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Citizen participation in criminal trials in Japan☆

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1. Two new systems of citizen participation

Japanese modern criminal justice had kept a strong characteristic of professionalism until the end of last century. Until a few years ago, it was only legal professionals – with the exception of the defendant – who argued before the court and it was also only professional judges who rendered final judgments. Public prosecutors also monopolized their power in criminal prosecution. One of the few exceptions to this principle of professionalism in Japan was the jury trial that existed from 1928 to 1943. Another exception has been the Prosecution Review Commission (PRC), which was introduced after the World War II as a unique Japanese variant of the grand jury system; eleven randomly selected lay citizens review prosecutors' discretionary non-prosecution decisions in criminal cases.

However, at the beginning of twenty first century, Japan incorporated two new systems of citizen participation into the criminal process. One is the *Saiban-in* trial and the other is victim participation.

During the judicial reform process, the function of the PRC was also substantially altered because in the old arrangement, a decision from the commission was not legally binding on the prosecutor. In the new system, the court appoints an attorney to serve as a prosecutor who must file an indictment, and a person must be indicted if the commission renders a decision twice that he or she should be criminally charged.

Since *Saiban-in* and victim participation are two important systems of citizen participation in criminal justice and trial process, this paper examines them in detail in the following section.

☆The original version of this essay was presented at a symposium on citizen participation in criminal trials in the 16th World Congress of International Society for Criminology in Kobe, Japan on August 7, 2011. This version of the manuscript incorporated recent changes and information on the *Saiban-in* system. The author thanks Prof. Setsuo Miyazawa for organizing the symposium and Prof. Hiroshi Fukurai for proofreading the draft for the publication. The appreciation is also extended to Mr. Weiqi (William) Qiu for editorial comments and suggestions.

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2. The *Saiban-in* trial

2.1. Outlines of the system

The *Saiban-in* system has been implemented since May 2009. Six ordinary citizens and three professional judges constitute a collegiate body.[1] The nine members deliberate together and decide guilt and, if they reach a conviction, the sentence. While professional judges have sole discretion on deciding matters of procedure and interpretation of the law, the nine people share equal votes on fact finding, application of the penal law, and sentencing. The basic rule of deciding process is a simple majority. However, a judgment against the defendant, (in the case of conviction), requires five votes including at least one from the judges. Five votes from the *Saiban-in* (a lay judge) are sufficient for an acquittal.

Potential *Saiban-in* members are randomly selected from a local list of voters. The court summons and appoints them through a process of selection. A *Saiban-in* has no fixed term, serving for adjudication of only one criminal case.

The law limits the use of the *Saiban-in* system only to the most serious criminal cases involving murder, bodily injury resulting in death, robbery and rape resulting in bodily injuries, dangerous driving resulting in death, or drug trafficking. The defendant in a case has no choice for either choosing or opting out of a *Saiban-in* trial. This automatic application is an apparent feature of Japanese system in comparison to American and/or Korean jury system that provides defendants with an option for a bench trial.

The *Saiban-in* system contains judicial elements from European legal tradition – in particular German – whereby lay and professional judges deliberate and decide together not only the guilt but also the sentence. German lay judges are also required to serve for a fixed term. The *Saiban-in* system also shares a common element with the Anglo-American jury system whereby citizens serve for the adjudication of only one case, having no fixed term for jury service. French jury seems most similar to Japanese *Saiban-in* because a joint panel of both lay and professional judges is asked to serve for the adjudication of only one criminal case.

2.2. Saiban-in outcomes

In the period from May 2009 to July 2012, Saiban-in panels tried 5604 defendants. This number is less than expected. Before the implementation of the lay justice system, it was estimated that more than 2000 defendants a year would be charged with serious and violent crimes and tried by lay judges. The differences in the numbers may reflect an actual decrease in the overall number of criminal cases in these years, while it is also possible that public prosecutors' cautious discretion led to the under-charging of the defendants, thereby disqualifying them for lay adjudication.

A total of 4163 defendants received judgments rendered by the *Saiban-in* during the same period: 4041 out of the 4163 defendants were convicted, and 11 were partially convicted and acquitted because of multiple counts and 18 were completely acquitted.[2] This rate of complete acquittal (0.5%) may seem very low to foreign legal observers. However, one should take note that even in cases in which the defendants have admitted guilt, a full trial is mandatory in the Japanese system. From 2006 to 2008, for three years, professional courts acquitted 44 defendants out of

[1] If the defendant will not contest the charge, the trial will then be simple: the court can compose a panel with one professional and four *Saiban-in* judges for adjudication. However, this special rule has not been applied in practice.

[2] http://www.saibanin.courts.go.jp/topics/pdf/09_12_05-10jissi_jyoukyou/h24_7_sokuhou.pdf, 3.

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7522 (0.5%) who were indicted with charges that could have been tried by *Saiban-in* panels.[3] These acquittal rates between the *Saiban-in* and professional courts are nearly identical.

What is interesting is that the acquittal rate of *Saiban-in* courts is considerably high in cases related to drug trafficking, including the alleged smuggling of stimulant drugs. In the period from May 2009 to July 2012, *Saiban-in* courts acquitted 8 defendants out of the 376 tried (2.1%),[4] while professional courts acquitted only one out of the 178 (0.6%) tried between 2006 to 2008[5] A typical acquittal of this type happens in a drug mule case. In such a case, the defendant is found carrying large amount of drugs in his/her suitcase at an international airport, but denies the intention of transporting them.

The most remarkable example of an acquittal by a *Saiban-in* court is a case decided by the Kagoshima District court on December 10, 2010.[6] The prosecution had charged a defendant of a robbery with murder of a couple; they also demanded the imposition of death penalty as a sentence, the court with *Saiban-in*, however, did not find proof of guilt beyond a reasonable doubt. Although the prosecution appealed to the Fukuoka High Court against the acquittal, the case ended without a judgment by the appellate court because the defendant died pending the procedure.

Some American studies on lay participation suggest that a jury is more likely to find the defendant not guilty than professional judges in cases with "weak" evidence.[7] It is likely that the *Saiban-in* trial too, renders higher rates of acquittal than professional judges. While professional judges evaluate the facts and evidence through a lens acquired in many years of experience, lay judges interpret and make judgments on the one unique case at hand. The difference in their experiences may make it easier for *Saiban-in* to apply a different level of reasonable doubt standards in a given case than professional judges. Unlike American jurors, however, this potential difference has not become apparent in Japanese *Saiban-in* trials.

It is an intriguing, yet unanswered question as to whether and how a sentencing pattern has changed as a result of citizen participation in criminal trials. The Supreme Court Secretariat has published a report comparing the distribution of various sentences on different types of criminal trials between professional courts and *Saiban-in* courts during the last three years.[8] The report shows that *Saiban-in* courts rendered somewhat longer prison terms on crimes such as attempted murder, bodily injury resulting in death, and rape and robbery resulting in bodily injuries than the professional courts; the length of sentence was roughly identical for other crimes like arson and drug smuggling. This ostensible difference in the severity of sentence with respect to the type of crime committed reflects a difference in idealized views on the appropriateness of the severity of penalty between the two courts.

Japanese law gives courts the discretion to order probationary supervision in cases where the court suspends imprisonment of the offender. The percentage of probationary supervision out of all suspensions of imprisonment is substantially higher in *Saiban-in* trials than professional courts.[9] This possibly reflects citizens' expectations that provisionary supervision as a form of penalty will aid in the rehabilitation of the offender.

[3] http://www.courts.go.jp/saikosai/vcms_lf/80818004.pdf.
[4] Supra note 4.
[5] Supra note 5.
[6] Johnson reported the case. David Johnson, Capital Punishment without Capital Trials in Japan's Lay Judge System, Vol.8, Issue 52, No.1 The Asian Pacific Journal, 17–20 (2010).
[7] E.g., Harry Kalven & Hans Zeisel, The AMERICAN JURY (1966), 55–59.
[8] http://www.courts.go.jp/saikosai/vcms_lf/80818005.pdf.
[9] The percentage of probationary supervision ordered by professional courts from 2006 to 2008 was 30.6%, while the percentage by *Saiban-in* courts from 2009 to 2012 was 55.1%. http://www.courts.go.jp/saikosai/vcms_lf/80818006.pdf.

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It has been customary for Japanese judges to render a sentence that was slightly more lenient than the prosecution's recommendation, typically reducing the requested term by 10 or 20 percent. The public prosecutor offices presumably have some common standards for sentencing. Although in theory a court could render a sentence that exceeds the prosecution's recommendation, it has been quite rare for a professional court to do so. As a consequence, sentencing outcomes for any particular case have been highly predictable to experienced lawyers. The Supreme Court Secretariat has compiled a database of previous sentences so that lay judges in the *Saiban-in* court can have rough guidelines for penalties on similar crimes. Parties and judges routinely cite the data and inform lay judges of the sentencing norms in similar cases.

However, it is not rare for a *Saiban-in* court to give a sentence that exceeds what the prosecution has recommended. On the other hand, *Saiban-in* courts can also sometimes render a sentence much more lenient than the prosecution's request. In one particular case, a *Saiban-in* court gave a more lenient sentence than what even the defense counsel had recommended[10]. There is, then, a greater spectrum of sentencing outcomes in *Saiban-in* courts than in professional courts; this also means that sentencing became less predicable. This is not particularly unwarranted because lay judges do not have prior knowledge of sentencing practices for a particular crime and, even when they are informed of them, may consider them to be less binding than professional judges do.[11]

So far, the introduction of *Saiban-in* trial has brought more evident changes to practices during hearings and trials rather than to actual trial outcomes. Traditional professional courts routinely had hearings with lengths lasting several weeks for each criminal case, which resulted in lengthy trial procedures, sometimes as long as several years for the first instance. On the other hand, *Saiban-in* courts apply consecutive hearings and most of them complete trials within several days. In traditional professional courts, the main evidence of the prosecution consists of documented statements of the accused and witnesses. Oral arguments by both parties were ceremonially read aloud without any discussion or vivid cross-examination. In *Saiban-in* courts, the evidence tends to involve live testimonies from multiple actors in trial. Prosecutors and defense attorneys often defend their sides in order to persuade *Saiban-ins* with their oral arguments. Enthusiastic attorneys learn methods of trial advocacy by inviting experienced lawyers from the U.S. The overall atmosphere and tone of *Saiban-in* trials are more dramatic and easier to understand for observers than that of the professional courts.

It is also important to examine the process by which professional and lay judges deliberate together. But it is unrealistic to study real deliberation processes because the law imposes strict confidentiality on ex-*Saiban-in* members. They cannot recount specifics from the deliberation room other than their own impressions or emotions regarding their involvement in the deliberative process.

Japanese law provides recourse for appeals to both sides of a trial. Prosecution can appeal against an acquittal. Grounds of the first (*kouso*) appeal can involve not only a matter of law, but also a matter of facts including fact-finding and sentencing. The traditional system of appeal was not altered by the introduction of *Saiban-in* trials and lay judges do not participate in appellate processes. One may find a contradiction with this arrangement because three

[10]When the charge was not contested, defense counsel usually recommended simply "a lenient sentence" to a professional court without referring to a specific term of imprisonment. Now, in *Saiban-in* trials, it has become a standard practice for a defense counsel to recommend a specific sentence.

[11]By July 2012, *Saiban-in* courts have sentenced 14 defendants to death.

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professional judges composing the High Court can in fact overrule any fact-finding and sentencing rendered by *Saiban-in* courts during the appeal process. Thus, this sort of overruling can potentially undermine the overall legitimacy of citizen participation in the justice system.

Many commentators argue that appellate courts should respect judgments of *Saiban-in* courts, limiting appellate overrulings to cases of obvious misjudgment. The first ever *Saiban-in* acquittal, which was a drug mule case, was quickly appealed by the prosecution. In this appeal, the Tokyo High Court judged that the fact-finding engaged by the *Saiban-in* court was improper, reversing the acquittal and convicting the defendant. In a subsequent *jokoku*-appeal by the defendant for the same case, however, the Supreme Court overruled the appellate decision and upheld the original acquittal verdict rendered by the *Saiban-in* panel.[12] The Court held that an appellate court should review whether or the fact-finding by the trial court was unreasonable in light of logical or empirical legal standards. Accordingly, an appellate court should show that the finding by the trial court is unreasonable with respect to these logical or empirical laws when it reverses judgments. Supreme Court Justice Shiraki suggested in his concurring opinion that an appellate court has to respect and allow some leeway of discretion to *Saiban-in* courts' fact-finding and sentencing decision, unless it can reveal apparent miscarriage of justice.

On November 16, 2012, in its ruling to a case that challenged the constitutionality of the *Saiban-in* trial in Japan, the Supreme Court declared that the *Saiban-in* system was indeed constitutional.[13] The Court held that the Japanese constitution permitted citizen participation in criminal court, and the duty of *Saiban-in* service did not fall under involuntary servitude, which Article 18 of the constitution prohibits. These judgments by the Supreme Court indicate the Court's respect for, and judicial commitment to, promote the system of citizen participation in the justice system in Japan.

2.3. Why does Japan need the Saiban-in system?

The question on the ultimate purpose of the *Saiban-in* system will yield different answers, depending on who one chooses to ask such as those who planned and created the system, politicians who proposed the legislation, or government bureaucrats responsible for explaining the aim of the new system to legislators and the citizens. While these questions are worth examining more important questions are more practical ones, including what changes citizen participation actually brings to Japan's judicial process and how Japanese legal apparatus can be affected by the introduction of the new lay adjudicatory system.

The legislator originally adopted the system as a major item to engineer a wholesale reform of Japan's justice system, with the aim to enlarge and empower the role of the judiciary in Japanese society. The Justice System Reform Council (JSRC) submitted a set of comprehensive recommendations on judicial reforms to the Japanese cabinet in 2001.[14] The recommendations included many important proposals such as a dramatic increase in the number of lawyers, renewal of professional legal education programs, the introduction of new professional law schools, and the expansion of legal aid programs, and the activation and restoration of Japan's civil justice. In the area of criminal justice, the recommendations introduced assigned counsel at a pre-indictment stage of the criminal process, new reinforcement of PRC's prosecutorial

[12]Judgment of the Supreme Court on February 13, 2012, 68 Saiko Saibansho Keiji Hanreishu (Keishu) 482.
[13]Judgment of the Supreme Court November 16, 2011, 65 Keishu 1285.
[14]http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612_e.html.

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power, and of course, the establishment of a *Saiban-in* system. Advocates of the reform believed that a large-scale change was necessary for further democratization of Japanese society. One of the chief catalysts of the movement was series of massive economic deregulations that the conservative party lead by Prime Minister Koizumi promoted. Political leaders at that time wanted to transform Japan's traditionally egalitarian society to more competitive one and the planers of the wholesale change of the judicial system believed that a more effective legal system would be necessary to resolve the emergence of new social and legal conflicts as results of increased free competition.

You can find different explanations and arguments on the reasons why *Saiban-in* was necessary for Japan. Some claim that the system was necessary for promoting the Japanese people's understanding and appreciation of the criminal justice process.[15] Article 1 of the *Saiban-in* Act claims that the merit in the *Saiban-in* system is precisely the participation of *Saiban-in* selected from the people with professional judges promotes people's understanding of justice and enhances their reliance on justice. A close reading of the legal provision seems to suggest that the purpose of the system is then the promotion of people's respect and appreciation toward Japan's judicial institutions. However, if this was the sole case, then the *Saiban-in* system is merely doing publicity work for the courts.

It is questionable if this specific purpose can justify legally obligating free citizens to serve. Advocates against the *Saiban-in* argue that imposing lay judge duty constitutes an undue restriction of freedom. This is especially true if the institution of the *Saiban-in* is for mere publicity's sake; instead, the underlying goal should be to improve the administration of justice through lay participation.

Some commentators argue that the *Saiban-in* system should aim to better reflect people's sound common sense and fair-minded judgment in criminal trials.[16] However, we have no reliable criteria to distinguish between "sound" and "unsound" common sense. Others argue that the *Saiban-in* system is necessary to reduce the miscarriage of justice, especially wrongful convictions. Although it is plausible that lay participation could reduce the number of wrongful convictions, we cannot predict how substantial the effect will be. In light of these different arguments, my view on the significance of the *Saiban-in* system is that it serves a dual purpose.

First, the institution of the *Saiban-in* should, by giving direct participation in the judicial process to citizens, aim to strengthen the legitimacy of criminal justice. Japanese legislators, when drafting the *Saiban-in* Act, did not consider citizen participation in criminal justice as a clear expression of democratization of the Japanese legal process, which is obviously different from their Korean counterparts who explained the introduction of Korea's new jury system to be an explicit and conscious effort to invoke the concept of democracy. Most of the Japanese commentators do not link the *Saiban-in* to democracy. Quite the opposite, they believe that the judicial process should be free from democracy, because the courts are professionally tasked with protecting the rights of the minority against the interests of the majority.

However, the JSRC recommendations have explicitly requested that the Japanese people break away from a previous conception of the legal status of "governed objects" to become "governing subjects". The *Saiban-in* system as conceived by the JSRC acts as a conduit and venue to establish the status of governing subjects and directly take part in the exercise of judicial power. The recommendations also planned to strengthen the legitimacy of direct

[15] E.g., Osam Ikeda, KAISETSU SAIBAN-IN HO (Commentary of Saiban-in Act), 3 (2nd. ed. 2009).

[16] E.g., Comment by Masahito Inoue, who is a leading scholar of criminal procedure and lead planning of Saiban-in system, 1208 Jurisuto 134 (2001).

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participation in the administration of justice. Democracy, then, in this context, is not merely a notion of majority rule, but a conception revolved around citizens' active participation in decision-making via collective involvement in deliberative processes, i.e., deliberative democracy. Corey and Hans suggested that citizen participation in the judicial process, including the Japanese *Saiban-in*, serves as a vital tool for instituting such a model of deliberative democracy.[17] Some Japanese commentators also understand the *Saiban-in* system as a venue for promoting active deliberation among participants.[18]

Hiroshi Fukurai, surveying recent international trends of the proliferation of lay adjudication in criminal judicial reform, suggests that the new popular jury systems adopted in Asian countries may reflect the adoption of counter-imperial strategies for resisting potential future political and legal oppression by their own governments that may closely follow the U.S. government's hegemonic behavior after the collapse of the Soviet Union.[19] Some, including the author, indeed expect that the *Saiban-in* system may democratize Japanese criminal justice. However, it was the government that took the initiative in introducing the *Saiban-in*. In Japan's case then, its introduction seems to have been driven mainly by political considerations whereby a competitive society would need new grounds of legitimacy, which was to be leveraged by giving access to people's direct participation and collective input into judicial decision-making. The recent decision by the Supreme Court which confirmed the constitutionality of the *Saiban-in* system pointed out that in Western traditions, citizen participation in criminal processes had the function of securing the legitimacy of the justice system; the reasoning implied that the *Saiban-in* system was to serve a similar purpose and function.

Another significant implication of the *Saiban-in* system is that it will potentially make Japanese judges more autonomous and independent. The Japanese Constitution prescribes the independence[20] of each judge and guaranties his or her judicial status in court.[21] The reality is, however, that most Japanese judges begin to serve as a young assistant judge at the start of their professional career and remain in the courts until they reach the age of retirement, moving among many districts in the whole country throughout their judicial career with an interval of several years at each court jurisdiction. The Supreme Court Secretariat manages personnel matters of all judges such as their placement and amount of salary. This routinized practice of reassigned duties within the traditional court system can restrict and eradicate the judicial discretion of Japanese judges, resulting in a tendency for them to avoid potential conflicts with colleagues, superior officers and prosecutors. Akira Kitani, an experienced retired judge, frankly points out a tendency among Japanese judges to develop sympathy toward prosecutors and in some situations feel pressured from them.[22] Japan's bureaucratic judges stand in stark contrast against Korean judges, who tend to exert much greater control over prosecutors.

[17]Zachary Corey and Valerie P. Hans, Japan's New Lay Judge System: Deliberative Democracy in Action?, 12 Asian-Pacific Law & Policy Journal 72 (2010).

[18]See, Daisuke Midori, Saiban-in no Hutan, Gimu no Seitoka to Minshushugi, (Democratic Justification of Burdon and Duty of Saiban-in) 77:4, Horitsu Jiho 40 (2005); Noboru Yanase, SAIBAN-IN SWEID NO RIPPOUGAKU (Legislative Theory of Saiban-in System) (2009).

[19]Hiroshi Fukurai, Introduction to the Special Issue: The Future of Lay Adjudication and Theorizing Today's Resurgence of Civic, Legal Participatory Systems in East and Central Asia, 32 International Journal of Law, Crime and Justice 141, 142 (2010).

[20]Article 76, Paragraph 2.

[21]Article 78.

[22]Akira Kitani, Tsuyosugiru Kensatsu (Kensatsukanshiho) to Saiban-in Seido (1) (Dominance of Prosecution and Saiban-in System), 71 Kikan Keijibengo 104,110 (2012).

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With the introduction of the *Saiban-in* system, however, judges can now invoke the authority of *Saiban-in* when they recommended unfavorable judgments against the interest of prosecutors or accepted practices of their colleagues. In other words, they can attribute an unfavorable decision or procedure to the collective opinions of *Saiban-in* judges – this situation can liberate them from concerns of potential retaliation from the prosecution and superior courts than ever before. Speaking more baldly, professional judges can put responsibility for such decisions on *Saiban-in*. For example, around the time of implementation of the *Saiban-in* Act, a movement emerged in courts to make more flexible the administration of the bail system and the pre-trial release of defendants.[23] The jurists in the Supreme Court gave some creative decisions that expanded the scope of discovery of evidence to benefit the defense and promote understandings of citizen participants in the *Saiban-in* trials.[24]

Some have voiced concern that the participation of citizens would actually undermine the independence of professional judges. This view, however, fails to take into consideration that the *Saiban-in* system provides a strong foundation for deliberative democracy and strengthens greater independence and autonomy of judges, which will further promote an overall autonomy of the law and judicial process in Japan.

2.4. Arguments against the Saiban-in system

The introduction of the *Saiban-in* system was met with vigorous oppositions. Those opposed raised varieties of reasons against citizen participation in the justice system. One major argument has been that citizen judges lack the proper ability or training to make judgments adequately – some lawyers believe that the *Saiban-in* members cannot decided properly either on the guilt of a defendant or his or her sentencing. Even some lay people themselves expressed that the law should not demand them to make judgments on such difficult matters, arguing that they are unqualified to the task.

It is no doubt a challenging role for anyone to decide on the guilt of an individual, especially if the sentencing may involve death penalty. There is, however, insufficient evidence to indicate that lay people lack proper competence in carrying out this task. Research by prominent jury scholar Valerie Hans indicated lay judges in America showed a reliable ability to understand, critically evaluate, and even employ scientific evidence in deciding the outcome of complex trials.[25] We have no positive reason to assume that Japanese citizens cannot do what American citizens have been doing in their legal system for many centuries. Furthermore Japanese judges who have experience working with *Saiban-in* judges reacted positively to the lay judges' sincerity and ability to evaluate evidence and arguments.[26]

The *Saiban-in* system symbolizes the concept of civic autonomy or self-government that encourages citizens to take responsibility in making decisions of social administration. The disagreements over the *Saiban-in* system are, in fact, opposing views that support the system of authoritarianism or civic autonomy. Therefore, whether we should support or oppose the *Saiban-in* system should depend on whether or not we believe it is good for responsible citizens to directly take part in the resolution of important issues in civil society.

[23]See, Yoshiki Matsumoto, Saiban-in Saiban to Hoshaku no Unyo nitsuite (On Administration of Release on Bail under Saiban-in Trial), 1312 Jurisuto 128 (2006).

[24]Decisions of the Supreme Court on December 25, 2007, 61 Keishu 895; on June 25, 2008, 62 Keishu 1886; on September 30, 2008, 62 Keishu 2753.

[25]Valerie Hans, AMERICAN JURIES (2007).

[26]For example, see Judge Tochigi's comment on quality of *Saiban-in* members, 2 Ronkyu Jurisuto 41 (2012).

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Many people who oppose the death penalty assert that the law should not obligate them to serve as lay judges because direct legal participation stands in conflict with their desire to not impose such a harsh sentence on anyone. But if one opposes death penalty as a form of sentence on ideological grounds, he or she should take advantage of the opportunity to serve as a *Saiban-in* member and vote against death penalty in a given case. Making that effort, one can be proud that one has done what he or she should do even if he or she has lost in the voting procedure. On the contrary, if one believes that the society should support the death penalty, he or she should not place its decision only on the shoulder of professional judges. In the U.S., a jury verdict is indispensible for a capital sentence. The ultimate punishment demands the endorsement of citizen members.

Some also predict that lay participation will increase the risk of wrongful convictions. We have, however, no reason to assume that the *Saiban-in* system will increase risk of wrongful conviction because, laypersons are more likely to reach an acquittal compared to professional judges in general. The new pretrial conference system that the legislator introduced also substantially enlarged the defense's chance to obtain discovery of evidence from the prosecution. Making use of the new system, the defense can access more evidentiary materials than ever before in order to rebut prosecution's case. Thus, the defense is in a much better situation with the *Saiban-in* trial in comparison to the traditional trial by a professional court.

2.5. Public opinion on the Saiban-in system

Some public opinion polls before 2009 showed that the majority of Japanese people responded negatively to the prospects of serving as *Saiban-in*.[27] Their reasons for the general negative attitude toward serving were either: (1) feeling incompetent in making decisions in legal matters; (2) too heavy a responsibility for lay judges to be involved in legal decision-making; or (3) generally too busy to take a time off from work to serve as a *Saiban-in* member. In 2011 the Supreme Court Secretariat's poll indicated that 83.4% of respondents would not want to serve as *Saiban-in*.[28] At the same time, the poll did show that many felt that the *Saiban-in* system could potentially make the judicial system more familiar to people, has greater efficacy for reflecting the people's sense in judicial matters, and help make people feel a personal stake in the rendering of justice. A poll conducted in 2010 by *Yomiuri Shimbun*, a major Japanese newspaper, also showed that although the proportion of those who were unwilling to serve as *Saiban-in* remained still high (76%), there was a steady increase in the number of those who thought that the *Saiban-in* system has improved the overall quality of Japan's justice system.[29]

The Supreme Court Secretariat also reported that in the period between 2009 and 2012, Japanese district courts summoned 352,598 prospective *Saiban-in* judges, out of whom

[27]Fukurai and Krooth reported a survey of many polls on the willingness to Saiban-in service. Hiroshi Fukurai & Richard Krooth, What Brings People to the Courtroom? Comparative Analysis of People's Willingness to Serve as Jurors in Japan and the U.S., 38 International Journal of Law and Justice 198, 201–204.

[28]This ratio contains those who chose "don't like to serve even if it is a duty" (41.1%) and those who chose "unwilling but have to serve if it is a duty"(42.3%). http://www.saibanin.courts.go.jp/topics/pdf/09_12_05-10jissi_jyoukyou/h23_isiki_5.pdf.

[29]In 2010, 59% of those who answered thought that Japanese criminal justice improved with the *Saiban-in* system (48.2% in 2009), while 9% thought it became worse with Saiban-in (26.9% in 2009). See http://www.yomiuri.co.jp/feature/fe6100/koumoku/20100403.htm; See also http://www.yomiuri.co.jp/feature/fe6100/koumoku/20090503.htm.

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196,568 were exempted from the service without appearing before the court.[30] These numbers suggest that courts were very flexible in exempting *Saiban-in* candidates from the duty of service in case they asserted personal difficulties to serve. Out of 156,021 people who were required to appear for the selection process, 123,388 actually came to the court, which makes a final appearance rate of 79.1% or a gross appearance rate of 35.0% in the summoned population.

The Supreme Court Secretariat also indicated that in 2011, 97.6% of *Saiban-in* members responded to a voluntary questionnaire from the court after finishing their service. And 59.9% of lay judges responded that the trial was comprehensible to them, while only 7.3% answered that it was difficult for them to understand court proceedings.[31] Nearly all (95.8%)[32] of the respondents gave positive evaluations of their trial experience, while 51.8%[33] of them originally had a negative opinion toward service prior to their duty. This significant gap suggests that actual legal participation made them feel more positive about their experience in the *Saiban-in* trial and procedure.

These statistics show that, while a substantial population of Japanese citizens may be still unwilling to serve as lay judges, once given the role, many of them perform the role and become more positively disposed to it. Although an anti-*Saiban-in* campaign is still being mounted in Japan, people's negative feelings will gradually erode as the system begins to slowly take root in Japan's society.

Education, then, is vital for improving people's overall perception of *Saiban-in* service. Legal literacy courses that train individuals in a basic understanding of the *Saiban-in's* role are currently being developed in Japan's high schools. The aim, however, is not to provide them legal grasp or technical judicial knowledge but to foster a legal consciousness for Japanese proactive subjects; future generations will become much more predisposed to lay participation having had accumulated the relevant socialization and legal education on the social importance of civic adjudication.

2.6. Improvements to the Saiban-in system

There are still improvements to be made to the current *Saiban-in* system. The most important issue is the heavy burden of confidentiality clause imposed on ex-*Saiban-in* members, which, if broken, entails a heavy penalty. The confidentiality rule prevents ex-*Saiban-in* from either speaking about the deliberation process or expressing their opinions on the verdict itself. Those who designed the system explained that this rule is necessary to guarantee free and viable discussion during actual deliberation.

The drawback, however, is that little is actually known about what the deliberation process is like. Since the core of the *Saiban-in* system entails close collaborations of laypersons together with professional judges, it is most essential to know whether judges actually guarantee free discussion and/or respect the opinion of their lay counterparts. While Korean law exempts ex-jurors from confidentiality when they cooperate for academic research purposes, Japanese law provides no such exemption. This stringent rule makes any formal academic research on the

[30] Supra note 4 at 5.

[31] http://www.saibanin.courts.go.jp/topics/pdf/09_12_05-10jissi_jyoukyou/h23_q1.pdf.

[32] This ratio contains those who chose "it (jury service) was a very good experience." (55.2%) and those who chose "it was a good experience." (40.3%).

[33] This ratio contains those who chose "I didn't like to be *Saiban-in*." (19.3%) and those who chose "I didn't like to *be Saiban-in* so much." (32.5%).

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Saiban-in extremely difficult, even when such studies can potentially improve and refine the current system. The confidentiality rule also renders it impossible for ex-*Saiban-in* to share their court experience even with their significant others. This also means that they may not be able to receive the necessary emotional support from their family needed for the mental stress they developed while in service.

Another problem with the current *Saiban-in* system is with respect to the function of the appellate courts. In 2011, the High Courts reversed some acquittals by *Saiban-in* courts. If such acquittals are routinely reversed by a higher court, participation in *Saiban-in* will quickly lose its judicial legitimacy and political significance. Thus, appellate reversals should be only restricted to cases involving jury nullification, which Japanese law does not allow. Since the above-mentioned case was deliberated, the Supreme Court has restricted the reversal of an acquittal only in cases where there was an obvious mistake made by the *Saiban-in* court; the scope of High Courts will now be more narrowly tailored when reviewing *Saiban-in* verdicts and their legitimacy.

One may note some other potential improvements to the system. A report by the Supreme Court Secretariat shows that the proportion of lay judges who have failed to fully comprehend the facts and procedures pertaining to a *Saiban-in* case is increasing.[34] This trend is explained by the fact that more and more complicated cases are now being tried in *Saiban-in* courts. Yet, at the same time, the trend may also in part be due to the large volume of detailed information presented to lay judges during trial from both sides. It is questionable whether these documents benefit or detract from *Saiban-in* apprehension of the case itself. Instead, lawyers may be able to improve lay judge comprehension by limiting the quantity of information presented and making their cases more concise. The report by the Supreme Court Secretariat also suggests that lay judges often consider the defense's arguments to be more difficult to comprehend than those of prosecution. Lay judges, having little experience with criminal procedures, are more susceptible to parties' skills of presentation than are professional judges. This forces prosecutors and defense attorneys to improve their trial advocacy skills in order to properly engage with lay judges.

Lastly, most courts prepare a minute-to-minute schedule of hearing for each *Saiban-in* trial; some professional judges with little experience facilitating *Saiban-in* trials may feel uneasy without a detailed procedural agenda. The nature of the trial itself, however, makes it difficult to estimate the time it takes to, for instance, examine each of witnesses. Thus, it is desirable for judges to gain more experience in *Saiban-in* trials, develop confidence in court processes, and learn to become more flexible and efficient on trial administration.

3. Victim participation

Victim participation in criminal trials started in December 2008 – earlier than the implementation of the *Saiban-in* system. It came as a result of a larger popular movement for the protection of victim rights that emerged in the last decade of twentieth century.[35] In 2000, the Japanese legislature amended the Code of Criminal Procedure (CCP) to allow an alleged victim of a charged crime to make statements of opinion during trial.[36] In 2007, it added another mode

[34]See, 2 Ronkyu Jurisuto 29–32 (2012).
[35]For the historical background of treatment of victims in Japanese criminal justice, see Shigenori Matsui, Justice for the Accused or Justice for the Victims?: The Protection of Victims' Rights in Japan, 13 Asian Pacific law and Policy Journal 54, 56–67 (2011).
[36]CCP, article 292-2.

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of victim participation[37] that made it possible for crime victims to participate more actively in criminal trials.[38]

The alleged victim of a certain category of serious crimes or their bereaved relatives can participate in the trial with permission from the court. A lawyer can represent the victim participant. If victim participants cannot afford an attorney, they can request the court to appoint a counsel for representation. A victim participant can examine a witness on matters of sentencing and can question the defendant in general. He or she can also argue before the court at the closing stage of the trial.

On the other hand, victim participants can neither present evidence to the court nor appeal a verdict. Additionally, they cannot initiate criminal prosecution independently from public prosecutors' decision as the French *partie civil* can. The status of a victim participant is somewhere between a party to the trial and witness for the trial. In 2011, 914 victims applied to participate in 586 cases and 902 of them were allowed to participate in trials.[39]

Some people expressed fear that lay judges in a *Saiban-in* trial may choose an unreasonably severe sentence when they were under the emotional influence of victim participants. One may attribute some examples of severe sentences by *Saiban-in* courts to the effect of victim participation. It is difficult to measure, nonetheless, how substantively the actual influence of victim participation exerts upon actual sentencing decisions.

Most legal professionals do not believe that the demand for severe penalties by the victim or surviving family should have a major influence on sentencing decisions. It is because they do not believe that killing a person who has no grieving family is a lesser crime than killing a person whose family and relatives miss him/her so much. Human lives must be treated equally under the law. On the other hand, a victim participant can reasonable expect a penalty to be largely reflective of the level of heinousness of crimes committed against the victim. This gap of perception is inevitable, given the differences in the positions of crime victims against legal professionals. If most lawyers' belief of sentencing policy is proper, the system of victim participation may necessarily betray victims. It is possible that experience of participation makes the result of the trial more acceptable to a victim, even if the participation does not have a substantive impact on the ultimate outcome of the trial. Whether or not the system is worth keeping depends on whether a victim should have an opportunity to argue in the trial, even if his or her opinion will not substantially change the actual outcome of the sentence.

One feature of Japanese criminal procedures presents a serious problem, particularly when combined with the *Saiban-in* trial and victim participation. Since Japanese criminal trials are not bifurcated, the court examines evidence for sentencing and hears argument of the victim participant and/or a victim impact statement before they reach a verdict of conviction. Given this type of procedural arrangements, it is likely that lay judges may be influenced at the verdict phase of trial by emotive information that is not logically relevant to the issue of guilt. An experiment of mock *Saiban-in* trials by Makiko Naka showed that even simple exposition to a portrait of the murdered victim not only could increase the severity of sentencing, but also the rate of conviction.[40] Although some judges try to create bifurcated trials in some original and

[37]CCP, articles 316-33:316-39.

[38]Saeki concisely described two modes of victim participation in Japanese criminal trials. See Masahiko Saeki, Victim Participation in Criminal Trials in Japan, 32 International Journal of Law, Crime and Justice 149, 150–153 (2010).

[39]Table 43 of Shiho Tokei Nenpo Keijihen (2011), available at http://www.courts.go.jp/sihotokei/nenpo/pdf/B23DKEI43.pdf.

[40]Makiko Naka, vol. 48, no.3 Keiho Zasshi 405 (2009).

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innovative ways, the vast majority of courts do not follow such a model thus far because current criminal codes do not require it. This becomes particularly problematic in capital cases, where surviving families' emotions are naturally intense.[41]

4. Conclusions

During the twentieth century, the global criminal justice system was predominated by professional judges, seriously hampering any chance of citizen participation in a legal decision-making process. Yet, in the new century, many countries, including Spain, Russia, Venezuela, and Argentina have begun to restore the jury trial. In East Asia, Korea and Japan have both successfully implemented new systems of citizen participation in the justice system. Taiwan is also currently planning to introduce its own version of a trial by jury. This global trend suggests that the authority and power of the legal profession is losing ground, and judicial systems now need new sources of legitimacy to gain wider public support. The new challenge for future Japanese citizens lays in whether or not they can continue to participate actively and positively in trials of their fellow citizens. The challenge facing future legal professionals in Japan is whether or not they can strike a delicate balance of respecting citizens' opinions as sovereign, while retaining the constitutional demand to keep reasonable justice and autonomy of the law.

[41] Supra note 8, at 21.

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