Japan's Lay Judge System and the Kijima Kanae Murder Trial日本の裁判員制度と木嶋佳苗の連続不審死事件裁判

Philip Brasor

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However one feels about the death penalty, it is difficult to avoid the conclusion that its application in Japan is arbitrary. At a mid-April symposium hosted by the Delegation of the European Union to Japan and the EU Institute in Japan at Waseda University in Tokyo, former Justice Minister Hiraoka Hideo publicly denounced his successor Ogawa Toshio 's decision to have three men on death row hanged on March 29, saying that the government needs to discuss the matter more before continuing with executions. The fact that Hiraoka on principle did not sign any execution orders during his tenure while Ogawa, in accordance with a very different set of values, approved three soon after assuming office shows that choices regarding life-and-death are governed by personal whim. Don't forget, these two men belong to the same political party, the ruling DPJ.

At the same symposium, Kaido Yuichi, the secretary general of the Japan Federation of Bar Associations, called for a change in judicial rules in relation to the two-year-old lay judge system. At present, a death sentence can be delivered if the majority of the 9 judges—six non-professionals and three professionals—vote in favor of it and one of the majority is a professional judge. The JFBA, which has called on the government to launch a public debate on abolishing the death penalty, says that death sentences should only be validated if the decision is unanimous.

When the lay judge system itself was being debated, one prominent lawyer who opposed it, Takayama Shunkichi, claimed that it was being pushed by the government to "streamline courtroom procedures" so that prosecutors could gain faster convictions, since there were provisions that take into consideration the limited time the average person could spend to sit for a trial. These provisions require judges, prosecutors and defense lawyers to participate in pretrial meetings to determine what will be discussed in court and what evidence is permitted. Takayama said such conditions automatically favor the prosecution, because once the evidence has been determined in the pretrial phase nothing can be changed, added or subtracted. A defendant cannot recant in court a confession he or she may have made under duress. As a practicing defense attorney, Takayama has said that of the twenty-odd cases that he has won over the years, "none involved trials of less than three years."

All of these issues were addressed either directly or indirectly during the recent trial of Kijima Kanae, who was convicted of killing three men and sentenced to death. The trial lasted 100 days, making it the longest one since the lay judge system started. More significantly, the prosecution presented only circumstantial evidence, thus forcing the lay judges to not only decide if someone is guilty but also send that person to death row based mostly on conjecture. In contrast, the even more infamous 1998 "Wakayama curry poisoning," which also involved a defendant who was convicted and sentenced to death based solely on circumstantial evidence, took four years. There are other

parallels. Like Kijima, Hayashi Masumi remained almost completely silent during interrogations. More significantly, both cases were hallmarked by the media's blanket coverage of the crimes, much of which actually preceded the suspects' arrests. Some reporters who had already been following the Kijima case implied that she was responsible for the deaths of a number of men she had allegedly led on with promises of marriage. At least three of these men died under conditions that looked suspicious: two in identical circumstances involving the use of burning charcoal, and a third in a house fire. The former were initially ruled suicides, the latter an accident. Kijima's initial arrest in 2009 was for fraud, but after the media connected her to the deaths of several men she supposedly had affairs with, she was eventually served arrest warrants for the murders of three. Kijima reportedly took cash from them, and prosecutors cited money as the motive in all three alleged murders, an aspect of the case that the media had covered in lurid fashion as a "black widow" story intensified by a blatantly sexist angle which questioned how such an unattractive woman could be so successful as a gold digger. By the time the trial started last January everyone in Japan with access to a TV or broadband connection knew the tale and most were likely convinced of her guilt.

Sensational coverage of the "black widow", using a high school photograph of Kijima Kanae

In April, NHK ran a special hour-long program about the trial. According to the law, lay judges cannot discuss afterward what they talked about in closed chambers, even with family, so in order to get some idea of what might have taken place the producers found six people who had served as lay judges in the past and provided them with court records and materials. They used these materials and their experience to recreate what the lay judges at the Kijima trial might have gone through before reaching their guilty verdict and death sentence.

All six agreed that the real lay judges in the case had their work cut out for them since the prosecution's entire argument rested on three pieces of circumstantial evidence and a motive that made sense but had to be inferred since there was no confession. The mock lay judges went through each item with tortured thoroughness. The two men who the defense claimed committed suicide had died from asphyxiation caused by charcoal stoves. Prosecutors say that Kijima drugged them and lit the stoves herself. They claimed that the fact that one of the victims did not have charcoal on his hands when he was found dead proved that he didn't kill himself because he obviously hadn't handled any charcoal. But the mock judges surmised that if he had killed himself he could have wiped his hands prior to lighting the charcoal. Prosecutors also submitted as evidence surveillance camera footage showing that Kijima visited the home of the third victim hours before his house burned down. The man was killed in the fire and the prosecution's claim was that she started it. The mock judges didn't see how the footage decisively showed a connection between Kijima's visit and the fire.

They eventually reached the conclusion that the prosecution's case was based on a very sloppy police investigation, but that didn't necessarily mean they didn't buy it, because the motive put forth by the prosecution had become too easy to believe: Kijima had extracted money out of these

men on the false pretense that she might marry them and once they found out she wouldn't they would surely demand the money back, so she killed them. NHK did not mention the media's role in planting this notion in the public's mind over a two-year period, but the prosecution's closing argument exploited the notion with a metaphor: When you wake up in the morning and see snow on the ground where there was none the day before, you know for a fact that it snowed during the night. In other words, the judges should know just by looking at all the circumstances in the case what happened. They don't really need anyone to prove it.

In the end, the mock judges assumed that the lay judges who actually tried the case had reached their conclusion because something had nudged them "out of the gray area" presented by the evidence and into a "black area" of a conviction. What provided that nudge they couldn't guess, though film director Suo Masayuki, who acted as a commentator on the program, implied that the professional judges "who have everyday experience in this situation" may have been the decisive factor. In essence, the pre-trial publicity had placed the burden of proof on the defense attorney, who had to show that his client didn't murder the three men. As far as the death sentence went, the mother of one of the victims was allowed to testify during the trial, and she asked for the harshest possible punishment.

The conclusion reached by the show's commentators was that there are still problems with the lay judge system but that its value as a platform for judicial participation has been proven, if only by the dedication that lay judges have demonstrated. Nevertheless, NHK had illustrated the confusion that lay judges feel when confronted with the responsibility of interpreting the law and deciding a person's fate. They are told definitively that they must only consider the facts presented to them, but they are also encouraged to go with their gut, to reach a verdict based on which story they think is the most plausible. Was the prosecution's narrative more believable than the defense's? One of the mock judges, remembering the real trial she judged last year, a trial that ended with the accused sentenced to death, broke down in tears because she didn't know anything for sure. Jurors are told they shouldn't convict if there is a shadow of a doubt, but for the mock judges the entire process was darkened by doubt.

At the end of the program NHK interviewed one of the real lay judges in the Kijima case. He wasn't allowed to discuss the decision in detail but admitted it had been "difficult to make a clear judgment." And in the end there was "no option but to convict. We did what we were supposed to do."

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