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### Japan's Experience with a New Jury (Saiban-in) System

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As to the results of trials, there have been some changes depending on the type of case. One of the changes is the sharp division that has emerged between cases that involve aggravating circumstances and those that involve mitigating ones. The penalties imposed for sexual offenses have become particularly heavy compared to before. There has been little change when it comes to the ratio of guilty verdicts to not-guilty verdicts. Verdicts on the death sentence also seem to be similar to those that were being reached before.

A final point to note here is how the system has been received by the general public. More than a few members of the general public have responded negatively to national surveys when asked if they wanted to become a *saiban-in*. However, according to the results of a questionnaire targeting people who had the experience of being *saiban-in*, as many as 95 percent of respondents said they were pleased to have had the opportunity to perform that duty. Their reflections on the experience covered a broad spectrum, ranging from the natural reaction that they thought being able to understand how a criminal trial works was a good idea, to those whose interest deepened in what is behind crime and how society works.

Though I think this may be clear from what I have said so far, the introduction of the *saiban-in* system has compelled us toward a fundamental reexamination of our approach to criminal justice in Japan. We need to scrutinize the Penal Code and the Code of Criminal Procedure from a variety of perspectives, and what's more, judges, prosecutors, and attorneys need to make a habit of conducting themselves mindful of the reactions of the public at large. Nonetheless, I think we can say at the very least that the *saiban-in* system has been running suitably well over these three years, even though it has only just gotten underway.

I have always kept in mind how the U.S. jury system works when I think about how this system operates.

To return to the start of my talk, I do not think about the fact that I studied at Columbia University as simply a matter of having acquired some skills and knowledge. To the contrary, I think the best things that those experiences gave me were a flexible intellect obtained through coming into contact with a different culture and society, the attitude of considering matters from multiple angles, and a pragmatic way of thinking. I have always thought of my experiences here at Columbia Law School as providing me with a wall off of which I can bounce ideas like a tennis ball when dealing with the many problems I have faced as a judge in the years since. Those experiences are an integral part of my makeup, at least as a judge, and I believe they form the starting point for my thinking. Thank you all for your time today, and thank you, Columbia.

Columbia's leadership in the field of Japanese law is embodied in the Center for Japanese Legal Studies. The Center initiates and administers a range of research projects, academic exchanges, and informal programs designed to enhance understanding of the Japanese legal system among the Columbia University community and beyond.

日本法研究センター

*For months, the Columbia Law School community looked forward to the visit of Chief Justice Hironobu Takesaki (LL.M. '71), who was scheduled to deliver a lecture at the Law School on October 31, 2012. Two days before his visit, New York City was hit by Hurricane Sandy. As a result of disruptions to the Chief Justice's travel schedule, we were unable to hold the event. Although we unfortunately did not have the honor of hosting the Chief Justice, we are able to share the remarks he planned to give that evening. We look forward to hosting Chief Justice Takesaki on his next visit to the United States.*

## Japan's Experience with a New Jury (*Saiban-in*) System

### Chief Justice Hironobu Takesaki



Chief Justice Hironobu Takesaki

I would like to thank Dean Schizer, Professor Milhaupt and everyone here at Columbia University for giving me the opportunity to speak to you. Thanks to the special thoughtfulness of Chief Justice John Roberts, I had the opportunity to observe oral proceedings at your Supreme Court and to speak with the Justices. Given that I was coming all the way to Washington, I thought I would also like to visit my alma mater, Columbia University.

I attended the Law School from 1970 to 1972 and studied mainly criminal matters. I remember many professors quite well, along with the memories of my fear and trepidation of the rigorousness of their exams.

Given that so many of you are gathered here, I think I should also offer some comments of a more organized nature. Accordingly, I would like to talk about a matter that may be of some interest to you, and that is Japan's *saiban-in* system. The system went into effect in 2009. To describe the system briefly, it is applied to certain serious crimes that can incur a statutory penalty, the death penalty, or life imprisonment such as homicide, robbery causing injury or death, arson, and so on. Under the system, three judges work alongside six *saiban-in* who are chosen for each case from among the general public. Together, they do the fact-finding to determine whether a defendant is guilty or not, and if the defendant is guilty to then determine the penalty. The fact that the *saiban-in* are chosen by lottery for each case from voter registration lists resembles the jury system,



while having judges and the *saiban-in* work together to reach a decision is basically analogous to the citizen-participation systems found in many European countries. In this sense, the *saiban-in* system is a unique one that mixes the two other systems together.

As you know, the vast majority of the world's countries have systems with respect to criminal trials that involve the general public in judicial procedures, whether as part of a jury or through citizen-participation. Japan also had a history of jury system from 1928 to 1942. However, for various reasons, after having handled only 500-plus cases, the system was dropped in 1943. Thereafter, all criminal trials in Japan were heard and decided upon by judges. After World War Two, in emulation of the U.S. adversarial system, procedures became the basis for criminal trials in Japan. However, a point of difference with trials in the U.S. can be seen in that the procedures relied heavily on documents. Police and prosecutors would collect large amounts of evidence during the investigation stage. The depositions of witnesses with knowledge of the case would be put into writing. Judges would painstakingly scrutinize the enormous written record generated during the investigatory stage, as well as the testimony offered in court, and then engage in the highly technical and detailed work of discovering where the truth is to be found. Such operations have been described by Japanese scholars as "precision justice." They tend to be heavily reliant on the written record. To put that another way, they tend to prove and ratify the results of the investigation. In that light, they have also been criticized as "trial by written record." What's more, it cannot be denied that these court procedures and analytical methods that depend on documents are difficult for the general public to understand. No matter how professional and sophisticated they may be, no one can say that criminal trials have a strong future if the understanding of them and their legitimacy has not been ensured nationally. In that light, involving the general public in some way is an issue that must be addressed. If the general public is to be involved in making judgments, whether through a jury or through citizen participation, then proof that relies heavily on documents and the written record will no longer suffice. Litigation procedures that center on testimony in an open court will be indispensable. At the same time, we must also preserve the capacity for elucidating the facts through written judgments as in past criminal trials. Accordingly, using a jury system in which only the conclusions are presented would be insufficient. In that sense, a participatory system in which judges and members of the public work together to pass judgments would be desirable. However, given that ordinary persons tend to hold back their opinions when they work together with professional judges, we thought these bodies should have a higher percentage of ordinary persons than judges. I think the *saiban-in* system can be seen as an aggregation of such various basic imperatives.

But making a system out of such concepts was not easy. There are a number of important matters to address in terms of both the system and its operation.

First is obtaining the cooperation of the general public. Participating in a criminal trial is certainly not an easy thing for the average citizen, both from a psychological standpoint as well as in terms of their daily life. For such a system to operate stably, it cannot subject people to unreasonable demands. The burden must be kept as light as possible. Accordingly, the Act on Participation

of *saiban-in* is quite flexible regarding reasons for excusing oneself. For example, in addition to categorical exemptions such as university students or anyone aged 70 or older, it also excuses those for whom service would present significant difficulties for such personal reasons as looking after children or providing nursing care. One of the reasons why we can allow such wide-ranging exemptions is because the number of crimes to which the system applies is comparatively limited. As a result, it also limits the number of cases overall. There have been only 4,800 cases in all over the three years the system has been in effect. Accordingly, selecting around 10,000 people nationwide each year has sufficed to meet our needs. Accordingly about 80 percent of the people who have the obligation to appear in court do attend.

The percentage of people who withdraw is closely related to the length of the trial. Trials end in five days or less for around 60 to 70 percent of the time. Even with cases that require longer periods of time, we have so far addressed the situation by appropriately increasing the number of potential *saiban-in* at the outset. The longest hearing thus far was for a case that required 100 days. Even so, selection of the *saiban-in* for the case took just one day.

The second important matter is the question of whether the trial is easily comprehensible to the public at large. Professionals have made many efforts on this point. We have had to reexamine most basic words such as "the intent to commit homicide," "self-defense," "insanity," and "conspiracy" to ensure that people can understand these concepts precisely. Prosecutors and attorneys work to provide explanations in words that even the ordinary person can understand. Diagrams and photographs are now frequently being used to make it easier to comprehend the circumstances at a crime scene and evidence conditions. The sight of a *saiban-in* directly questioning a witness during cross-examination has now become an everyday occurrence. Most *saiban-in* take part in the hearings in earnest. They have high degrees of understanding. While I have no direct experience, based on what judges have told me the exchanges between and deliberations among the judges and the *saiban-in* are on the whole quite lively, and these ordinary persons do not seem to be holding themselves back with respect to the judges.

A third important issue we need to bear in mind is that the *saiban-in* system should not infringe upon the rights of the accused. Of particular importance here is the question of whether we can fully ensure the readiness of defenses. Holding trials for several days in a row has greatly increased the burdens on defense attorneys. Also, many defense lawyers are not necessarily well-versed when it comes to criminal trial procedures. Furthermore, many defendants lack sufficient means to hire their own attorneys. Strengthening the readiness of defense teams is an essential condition for the *Saiban-in* System. Accordingly, parallel to the introduction of the *saiban-in* system, arrangements were made to establish Japan Legal Support Centers throughout the country so that persons of limited means can easily obtain lawyers for both civil and criminal matters. The Centers are operated by full-time staff attorneys along with general attorneys who register there. They assign at least two lawyers each to trials involving *saiban-in*. This is still in its earlier stages and while it will take some time for this to catch up to the public defender system in the U.S., I think it at least has gotten underway.