

〈논문〉

## Introduction of the *Saiban-in* System and Reformation of Criminal Procedure in Japan\*

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### Abstract

In 2004, Japan enacted a statute (the *Saiban-in* Act) to introduce a system of lay participation in criminal trials. In the new system, six people selected randomly from among the citizens in each case would serve as *Saiban-in* (lay assessor) and, in collaboration with three professional judges, engage themselves in deciding both guilt and sentence in the trials involving capital and other serious offenses.<sup>1)</sup>

After five years of preparation, the *Saiban-in* Act came into force on May 21, 2009. In the four years and eight months since the first *Saiban-in* trial was held in August that year, 6,530 defendants were tried by the mixed panel courts, in which 36,837 citizens served as *Saiban-in* and 12,597 as supplementary *Saiban-in*.<sup>2)</sup>

The introduction of this new system, which almost necessarily accompanied several important revisions in the Code of Criminal Procedure (CCP), has already led to not only dramatic changes in the management and manner of criminal trials but also significant developments in judicial precedents. It also seems to have been changing the attitudes of criminal justice professionals and even the public views on criminal law and justice in the long run.

In the following parts, I will give a brief survey on the backgrounds of the introduction of the *Saiban-in* system and the ongoing reform which it has brought about in the Japanese criminal procedure.

Keywords: *Saiban-in*, lay participation, jury, criminal procedure, Justice System Reform, Japan

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## I . Introduction of the *Saiban-in* System

### 1. Historical Backgrounds

#### (1) The Former Jury System

This is not an entirely novel experience for Japan to have a lay participation in criminal trials. From 1928 through 1943, there was a jury system in which 12 selected citizens heard the evidence and decided the guilt of the defendant in the trials involving serious offenses.<sup>3)</sup>

The former jury system was adopted as a result of party politics in the 1910s and 1920s<sup>4)</sup> when the so-called *Taisho* Democracy movements appeared temporarily to prevail in various aspects of the Japanese society before militarism and totalitarianism took over. There were outcries for popular election and freedom of speech in political aspect, for gender equality and laborers' right to organize union in social aspect and for liberalism or modernism in cultural aspect. A political historian later presumed that the jury system, modeled after the American one, was proposed by the then cabinet with the intention of attaining a populist effect in place of popular election which they deemed too early to adopt.<sup>5)</sup>

Although the introduction of jury trial into the authoritarian, inquisitorial criminal

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1) The *Saiban-in* Act, art. 2 sec. 1, *enumerating* the offenses for which death penalty or life-imprisonment is prescribed by law and the intentional offenses resulted in the death of the victim for which minimum sentence of imprisonment not less than one year is prescribed by law.

2) Saiko Saibansho Jimu-sokyoku, *Saiban-in Seido no Jisshi Joukyo ni tsuite* (Seido-Shiko~ Heisei 26 Nen 3 Gatsu-matsu) (General Secretariat of the Supreme Court of Japan, The Enforcement Situation of the Saiban-in system until the end of March, 2014), pp. 2-5.

3) The cases involving the offenses for which death penalty or life imprisonment was prescribed by law were mandatorily subject to jury trial unless the defendant waived it (the Jury Act, art. 3), and those involving the offenses for which imprisonment not less than 3 years was prescribed by law, with some exception, was subject to jury trial if the defendant applied for it (*id.*, art. 4).

4) TAICHIRO MITANI, *SEIJI-SEIDO TOSHITENO BAISHIN-SEI* (The Jury System as a Political Institution) (revised ed., 2013), pp. 91 *et seq.*

5) *Id.*, p. 141.

justice system at that time was a remarkable innovation, it deviated from its Anglo-American model in a crucial point. The judges of the court could turn down the jury verdict if they found it inappropriate, and select a new jury to retry the case (*renewal of jury*). This was because of the constitutional provision guaranteeing the individual's right to "trial by the judges determined by law,"<sup>6)</sup> which was interpreted to prohibit jury verdict from binding independent judges' decision. It is also realistically doubtful if the jury trials had any substantial impact upon the criminal justice system as a whole or the general public in those days. Only a small portion of the people, males thirty and over who paid a considerable amount of income tax (less than 8% of those age groups), were eligible for a juror. In addition to that, most of the defendants who were entitled to have a jury trial actually waived it. In the fifteen years of its operation, there were totally 484 jury trials,<sup>7)</sup> including 448 mandatory cases (less than 1.8% of those which could have been subject to jury trial if the defendant had not waived it).<sup>8)</sup>

As it became wartime, jury trials decreased year by year, finally down to just one case in 1942. Next year the military government suspended the Jury Act,<sup>9)</sup> terminating the short life of the early Japanese lay participation system.

## (2) Developments under the Current Constitution

During the postwar occupation by the Allied Forces, it was temporarily put on agenda whether to adopt or revive a jury system<sup>10)</sup> in addition to the criminal procedure

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<sup>6)</sup> The Constitution of the Empire of Japan of 1889, art. 24.

<sup>7)</sup> This includes 24 retrials by renewed juries. Among the 484 jury trails, 215 involved murder and 214 arson. The jury found the defendant not guilty in 81 cases (17.6% of those excluding 24 retrials). Masao Okahara, "'Baishin-ho no Teishi ni kansuru Horitsu" ni tsuite" (On "the Act concerning the Suspension of the Jury Act"), *HOSOKAI ZASSI*, Vol. 21, No. 4 (1943), p. 16; Shiho-seido Kaikaku Shingikai Jimukyoku, Wagakuni de Okonawareta Baishin Saiban (Jissi Jokyo) (Secretariat of the Justice System Reform Council, The Jury Trials Formerly Enforced in Japan) (Material 18, Apr. 17, 2000).

<sup>8)</sup> TAKASHI MARUTA, *BAISHIN-SAIBAN WO KANGAERU* (Thinking about the Jury Trial) (1990), pp. 133, 137-138.

<sup>9)</sup> The Act of Apr. 1, 1943, concerning the Suspension of the Jury Act.

<sup>10)</sup> A provision for the right to trial by jury was included in the early tentative versions of the so-called "MacArthur Draft," which the occupation authorities prepared and presented

reform in which an adversarial principle was adopted after the model of American law. As a matter of fact, the new Constitution of 1946 provides for the right to “trial in the court” (art. 32) in place of the former constitutional provision mentioned above, presumably in order to get ready even for admitting a jury equipped with full power. The Court Act of 1947 also provides that its provisions shall not prevent the establishment of a jury system for criminal cases separately by law (art. 3, sec. 3).

Such an idea, however, was not realized in spite of rapid democratization of the whole ruling systems during the occupation. Not only the Japanese government<sup>11)</sup> but also the occupation authorities<sup>12)</sup> were not so much enthusiastic, probably because of its infeasibility in the postwar social disorders and destructed environments,

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to the Japanese government as a basis for the drafting of the new Constitution. Although the provision was deleted in its final version for unknown reasons, the Japanese government believed that they were required to consider seriously the adoption of such a system in the revision of the Code of Criminal Procedure. *E.g.*, Shihosho Keijikyoku, “Keijisoshoho Kaisei Hoshin Shian” (Ministry of Justice Criminal Affairs Bureau, Plans for the Revision of the Code of Criminal Procedure: A Tentative Draft) (Apr. 30, 1946), in *KEIJSOSHOhO SEITEI SHIRYO ZENSHU: SHOWA KEIJSOSHOhO* (Collected Legislative Materials of the Criminal Procedure Laws: Code of Criminal Procedure of 1948), Vol. 2 (M. Inouye *et al.* ed. 2007), p. 368; “Keijisoshoho Kaisei nitsuki Kouryo subeki Mondai” (Issues for Consideration concerning the Revision of Code of Criminal Procedure) (presented at the first meeting of the governmental Justice System Council, July 7, 1947), *id.*, pp. 33-34. *See also* Nobuyoshi Toshitani, “Sengo Kaikaku to Kokumin no Shihosanka” (Postwar Reforms and Citizens’ Participation in the Justice System), in *SENGO KAIKAKU*, Vol. 4 (the University of Tokyo Institute of Social Sciences ed. 1975), pp. 109-130.

<sup>11)</sup> In response to the negative opinions in the Justice System Council against a jury system for the reason of high cost and possible harmful effects, the Ministry of Justice presented an alternative proposal to adopt a Continental-European type of mixed panel court system, which could not gain majority support, either. The discussion on it ended up with a deferral mainly because of its uncertain constitutionality. *See KEIJSOSHOhO SEITEI SHIRYO ZENSHU: SHOWA KEIJSOSHOhO* (Collected Legislative Materials of the Criminal Procedure Laws: Code of Criminal Procedure of 1948), Vol. 3 (M. Inouye *et al.* ed. 2008), pp. 115, 120, 226-227, 293-296. *See also* Toshitani, *supra* note 10, pp. 130-141.

<sup>12)</sup> At the same time, the occupation authorities thought it necessary for the Japanese government to show due respect for public participation as a principle of democratic judicial system. The above art. 3, sec. 3 of the Court Act of 1947 was the very product of their recommendation on such a ground. Toshitani, *supra* note 10, pp. 150-153.

including court houses, throughout Japan.<sup>13)</sup>

Still certain number of lawyers and scholars, individually or in groups, continuously proposed for lay participation in criminal trials for many years since then. Such movements were stimulated especially since the late 1980s when the judiciary, under the instruction of Chief Justice Koichi Yaguchi of the Supreme Court, began a broad research on the situations of lay participation in several Western countries.

They were divided into two schools. While a school of people asserted to adopt an Anglo-American type of jury system for the purpose either of democratizing the highly bureaucratic, closed Japanese judiciary or of preventing miscarriage of justice by professional judges who, in their opinion, were biased for prosecution or became too much habituated to mass of guilty defendants to look at each particular case without prejudice,<sup>14)</sup> another school of people rather preferred a Continental-European type of mixed panel court consisting of professional judges and citizens because of their concern about possible miscarriage of justice by an inexperienced or runaway jury and ineffective appellate remedy for it because no detailed reason would be shown for the jury verdict. In contrast to the former school's skepticism against possible manipulation of lay assessors by professional judges in a mixed panel court, the latter rather expected that a collaboration of professional judges and citizens should enlighten both of them.<sup>15)</sup>

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<sup>13)</sup> Toshitani, *supra* note 10, pp. 114-118, referring to the answers of the Ministers of State in charge of the new Constitution and of Justice at both Houses of the Diet, and pp. 158-159, speculating the occupation authorities' basic attitude toward the matter and its backgrounds.

<sup>14)</sup> *E.g.*, EIGORO AOKI, *BAISHIN SAIBAN* (Jury Trial) (1981); CHIHIRO SAEKI, *BAISHIN SAIBAN NO FUKKATSU* (Resurrection of Jury Trials) (1996); Satoru Shinomiya, "Baishin, Sanshin, Shokugyo Saibankan (1) Baishin-sei no Tachiba kara" (Jury, Mixed Panel Court or Professional Judges (1) From the Viewpoint of a Jury System Supporter), *KEIHO ZASSI*, Vol. 39, No. 1 (1999), p. 18; Nihon Bengoshi Rengo-kai, "Baishin Seido no Jitsugen ni muketeno Teigen" (Japan Federation of Bar Associations, Proposals for the Purpose of Realizing a Jury System) (Mar. 17, 2000).

<sup>15)</sup> *E.g.*, Ryuichi Hirano, "Kokumin no Shiho-sanka wo Kataru" (Talking about the Citizens' Participation in the Justice System), *HO NO SHIHAI*, No. 87 (1992), p. 38; *id.*, "Sanshin Seido Saiyo no Teisho" (A Proposal for the Adoption of a Mixed Panel Court System), *JURIST*, No. 1189 (2000), p. 50; Hiroshi Sato, "Baishin, Sanshin, Shokugyo Saibankan (2) Baishin-sei no Tachiba kara" (Jury, Mixed Panel Court or Professional Judges (2) From the

Quite contrary, however, there also were deep-seated basic oppositions against lay participation among lawyers and scholars who, in addition to their constitutional objections<sup>16)</sup> inherited from the age of the former Jury Act, convinced themselves that fair and right justice could be done only by independent, legally trained and suitably experienced professional judges.<sup>17)</sup> Many of them also doubted whether the characteristics of the Japanese people whom they stereotyped as obedient to authority as well as averse to litigation would fit in with a Western-fashioned lay participation system, especially with an Anglo-American type of jury system.<sup>18)</sup> As a matter of fact, results of various polls indicated that the public generally put confidence in the works of professional judges.<sup>19)</sup>

## 2. The Justice System Reform

### (1) The JSRC's Recommendations and their Implementation

With these opposite opinions for and against lay participation, not a few people were skeptical if any consensus could be reached on the subject when it was put on agenda for the discussion in the Justice System Reform Council (JSRC) in 1999,<sup>20)</sup>

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Viewpoint of a Mixed Panel Court System Supporter), *KEIHO ZASSI*, Vol. 39, No. 1 (1999), p. 30.

<sup>16)</sup> E.g., HAJIME KANEKO, *SHIN-KENPO TO SHIHO* (New Constitution and the Justice System) (1948), pp. 75-76 and 81; HOGAKU KYOKAI, *CHUKAI NIHONKOKU-KENPO* (Commentaries on the Constitution of Japan), Vol. 2 (1953), pp. 1122 and 1128.

<sup>17)</sup> E.g., KANEKO, *supra* note 16, p. 31.

<sup>18)</sup> E.g., Fumio Aoyagi, "Baishin-sei Sanshin-sei ni tsuiteno Ichi-Kosatsu" (A Study on the Jury System and the Mixed Panel Court System), *JOCHI HOGAKU RONSHU*, Vol. 4, No. 1 (1960), pp. 27 *et seq.*

<sup>19)</sup> For instance, a nation-wide questionnaire survey conducted by a national newspaper right before the beginning of the justice system reform revealed that the public evaluated the general quality of criminal trials by professional judges and that 79% of the respondents deemed judges reliable, the highest score among the professions involved in criminal justice, followed by police officers (74%) and public prosecutors (72%). *The Yomiuri Shinbun*, Dec. 27, 1998, morning issue, special page A.

<sup>20)</sup> Act for Establishment of the Justice System Reform Commission, art. 2 sec. 1; the JSRC, The Points at Issue in the Justice System Reform (Dec. 21, 1999) (English ver.), Chap. III, Part. 2(4) [available at [http://www.kantei.go.jp/foreign/policy/sihou/singikai/991221\\_e.html](http://www.kantei.go.jp/foreign/policy/sihou/singikai/991221_e.html)].

mainly on the initiatives of bar association people who had been longing for a jury system. The JSRC was set up under the cabinet in order to discuss a wide range of challenges to the Japanese justice system and to recommend reforms to make the system much more accessible, reliable and effective in accordance with various needs of the people.

In June, 2001, after two years of intensive discussion, the JSRC presented comprehensive recommendations which consisted of three pillars of reform: (1) reforms of the civil and criminal justice systems in order to establish “a justice system that meets public expectations,” (2) increased production of well-qualified lawyers trained in newly founded professional law schools in order to supply “the legal profession supporting the justice system,” and (3) citizens’ participation in order to establish “the popular base” for the justice system.<sup>21)</sup> The highlight of the third pillar was the introduction of the *Saiban-in* system.

Although I engaged myself in the JSRC’s discussion as one of its thirteen members and served as a reporter on the subject at the final stage, it is not evident or easy to specify what really made this happen.<sup>22)</sup> At the beginning, there seemed to be a sharp division of opinion between several members of the JSRC who were enthusiastic for a jury system and the others who were cautious or negative about it. Most of them, however, shared a view that the existing justice system, which was too exclusive to professionals, should reflect regular citizens’ sense and feelings more keenly and that increased public involvement in some form or other should help not only for that purpose but also for the people themselves to identify with the justice system.

After twists and turns,<sup>23)</sup> the JSRC reached to the conclusion that an own style of

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21) Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21st Century (June 12, 2001) (English ver.), Chap. I, Part. 3 [available at <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>].

22) See Masahito Inouye, “*Saiban-in Seido no Dounyu ni itaru Kei-I to Sono Gaiyo*” (The Course of Things up to the Introduction of the *Saiban-in* System and Its Outlines), *JURIST*, No. 1279 (2004), pp. 74 *et seq.* Except for the first few sessions, all the deliberations in the Council were monitored simultaneously by the representatives of news organs and their complete verbatim minutes were publicized on the Prime Minister’s Office Web site [<http://www.kantei.go.jp/jp/sihouseido/gijiroku-dex.html>].

popular participation in criminal trials should be adopted in order to improve the quality of justice done by the court in terms of effectively reflecting “the sound social common sense of the public.”<sup>24)</sup> Evaluating positively the general quality of existing criminal trials by professional judges, the JSRC thought that citizens’ collaboration with them should make it much better.<sup>25)</sup>

The *Saiban-in* Act was the fruit of further detailed deliberation in the expert committee, which I presided, of the Cabinet’s Headquarter for the Promotion of the Justice System Reform to materialize the JSRC’s recommendations.<sup>26)</sup>

## (2) Accompanying Reform of the Criminal Justice System

The JSRC also expected that the introduction of the *Saiban-in* system should contribute to their first pillar of reform, the reform of the criminal justice system.

Although most criminal trials under the existing system were managed promptly, several cases of public concern in which trials took a considerable period of time caused the people’s loss of trust in criminal justice system. It also seemed that the insufficient public understanding of the system was more or less attributable to the unique, nontransparent features of the Japanese trial proceedings in terms that court sessions were not held consecutively, but with the interval of several weeks

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<sup>23)</sup> On September 12, 2000, the General Secretariat of the Supreme Court presented to the Justice System Reform Council their opinion that it should be desirable to adopt a variant mixed panel court system in which lay assessors could just express their judgment on the case, but not formally participate in the final verdict of the court. They were afraid it might cause a constitutional dispute if the judgment had a legally binding effect upon the judges. Although the opinion appeared too reluctant especially to those who were enthusiastic for lay participation, this became a critical juncture in terms of setting a bottom line for the subsequent discussion on the subject in the Council, which was virtually deprived of any possibility to totally reject lay participation.

<sup>24)</sup> Recommendations of the Justice System Reform Council, *supra* note 21, Chap. IV, Part. 1, 1.

<sup>25)</sup> Inouye, *supra* note 22, p. 76.

<sup>26)</sup> From February, 2002 through July, 2004, the Expert Deliberation Committee on the *Saiban-in* System and Criminal Justice Reform held a total of 32 sessions, 12 of which were spared exclusively to the deliberations on the *Saiban-in* system. Their complete verbatim minutes also are publicized on the Prime Minister’s Office Web site ([kantei.go.jp/jp/singi/sihou/kentoukai/06saibanin.html](http://kantei.go.jp/jp/singi/sihou/kentoukai/06saibanin.html)). See also HIROYUKI TSUI, *SAIBAN-IN HO, KEIJSOSHO HO* (The Saiban-in Act and the Code of Criminal Procedure) (2005).

(*installment justice*), that trials relied heavily on documentary evidence, including prosecutors' and police written records of the statements of the suspects and witnesses as the results of investigative questioning, which was presented just summarily at the trial and subject to later careful reading by the judges back in their chambers or home (*trial on records*), and that trial courts, which longed for revealing the whole picture of the case, inclined to examine large amount of evidence without strict screening and to make detailed fact-finding even on uncontested issues, including motives and personal backgrounds of the defendant (*minute justice*).<sup>27)</sup> A prominent scholar called the features "a situation like the Galápagos Islands,"<sup>28)</sup> and another criticized them as pathological and abnormal.<sup>29)</sup>

The basic direction of reform, therefore, must be to realize efficient and effective trial proceedings through active allegation and presentation of evidence by the parties (*principle of directness and orality*), focusing on truly contested issues, in concentrated proceedings. The introduction of a public participation system, in the JSRC's opinion, should make the demand for such reform even more pronounced because it could not be expected for participating citizens to serve for a long period of time or to read voluminous documentary evidence.<sup>30)</sup>

For that purpose, the CCP was revised, on the recommendations of the JSRC, to introduce several measures, including a new preparatory procedure (the pretrial or intermediate arrangement procedure) in which contested issues would be sort out on the basis of appropriate disclosure of evidence between two parties according to such

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<sup>27)</sup> Masahito Inouye, "Keiji-Saiban ni taisuru Teigen" (Proposals to Improve Criminal Trial Proceedings), *SHIHO-KENSHUSHO RONSHU*, No. 85 (1991), pp. 94-96.

<sup>28)</sup> KOYA MATSUO, *KEIJIHO-GAKU NO CHIHEI* (Horizon of Criminal Law Jurisprudence) (2006), p. 9; *id.*, "Keiji Saiban to Kokukmin Sanka" (Criminal Trials and Citizens' Participation), *HOSO JIHO*, Vol. 60. No. 9 (2008), p. 13. The term refers to an isolated, epidemic development, compared to the epidemic species which Charles Darwin observed on the isolated Galápagos Islands.

<sup>29)</sup> Ryuichi Hirano, "Genko Kiji-sosho no Shindan" (Diagnosis of the Current Japanese Criminal Procedure), in *DANDO SHIGEMITSU HAKASE KOKI SHRUGA RONBUNSHU* (Essays in Celebration for the 70th Anniversary of the Birth of Justice Shigemitsu Dando), Vol. 4 (1985), pp. 407 *et seq.*

<sup>30)</sup> Recommendations of the Justice System Reform Council, *supra* note 18, Chap. II, Part. 2, 1.

a new framework set forth by law as described below, and a clear plan for trial proceedings could be established in advance (arts. 316-2 through 316-32). The pretrial arrangement procedure is mandatory for the cases subject to the *Saiban-in* trial (the *Saiban-in* Act art. 49).

The public criminal defense system, which previously had been available only to the defendants after public prosecution, also was enlarged to the suspects detained for an offense punishable with death penalty, life imprisonment or imprisonment for more than three years (CCP art. 37-2). This would provide an appropriate legal support to suspects and defendants continuously from the early stage so that the defense could prepare adequately for the pretrial arrangement procedure as well as the concentrated trial proceedings, including the *Saiban-in* trials. A special public entity, the Japan Legal Support Center, was established to manage the combined public criminal defense system for suspects and defendants in association with bar associations and to supplement the insufficiency of available local defense lawyers with its own staff attorneys.

Based upon these arrangements, the principle of consecutive trial proceedings was reconfirmed (CCP art. 281-6).

## II. Acceptance of the *Saiban-in* system

### 1. Constitutional Legitimacy

Even after the enforcement of the *Saiban-in* Act, strong oppositions still have continued in and outside the legal professions. Not a few lawyers, including former well-known criminal law judges and prosecutors, have publicized opinions attacking the new system for various reasons. Some have stuck to the conventional belief, or even natural repugnance, that justice should be spoiled by unrestrained, emotional judgments of lay people. Others blamed it for its unconstitutionality in terms of violating the defendant's right to trial by an impartial tribunal (Const. arts 32 and 37) as well as imposing on the people the obligation to serve as *Saiban-in* and other accompanying undue burdens in violation of their right to the pursuit for happiness

(art. 13), freedom from involuntary servitude (art. 18), freedom of thought and conscience (art. 19) etc.<sup>31)</sup>

Practically, however, the legitimacy of the *Saiban-in* system has been established since the Supreme Court totally rejected these constitutional claims.<sup>32)</sup>

## 2. Public Acceptance

Furthermore, until the *Saiban-in* trials actually began, not only the press but also many people concerned were more or less anxious if the *Saiban-in* system would be welcomed by the public and if they really would come to participate when they were summoned for the *Saiban-in* duties. Various official and nonofficial questionnaire surveys had revealed that only a limited percentage of the respondents expressed their willingness to participate.<sup>33)</sup>

I was a little more optimistic because it is rather natural for the people to incline to avoid such burdensome duties, and their actual behavior might be different from their response to hypothetical questionnaires. As a matter of fact, nearly half of the respondents answered that they would participate if they were legally obliged to do so.<sup>34)</sup>

Since the *Saiban-in* system was put in operation, the courts administration authorities

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<sup>31)</sup> E.g., Taro Okubo, “Saiban-in Seido Hihan (zoku)” (Criticism Against the *Saiban-in* System: a Sequel), part 1, *HANREI JIHO*, No. 1172 (2002), 3; Toshimaro Kojo, “Saiban-in Seido no Goken-sei” (Constitutionality of the Saiban-in System), *GENDAI KEIJIHO*, Vol. 6, No. 5 (2004), p. 24; KIICHI NISHINO, *SAIBAN-IN SEIDO HIHAN* (Criticism Against the *Saiban-in* System) (2008), pp. 79 *et seq.*

There have been publicized many articles analyzing and rebutting these arguments. E.g., Masakazu Doi, “Nihonkoku Kenpo to Kokumin no Shiho-Sanka” (The Constitution of Japan and Citizens’ Participation in the Justice System), in *HENYO SURU TOCHI SISUTEMU* (*Ruling System in Transformation*) (M. Doi ed. 2007), pp. 241 *et seq.*

<sup>32)</sup> Sup. Ct. (Grand Bench) judgment of Nov. 16, 2011, *KEISHU*, Vol. 65, No. 8, p. 1285; Sup. Ct. (2d Petty Bench) judgment of Jan. 13, 2012, *KEISHU*, Vol. 66, No. 1, p. 1.

<sup>33)</sup> According to the result of the officially entrusted survey on public awareness right before the enforcement of the *Saiban-in* system, only 4.4% of the respondents wished, and 11.1% were ready, to participate while 47.6% wouldn’t do so even if it were their legal obligation. Saiko Saibansho Jimu-sokyoku, “Saiban-in Seido ni kansuru Ishiki Chosa Kekka Hokokusho” (General Secretariat of the Supreme Court of Japan, Report of the Survey on Public Awareness concerning the *Saiban-in* System) (Mar. 2008), p. 22.

<sup>34)</sup> *Ibid.*

have taken a policy to discharge flexibly and generously the duties on the application of prospective *Saiban-in* for various reasons. As the result, nearly 80% of those summoned to the court for *Saiban-in* selection have shown up, and once selected, most of the *Saiban-in* have served until the closing of the trial.

Although there has been no substantial change in the public response to subsequent questionnaire surveys about their willingness to participate,<sup>35)</sup> overwhelming majority of those who actually served as *Saiban-in* or supplementary *Saiban-in* have evaluated the experience very positively.<sup>36)</sup>

Thanks to their serious and sincere involvement, *Saiban-in* trials in general are operating smoothly and effectively so far. It seems that the system has been accepted by the people in spite of the occasional media coverage of sensational cases in which difficulties and excessive burden to *Saiban-in* are emphasized.

The publicity of many *Saiban-in* trials has apparently contributed to the people's better understanding of the criminal justice system.<sup>37)</sup> Among others, capital offense cases in which the media repeatedly reported that *Saiban-in* had a hard time to decide life or death of the defendant have drawn much public attention, so that many people seem to have begun thinking of death penalty, and even further of criminal punishment in general, more seriously as a problem close to themselves. These basic changes might have a profound effect on Japanese criminal justice as a whole in the long run.

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<sup>35)</sup> The official public awareness survey conducted in 2013, three and a half years after the enforcement of the *Saiban-in* system, revealed that still only 4.7% of the respondents wished, and 10.2% were ready, to participate. Saiko Saibansho Jimu-sokyoku, *Saiban-in Seido no Un-you ni kansuru Ishiki Chosa* (General Secretariat of the Supreme Court of Japan, The Survey on Public Awareness concerning the Operation of the *Saiban-in* System) (Mar. 2013), p. 51.

<sup>36)</sup> Saiko Saibansho Jimu-sokyoku, *Saiban-in Saiban Jissi Jokyō no Kenshō Hokoku* (The General Secretariat of the Supreme Court, Report of the Examination on the Enforcement Situation of *Saiban-in* Trials) (Dec. 2012), pp. 40-41.

<sup>37)</sup> A series of official questionnaire surveys have demonstrated that the public impression of trials was improved after the introduction of the *Saiban-in* system, most notably in terms of being close to them, speedy as well as easily understandable, and to a certain extent, in terms of reflecting the people's sense of justice as well as stimulating them to become thinking justice as their own matter. Saiko Saibansho Jimu-sokyoku, *supra* note 36, p. 53.

### III. Reformation of Criminal Procedure

#### 1. Transfiguration of Trial Proceedings

The introduction of the *Saiban-in* system has definitely been causing a wide-range, overt or covert, transformation of the Japanese criminal procedure in various ways and producing new challenges to cope with.

The most covert and dramatic changes have been brought about in trial proceedings.

##### (1) Activation, Visualization and Concentration

In order to ensure meaningful participation as well as reasonably limited burden of citizens, the *Saiban-in* Act requires judges, public prosecutors and defense counsels to make trial proceedings speedy and easily understandable (art. 51). The Rules for *Saiban-in* Trials also provides that both parties shall make a proof and arguments in an easily understandable way so that each *Saiban-in* could form his/her own opinion based upon the trial hearings (art. 42).

In compliance with these directions, the judiciary, public prosecutors' offices and bar associations, separately as well as collaboratively, have made continuous efforts to make their modes of presentation at trial as efficient and effective as possible by focusing on the points, making full use of visualizing methods, and relying on live testimonies in the court instead of documentary evidence. As the result, the sight of Japanese criminal trials has changed dramatically in terms of activation, visualization and concentration, as far as *Saiban-in* cases are concerned

##### (2) Expediting and Improved Understandability

Then, have the trial proceedings really become speedy and easily understandable for participating citizens?

###### (a) Expediting

According to the official statistics, the period of trial itself has been remarkably shorten, from an average of 6.5 months for previous trials involving the same

offenses down to 5.7 days for *Saiban-in* trials (in contested cases, from 10.8 months to 8 days).<sup>38)</sup> While previous criminal trials sometimes took many years in big cases, the longest *Saiban-in* trial so far did just 100 days from the selection of *Saiban-in* to the pronouncement of judgment (including 36 days of actual trial session)<sup>39)</sup> and the second longest 97 days (including 19 days of trial session)<sup>40)</sup>, third longest 75 days (including 20 days of trial session).<sup>41)</sup>

However, it should not be overlooked that the pretrial arrangement procedure for *Saiban-in* trials have taken an average of 6 months (8 months in contested cases) and in some cases over a year or more.<sup>42)</sup> Although this is attributable mainly to additional charges filed subsequent to the initial prosecution as well as psychiatric examination of the defendant which would suspend the proceedings for months, some point out that it takes time for the defense to respond the public prosecutor's offer of proof and to make their allegations after discovery of evidence, which

<sup>38)</sup> Saiko Saibansho Jimu-sokyoku, *supra* note 36, p. 66.

<sup>39)</sup> Saitama Dist. Ct. judgment of Apr. 13, 2012, *infra* note 56. In the course of *Saiban-in* selection in this case, 255 of 330 prospective *Saiban-in* were discharged at their request and only 61 persons attended the selection proceeding in the court where 6 *Saiban-in* and 6 supplementary *Saiban-in* were selected out of 34 finally remaining candidates. All the 6 *Saiban-in* served until the conclusion of the trial while 3 supplementary *Saiban-in* were discharged on the way.

<sup>40)</sup> Saitama Dist. Ct. judgment of Mar. 26, 2014, LEX/DB 25503842, finding the defendant, a senior member of the biggest organized crime syndicate, guilty and sentencing him to life imprisonment for commanding the assassination of an opponent organized crime cadre. The trial sessions were held under tight security because of the natures of the case and the people involved.

<sup>41)</sup> Tottori Dist. Ct. judgment of Dec. 4, 2012, LEX/DB 25503373, finding the defendant, a former bar hostess, guilty and sentencing her to death for, among others, intentionally drowning two men in the sea and the river respectively to avoid the return of the large amount of debt after dosing them with sleeping pills ("Tottori Serial Suspicious Death Cases" in which the defendant had been subject to a lot of media coverage suspecting her of also killing four more men in similar ways). At the beginning of *Saiban-in* selection in this case, a total of 700 prospective *Saiban-in* were chosen by lot from among the 1,500 names on the basic list for that year in the jurisdiction. With 606 of them discharged at their request, only 55 persons attended the selection proceeding in the court where 6 *Saiban-in* and 4 supplementary *Saiban-in* were selected out of 38 finally remaining candidates. All the 10 *Saiban-in* and supplementary *Saiban-in* served until the conclusion of the trial.

<sup>42)</sup> Saiko Saibansho Jimu-sokyoku, *supra* note 36, p. 5.

sometimes takes many days. Improvements are now under discussion in and out the judiciary.

(b) Understandability

A series of official questionnaire surveys to former *Saiban-in* indicate that, while majority of them evaluate the trial proceedings in their cases as easily understandable, the percentage of negative respondents, though still less than 10%, is increasing gradually.<sup>43)</sup> Worried that this might be attributable to a revival of easy reliance on documentary evidence in uncontested cases, the judiciary has warned repeatedly against such a practice, reminding trial judges and lawyers of the purposes of the justice system reform.<sup>44)</sup>

The surveys also reveal that defense counsels' presentation, among others, has received the lowest evaluation in terms of understandability.<sup>45)</sup> Although they are in a disadvantageous position of speaking even for the client who makes incoherent or unreasonable assertion, it might be caused by total reliance on the style and ability of each individual defense lawyer without sufficient systematic training. The bar associations are seriously trying to cope with this challenge, for instance, by holding special seminars to improve defense lawyers' in-court performances and skills.

## 2. New Challenges and Developments of Judicial Precedents

The introduction of the *Saiban-in* system has produced various new challenges to the existing criminal procedure. As mentioned above, the CCP was revised in preparation for several predictable challenges. Still further new challenges have come up through the continuous efforts in practice to realize the purposes of those statutory revisions as well as the *Saiban-in* system itself effectively. It is remarkable that, contrary to their previous negativism, the Supreme Court of Japan and other high courts have actively and promptly (or even in advance) addressed many of them.

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<sup>43)</sup> *Id.*, p. 18.

<sup>44)</sup> *E.g.*, Chief Justice Hironobu Takesaki, "Shin-nen no Kotoba" (Words for the New Year), *SAIBANSHO JIHO*, No. 1545 (2012), p. 1.

<sup>45)</sup> Saiko Saibansho Jimu-sokyoku, *supra* note 36, p. 18.

## (1) Disclosure of Evidence

Disclosure of evidence had long been a matter of heated disputes before the new system was adopted by the 2004 revision of the CCP. In the new system, the defense may have a three-phased disclosure of evidence from the prosecution in the course of the pretrial/intermediate arrangement procedure (CCP arts. 316-13 through 316-20). First, the public prosecutor shall submit to the defense a document describing the facts he/she plans to prove and disclose all the evidence he/she has requested to examine, including some written record of investigative questioning or a document indicating what each prosecution witness is supposed to testify at trial. Second, upon the request of the defense, the public prosecutor shall disclose to the defense several categories of evidence (tangible evidence, results of expert examination, recorded former statements of the defendant as well as prosecution witnesses etc.) that is deemed important to evaluate the credibility of the prosecution evidence, if he/she deems it appropriate considering the extent of necessity for the defense and the extent of possible harm the disclosure might cause. Third, when the defense requests after revealing the facts they plan to prove and other allegation they intend to make, the public prosecutor shall disclose to the defense the evidence that is deemed relevant to those facts and allegation if he/she deems it appropriate on the similar consideration. The defense, if discontent with the public prosecutor's disposition at any phase, may request for its review by the trial court (the judges in the *Saiban-in* cases), who may order the public prosecutor to disclose particular evidence to the defense if it is deemed appropriate (CCP arts. 315-25 through 315-27).

In practice, it is reported that the public prosecutors' offices use their discretion generously to disclose the evidence much wider than required by law, and that the defense could have access to almost every evidence they need in most cases.

Still, there remain several points of issue. One of them is whether the disclosure required by law is limited to the evidence that is actually in the custody of the public prosecutor. Although some concerned lawyers opined differently, the drafters of the new disclosure procedure apparently had such evidence in mind.<sup>46)</sup>

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<sup>46)</sup> E.g., Hiroyuki Tsuji, "Keijisosho-ho no Ichibu wo Kaiseisuru Houritsu nitsuite" (Commentaries on the Act for Revising Several Parts of the Code of Criminal Procedure)

Therefore, it is rather amazing that the Supreme Court, emphasizing the purpose of the disclosure procedure, adopted a liberal interpretation that the item (such as the police officers' memo of their questioning of the suspect) which was not filed in the public prosecutors' office also should be subject to the disclosure as long as it had been made or obtained during the investigation of the instant case, and was in the custody of a public official and easily obtainable for the public prosecutor.<sup>47)</sup> Discussions have been continuing on how far the scope of the decision would extend.

Defense lawyers have been demanding further a list of all the evidence in the public prosecutor's custody to be disclosed at an early stage of the pretrial arrangement procedure so that they could make their requests for disclosure effectively. The issue is now under deliberation in a governmental committee.<sup>48)</sup>

## (2) Law of Evidence

After the current CCP of 1948 adopted such evidentiary rules as the exclusion of involuntary confession and that of hearsay evidence (arts. 319 and 320) which were totally novel at that time, Japanese scholars and lawyers eagerly studied the Anglo-American law of evidence, of which basic principles have since been shared commonly in the Japanese legal world. Many pages in criminal procedure text books and many hours in criminal procedure classes at law schools are spared to the law of evidence.

As a matter of fact, there have been few substantial developments in the actual evidentiary rules other than the original exclusionary rules of illegally obtained evidence and confession which the Supreme Court and lower courts have adopted.<sup>49)</sup> I suppose this might be attributable largely to the lack of lay participation because professional judges, who are authorized both to admit and to evaluate the evidence, prefer handling it at their discretion to being bound by inflexible rules.

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(2), *Hoso Jihō* Vol. 57, No. 8, p. 2311.

<sup>47)</sup> Sup. Ct. (3d Petty Bench) decision of Dec. 25, *KEISHU*, Vol. 61 No. 9, p. 895; Sup. Ct. (1st Petty Bench) decision of Sep. 30, 2008, *KEISHU*, Vol. 62, No. 8, p. 2753.

<sup>48)</sup> See *infra* note 83.

<sup>49)</sup> E.g., Sup. Ct. (1st Petty Bench) judgment of Sep. 7, 1978, *KEISHU*, Vol. 32, No. 6, p. 1672.

However, the introduction of the *Saiban-in* system changed such structure. Participating lay persons must be protected from possible prejudicial effects of inadequate evidence and guided by appropriate rules of proof so that they could reach to the right fact-finding.

On such recognition, the Supreme Court of Japan and other high courts have been actively making new case laws on evidence as follows.

(a) Exclusion of Similar Fact Evidence

In reference to the Anglo-American law of evidence, it has long been almost an established theory that similar fact or bad character evidence such as the defendant's previous convictions for, or criminal records of, similar offenses should not be admissible to prove his/her guilt unless it involves a significantly characteristic modus operandi common to the instant case or it is used for a limited purpose of proving the defendant's criminal intent when his/her committal is proved by other evidence.

In practice, however, it was not necessarily clear where to draw the dividing line between the principle and its exceptions in a concrete case.

As a matter of fact, in a cause-celebre called "Wakayama Poisoned Curry Case," where the defendant was prosecuted for killing 4 neighbors and injured many others by serving them arsenic-poisoned curry and rice at a local festival, the trial court consisting of judges admitted as an evidence of her committal the proof that she allegedly had served foods containing arsenic or sleeping drug to her acquaintances for insurance money nineteen times, in addition to her simultaneously indicted criminal acts that she allegedly had attempted to murder her husband and an employee for the same purpose repeatedly, despite the differences in the motive and other circumstances from the instant case. The appellate court, which found inappropriate the trial court's admission of the proof concerning the use of sleeping drugs, affirmed the trial court's judgment that found the defendant guilty, inferring her committal from the facts of her three attempted murders and one previous similar act involving the use of arsenic on top of other circumstantial evidence.<sup>50)</sup>

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<sup>50)</sup> Osaka High Ct. judgment of June 28, 2007, *HANREI TIMES*, No. 1192, p. 186. The

Courts have become more conscientious and self-restrictive about the problem after the introduction of the *Saiban-in* system. In a case involving alleged trespass, theft and arson, in which the defendant admitted he had committed the trespass and theft, the judges of the *Saiban-in* trial court excluded the proof of his eleven previous convictions for similar trespass, theft and arson from the evidence to prove his committal of the arson. The defendant's acquittal on the charge of the arson was reversed by the appellate court, which found the defendant's previous convictions for similar offenses admissible because they have a characteristic similarity with the instant case both in his habits of action of setting fire to scattered heating oil in the dwelling he stole in and in his motive to vent his anger about the petty gain he could get in that dwelling.<sup>51)</sup>

On appeal, however, the Supreme Court quashed the appellate court judgment, proclaiming that the evidence of the defendant's previous convictions for similar offenses should not be admitted to prove his committal of the offense at issue unless the previous criminal acts had such significant characteristics considerably similar to the criminal act charged in the instant case as to enable by themselves a reasonable inference that the identical person committed both the former and the latter offenses. Such evidence, the Court reasoned, tends to lead to an empirically unfounded personal evaluation of the defendant's criminal tendency, which in turn could cause a wrongful inference of the defendant committal in the instant case.<sup>52)</sup>

Two and a half months later, the Supreme Court further reconfirmed that the ruling should extend to the similar criminal acts other than the previous convictions

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defendant's final appeal against the High Court judgment was rejected by the Supreme Court, which affirmed, without any reference to the proof by similar facts, that the defendant's committal was proved beyond a reasonable doubt by several circumstantial evidence, including (1) the detection of arsenic of the same characteristic composition at the defendant's house, (2) that of arsenic component from her hair, (3) the fact that nobody other than the defendant had an opportunity to poison the curry and (4) her suspicious behavior witnessed around the time and place of the offense. Sup. Ct. (3d Petty Bench) judgment of Apr. 21, 2009, *HANREI JIHO*, No. 2043, p. 153.

<sup>51)</sup> Tokyo High Ct. judgment of Mar. 29, 2011, *HANREI TIMES*, No. 1354, p. 250, remanding the case to the Tokyo District Court for a new *Saiban-in* trial.

<sup>52)</sup> Sup. Ct. (2d Petty Bench) judgment of Sep. 7, 2012, *KEISHU*, Vol. 66, No. 9, p. 907.

of the defendant.<sup>53)</sup>

These rulings, however, have left a difficult question: in what sense and to what extent the characteristics common to the previous criminal acts and the charged one must be significant before the exception applies.

The difficulty is even more amplified when we take into account the concurring opinion of Justice Seishi Kanetsuki to the second Supreme Court judgment, which mentions that further exceptions could be admitted in cases a strong, characteristic criminal trend of the defendant has evidently fixed or a number of similar offenses repeated by the same defendant are indicted and tried simultaneously.<sup>54)</sup> As Justice Kanetsuki is a former prominent criminal judge, its implication over the scope of the Supreme Court rulings seems to demand detailed analysis.<sup>55)</sup>

Indeed, a somewhat similar view to the second branch of his indicated exceptions has been adopted by an appellate court in another cause-celebre called “Metropolitan-area Serial Suspicious Death Cases,” where the defendant was prose-

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<sup>53)</sup> Sup. Ct. (1st Petty Bench) decision of Feb. 20, 2013, *KEISHU*, Vol. 67, No. 2, p. 1.

<sup>54)</sup> *Id.*, p. 5.

<sup>55)</sup> The Supreme Court rulings do not mean further to prohibit the production of the defendant’s previous convictions or criminal records of similar offenses as a sentencing material. In this regard, a group of scholars and lawyers have been stressing the necessity to bifurcate the trial hearing into two phases of guilt-finding and sentencing in order to prevent prejudicial influence of sentencing materials to participating *Saiban-in*. However, a majority, which I concur, prefers a more flexible solution. In uncontested cases, it would be inappropriate to bother the same witness testifying on the matters relating to both guilt and sentence to show up to the court plural times. In contested cases, the hearing as well as the intermediate deliberation among the members of the court could be divided into plural phases, not necessarily the above two, but possibly more according to separate issues raised in each case, by an appropriate exercise of discretion by the judges in the pretrial arrangement procedure. Repeated instruction by the presiding judge also could help *Saiban-in* to save themselves consciously from possible prejudicial influence of sentencing materials. As each *Saiban-in* is supposed to state the reasons for his/her judgment in the deliberation, it should be checked and corrected by other *Saiban-in* and judges even if any one of them had made his/her judgment unreasonably. As a matter of fact, there have been no grounds to suspect such a flexible solution does not work. See Hosei Shingikai Sin-Jidai no Keiji-shiho Seido Tokubetsu Bukai, *infra* note 83, p. 34; Homu-sho Saiban-in Seido ni kansuru Kento-kai, Torimatome Hokoku-sho (Ministry of Justice Deliberation Committee on the *Saiban-in* System, A Summary Report) (June, 2013), pp. 29-30.

cuted for, among others, killing two middle-aged men, whom she met on online dating site and allegedly cheated out of their money with a false promise of marriage, and a 80 year old man, whom she frequently visited with and allegedly stole property from, by firing a briquette to generate carbon monoxide gas inside the sealed-up car, apartment and house respectively where she left each victim behind after covertly dosing him with a sleeping pill. At the trial, the defense rebutted, in vain, that the deaths of her two boyfriends possibly were suicides and the third victim possibly was killed by an accidental fire of his dwelling; the *Saiban-in* trial court found her guilty for all the charges and sentenced her to death to conclude the record-breaking 100 day trial proceedings, including 36 trial sessions and 10 day deliberation.<sup>56)</sup>

On appeal, the Tokyo High Court affirmed the *Saiban-in* trial court judgment, rejecting the defendant's challenge against the public prosecutor's reference in the closing argument to the common features of all the three murder cases (1) that the defendant had prepared a large amount of briquettes and heating appliances in advance, (2) that she was the last person who saw the victim, (3) that the victim died of carbon monoxide poisoning, (4) that there remained at the scenes the same kind of briquettes and burning appliance as she had prepared, and (5) that she killed the victim by burning a briquette inside the sealed place after putting him to sleep. The public prosecutor's argument that the defendant's criminal act of special modus operandi should be admissible as a proof for her committal of another similar criminal act, in the appellate court's opinion, was not in contradiction with the above mentioned Supreme Court rulings because those facts, when put together, assumed significant characteristics considerably similar to the criminal act to be proven.<sup>57)</sup>

#### (b) Proof beyond a Reasonable Doubt Doctrine

In the five-year preparation for the enforcement of the *Saiban-in* system, judges, lawyers and scholars have elaborated how to instruct or explain to participating lay citizens about difficult legal norms and terms in plain words so that they could get

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<sup>56)</sup> Saitama Dist. Ct. judgment of Apr. 13, 2012, LEX/DB 25481416.

<sup>57)</sup> Tokyo High Ct. judgment of Mar. 21, 2014, LEX/DB 25503368.

a substantial understanding of the elements of each charged offense as a prerequisite for their fact-finding as well as various principles of criminal procedure. Among others, the proof beyond a reasonable doubt was one of the hardest as you might easily imagine.

A model instruction used in the Tokyo District Court describes, “Although we cannot ascertain in person if a particular fact existed in the past, ... you shall find the defendant guilty in cases where, assessing in accordance with common sense, you are convinced that he/she committed the indicted offense. On the contrary, you shall find the defendant not guilty if, assessing in accordance with common sense, you have a doubt against his/her guilt.”

Anticipating the enforcement of the *Saiban-in* system, the Supreme Court of Japan itself indicated in advance that a proof beyond a reasonable doubt does not mean nonexistence of any possibility of opposite facts, and that, even when there is a room to doubt if opposite facts exist as a matter of abstract possibility, the defendant could be found guilty as far as, according to sound social common sense, such doubt is deemed to lack reasonableness.<sup>58)</sup>

While it is not certain how effective such instructions are, I suppose that hours of group deliberation among all the members of the court based on repeated explanation by the judges from an early stage of the trial should help ease the hardship participating citizens might feel in forming their own judgment.

#### (c) Proof by Circumstantial Evidence

The hardship for participating citizens in this respect, if any, must be much bigger in cases where the proof of guilt relies totally on circumstantial evidence. As a matter of fact, there has long been a controversy even among professional lawyers and scholars about what should be required to fulfill the standard of proof beyond a reasonable doubt in such a case. While one school of them would think it suffice if the court, assessing comprehensively all the circumstantial evidence, reaches the judgment that the defendant’s guilt is proved beyond a reasonable doubt, the others would demand a proof of at least one fact which is unexplainable unless the defendant

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<sup>58)</sup> Sup. Ct. (1st Petty Bench) decision of Oct. 16, 2007, *KEISHU*, Vol. 61, No. 7, p. 677.

committed the charged offense.

Apparently in anticipation of the possible confusion such controversy could cause to *Saiban-in* trials, the Supreme Court declared in 2010 that a fact unexplainable or extremely difficult to explain unless the defendant was the perpetrator of the charged offense should be included among the facts proved by circumstantial evidence, reversing the trial court's judgment that had found the defendant guilty for the murders of a mother and her baby son on a comprehensive assessment of the facts proved by circumstantial evidence.<sup>59)</sup>

Although there are divisions of opinion about the appropriateness of this ruling, it has actually had an evident effect on subsequent *Saiban-in* trials. For instance, in a robbery-murder case of the same year, the *Saiban-in* trial court acquitted the defendant for the very reason that such an unexplainable fact as required by the Supreme Court ruling was not included, despite its finding that the defendant's fingerprints and cell debris found at the crime scene in the victims' house aroused strong suspicion of his breaking in and ransacking the house around the time of the charged offense and that his total denial of entering in the house was a lie.<sup>60)</sup>

In another case, in which the *Saiban-in* trial court had convicted the defendant for setting fire to a car owned by her lover's wife on circumstantial evidence, the appellate court reversed the conviction and found her not guilty on the grounds that any fact proved by circumstantial evidence could be reasonably explained even if she was not the arsonist.<sup>61)</sup>

### (3) Appellate Review

#### (a) Reversal for Mistake of Fact

As the arson case indicates, judgments of *Saiban-in* trial courts could be subject to an appellate review for mistake of fact as well as inappropriate sentence. In the course of the justice system reform, there was a discussion whether an appellate

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<sup>59)</sup> Sup. Ct. (3d Petty Bench) judgment of Apr. 27, 2010, *KEISHU*, Vol. 64, No. 3, p. 233.

<sup>60)</sup> Kagoshima Dist. Ct. Judgment of Dec. 10, 2010, LEX/DB 25443123.

<sup>61)</sup> Fukuoka High Ct. Judgment of Nov. 2, 2011, LEX/DB 25443956.

court consisting exclusively of professional judges could be justified to review and to reverse the guilty/not-guilty judgment or sentencing of the *Saiban-in* trial court without diminishing the purpose of the public participation. It was a majority opinion that such an appellate review would be necessary to remedy mistake of fact and inappropriate sentence possibly caused by *Saiban-in* trial courts and justifiable if the appellate courts' role was adequately limited to an ex-post review on the basis of the case records as the existing CCP in itself supposed.<sup>62)</sup> Hence there was no revision in its relevant provisions.

As a matter of fact, a very critical question has been presented to appellate court judges how they actually could and should exercise their reviewing power properly while paying due respect to the judgment of the public-participated trial court. Ever since the enactment of the *Saiban-in* Act, serious discussions had been piled up<sup>63)</sup> before the Supreme Court at last defined their position for a self-inhibitory appellate review on possible mistake of fact in the *Saiban-in* trial court judgment.

As the result of customs inspection at the Narita International Airport, it was detected that the defendant, an arrival passenger, carried three chocolate boxes containing some 1 kg of methamphetamine in his bag. He was prosecuted for smuggling the stimulant drug on the commission of his acquaintance, but disputed his awareness of the contents of the chocolate boxes, asserting that he had been asked by a local person in Malaysia to bring them back to Japan as a souvenir to that acquaintance. The *Saiban-in* trial court found the defendant not guilty; the court did not find it “certain according to common sense” that he had been aware of the illegal drug being contained in the chocolate boxes, despite the circumstantial proof that he had traveled to Malaysia on the compensated commission<sup>64)</sup> by the person who had been prose-

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<sup>62)</sup> Recommendations of the Justice System Reform Council, *supra* note 18, Chap. IV, Part. 1, 1(4)c; Masahito Inouye, ““Kangaerareru Saiban-in Seido no Gaiyo nitsuite” no Setsume” (Commentaries on the Chairperson’s Tentative Draft “the Outlines of a Thinkable *Saiban-in* System”) (Oct. 28, 2003), Part 3, 5 [available at <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai28/28siryou3.pdf>].

<sup>63)</sup> Cf. Sukeaki Tatsuoka, “Joso-shin no Arikata” (How the Appellate Review on the *Saiban-in* Trial Court’s Judgment Should Be), *RONKYU JURIST*, No. 2 (2012), pp. 77 *et seq.*

<sup>64)</sup> The defense asserted that the defendant was dispatched to receive from the local person a forged passport that was detected in his possession at the same time.

cuted for smuggling stimulant drug and actually brought back the chocolate boxes, that the boxes had been unnaturally heavy, and that he had behaved suspiciously during the custom inspection (Narita SD Smuggling Case).<sup>65)</sup>

Acquittals for similar reasons in several *Saiban-in* trials involving similar stimulant drug offenses followed this,<sup>66)</sup> shocking public prosecutors and investigative agencies, who had never imagined that such an excuse as asserted by the defendant could be accepted by the court contrary to their “common sense.” Their protests were admitted by several appellate courts, which reversed the trial court judgments, including the above one, and in most cases, found the defendants guilty on the opposite evaluation of the circumstantial proof.

The Supreme Court, however, quashed the appellate court judgment<sup>67)</sup> in the Narita SD Smuggling Case. On the basic understanding that an appellate review on possible mistake of fact in the trial court judgment generally should be conducted from the viewpoint of whether the trial court’s evaluation of the credibility of each evidence as well as its comprehensive assessment of all the evidence was unreasonable according to the rules of inference and thumb, the Court emphasized that such a self-inhibitory approach should be observed especially in relation to *Saiban-in* trial cases. The appellate court judgment in the instant case, the

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<sup>65)</sup> Chiba Dist. Ct. judgment of June 22, 2010, *KEISHU*, Vol. 66, No. 4, p. 549.

<sup>66)</sup> Until the end of March, 2013, 16 defendants have been totally acquitted in the cases involving stimulant drug offenses; the acquittal rate (that of the totally acquitted defendants among those tried by *Saiban-in* trial courts, including the ones who had not disputed their guilt) is 2.82%, much higher than that (0.52%) in the *Saiban-in* trial cases in general. Saiko Saibansho Jimu-sokyoku, *supra* note 2, p. 4. The number of acquittals by *Saiban-in* trial courts in stimulant drug cases must become larger when the acquittals on a charge of such offense included in one plural count prosecution (partial acquittal) are counted in.

According to an official statistical study, the acquittal rate of *Saiban-in* trials was 0.47% (0.74%, counting in partial acquittals) in general and 2.33% (2.62%) in stimulant drug cases in the three years after the enforcement of the system while that of professional judge trials involving the same categories of offenses was 0.6% (0.86%) in general and 0.56% (1.7%) in stimulant drug cases in the preceding three years. Saiko Saibansho Jimu-sokyoku, *supra* note 36, p. 46.

<sup>67)</sup> Tokyo High Ct. judgment of Mar. 30, 2011, *KEISHU*, Vol. 66, No. 4, p. 559, finding the defendant guilty and sentencing him to imprisonment for 10 years.

Court concluded, failed to demonstrate concretely the unreasonableness of the trial court's fact-finding according to the rules of inference and thumb.<sup>68)</sup>

In contrast, the appellate courts' judgments reversing the acquittals in other three cases have been affirmed subsequently by the Supreme Court.<sup>69)</sup>

In the first case, the defendant, a foreigner coming recently from Mexico, allegedly attempted to receive two cardboard boxes containing 6 kg of methamphetamine which his unknown accomplice had sent by air freight from Mexico. The *Saiban-in* trial court, conceding that the defendant had a guess about the contents of the air cargo when he was ordered by an organized crime member to receive it in Japan, found him not guilty on the grounds that there remained a reasonable doubt about the existence of conspiracy between him and the alleged accomplice, which was not deemed "certain according to common sense."<sup>70)</sup> The appellate court reversed this judgment for the reason of unreasonable fact-finding in contradiction with the rule of thumb, according to which, in the appellate court opinion, a tacit agreement between them was reasonably inferred from the facts that the defendant had received air tickets, considerable amount of compensation as well as a portable computer for communication from the organized crime member and actually communicated with that person around the time of his arrival in Japan, in addition to the fact that he, being aware of probable containing of stimulant drug in the air cargo, had agreed and actually attempted to receive it in Japan on the commission of that person.<sup>71)</sup>

The second case was more similar to the Narita SD Smuggling Case in terms that the *Saiban-in* trial court denied the defendant's awareness of the drug contained in his suitcase which was detected by customs inspection on his arrival from Uganda by way of Benin and Paris. The *Saiban-in* trial court, conceding that the involvement of an organized crime group was inferred from the quantity as well as the artful

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<sup>68)</sup> Sup. Ct. (1st Petty Bench) judgment of Feb. 13, 2012, *KEISHU*, Vol. 66, No. 4, p. 482.

<sup>69)</sup> Sup. Ct. (3d Petty Bench) decision of Apr. 16, 2013, *KEISHU*, Vol. 67, No. 4, p. 549; Sup. Ct. (1st Petty Bench) decision of Oct. 21, 2013, *KEISHU*, Vol. 67, No. 7, p. 755; Sup. Ct. (1st Petty Bench) decision of Mar. 10, 2014, *SAIBANSHO JIHO*, No. 1599, p. 2.

<sup>70)</sup> Tokyo Dist. Ct. judgment of July 1, 2011, *KEISHU*, Vol. 67, No. 4, p. 632.

<sup>71)</sup> Tokyo High Ct. judgment of Dec. 8, 2011, *KEISHU*, Vol. 67, No. 4, p. 637, finding the defendant guilty and sentencing him to imprisonment for 12 years.

concealment of the stimulant drug, deemed it thinkable that some group member asked the defendant to transport the suitcase without letting him know its contents or its recipient in Japan.<sup>72)</sup> The appellate court found it against the rule of thumb to think that some organized group possibly dared to commission the defendant to transport the suitcase containing that amount of illegal drug such a long way with bearing his travel expenses, but without telling him its recipient or destination, and inferred from these and other facts that he was aware of some illegal drug probably contained in the suitcase.<sup>73)</sup>

The prosecution against the Iranian defendant in the third case for masterminding a conspiracy of smuggling stimulant drugs for profit also arose from the detection of some 4 kg of methamphetamine as the result of airport customs inspection into the suitcase of an arriving passenger (“D”) from Turkey. To prove the defendant’s guilt, the prosecution presented the statement of an alleged accomplice “A” that he engaged himself in several activities to further the criminal enterprise at a defendant’s command, the phone logs of the defendant, “A” and other accomplices which indicated frequent telephone communications among them, as well as the facts that the defendant himself went to the airport each time when stimulant drug carriers commissioned by “A” were supposed to arrive there in the preceding one year and that the defendant earned a large amount of money in that period. The *Saiban-in* trial court, however, found the defendant not guilty on the reason that the statement of “A” was not reliable because of several inconsistencies with the call histories recorded in the phone logs. Based upon the statements of “D” and another accomplice that they heard a strange voice of some male beside “A” when they talked with him on the phone and some other circumstantial evidence, the court also mentioned that the charged smuggling possibly was commanded by a different person.<sup>74)</sup> Quite contrarily, a detailed analysis of the same prosecution evidence and some others led the appellate court to the findings (1) that the call histories should rather drive it to strongly infer that many

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<sup>72)</sup> Chiba Dist. Ct. judgment of June 17, 2011, *KEISHU*, Vol. 67, No. 7, p. 853.

<sup>73)</sup> Tokyo High Ct. judgment of Apr. 4, 2012, *KEISHU*, Vol. 67, No. 7, p. 858, finding the defendant guilty and sentencing him to imprisonment for 10 years.

<sup>74)</sup> Osaka Dist. Ct. judgment of Jan. 28, 2011, LEX/DB 25470387.

of the telephone calls were related to the smuggling and were consistent in large part with the statement of “A,” and (2) that the existence of such an unknown different commander as mentioned by the trial court was only an unsupported abstract possibility. The trial court’s contrary fact-findings and denial of the defendant’s involvement based upon them, the appellate court concluded, were evidently unreasonable according to the rule of thumb.<sup>75)</sup>

The Supreme Court has affirmed these three appellate courts’ reversals as supported by a concrete demonstration of the trial courts’ mistakes of fact in contradiction with the rule of thumb.

However, it doesn’t appear so clear how consistent the conclusions in the above four cases are. I am afraid that trial court as well as appellate court judges are forced to keep struggling with a crucial question, what the rules of inference and thumb as referred to in these Supreme Court rulings are.<sup>76)</sup>

#### (b) Reversal for Inappropriate Sentence

One of the motives for the introduction of the *Saiban-in* system was a public opinion that sentencing by professional judges from time to time differed from regular citizens’ sense of justice. Hence the participating lay assessors are supposed to engage themselves also in sentencing so that it would reflect a public sense of justice more keenly.

As a matter of fact, it is not easy for first-timers to form their opinion about the right sentence within the considerable breadth of penalty described by law, though public prosecutor’s recommendation as well as statistical data about the sentences in similar cases may help them to certain extent.

As far as demonstrated by official statistics, *Saiban-in* trial courts’ sentences in

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<sup>75)</sup> Osaka High Ct. judgment of Mar. 2, 2012, LEX/DB 25480530, remanding the case to the Osaka District Court for a new *Saiban-in* trial.

<sup>76)</sup> Criminal law scholars and practitioners have recently had an intensive discussion on these and other issues involved in the appellate review of the *Saiban-in* trial courts’ judgments at the annual conference of the Criminal Society of Japan in Kyoto. The presentations and discussions at the conference will be publicized in a coming issue of the *KEIHO ZASSI*.

general do not seem to differ substantially from previous sentences in the same categories of cases, except for the cases involving a sex crime, in which heavier sentences are imposed by *Saiban-in* trial courts, probably reflecting the recent public indignation against those crimes.<sup>77)</sup> Still it sometimes happens that the *Saiban-in* trial court imposes heavier or notably lighter sentence than recommended by the public prosecutor.

Although appellate courts, respecting the purpose of the *Saiban-in* system, have strictly restrained themselves from intervening in the *Saiban-in* trial courts' sentencing for the first two years, they began exercising their reviewing power especially in cases where, in their opinions, an inappropriately heavier sentence had been imposed. Still it is honest to say that they have been groping for the right limit and standards for their intervention.

Among others, the most serious is a sentencing in capital offense cases. It is repeatedly reported that participating citizens in those cases have a hard time to decide life or death of the defendant who is in their presence in court, at the same time taking into consideration the horrible scene of victimization as well as the rage of victim's family presented to them. Regarding such a hardship, much more days are allocated for the final deliberation in those cases.

As a matter of fact, death sentence has been imposed in 21 *Saiban-in* trial cases in the last four years and eight months.<sup>78)</sup> Although most of them involved the killing of plural victims, there are a few cases involving a single killing.

In this regard, previous courts had long adhered to a leading Supreme Court precedent, which directed that death sentence should be permissible only when it is deemed inevitable from the view point of the extreme gravity of the defendant's culpability, the proportionality of punishment to crime, as well as the crime prevention, on comprehensive assessment of various factors, including the number of victims killed.<sup>79)</sup> While there were single killing cases in which the defendant was sentenced to death, almost all of them involved a premeditated robbery-murder, a

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<sup>77)</sup> Saiko Saibansho Jimu-sokyoku, *supra* note 36, pp. 22-23.

<sup>78)</sup> Saiko Saibansho Jimu-sokyoku, *supra* note 2, p. 4.

<sup>79)</sup> Sup. Ct. (2d Petty Bench) judgment of July 8, 1983, *KEISHU*, Vol. 33, No. 6, p. 609.

kidnapping-murder, as well as a murder by life-imprisonment prisoner on parole or for insurance money.

Considering these facts, a recently publicized report of study sponsored by the judiciary recommended that even the *Saiban-in* trial courts should respect precedents in sentencing in capital cases, where each person might have quite a different opinion.<sup>80)</sup>

As if responding to the recommendation, the same division of the Tokyo High Court has recently turned down the *Saiban-in* trial courts' death sentences in three robbery-murder cases, for the reasons that the murder of the victim itself had not been premeditated in the first two cases, that the defendant's previous conviction for murder was of different nature in terms of involving killings of his wife on quarrel and of his daughter resulted from his attempted double suicide in the first case and that the defendant, without any own monetary motive, had just followed two other perpetrators in the third case.<sup>81)</sup>

As the victims' families have raged<sup>82)</sup> and the prosecution has filed appeals against the first two decisions, which in the prosecution's opinion should nullify the purpose of citizens' participation, the Supreme Court is expected to define their position before long.

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<sup>80)</sup> Makoto Ida *et al.*, "Saiban-in Saiban ni okeru Ryokei Hyogi no Arikata ni tsuite" (On How the Sentencing Deliberation in *Saiban-in* Trials Should Be) (Judicial Training and Research Institute, 2012).

<sup>81)</sup> Tokyo High Ct. judgment of June 20, 2013, LEX/DB 25501724; Tokyo High Ct. judgment of Oct. 8, 2013, LEX/DB 25502257; Tokyo High Ct. judgment of Feb. 27, 2014, LEX/DB 25503240.

In the third case which involved the murders of three victims, the same division affirmed the death sentence of the *Saiban-in* trial court against one of the other two perpetrators. Tokyo High Ct. judgment of Feb. 20, 2014, LEX/DB 25503241. The death sentence against the rest one perpetrator also had been affirmed by another division of the Tokyo High Court. Tokyo High Ct. judgment of Mar. 22, 2012, LEX/DB 25500349.

<sup>82)</sup> *E.g.*, News Letter of the National Association of Crime Victims and Surviving Families, No. 46 (Dec. 10, 2013), p. 1 [criticizing the first two decisions as betrayal to the nation]; No. 47 (Mar. 31, 2014), pp. 5-6.

#### IV. Conclusion

The reformation of Japanese criminal procedure under the direct and indirect influence of the *Saiban-in* system is still going on. It is too early to predict how far it would extend and how it would transform Japanese criminal justice at its end.

It also should be noted that several other relevant reforms in the law of criminal procedure are under deliberation in governmental committees. The most significant are those involving the video/tape-recording of investigative questioning of the suspect, the enlargement of public defense cases, the disclosure of the list of the evidence in the custody of the public prosecutor, the enlargement of the categories of offenses subject to electronic surveillance and the adoption of a bargaining system between the prosecution and the defense.<sup>83)</sup> If several of them are realized, they must give profound impacts upon the criminal investigation as well as trial proceedings.

Intertwined with these and other factors, the reformation of Japanese criminal procedure should be proceeding.

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<sup>83)</sup> Hosei Shingikai Sin-Jidai no Keiji-shiho Seido Tokubetsu Bukai, “Jidai ni Sokushita Aratana Keiji-Siho Seido no Kihon Koso” (Council on Legislation, Special Division on the Criminal Justice System in New Era, Basic Designs for a New Criminal Justice System Conformable to the Contemporary Situation) (Jan. 29. 2013), p. 2 [[http://www.moj.go.jp/keiji1/keiji14\\_00070.html](http://www.moj.go.jp/keiji1/keiji14_00070.html)].

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