; it shows actress and model *Kyoko Hasekawa* who has become the face of *Saiban-in Seido*; see also ANDERSON / AMBLER (Fn. 4) 73.

16 In addition promoting the *Saiban-in seido* by a special website available at: <http://www.saibanin.courts.go.jp> [last visited 20 September 2010].

17 A result of a public opinion poll February 2007: 44, 5% do not like to be a juror, *Naikaku fusei fukô hôshitsu, Saiban-in seido ni kansuru seron chôsa*, available at: <http://www8.cao.go.jp/survey/tokubetu/h18/h18-saiban.pdf> 3 [last visited 26 September 2010].

18 Delicts like in Artt. 199, 208-2, 225-2, 240, 218, 219 of the Japanese Penal Code (*Keihô*, Law No. 45/1907).

entire trial. Under the new system, jurors' names and other personal data are to be kept under wraps until the trial is over; without consent of the lay judge, personal information will not be disclosed.

In May 2009 (*Heisei 21*) the *Saiban-in* system took effect, and the first trial began in August 2009 in Tokyo District Court.

II. THE TRIAL: TOKYO DISTRICT COURT, 3 AUGUST 2009

The attention on the trial was remarkable.¹⁹ Over 30 teams of reporters and cameramen took their places in front of the entrance of the district court in Kasumigaseki, Tokyo. More than 2000 people stood there, too, in hopes of getting a ticket for one of the 58 seats available in the public gallery of the courtroom; 40 seats were reserved for non-involved lawyers, special organisations, and the press.

On the other hand, there were just as many people around the area who were demonstrating against the system – the *Saiban-in Seido wa iranai* [“we don't need a lay-judge system”] organisation – including lawyers, academics and people from civic groups. Their opinion was that lay judge trials only force unwilling people to experience trials, and the conclusion will still be the same as those made by professional judges.²⁰

After the public gallery of the 104th criminal divisions courtroom (*104-gô Hôtei*) was seated, the three professional judges entered the courtroom and took their seats, followed by the defendant *K. Fujii*, a 72-year-old bone and posture therapist from Adachi Ward, Tokyo. The defendant was escorted by guards to a seat next to his lawyer. The presiding judge *Y. Akiba* ordered his handcuffs removed before two of the professional judges stood up and went out again to invite the six lay judges in. Five women and one man entered and took their seats, three on each side of the professional judges. Three alternate lay judges followed and sat behind the six lay judges. The court was complete. The family of the victim had appealed for the case to be made open to them under the “Victim Participation System,” and they were allowed to attend the trial proceedings.

After the court questioned the defendant about his personal life, the state attorney read the following indictment:

On May 1, 2009, at about 11:50 a.m., the defendant attacked the female victim – a South Korean citizen – M. Chun Ja, 66 years old, in the neighbourhood, after she knocked down bottles of water which the defendant had placed around his house to ward off cats. With full cognizance of the weapon's lethality, he stabbed her with a survival knife measuring 9 by 3 inches, twice in her bosom and once in the back of her body. As a result of this conflict, the victim was hospitalized in Tōkyō Joshi

19 See trial protocol for the following summary, available at *Tōkyō Chihō Saiban-sho* (only in Japanese), also available at: http://www.nishinippon.co.jp/nnp/feature/2009/saibanin/kiji/kyushu/20090814/20090814_0009.shtml [last visited 26 September 2010].

20 See discussion by the Dutch journalist D. LEUSSINK in his blog entry dated of 25 August 2009 available at: <http://www.danielleussink.com> [last visited 7. September 2009]

Ika Daigaku Tōiryō Sentā in Arakawa Ward, Tokyo, where she died at 3:13 p.m. from loss of blood and shock.²¹

The defendant gave few particulars; following that the state attorney and the defence counsel began with their examination. During this time, the participants showed pictures and graphics on court screens with a view to helping the lay judges understand the *corpus delicti*. The survival knife in question was also presented. The lay judges followed the presentations carefully and wrote down important statements for themselves. It was apparent that some of the lay judges had difficulties understanding the official law language. Some of them were distracted and looked around the courtroom.

After the hearing, the first of four witnesses came in – a woman from the defendant’s neighbourhood – who could testify about the defendant’s attack. She testified that after she heard cries, she went outside her home and found the bleeding victim on the ground and the defendant with the knife in his hands. When this witness had finished her testimony, the trial was recessed until the next day.

III. THE TRIAL: TOKYO DISTRICT COURT, 4 AUGUST 2009

The second trial day began with a hearing of three witnesses, one of whom was the oldest son of the victim. He advocated sentencing the defendant with the death penalty. Following this testimony, the lay judges had their first opportunity to pose questions. Lay Judge No. 4 asked two questions to the witness concerning the victim’s life and personality.

With the end of the evidence collection portion of the trial, the defence lawyer and then the state attorney began questioning the defendant. The defendant did not assert his innocence, but pointed out that he had been drunk when he attacked the victim. The trial was recessed again at about 5 p.m.

IV. THE TRIAL: TOKYO DISTRICT COURT, 5 AUGUST 2009

The conclusion of the trial started with a change: the total number of lay judges including alternates was decreased to four women and three men. The woman who until the last trial day had been Lay Judge No. 3 was now absent, and her position was filled by an alternate male lay judge (No. 7). All the lay judges took their seats at the table next to the professional judges. The presiding judge explained that Lay Judge No. 3 had informed the court that she could not attend the trial that day because of illness and asked whether there were any concerns regarding the replacement of her position; there were no objections.

21 Facts of the case according to the of judgment, available at:
http://www.nishinippon.co.jp/nnp/feature/2009/saibanin/kiji/kyushu/20090814/20090814_0006.shtml [last visited 26 September 2010].

The trial continued with questions of the defendant by the lay judges. Under questioning, it came out that the defendant, after committing the crime, withdrew money, bought a horse racing paper, and went to a racetrack. The following is an extract of the trial protocol:

Lay Judge No. 1: *“I have a question about the knife which was used as the dangerous weapon.... Why did you take the survival knife with you for the dispute with the victim, although you had closed your toolbox in your room to go outside?”*

Defendant: *“I thought that the other party would understand my viewpoint when she saw the knife’s threat.”*

Lay Judge No. 2: *“Didn’t you think that you could attack with the knife?”*

Defendant answered the same as before.

Lay Judge No. 7: *“Even when you noticed that the victim could die, didn’t you think about calling for help or No. 110?”*

Defendant: *“When I saw a man from the neighbourhood, I thought he had done it in the meantime...”*²²

All the lay judges asked the defendant several questions. Most of them tried to understand the defendant’s crime act resolution. Following this, the professional judges asked about some unsolved circumstances, too, before the final speeches began. Finally, the trial was recessed until the next day for judgment, and the court started its deliberation process.

V. JUDGMENT: TOKYO DISTRICT COURT, 6 AUGUST 2009

On judgment day the interest was significant. In addition to the public, more press and media were present than in the beginning and during the trial. The members of the court entered the tense trial room and took their places. Everyone stood up and the presiding judge read out the sentence: “The defendant will be sentenced to 15 years in prison” (*hikoku o chôeki 15-nen ni sho suru*).²³ The judge continued with the reasons for the judgment. All of the lay judges looked relieved to be finished with their duty, including Lay Judge No. 3, who was again in attendance. The verdict was about two pages long and reflected points that the lay judges had brought up. After finishing, the court left the courtroom and the lay judges went to the press conference.

²² See trial Protocol (Fn. 19) 25 et seq.

²³ Compare judgment of *Tokyo Chihô Saiban-sho, 104th Criminal Division* (available in Japanese only), available at: [http://www.nishinippon.co.jp/nnp/feature/2009/saibanin/kiji/kyushu/20090814/20090814_0006.shtml] [last visited 26 September 2010].

VI. CONCLUSION

This first jury trial showed the effect of bringing the legal process closer to the people. By way of example the jurors rejected the death penalty, which usually is the result in that kind of case with victims who have died, especially when they have been murdered with intent. As a safeguard, however, at least the presiding court must agree with the citizen judges' majority decisions. Establishing the *Saiban-in* system has sparked fierce criticism from those who argue that lay judges are not fit to make informed judgements in serious crime cases or in decisions about a convict's life and death. It is a moot point whether the possibility of questioning by the lay judges and using materials to bring familiarity with legal traditions and procedures is effectual. With this reform, the lay judges meet the court just before the trial to receive a review about the *corpus delicti*.

One of the lay judges, a 43-year-old company employee, stated that although prosecutors and the defence counsel used visual materials, it was sometimes difficult to follow their viewpoint. But the presentation helped him to understand important circumstances. On the other hand, another lay judge, a 61-year-old part-time worker, said, "*I'd expected a relatively large amount of material for us to get through, but some of it came in the form of graphics and I think I was able to get a good understanding... I hope.*"²⁴

Others said that they were exhausted when they arrived home at the end of each trial day. One of them said that she would be afraid of more complicated cases, and thinks a four-day trial would not be enough for that level of complexity. Another expressed that in some future trials the schedule might be too tight, making it a challenge to set a schedule that would not be too heavy a burden for lay judges to bear. "*I am not good at giving my opinion in front of people, and I worried I might say something that missed the point,*" a 51-year-old lay judge said. The lay judges also felt that the professional judges gave extra consideration to them when they discussed the sentence so there could be an active discussion. They said they were directed by the professional judges.

One of the professional judges said that they determined the extent of the defendant's murderous intent by looking at how the victim was wounded. In contrast, the lay judges focused on the detailed explanation of the criminal act. They drew on their common sense and made their decision based on what they directly saw and heard, without thinking of past trials. The trial was straightforward because of the admission by the defence counsel. But the regular judges anticipate more problems in the future with trials where there is no confession: Also "*It will take time for lay judges to understand which part of a corpus delicti is more relevant for conviction concerning the alleged act and which refers to the defendant's guilt,*" one said.

24 F. TANAKA / D. ADACHI, Lay judges appreciate help during trial, in: Daily Yomiuri Shinbun, 8 August 2009, 2.

VII. OUTLOOK

Under the rules of the new lay judge trial system, judges and jurors deliberate together. Experts do not anticipate that the outcome of court cases will change significantly in the near future because there is not enough time to support juries with complete evidence before verdicts are rendered.

Since the first trial was handed down at the Tokyo District Court on 6 August 2009, a total of 214 decisions have been delivered to 223 defendants in 214 cases at 53 district courts. About 30 percent of defendants who have been convicted in lay judge trials have appealed their rulings, almost the same ratio as that in judge-only trials. The number of defendants who appealed their rulings came to 32 percent, all of them having been given prison terms of between 30 months and 24 years without suspension.²⁵

There have been no appeals from the prosecution. The verdicts of 101 defendants have been finalized. Among the reasons for appealing, one defendant was not convinced that the ruling was in accordance with what the prosecutors were seeking, while another thought it was impossible for lay people to hand down rulings.

How effective the lay judge system is (or will be) depends on Japan's criminal justice system and the people involved as jurors. Regarding this fact, there could be cases that may test and possibly sway the lay judge system. According to Japanese media, one example is the arrest in December 2009 of *T. Ichihashi*, who killed a 22-year-old British language teacher in early 2007 and buried her body in a sand-filled bathtub which he had moved from the bathroom to the balcony.²⁶

During the following two years there was a great amount of media and press coverage within Japan and abroad. Nearly all Japan's citizens followed the details of this indictable offence. Accordingly, interest was high when the police arrested *T. Ichihashi* in Osaka²⁷ while he was attempting to board a ferry to Okinawa in November 2009. *T. Ichihashi* had allegedly undergone plastic surgery but could be convicted by his fingerprint.

It is debatable whether he can expect a fair trial under the Japanese criminal justice system, especially considering the intense media coverage this case has generated over the last years. He is likely to be the first person tried under the lay judge system where the circumstances of the crime have been the subject of such a remarkable amount of media inspection. The judgment must await the issue of the trial, but in such cases the death penalty is usually given. In sentencing practice to date in Japan, death sentences

25 As of 7 February 2010; Kyodo News available at: <http://www.japantoday.com/category/crime/view/one-third-of-defendants-in-lay-jury-trials-appeal-sentences> [last visited 20 September 2010].

26 The Japan Times, 29 March 2007, available at: <http://search.japantimes.co.jp/cgi-bin/nn20070329a1.html> [last visited 26 September 2010].

27 S. GREEN, Ichihashi trial key test of legal reforms- extensive media coverage could sway lay judges, in: The Japan Times Online at <http://search.japantimes.co.jp/cgi-bin/fl20091208zg.html> [last visited 26 September 2010].

meted out by professional judges are extremely rare. Most lawyers (defence counsel) and judges do not want to decide about human life. Increasing citizens' involvement through the lay judge system may mean that the death penalty will be given more often, especially as surveys have shown the level of public support in Japan for capital punishment to be as high as 80 percent..

Given this concern, there are calls from various sides to approve a kind of application to the court that the case is exceptional and should be tried by professional judges only. But the Ministry of Justice (*Hômu-shô*) disapproves of this proceeding, claiming that this option would violate the lay judge law, reverting to the old jury system in which no participant could affect the choice of jurors or the shape of the trial. Minister of Justice *K. Chiba* is confident and says she hopes that lay judges will “*understand the seriousness of handing down the (death) penalty.*” That is also the intent of the new elected government. The development of the lay judge system will show its own effect.

SUMMARY

The article reports on the inaugural case of the reintroduced lay judge system for criminal trials in Japan. After briefly summarizing the key elements of the new system, the author shares his personal observations from the trial, which took place in the Tokyo District Court in August 2009 attracting considerable media attention. The new system for the time being remains controversial, but all in all seems to have got off to a smooth start.

ZUSAMMENFASSUNG

Der Artikel berichtet über die Gerichtsverhandlungen im Rahmen des ersten Strafverfahrens in Japan, welches das wieder eingeführte Laienrichtersystem verwendet. Nach einer kurzen Einführung in das neue Verfahren schildert der Verfasser seine Beobachtungen aus den Verhandlungen vor dem Distriktgericht Tokyo im August 2009, die ein starkes Medienecho gefunden haben. Das neue System bleibt umstritten, scheint insgesamt jedoch ohne größere Zwischenfälle gestartet zu sein.

(d. Red.)