PSYCHIATRIA ET
NEUROLOGIA
JAPONICA

*This English manuscript is a translation of a paper originally published in the Psychiatria et Neurologia Japonica, Vol. 123, No. 1, p. 32-37, which was translated by the Japanese Society of Psychiatry and Neurology and published with the author's confirmation and permission. If you wish to cite this paper, please use the original paper as the reference.

Special Feature Article

Why the Japanese Lay Judge System should be abolished

Taro MURAMATSU
Department of Neuropsychiatry, Keio University School of Medicine
Psychiatria et Neurologia Japonica 123: 32-37, 2021

Abstract

The Japanese lay judge system, which started in 2009, has revolutionized the criminal justice system in the country. However, as the results of excessive emphasis placed on lay judges during the following ten years, understandability has been prioritized over accuracy in both trials and psychiatric evaluation, and the most important function, or duty, of the judicial system to pursue the truth is being profoundly impaired.

Keywords: lay judges, expert witness, psychiatric evaluation, capacity for responsibility

Introduction

In August 2009, the Tokyo District Court held the first lay judge trial in the history of criminal justice in Japan.

Since September of that year, this author has conducted psychiatric examinations in 15 lay judge trial cases over the past 10 years, and has had the opportunity to appear and testify in all of them and has been involved in several

Copyright: ©The Japanese Society of Psychiatry and Neurology and Author

other lay judge trial cases by submitting written opinions. In this essay I would like to reflect on the past ten years, and modestly offer a vision for the future.

I. Evolution

1. Reform of Expert Testimony

In the Lay Judge System, expert testimony must be easy to read and understand for citizen judges (2008, Ministry of Health, Labour and Welfare study) 6).

A lay judge judges a serious criminal case jointly with professional judges. The introduction of the Lay Judge System is the largest judicial reform in the postwar period in Japan, and careful and multifaceted preparations have been made. One of these was the reform of the psychiatric evaluation, and the *"Guide to the Preparation of Psychiatric Evaluation Reports on Criminal Responsibility"* (hereinafter referred to as the *"Guide"*) 6). This was prepared by a research group of the Ministry of Health, Labour and Welfare and was a monumental publication.

Since psychiatric evaluation is treated as important basic data for judging a person in criminal trials, it is inappropriate to maintain impartiality if there are variations in the methods and theories that lead to the conclusions of the evaluation depending on individual medical examiners and regions. However, for decades, no progress had been made in the standardization of psychiatric evaluation, reflecting the difficulty of standardizing psychiatry in the first place, the so-called eternal problem. The lay judge system acted as a solution to this situation, so to speak, as external pressure in a positive sense. Since the lay judge system is a system in which lay judges participate in the decision-making process, the expert testimony must be understandable to them. With this absolute requirement at the core, standardization became a time-tested imperative in forensic psychiatry. No matter how high the quality of the professional explanation offered by psychiatry, if the lay judge cannot understand it, it cannot serve as expert testimony. In the *"Guide"* 6), it is stated as follows:

The expert testimony may be used as evidence during a short trial date, and may even be read aloud in court. The expert testimony must be as concise and as easy to understand as possible, because it must be understood by the lay judges. At the same time, however, it must not lose the precision and sophistication of highly specialized considerations that have been valued in conventional psychiatric expert testimony. We must seek a balance between the two.

Copyright: ©The Japanese Society of Psychiatry and Neurology and Author

Accordingly, a standard format was proposed in the *"Guide"* 6). The greatest achievement for forensic psychiatry with the introduction of the lay judge system was this powerful step toward the standardization of psychiatric evaluation.

2. Reform of the Trial Process

"judges, public prosecutors and defense counsels must endeavor to make proceedings prompt and <u>*understandable*</u> *so that saiban-in may carry out their duties fully while avoiding imposing excessive burden on said saiban-in."* (2004, Act on Criminal Trials with the Participation of Saiban-in (Lay Judges), Article 51) (underlining by this author).

"Understandability" is the most powerful keyword of the Lay Judge System.

Every effort was made in legal circles to achieve the goal of trials that are easy for lay judges to understand. Before the introduction of the Lay Judge System, mock trials were held to simulate actual trials, and discussions were held enthusiastically on how to make psychiatric evaluations easier to understand. After the introduction of the system, improvements were made, and two procedures of psychiatric evaluation were developed and soon became established.

The first was the expert witness conference.

In a Lay Judge Trial, it is mandatory to adopt the pretrial arrangement proceedings. In cases where a psychiatric evaluation has been conducted, it has become standard practice to hold an expert witness conference at this stage, bringing together the expert witness, the prosecutor, the attorneys, and possibly the judge as well. This conference provides a valuable opportunity to learn how the legal profession understands expert testimony and psychiatry. Often it became clear that there were major misconceptions about psychiatry among the lawyers. But are their "misconceptions" really misconceptions? The supposedly scientific part of modern psychiatry is based on so-called *evidence*, which is merely a statistical fact, not necessarily true for the particular individual in front of us. On the other hand, the non-scientific part is almost a traditional art, and since it is merely inherited knowledge from our predecessors, it may be almost superstitious, but on the other hand, it may also be highly reliable clinical knowledge. What is the truly correct psychiatric knowledge that can be applied to this case? If the expert witness is to give a true account of his or her findings, he or she must face this

Copyright: ©The Japanese Society of Psychiatry and Neurology and Author

question and respond to the sharp criticism of the legal profession, which is the wisdom of a different field. The conference not only improves criminal trials, but also provides a rare opportunity to fundamentally rethink psychiatry.

The second is presentation by the expert witness.

In trials by lay judges, it has become standard practice for expert witnesses to explain their findings in court using a PowerPoint presentation.

In the past, the opportunity for an expert witness to formally explain the results of his/her expert testimony (in a form that would be recorded in the trial record) was limited to a question-and-answer session. There are two aspects to a trial: the discovery of the truth and the dispute between the parties. Although the basic idea that truth can be discovered only through conflict is probably correct, interrogations are so strongly tinged with conflict that they are far removed from the discovery of the truth, and the contents of expert testimony are often misunderstood and sometimes distorted. In contrast, the presentation by expert witness is a far superior format for an interrogation method designed to communicate the results of the expert testimony, because the expert witness takes the initiative and can provide psychiatric explanations in an orderly fashion. The presentation is followed by an interrogation, as in the past. However, the number of sterile interrogations has been drastically reduced because interrogations that deviate from the point of contention only make the story more difficult to understand and are of no benefit at all. The aforementioned *"Guide"* 6) mentioned the possibility of the expert testimony document being read aloud, but this did not happen, and the expert testimony document itself was not submitted to the court as evidence. Rather, only the presentation was treated as the result of the expert testimony. It was natural that an "easy-to-understand" presentation would be more persuasive, and the value of psychiatric evaluation became very important in terms of its understandability.

3. Expectations for Evolution

"No quality without criticism" 4).

The fact that expert testimony has become more understandable and persuasive, however, does not necessarily mean that it is desirable for a court of law. This is because, as with all medical judgments, the psychiatric evaluations can be wrong. Since a psychiatric evaluation has the power to greatly influence the fate of a defendant, it would be detrimental to society if an erroneous psychiatric evaluation were

Copyright: ©The Japanese Society of Psychiatry and Neurology and Author

to be used in a trial. As such, the most important thing in a psychiatric evaluation is that if it is wrong, it is excluded. Indeed, the worst kind of psychiatric evaluation is not a complicated and difficult-to-understand psychiatric evaluation, but rather, an evaluation that is wrong, but simple, easy to understand, and persuasive to the layperson. It is necessary to be understandable; however, understandability is meaningful only when accuracy is ensured. To ensure accuracy, there must be a system that eliminates erroneous psychiatric opinions.

The concise expert testimony recommended in the *"Guide"* 6) is intended to be read by the judges or recited in court. In the actual courtroom of a lay judge trial, however, presentation becomes everything, and the expert testimony becomes a document to be read by the prosecutor, the defense counsel, and sometimes the judge, prior to trial. It is at this stage that expert testimony can be sharply criticized, so brevity is unnecessary or even inappropriate. In order to be judged rigorously enough, expert testimony must not be brief. Briefness is no way to judge accuracy, and it prevents the weeding out of erroneous psychiatric opinions. "*No quality without criticism* " was the title of this author's presentation at a symposium held at the 2014 conference of the Japanese Society of Forensic Mental Health, titled "*Lay Judge Trials and Psychiatric Evaluation: Looking Back on Four Years After Their Enactment*" 4). As the number of actual lay judge trials increased, the state of psychiatric expert testimony gradually changed, taking the *"Guide"* as a first step. There was a return to detailed and precise expert testimony. This was considered desirable from the standpoints of improvement of the quality of expert testimony and the significance of psychiatrists providing expert testimony.

II. Degeneration

1. Degeneration of Evidence

Since the public, who are not experts in trial practice, participate in criminal trials, the evidence necessary to determine the issues in dispute is carefully selected and examined (Court website; Trial Lawyer System Q & A) 7) (underlining by this author).

The expert testimony itself should be detailed, and the presentation should be clear and easy to understand in its essence. It has become clear that this ideal, however, can only rarely be realized. The reason, as visualized in the figure, is that the lay judge trial is like a two-stage rocket system. In order to arrive at the truth, it is necessary to

Copyright: ©The Japanese Society of Psychiatry and Neurology and Author

select important evidence from raw data in the case of science, or from a vast and complex set of facts in the case of a trial case. This selection itself is a task that requires broad and deep insight, and sometimes, even after the selection has been made, it is necessary to go back to the raw data. Without such work, it is impossible to arrive at the truth. In other words, as shown in Figure a, a trial in professional judges' court is a continuous process with a vast and complex set of facts.

In a lay judge trial (Figure b), on the other hand, much of the evidence is removed during pretrial proceedings outside the courtroom, and the lay judges are not informed of the existence of such evidence. The trial proceeds in a space separate from the vast and complex facts. This enables a concise and easy-to-understand argument, but such conciseness and ease of understanding are only what is prepared and given to the lay judges, so to speak.

In order to reduce the burden on the lay judges and make the proceedings easier for them to understand, evidence is "carefully selected" in the pre-trial stage. The main message of the above court's website is that "lay judges do not need to read many documents because evidence is carefully selected", and the content of this message is certainly true. However, the reverse side of the message is deletion. As shown in Figure b, in order to make the trial, i.e., the 2nd stage rocket, easier to understand, a large number of complicated facts are eliminated in the lay judge trial in the name of careful selection. It is only natural that the trial would then be "understandable". However, it is often the case that complex and difficult-to-understand facts contain truly important evidence, but once the two-stage rocket system is adopted, it is no longer possible to access them once the trial has begun. It is impossible to make a truly correct judgment if a vast amount of facts are separated because they are difficult to understand.

This situation also casts a shadow over the state of psychiatric evaluation. For example, if auditory hallucinations are replaced by "voices" and delusions by "beliefs", the explanation is easy for lay judges to understand and is welcomed by professional judges. However, this explanation removes an essential part of schizophrenia, the ego disorder. This makes even more obvious the serious problem that has long been pointed out 5) that the deep psychopathology of endogenous psychosis is neglected, but it is the courtroom of the lay judge trial that proceeds in isolation from the "hard-to-understand" pathologies. Even if " understandability" is necessary in a trial, it cannot be the purpose of the trial in itself, but as the lay judge system

Copyright: ©The Japanese Society of Psychiatry and Neurology and Author

progressed, "understandability" was promoted from a keyword to a dogma.

2. Degeneration of the Truth-finding Function

"It is desirable to avoid, as much as possible, expert witnesses that express their opinions regarding the defendants' ability to distinguish right from wrong, and to behave in accordance with normal judgement in a manner that is directly related to the conclusion of capacity for responsibility" (Judicial Research Institute, 2009) 10).

The delicate relationship between expert witnesses and capacity for responsibility has been maintained for many years, that is, like the love affair which is an open secret. It goes without saying that the purpose of conducting an expert opinion is to determine capacity for responsibility, but since capacity for responsibility is a legal matter, it can never be reached by an expert witness who is a medical doctor. However, in the practice of criminal trials, the judgment of capacity for responsibility by an expert witness is explicitly and implicitly demanded.

The Judicial Research Institute's statement that *"it is desirable to avoid, as much as possible, the expression of opinions by expert witnesses regarding capacity for responsibility"* 10) sounds as if it is righteous advice that decries as unhealthy the delicate relationship between expert witnesses and capacity for responsibility. However, this advice is unacceptable for at least two reasons.

The first reason is found in a 1983 Supreme Court decision. The famous decision of the Third Petty Bench of the Supreme Court that capacity for responsibility is *"ultimately a matter to be left to the court's evaluation"* 8) is often cited as a basis for prohibiting expert witnesses from rendering an opinion on capacity for responsibility, but it misinterprets the word "ultimate". The "ultimate evaluation" is an evaluation made after hearing a wide range of opinions necessary for judgment, and an evaluation made by limiting the opinions of experts on specialized matters is not "ultimate", but "self-righteous".

The second reason is in the words of the Judicial Research Institute itself 10). The reason given for avoiding the expert witness's opinion on capacity for responsibility is that there is concern that the expert's opinion may influence the lay judges' judgement. This is a truly bizarre and impolite statement. It treats lay judges as children in the sense that they are shielded from information that might tempt them, and it treats expert witnesses as tools in the sense that they are restricted from speaking while their professional opinions are sought.

The current Japanese concept of capacity for responsibility was

Copyright: ©The Japanese Society of Psychiatry and Neurology and Author

established in the first half of the 20th century, when even electroencephalography was not yet common. The brain was a complete black box. Nearly 100 years have passed since then, and the age in which it is impossible to discuss capacity for responsibility (whether the offender was capable of distinguishing right from wrong or of behaving in accordance with normal judgement), and even ethics and morality in isolation from brain functions is just around the corner 2). In order to ensure that the ultimate evaluation by the court does not fall behind the times, it is necessary to fully discuss the issue of capacity for responsibility with brain function in mind, and blocking the opinions of experts in the courtroom, the perfect venue for such discussion, is as foolish as a national isolation policy in the Edo Period (1603-1867).

The adverse effect of the two-stage rocket system shown in the Figure is that truly important information is cut off. This adverse effect inherent in the lay judge trial system itself is symbolically manifested in the aspect of determining the capacity for responsibility of judges. The two-stage rocket system makes the proceedings at trial easier to understand, but only leads to a distraction from the discovery of the truth.

3. Degeneration of Criminal Justice

"The percentage of those who have participated as a lay judge who said they felt that their participation as a lay judge was a 'very good experience' or a 'good experience' exceeded 95%" (2019, Supreme Court) 9).

In 2019, the Supreme Court issued a "*Summary Report on the Ten Years of the Lay Judge System*" 9). The first part of the report is the satisfaction level of those who have experience as a lay judge. It is understandable that the positive view of the system by those who have been lay judges is an important part of the evaluation of the system. However, the fact that lay judges are not parties to the lay judge system is ignored. The parties to the trial are the plaintiff and the defendant, and the lay judge is essentially a supporting actor. The measure of the success of a trial should not be the satisfaction of the lay judges, but the evaluation of the public. From this point of view, the most important thing to consider is the fact that the refusal rate of prospective lay judges is on the rise. Nowadays, two out of every three candidates are turned down. The results of a questionnaire survey of the general public are also included in the "*Summary Report on the Ten Years of the Lay Judge System*" 9), which emphasizes that the impression of criminal trials, such as "familiarity" and "procedures and contents are easy to understand", has greatly improved

Copyright: ©The Japanese Society of Psychiatry and Neurology and Author

since the introduction of the lay judge system. However, since the refusal rate is actually increasing, it is a stark fact that although the name recognition has increased, the acceptance situation is still unfavorable. It may be permissible to conduct a campaign in which the lay judges play a leading role immediately after the introduction of the novel system of lay judges. However, it is a great departure from the common sense of society to still be campaigning 10 years after the introduction of the new system. If this were a matter related to some product targeted at the public, it would be appropriate to stop its release.

Moreover, the lay judges are only set up as the main actors, but they are never respected as the main actors; they are treated as children. Difficult facts are separated, and only easy-to-understand facts are shown to the lay judges for discussion. The professional judge smiles at the lay judges. He/She praises them for a good argument. This is an evaluation of a class meeting, not an evaluation of an adult's argument.

Conclusion

Ten years have passed, " understandability " has further usurped the dogma, and what the lay judge system has reached is the supremacy of the lay judge. The campaign to attract lay judges by putting " understandability" at the forefront continues to this day. Looking at the courtroom scene alone, it appears to be a success. The lay judges leave the courtroom with smiles on their faces, satisfied that they had a good experience. However, behind the scenes, the parties involved are compelled to accept the disappointing judgements. “The lay judge has become too much of a leading role. The regret of the bereaved families will not disappear until all the facts are revealed”. This is the grief-stricken voice of a victim's bereaved family member 1). "The unnecessary reduction of evidence can create difficulties in reaching a conviction, and in fact, can give rise to a sense of uncertainty". This is a point made by a public prosecutor with a great deal of insight 3). All of the above statements accurately identify the weakening of the most important function of a trial, which is the discovery of the truth, and they earnestly call for the restoration of this function.

The presiding judge praises himself /herself for such a system. In the “*Summary Report on the Ten Years of the Lay Judge System*” 9), it is stated that with the introduction of the lay judge system, trials are evolving toward a "core justice" and "trial centrism". It is said that the original concept of criminal trials, which is to focus on the core of the case in the courtroom, is being achieved. However, this is only

Copyright: ©The Japanese Society of Psychiatry and Neurology and Author

the tip of the two-stage rocket shown in the figure, viewed through a magnifying glass. The “trial-centered core judiciary” is built upon the separation of vast and complex facts. What to cut out and what to keep is an important decision that directly affects the conclusion of the trial, but this process is not made known to the lay judges. The lay judges are satisfied that it was a good experience, unaware that they are dancing in the palms of the hands of the three legal professionals.

Article 1 of the Act on Criminal Trials with the Participation of Saiban-in (Lay Judges) states that “(the Lay Judge System) *helps to promote the citizens' understanding of and enhance trust in the judicial system*”. Certainly, the lay judge system has brought the judiciary and the public closer together. Opportunities for interaction between expert witnesses and legal professionals have increased dramatically. The number of people who have the opportunity to seriously consider criminal trials, which used to be a different world for most of the public, has increased. The lay judge system has been a great success in terms of improving the public's understanding. However, improvement of understanding and improvement of trust do not proceed in parallel. In politics, as in business, and in medicine, unrealistic glorification and trust are often maintained when people do not fully understand. As understanding progresses, the inherent flaws and ugly aspects of any system come to light, and trust once again begins to decline. True trust lies beyond such negatives. The lay judge system is now ten years old; its flaws have been exposed, and it has entered the stage of declining trust. However, the presiding judges continue their campaign to divert the public's attention from the flaws. It is not only the lay judge system itself, but also the judiciary that seems to be moving in the wrong direction. In the *“Summary Report on the Ten Years of the Lay Judge System”* 9), it is stated as if the ideal of a written judgment, not only in lay judge trials, is to be concise, and conversely, the avoidance of detail is strongly suggested, which makes me doubt my eyes. If we aim for true trust and understanding of the judiciary, the written judgements that are made public at the conclusion of a trial must be open to criticism. Conciseness is then unnecessary and rather inappropriate. In order to receive a sufficiently accurate evaluation, the judgment must not be brief. Briefness is no way to judge accuracy, and it does not weed out erroneous judgments. Neither judgements nor psychiatric evaluations can evolve properly unless they are sufficiently detailed and open to severe criticism. Now, the lay judge system is pushing the psychiatric evaluation and

Copyright: ©The Japanese Society of Psychiatry and Neurology and Author

the criminal trial toward degeneration.

There are no conflicts of interest to disclose in connection with this paper.

References

1) Chunichi Shimbun, May 19, 2019.

2) Glenn, A. L., Raine, A.: Neurocriminology: implications for the punishment, prediction and prevention of criminal behaviour. Nat Rev Neurosci, 15 (1); 54-63, 2014

3) Mainichi Shimbun, June 22, 2019.

4) Muramatsu, T: No quality without criticism. Jnp J Forensic Mental Health, 9 (1); 85-89, 2014

5) Nakajima, N: Endogenous psychosis and forensic psychiatry. Jpn J Clin Psychiatry , 40 (8); 1097-1103, 2011

6) Research group of the Ministry of Health, Labour and Welfare (Okada, T, et al): Guide to the Preparation of Psychiatric Evaluation Reports on Criminal Responsibility ver.4.0. A study on the criminal responsibility evaluation of those who committed acts of harm to others. 2008.

7) Supreme Court of Japan: Lay Jud ge System; How much material do I have to look at when I become a lay judge? (http://www.saibanin.courts.go.jp/qa/c4_10.html)

8) The third Petty Bench, Supreme Court of Japan. Decision, Sep 13, 1983.

9) General Secretariat, Supreme Court of Japan: Summary Report on the Ten Years of the Lay Judge System. May 2019.

10) Judicial Research Institute(eds): Esoteric legal concepts and lay judge trials. Hoso-kai, Tokyo, p.42, 2009

Copyright: ©The Japanese Society of Psychiatry and Neurology and Author

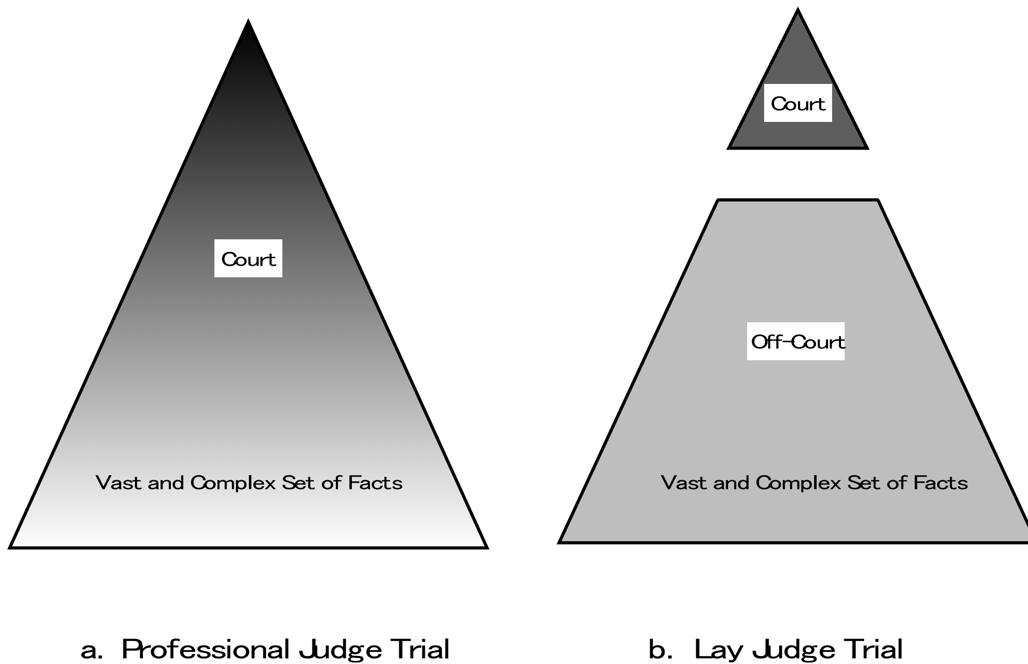

Figure　Structural Flaws in Lay Judge Trials
a: In a professional judge trial, the trial in the courtroom exists in continuity with the vast and complex facts. b: In contrast, in a lay judge trial, much of the evidence is removed during pretrial proceedings outside the courtroom, and the trial proceeds in a space separate from the vast and complex facts.

Copyright: ©The Japanese Society of Psychiatry and Neurology and Author