

“*Quo Vadis?*”^{*}: First Year Inspection to Japanese Mixed Jury Trial

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^{**} “*Quo Vadis?*” is a Latin phrase from the New Testament, which means “where are you going”. See, Acts of Peter (Vercelli Acts XXXV).

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INTRODUCTION

On August 4th, 2009, I waited with an expectant crowd of thousands in front of the Tokyo District Courthouse to draw lottery tickets for attendance of the first ever saiban-in trial in Japan. This trial was a monumental event for it was the first time in sixty years that Japanese citizens were allowed to participate in a criminal trial. Every national television network in Japan dispatched its broadcast van to the court building to televise the live news, and commentators and famous news anchors were sent to observe the courtroom in order to later recount their views and impressions of the trial on their respective programs. Every major newspaper was present to cover the details of this trial. All in all, this trial became quite a judicial “show” for the Japanese media.

In July 2010, almost one year since the implementation of the saiban-in system, I revisited the same courtrooms of the Tokyo District Court to once again observe the saiban-in trials. Some things were characteristically different about these trials. While there were some audiences in each of the courtrooms, including a few reporters, the court rooms were never at full occupancy. The three judges and six citizens on the bench seemed to be quite relaxed as the trial proceeded, while the defense attorneys and the prosecutors were also engaged in what seemed to be only mundane routines of the court.¹ In two of the four trials, I could recognize the faces of the defense attorneys who, surprisingly, did not seem nervous at all. Every corridor in the court building was quiet, and there was no line for the drawing of lotteries. Compared to just a year ago, the lay judge trial now presents itself as an integral part of the Japanese justice system.

Since that first saiban-in trial in Tokyo, national newspapers have been unceasingly covering stories of the saiban-in in their daily columns for even the most trivial and non-dramatic cases. Despite this copious amount of media coverage, however, academic analyses of the new trial

¹ For a picture of the saiban-in trial, see the Japanese Court website, http://www.courts.go.jp/english/proceedings/img/criminal_justice/photo1.jpg

system remain sparse and rudimentary.² Among the few scholars who have engaged in research of the saiban-in system is Emeritus Professor of Tokyo University Matsuo Koya, dubbed by many as the “founder of the saiban-in system.” While he heralds the system as a success,³ from a socio-legal perspective, swooping claims of such a novel judicial system need to be examined more critically and analytically. This article has two goals: First, it aims to provide a brief sketch of the one-year experience of the saiban-in trial in Japan. The author will discuss the impact of the new mixed jury system on the Japanese criminal process and analyze the changes in court practice and judicial performance based on court statistics and survey reports accessible by the public. Second, the author will describe, via the socio-legal perspective, special characteristics of the relationship that has been developed as a consequence of the saiban-in trial between civil participation and the criminal justice system in Japan and provide some recommendations for the equitable operation of the saiban-in trial in the future.⁴

I. BACKGROUND TO THE LAY JUDGE SYSTEM

In 2001, the Judicial Reform Council (JRC) issued its Final Report, recommending the implementation of civil participation into the Japanese

² Some empirical research of the Saiban-in trial has already been published. See Takayuki Aoki, *Saiban-In Saiban Ni Okeru Ryoukei No Riyu To Doukou* [*The Reasoning of Sentencing in the Saiban-In Trial*], 2073 HANREI JIHO 3 (2010) & 2074 HANREI JIHO 11 (2010); *Saiban-In Seido No Jisshi Jokyo Ni Tsuite* [*Implementation of Saiban-In Trials*], 75 SHIHO NO MADOU 10 (2010); Hiroaki Saito, *Saiban-In Saiban No Jisshi Jokyo Nitsuite* [*Implementation of Saiban-In Trial*], 156 HO NO SHIHAI 73 (2010).

³ Koya Matsuo, *Saiban-in saiban ni tsuite*, 927 NBL 8 (2010). He pointed out reasons for his positive position: (1) the new system accompanied with other important revisions in the criminal justice system; (2) many mock trials based on the cooperation with people in legal communities; (3) active debates on the pros and cons of lay participation; and (4) positive impacts from our counterpart, Korea, which successfully introduced an all-citizen jury system in 2008.

⁴ For the general outline of the Japanese criminal justice and procedure, see The Secretariat of the Judicial Reform Council, *The Japanese Judicial System* (1999), available at <http://www.kantei.go.jp/foreign/judiciary/0620system.html>, and The United Nations Asia and Far East Institute (UNAFEI), *Criminal Justice in Japan*, available at <http://www.unafei.or.jp/english/pages/CriminalJusticeJapan.htm>.

criminal trial as one of the major missions among many suggested reforms in the judicial system.⁵ This reform movement originated not from politicians, citizen movements or any other civic sectors, but stemmed from a growing demand of the industrial and economic sectors. The proponents of the reform became increasingly frustrated with the perceived inefficiency of the judiciary, lengthiness of trial proceedings, and the high costs involved in attaining judicial resolutions. Thus, for these industry proponents, to accelerate the judicial process, restore the credibility of the judiciary, and recover the reliability of the courts became the integral part of the most important judicial reforms to ensure Japan's future economic expansion and industrial development.

In addition, although a small number of civic groups pushed for a jury trial reform, the Japanese public did not provide strong support for this goal as a pertinent political issue, even given its knowledge of the famous wrongful convictions of four death row inmates that took place in the 1980's that exposed the inequities of Japan's judicial system.

Historically, first civil participation in Japanese criminal trials began with the introduction of the Jury Act in 1923, which was later suspended by the Japanese military government in 1943 in the midst of the Second World War.⁶ After the war, the Jury Law was not reactivated for many years, even with the Japan Federation of Bar Association's (hereinafter JFBA) long history of advocating for the re-introduction of the all-citizen jury system in Japan's criminal trial.

During a recent discussion for Japanese judicial reform, a heated debate for the civil participation formula occurred in the Council between the supporters of two main views: one of which supported a common law

⁵ Justice System Reform Council, *Recommendations of the Justice System Reform Council- For a Justice System to Support Japan in the 21st Century*, June 12, 2001, available at http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612_e.html.

⁶ For these 16 years, there were 484 jury trials and 81 of them resulted in not guilty verdicts. It was implemented during so called a "Taisho Democracy" era. There were many constraints, however, for the jury system. For example, the judge could reverse the verdict if he did not agree with the verdict, and the defendant had no appeal right against the verdict. The defendant had the burden of paying the entire cost of trial if the jury returned a guilty verdict. Commentators viewed that these reasons made this system unpopular among the lawyers and citizens. And the conscription system during the War made difficult it for the court office to summon peoples as jurors because male was only qualified as a juror at that age. Finally, the parliament adopted a law of suspending the jury system on April 1, 1943.

type all-citizen jury model, while the other supported a continental-type mixed jury model that relied on a system of collaborative deliberations conducted by both professional and lay judges. Finally, the Council adopted the mixed jury model but added an important ingredient into the model, in which civil judges are to be randomly selected from a pool, but not nominated as fixed-term judges like the ones in Germany or other European countries.. This Japanese model serves as a hybrid between the common law type jury institution and the continental mixed tribunal system. In 2001, the Council submitted the final report to the office of the Prime Minister and made civil participation official.

Based on these recommendations, the Headquarters to Promote Justice System Reform prepared the draft of a new bill, termed the “Saiban-in Act 2009.” With bipartisan support, the bill was passed in the Japanese Parliament, indicating that the saiban-in system is to be officially implemented on May 21st, 2009.⁷

One intriguing aspect of the bill is its treatment of the former Jury Act that has been suspended since 1943. In the Court Act, Section 3 of Article 3 announces that “The provisions of this Act shall not prevent the establishment of a jury system for criminal cases separately by law.”⁸ When the Diet adopted the Saiban-in Act, the article was not revised and the Jury Act was not abolished. Consequently, the Jury Act is still officially included in the list of the Japanese Existing Law recognized by the Japanese parliament.

II. BASIC STRUCTURE OF THE SAIBAN-IN SYSTEM

In this section, the basic procedures and rules of the saiban-in system (the lay judge system) are examined along with the legal framework of its proceedings, judgments, sentencing, and other relevant regulations.

A. *Jurisdiction*

The cases that are within the jurisdiction of the saiban-in are limited to only heavy criminal offences. Due to a lack of formal classification of what constitutes as a felony or misdemeanor in the Japanese Penal Code, the definitions of what crimes that the saiban-in trial may formally adjudicate is very unique. Specifically, the Saiban-in Act

⁷ There are still persistent criticisms of the saiban-in system in Japan because it might be unconstitutional for the defendant and against freedom of thought of the citizen. The Tokyo High Court denied the argument of its unconstitutionality on April 22, 2010. See, *High Court Rules Lay Judge Trial Constitutional*, JAPAN TIMES, April 23, 2010, available at <http://search.japantimes.co.jp/cgi-bin/nn20100423a6.html>.

⁸ Court Act (Act No. 59 of April 16, 1947).

covers: (1) crimes that warrant the death penalty or an indefinite prison term as the maximum sentence, and (2) crimes where the victim died by intent of the defendant.⁹ Specific crimes thus include: homicide, robbery resulting in bodily injury or death, bodily injury resulting in death, unsafe driving resulting in death, arson of an inhabited building, kidnapping for ransom, and abandonment by a person responsible for protection resulting in death.

B. *Panel*

The panel of the saiban-in trial consists of three professional judges and six lay judges (saiban-in).¹⁰ In the event where the defense does not object to the prosecution's case, the panel can then be altered to include only one professional judge and four lay judges with the consent of both parties.

C. *Function*

The panel shall determine the guilt of a defendant, and when it criminalizes, it also has the responsibility to determine the appropriate sentence.¹¹ For the interpretation of legal and procedural matters, the professional judges have the chief responsibility.¹²

D. *Qualification and Selection Process*

For the selection of the lay judges, any citizen who has voting rights in the lower diet may be selected as a candidate for the nomination pool.¹³ Every November, the court office in each district sends the first notice to individuals who have been randomly selected from the voting list for nomination into the pool. In this notice, the citizens are notified of their nominations as potential lay judges and of their summons for duty in the next year. The candidates are to return the attached survey questionnaires, indicating any legal prohibitions from judge duty, in which case they can then be withdrawn from the selection process given their official reason for declination. The Saiban-in Act prohibits following groups of individuals from serving as lay judges, including Diet members, State Ministers, executive government officials, professional judges, prosecutors, practicing lawyers, law professors, governors, mayors, and

⁹ Saiban-in Act, art. 2, § 1. (Act No. 124 of November 30, 2007)

¹⁰ *Id.* art. 2.

¹¹ *Id.* art. 6, § 1.

¹² *Id.* art. 6, § 2.

¹³ *Id.* art 13.

self-defense force officers.¹⁴ The Act also prohibits any individual who has had prior criminal records, such as arrest, detention or imprisonment from serving.¹⁵ Lastly, the Act approves that those with certain conditions and individualized circumstances are exempt from service, such as local assembly members, students, people with special conditions such as serious illnesses or injuries, individuals who need to take care of cohabiting family members, business owners whose attendance could potentially endanger their businesses, and individuals holding funerals for recently deceased family members.¹⁶

From the pool of the potential lay judges, the court sends the summons with a question sheet to candidates who were chosen by lot before the trial. On the selection day at the courtroom, the judges ask questions in reference to this question sheet and decide which candidate should be chosen as the lay judge or the alternate lay judge for a given trial. This selection process is not open to the public.

The Saiban-in Act also permits the professional judge to decide and accept other reasons for declination. The Cabinet has also added several other legal factors to be included for the reason of declination from lay judge service. These reasons include: (1) women who have been pregnant for the past eight months; (2) individuals who need to act as caretakers for their families; i.e. a medical care provider for a spouse, child and/or an elderly; (3) persons who have difficulty traveling to the court house; (4) husbands who need to attend the birth or act as caretakers for their pregnant wives; and lastly, (5) anyone who might experience physical, economic or mental damage if presided as a lay judge.

After completing the selection of the Saiban-in, the employers of the chosen lay judges are prohibited from dismissing them or giving them unfair treatment due to any conflicts that may arise of their lay judge duties.¹⁷ The identities of the lay judges are prohibited from disclosure before and during trial and can only be disclosed after the trial with written consent.¹⁸ No contact with lay judges can be made before or during the duration of the trial¹⁹ and no person shall contact lay judges

¹⁴ *Id.* art. 15, § 1.

¹⁵ *Id.* art. 15, § 2.

¹⁶ *Id.* art. 16.

¹⁷ *Id.* art. 100.

¹⁸ *Id.* art. 101.

¹⁹ *Id.* art. 102, § 1.

with the intention of soliciting confidential information involving the content of the trial at anytime.²⁰

E. *Pre-Trial Process*

When the Saiban-in Act was introduced, the Judicial Reform Headquarter planned to alter the old pre-trial process to be compatible with the new system. Its first mission was to set up a new pre-trial process followed by the implementation of a formal disclosure proceeding.

Formerly, there was no mandatory disclosure scheme for criminal trials in Japan, and prosecutors held no legal obligation to reveal their evidence to the defense. Traditionally prosecutors revealed evidence either voluntarily or a judge orders the disclosure of a specific piece of evidence due to case law.²¹ The newly established Pre-trial Arrangement Procedure (“kouhan-mae seiri tetsuduki”) intends to achieve the prompt and effective preparation for the saiban-in trial. By introducing lay participation into judicial decision-making, the Japanese judge is able to give a legislative order to reveal specific evidence from the prosecutor to the defense, thereby enabling the defense attorneys with the opportunity to examine and assess certain evidence held by the prosecutor.

The main purpose of this new pre-trial procedure is to sort out any factual and legal issues over which the both parties would argue in the trial. The trial period is expected to be as brief as possible for the citizens who are serving as lay judges. In completing this pre-trial procedure, the judge shall make arrangements of the facts and legal points at issue, the admission of evidence, and the trial proceeding schedule.

F. *Trial Process*

During the official trial, both parties are expected to present an opening argument. Prior to the introduction of the saiban-in trial, the defense was not required to make such an argument in front of the professional judges. With the saiban-in trial however, both parties are now expected to give their arguments succinctly.²²

Formerly, the trial was held in intervals of usually two weeks at a time. In the Saiban-in trial, the sessions will be held daily throughout the entire day and continues until its conclusion..

²⁰ *Id.* art. 102, § 2.

²¹ Supreme Court, *Decision Ruling that the Order of Disclosure of Evidence Issued to the Public Prosecutor in Respect of the Written Statements Is Illegal*, 23 KEISHU 275 (1968), available at <http://www.courts.go.jp/english/judgments/text/1969.04.25-1968.-Shi-No..109.html>.

²² Saiban-in Act, art. 40.

The most unique aspect of the new trial process is that the Act permits the trial to be separated for individual crimes committed by the same defendant. Typically, if a defendant has more than one criminal charge, the Japanese Penal Code requires a combined trial for these crimes and classifies them as “consolidated crimes” (Heigo-zai).²³ This trial procedure benefits both the defendant and the court because the court can cut overhead costs as well as time by adjudicating consolidated crimes in a single trial. Through this special trial arrangement, the defendant often receives a lighter sentence rather than dual punishments given by separated trials.

Today, the Saiban-in Act may force the court to separate these crimes and hold individualized saiban-in trials for each crime. This type of trial is called as “Kubun-shinri” (partitioned trials). The court is required to make the decision for the partitioned trial based on the request from the prosecution or defense attorneys. The court can also proceed with the partitioned trial based on its own discretion.²⁴ For example, if a defendant is indicted for both the confinement and rape of the victim, two saiban-in trials may be held separately against the same defendant.

G. *Deliberation and Verdict*

The panel of six lay judges and three professional judges are to deliberate behind closed doors and decide their verdict on the conditional majority rule. The majority decision requires at least one professional judge’s approval vote.²⁵ Some commentators are critical of this conditional majority rule because it gives undue power of decision-making into the hands of lay persons who may lack substantial legal knowledge. On the other hand, other commentators support this special majority rule in light of the fundamental human rights principles embedded in the Japanese Constitution. Nevertheless, with these guidelines, the professional judges cannot attain a majority based only on their voting.

Additionally, the Saiban-in Act stipulates that the judges must provide assistance and support to lay judges in carrying out their deliberative responsibility. For example, the chief judge must explain

²³ Saiban-in Act, art. 45. Two or more crime that have been committed but for which no judgment has yet become final and binding shall constitute crimes for consolidated punishment. When a judgment imposing imprisonment without work or a greater punishment becomes final and binding for a crime, only that crime and other crime committed before such judgment became final and binding shall constitute crimes for consolidated punishment.

²⁴ *Id.* art. 71.

²⁵ *Id.* art. 67, § 1.

necessary and applicable laws to lay judges and provide sufficient opportunities for lay judges to express their opinions.²⁶ Lastly, the lay judges must bear the responsibility for the legislative duty of confidentiality, such that information obtained from the deliberative process shall not be revealed.²⁷

H. Sentencing

In the case of a guilty verdict, the professional and lay judges shall decide the sentence in a collaborative manner. Indeed, the dual responsibility for sentencing is the key aspect of this hybrid-model. When the opinion for sentencing is split, a special majority rule is applied.²⁸ If the opinion for sentencing does not reach unanimity or even gain a majority in the panel, the most unfavorable opinion to the defense shall be added to the next favorable option until the majority opinion is attained.²⁹

I. Judgment and Judgment Document

In the Saiban-in Act and the Rule of Saiban-in, there exists a rule for which the judgment making process is based on a model of deliberation. Additionally, the reasoning of the decision and, in the case of a guilty verdict, the reason of sentencing must be released.³⁰ In the saiban-in trial, the professional judges shall create a judgment document and release it to both parties. Based on the deliberation and the result of voting, the professional judges shall describe the judgment, the sentence and the reasoning. Although the JFBA demanded the release of all of such judgments to the public³¹, the court office has yet to respond to its request.

In the case of the partitioned trials (kubun shinri), the courts shall have partial judgments (bubun hanketsu) on each trial.³²

²⁶ *Id.* art. 66, § 5.

²⁷ *Id.* art 70.

²⁸ *Id.* art. 67, § 2.

²⁹ *Id.* art. 67, § 2.

³⁰ Rules of Criminal Procedure, art. 34, 36, 53 & 57.

³¹ See, JFBA, *Saiban-in Saiban no Zenhanketsusho no Kokai o Motomeru Ikensho* [Request to Release All Judgments of the Saiban-in Trials to the Public], NICHIBENREN, March 19, 2010, available at http://www.nichibenren.or.jp/ja/opinion/report/data/100319_2.pdf.

³² Saiban-in Act, art.78.

J. *Appeal*

There were no revisions to the appeal procedure of criminal cases when the Saiban-in Act was enacted, meaning that the appellate process remains unchanged for the saiban-in trial. In the saiban-in trial, only professional judges are involved in the appeal process. The Japanese Supreme Court has decided that the prosecutorial appeal against the not-guilty verdict was not a violation of constitutionality.³³ In the past, many acquitted verdicts were vacated by the appellate court through the prosecutorial appeal based on an error in the legal application of fact-finding.

K. *Payment*

Each saiban-in (lay judge) will be paid ten thousand yen (approximately one hundred US dollars) daily and the candidates will be paid eight thousand yen (app. eighty US dollars).³⁴ Both shall be provided their accommodations and also shall be paid for their transport expenses standing on the governmental rule.³⁵

L. *Crimes Pertaining to the Saiban-in Trial*

Any request for the saiban-in to exercise his or her influence as a lay judge to potentially alter the outcome of a trial is punishable.³⁶ Additionally, the release of any statements or information for the purposes of influencing their judgment is also punishable.³⁷ These same conditions apply to lay judge candidates.³⁸ Any attempt to intimidate the saiban-in, former saiban-in, candidates and/or their relatives through threat using meetings, the sending of documents, phone calls or any other method is also punishable by law.³⁹

Any current or former lay judge who discloses secret information concerning a trial or the process of deliberation to outsiders is subject to prosecution.⁴⁰ Any other relevant parties, including defendants and their

³³ Supreme Court, 4 KEISHU 1805 (1950).

³⁴ Saiban-in Act, art 7.

³⁵ *Id.* art 6.

³⁶ *Id.* art. 106, § 1.

³⁷ *Id.* art. 106, § 2.

³⁸ *Id.* art. 106, § 3.

³⁹ *Id.* art. 107.

⁴⁰ *Id.* art. 108.

families who reveal the identity and other confidential information of the saiban-in and the candidates are also subject to punishment.⁴¹ Saiban-in candidates who provide false information during the selection process are also punishable by law.⁴² Additionally, any candidate who neglects the summons to court will be punished.⁴³ On the other hand, there are no rules to require secrecy for the lay judge selection proceeding in the Saiban-in Act and other laws.

III. THE FIRST YEAR OF THE “SAIBAN-IN” TRIAL

This section examines the performance of the first year of the saiban-in system based on statistics and questionnaire surveys given to individuals who have served as lay judges.

A. *Lay Judge Attendance*

Before the start of the saiban-in system, nearly all of public opinion surveys conducted by the media reported that a high percentage of the public did not want to serve as lay judges.⁴⁴ Once the saiban-in trial began, however, many saiban-in candidates responded positively to their summons for duty. As of March 31, 2010, nearly one year after the introduction of the lay judge system, a total of 41,047 individuals have been selected as possible candidates for lay judge duty, and the letters of summons with questionnaires were sent to 30,220 of them. After screening, 20,038 were summoned, and 16,600 appeared at the courthouse (an attendance rate of 82.8 percent). A total of 21,435 candidates were approved for their declinature from saiban-in service. The most common reason of declinature was the legally approved condition, including age-specific exemption and those with legally-excluded occupations, such as professors and students (see Figure 1). Job-related declinature was the second common reason followed by diseases and nursing care.

⁴¹ *Id.* art. 109.

⁴² *Id.* art. 110.

⁴³ *Id.* art. 112.

⁴⁴ On the survey at February 2005 by the Cabinet Office, 70% of the respondent answered negative. See, Chapter 5 in the report. <http://www8.cao.go.jp/survey/h16/h16-saiban/index.html>

Figure 1: Reasons for declinature (May 21st 2009 ~ March 31st 2010)

Total summons	41,047	
Approved Declinature	21,435	100%
Legally Approved Reason	7,439	34.7
Disease	2,851	13.3
Nursing care	2,339	10.9
Important task on the job	5,258	24.5
Important task on the social life	513	2.3
Pregnant or postpartum	359	1.6
Nursing care in the special occasion	228	1.0
Caring for hospitalization	171	0.7
Attendance of birthing	37	0.1
Long distance	457	2.1
Other mental/economical reason	1,449	6.7
Other reasons	334	1.5

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A total number of candidates discharged or excluded from the candidate pool of saiban-in was 12,771 (see Figure 2). However, the main factor that contributed to their exclusion from lay judge service was simply non-selection by lot, i.e., they were included in the original list of lay judges, but they were not chosen for the lay judge duty.

Figure 2: Discharged/non-selected candidates

Total number of non-selected candidate	12,771
Discharge by reason (Art. 34 Sec.4)	86
Discharge by refusal (Art.34 Sec.7)	1,833
Discharge without reason (Art. 36)	1,997
Non-selection by lot (Art. 37 Sec. 3)	8,855
Non-selection without question (Statute Art. 35 Sec. 2&3)	---

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B. Number of Trials and Crime Categories

During the first year of the saiban-in trial, from May 21st, 2009 to May 20th, 2010, the district courts handled 1,881 cases and had issued a total of 530 guilty verdicts⁴⁵ with no verdicts of acquittal.⁴⁶ Among the

⁴⁵ Japanese Court Office, *Chiken Betsu: Saiban-In Saiban Taisho Jiken Zaimai Betsu Kiso Kensu* [District Statistics: Indictment for Saiban-in Trial Qualified Crimes], May 2010, available at <http://www.moj.go.jp/content/000050861.pdf>.

indicted cases, robberies with assault (465) and murders (419) are the two most common crimes, followed arsons (172), bodily injuries (130), use of amphetamines (125), rapes with assault (120), and indecent assaults (88) (see Figure 3).

Figure 3: Statistics of indicted crimes for saiban-in trial (May 21st 2009 ~ May 20th 2010)

Crime Category	Number	Percent
Total	1881	100%
Robbery resulting bodily injury	465	24.7
Murder	419	22.2
Arson	172	9.1
Bodily injury resulting in death	130	6.9
Use of Amphetamine	125	6.6
Rape resulting in bodily injury	120	6.3
Robbery and rape	88	4.6
Indecent assault	80	4.2
Robbery resulting in death	69	3.6
Uttering counterfeit currency	49	2.6
Drug	39	2.0
Other crimes	24	1.2
Counterfeit currency	20	1.0
Dangerous driving resulting in death	19	1.0
Gang rape	15	0.7
Illegal weapon (gun/knife)	15	0.7
Negligence as guardian resulting in death	14	0.7
Other special crimes	12	0.6
Violation of explosive control act	6	0.3

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Three-quarters of the saiban-in trials were concluded in three days and the average trial length was 3.3 days (see Figure 4). For the same period, a total number of completed saiban-in trials were much less than previously expected, meaning that court procedures were very slow, and the court was only able to process less than one-third of the indicted cases. In May 2010, Japan's Supreme Court Chief Justice Hisanobu Takesaki made a brief comment on the small fraction of completed saiban-in trials after the initial indictments and encouraged the courts to work harder to

⁴⁶ *Saiban-in Seido Kaishi Ichi-nen: Hanketsu Uketa Zenin Ga Yuzai* [The First Year of the Saiban-in System: All Defendants Were Found Guilty], NITTERE NEWS at 24, August 24, 2010, available at <http://news24.jp/articles/2010/05/21/07159580.html>.

speed up the trial process.⁴⁷ Generally, the saiban-in trial takes three or four days from the opening statement to the judgment, dramatically shorter than the traditional trial process. Despite this, the new system still requires careful preparation prior to the commencement of the trial. During this pre-trial stage, the judge, prosecutors and defenders must work intimately and collaboratively to discuss the admission of evidence, the arrangement of points at issue, and the trial proceedings schedule. This pre-trial process, called “kouhan-mae seiri tetsuduki”, (Pre-trial Arrangement Procedure) requires an enormous amount of time and effort because both parties must adequately prepare their respective pieces of evidence and present effective arguments against the opposition. Due to the fact that the prosecutor has no automatic and/or mandatory duty to disclose their unused evidence in Japan, the defense attorneys must prepare a list of disclosure request to the court, who then must order the prosecution to release their evidence. Additionally, since this entire process takes months of preparation, the pre-trial process becomes extremely time-consuming.

The average length of pre-trial arrangement procedure was 4.0 months for plea-guilty cases and 4.8 months for non-confession cases.⁴⁸ The average number of days for the pre-trial arrangement procedure was 3.3 for plea-guilty cases and 4.5 for non-confession cases. The average procedural period from the indictment to the judgment was 6.0 months -- 5.8 months in guilty-plea cases and 6.8 months in contested cases.

The 2008 Court Office report indicated that, prior to the introduction of saiban-in trials, the average trial length of the criminal case was 7.7 months in total (see Figure 4) --5.9 months for guilty plea cases and 10.5 months for non-confession cases.⁴⁹ The average number of trial days took 3.0 days of meeting for guilty-plea cases and 6.1 for non-confession

⁴⁷ *Saiban-in Seido*, “Yoi Sutato Ga Kireta” [*The Saiban-in System, “Excellent Start”*], ASAHI SHIMBUN, May 3, 2010, available at <http://www.asahi.com/national/update/0502/TKY201005020196.html>.

⁴⁸ Japanese Court Office, *Saiban-In Saiban No Jisshi Jokyo Ni Tsuite* [*Implementation of the Saiban-in Saiban*], April 16, 2010, available at http://www.courts.go.jp/saikosai/about/iinkai/saibanin_kondan/siry0_07/pdf/siry0_5.pdf.

⁴⁹ Japanese Court Office, *Saiban-in Saiban No Taisho To Naru Jiken No Jininsu, Genzaino Heikin Shinri Kikan Oyobi Heikin Kaitei Kaisu* [*Lay Judges, Average Deliberation, and Average Court Meeting for Criminal Cases Qualified for the Saiban-in Trial*], August 26, 2008, available at http://www.saibanin.courts.go.jp/shiry0/pdf/heikin_sinri_kikan.pdf.

cases.⁵⁰ Compared to the duration of the professional judge trial to that of saiban-in trial, the trial length for confession cases was virtually identical for both the professional judge and saiban-in trials. The only significant difference was found in the duration of non-confession cases, in which the length for professional judge trial was four months longer than that of the saiban-in trial. The professional judge trial also took two more extra days to complete its trial process than the saiban-in trial.

Figure 4: Average trial period and trial days comparing with supposed cases

	2008 Case of Saiban-in Trial Jurisdiction (estimated)			May 2009 – Feb/March 2010 Case of Saiban-in Trial (actually indicted and judged)		
	Total Number	Average Trial Period	Average Trial Days	Total Number	Average Trial Period *	Average Trial Days
Total Number	2,208	7.7 month	4.3	444	6.0 month	3.5
Confession	1,265	5.9	3.0	324	5.8	3.3
Non-confession	904	10.5	6.1	120	6.8	4.2

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Another important finding is that a total number of saiban-in trials in this period did not reach the anticipated goal. The expected number of the case to be adjudicated by the Saiban-in trial was estimated to be around 3,000 annually, according to formal judicial statistics.⁵¹ The actual number of saiban-in trials, however, were 40 percent lower than the expected number, and the completed trials were only a little more than 18 percent.⁵² Overall, the saiban-in trial achieved the goal of speediness and efficiency, but the rate of completing the cases was far below the anticipated level.

⁵⁰ *Id.*

⁵¹ Japanese Court Office, *Saiban-in Seido No Taisho To Naru Jiken No Kazu, 2008* [Criminal Cases Qualified for the Saiban-in Trial, 2008], August 26, 2008, available at <http://www.saibanin.courts.go.jp/shiryo/pdf/03.pdf>.

⁵² *Id.*, at 7. A total of 554 cases were completed by the end of May 2010. Among 582 criminal defendants, 152 of them pleaded not-guilty (26.1 percent).

C. Judgment/Verdict

Two other important findings of the saiban-in trials are the low numbers of not-guilty plea cases and the extreme low percentage of not-guilty judgments. Up until the end of May 2010, the rate of not-guilty pleas was 26 percent in a total of 554 indicted cases.⁵³ The average number of not-guilty pleas for serious crimes in the district court from 2003 to 2007 was approximately thirty percent in Japan for this period.⁵⁴ The figures for saiban-in trials are only slightly lower than that of the ordinary trial by professional judges.

In regards to the rate of not-guilty verdicts in comparison to the rate of not-guilty pleas, the result in the saiban-in trial was much lower than in the professional judge court. For the years between 2003 and 2007, the rate of not-guilty verdicts in the contested cases varied from 2.10 percent in 2003 and 2.91 percent in 2007.⁵⁵ On the other hand, until the end of May 2010, the number of not-guilty judgments for a total 210 defendants in the saiban-in trial was zero.⁵⁶ The first not-guilty verdict in the saiban-in trial was rendered in the Chiba District Court on June 22, 2010 in a case involving a contraband trade of amphetamines.⁵⁷ At the post-verdict conference interview, one lay judge commented that the

⁵³ Japanese Court Office, *Saiban-in Saiban No Jissi Jokyo Ni Tsuite* [*The Implementation of the Saiban-in Saiban*], July 2010, available at http://www.saibanin.courts.go.jp/topics/pdf/09_12_05-10jissi_jyoukyou/02.pdf.

⁵⁴ Supreme Court of Japan, *Table 2. Annual Comparison of Rate of the Accused Who Confess- Ordinary Cases in the First Instance*, available at http://www.courts.go.jp/english/proceedings/pdf/criminal_justice/table2.pdf. The rate of confession in felony cases (i.e., “obligatory three-judge panel cases”) ranged from 69.5 percent in 2004 to 72.4 percent in 2005.

⁵⁵ Supreme Court of Japan, *Table 4. Annual Comparison of Number and Rate of the Accused Found Not Guilty or Partially Not Guilty,* 2008, available at http://www.courts.go.jp/english/proceedings/pdf/criminal_justice/table4.pdf.

⁵⁶ Japan Court Office, *supra* note 53, at 3.

⁵⁷ *First Full Acquittal in Lay Judge Trial*, JAPAN TIMES, June 23, 2010, available at <http://search.japantimes.co.jp/cgi-bin/nn20100623a4.html>.

prosecutor had failed to provide sufficient evidence to convict the defendant.⁵⁸

D. Sentencing

One characteristic of sentencing in the saiban-in trial is the high-rate of probation for the suspended sentence cases. The saiban-in panel gave probation sentences in 59.2 percent of the cases. On the other hand, in the professional judge trial, the probation rate was given in 36.6 percent of the cases. Shozo Fujita, Director of the Supreme Public Prosecutor's Office, commented that "this seems to indicate the lay judges are [more] interested in the correction of the defendants [in society rather in prison] and preventing [the possibility of] repeated offenses."⁵⁹

There have been heated debates on the possible causes of such dramatic shifts in sentencing trends with the introduction of the saiban-in trial. Given the dramatic change in sentencing decisions, some opinions emerged including from demanding harsher penalties to accepting more moderate sentences for the defendants. Still some said that it was very difficult to predict such a change because the sentencing decision was influenced by many factors including prosecutorial decisions, victim impact statements, modifications to maximum penalty, media impact on the trial, defendant backgrounds and personalities, and the contents of arguments presented in the trial.

The sentencing statistics also show other indisputable differences between the lay and professional judge trials. Figures 5 through 8 compare the sentencing differences in the following four crimes; (1) murder, (2) accidental mortality, (3) rape with assault, and (4) robbery resulting in bodily injury.⁶⁰

There are three notable characteristics of sentencing patterns for the lay judge trial: (1) heavier penalties on sexual crimes, (2) wider variations of the incarcerative penalty on other crime categories, and (3) a higher rate of requests for parole in suspended sentences.

⁵⁸ *Id.*

⁵⁹ Setsuko Kamiya, *Year One of Lay Judge System: All Convicted*, JAPAN TIMES, May 21, 2010, available at <http://search.japantimes.co.jp/cgi-bin/nn20100521a5.html>.

⁶⁰ Supreme Court Office, *Ryokei Bunpu Ni Tsuite [Distribution of Criminal Penalty]*, 2010, available at <http://www.moj.go.jp/content/000050864.pdf>. The professional judge's court has still adjudicates criminal cases after the saiban-in trial started because some defendants were indicted before the new system was put into effect.

First, for sexual crimes such as rape resulting in bodily injury and indecent assaults, the saiban-in trial gave heavier penalties than the professional judge trial. Figure 7 shows that, in the case of rape resulting in bodily injury, nearly half of the defendants in professional judge trials were given sentences of under five years (47.1 percent), including suspended sentences and sentences with parole. However, in the saiban-in trial, only one quarter of the cases received similar verdicts (25.9 percent), suggesting that the lay judge court sought to punish sex offences more severely.

On the other hand, in other crime categories, it is difficult to confirm similar trends. Instead, the sentencing in the lay judge court is divided widely between mild sentences and heavier sentences. But the nearly identical sentencing pattern is also found between the professional and lay judge trials with respect to robbery resulting in bodily injury (35.7 percent and 32.5 percent respectively) (see Figure 8, “Under 5 years”).

Thirdly, the saiban-in panel issued a high rate of parole requests in all criminal categories, except for rape. As Figure 8 shows, in the case of robbery resulting in bodily injury, the bench trial rarely granted parole (1.8 percent), while the saiban-in court gave parole at a much higher rate (12.3 percent). A similar pattern is also observed in the sentencing for accidental mortality, where the professional judge trial only gave parole in one out of the 227 cases (0.4 percent) and suspended sentences in 25 cases (11.0 percent). The saiban-in trial gave parole in one of 33 cases (3.0 percent) and suspended sentences in 6 cases (18.2 percent). While a total number of saiban-in trials were small, there still exists a distinct difference in the sentencing pattern between professional judge and lay judge trials.

Figure 5: Sentence of murder cases in professional judge and saiban-in trials (%)

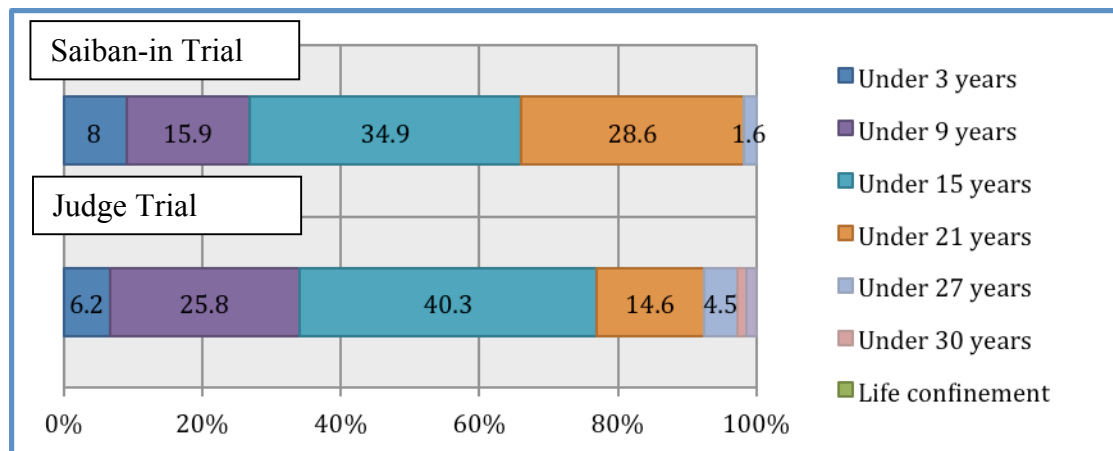
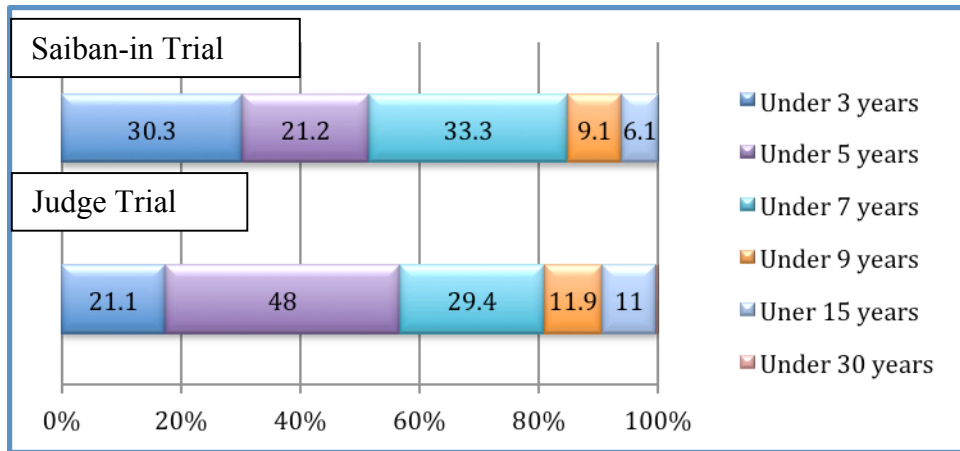
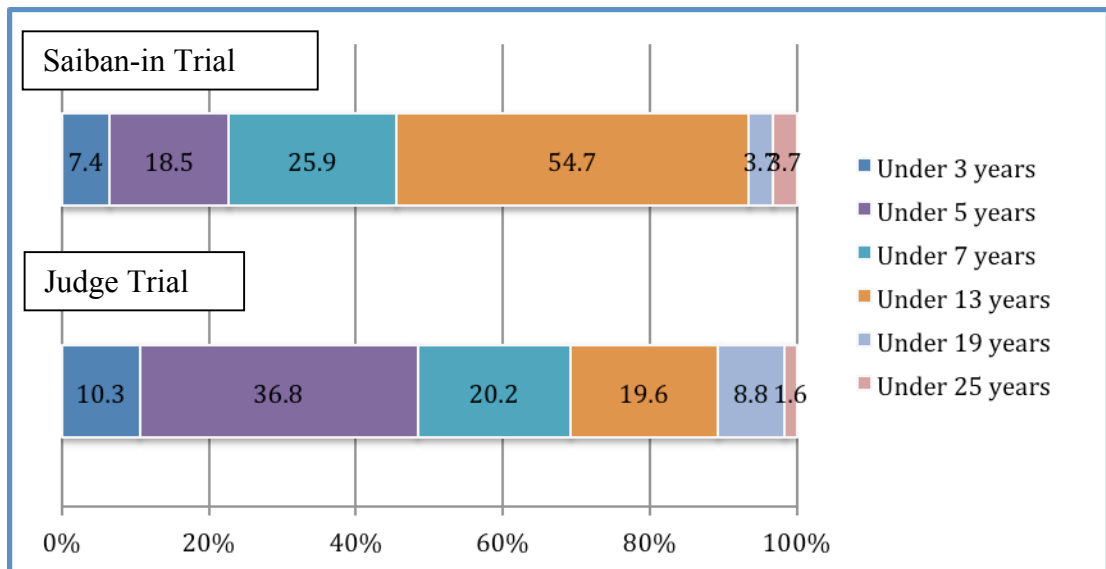


Figure 6: Sentence of Accidental mortality in professional judge and saiban-in trials (%)



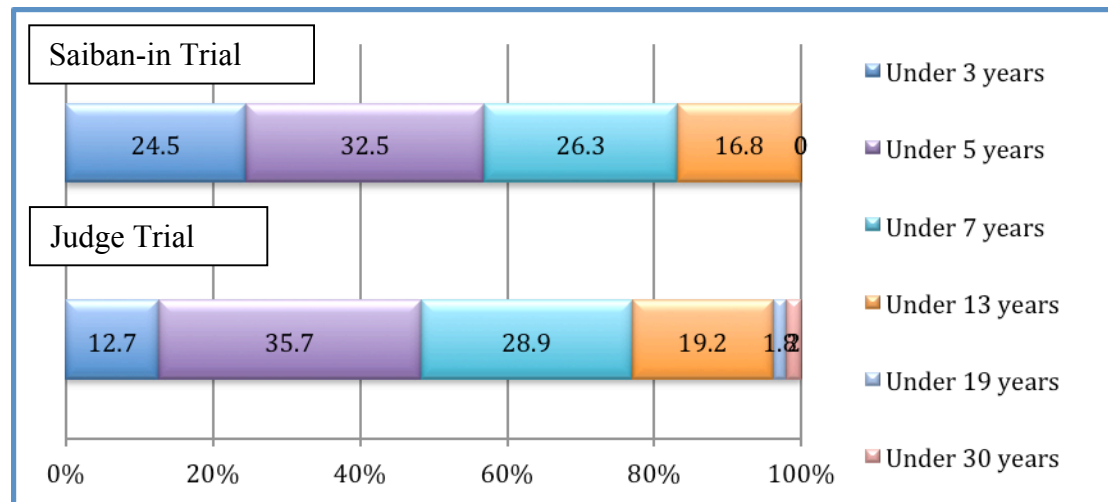
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Figure 7: Sentence of rape resulting in bodily injury in professional judge and saiban-in trials (%)



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Figure 8: Sentence of robbery resulting in bodily injury in professional judge and saiban-in trials (%)



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E. Survey Responses from Lay Judges

The Supreme Court Office distributed survey questionnaires to lay judge participants from August 3rd 2009 to the end of December 2009,⁶¹ and 5,054 respondents replied to the survey questionnaires.⁶²

An overwhelming majority of the lay judges evaluated their saiban-in experiences as positive. For individuals who had worked as lay judges, there exists a drastic change before and after their experiences. Figure 8 indicates that 57.0 percent of them said that the experience of lay participation was “extremely positive,” and 39.7 percent said it was a “positive” experience, indicating that nearly all of them (96.7 percent) showed a strong sense of positive fulfillment in their duties as lay judges.⁶³

⁶¹ Supreme Court Office, *Saiban-in To Keikensha Ni Taisuru Anketo: Chosa Kekka Hokokusho Heisei 21 Nendo* [Survey of Those who Served as Saiban-in: Report of Investigative Results in 2009] (hereinafter *Lay Judge Survey*),” March 2010, available at http://www.courts.go.jp/saikosai/about/iinkai/saibanin_kondan/siryo_07/pdf/siryo_2-1.pdf.

⁶² Supreme Court Office, *Saiban-in To Keikensha Ni Taisuru Anketo Chousa Houkokusho* [Report of Questionnaire Survey of Former Lay Judges], March, 2010, available at <http://www.moj.go.jp/content/000050865.pdf> [hereinafter *Lay Judge Survey*].

⁶³ *Id.* at 6.

On the other hand, 58.6 percent said that they initially did not want to serve as a saiban-in, while only 26.2 percent had a desire to serve at the trial.⁶⁴ Such discrepancy underscores the fact that the participants' actual experiences of judicial duties exceeded their expectations of civil participation in criminal trials.

The similar results were found in another system of civil participation called "Kensatsu Shinsa Kai" (Committees for the Inquest of Prosecution (CIP)). This Committee system boasts sixty years of successful operation since its establishment immediately after the Second World War. Its primary function is to review and investigate the prosecutor's discretion in deciding not to prosecute criminal suspects. The CIP has already reviewed more than one-forty-thousand cases since 1949.⁶⁵ Former members of the Committee expressed similar positive reactions about their experience, while many of them initially indicated that they had no desire to serve.⁶⁶ They changed their minds after completing their service, realizing that their service was crucial in maintaining an equitable criminal justice system in Japanese society. They also believed that the prosecutor's office had respected their recommendations for indictments of criminal suspects.⁶⁷

⁶⁴ Setsuko Kamiya, *Lay Judges Off to Solid Start- Legal System Gets a Positive Jolt from Citizen Participation*, JAPAN TIMES, Feb. 26, 2010, available at <http://search.japantimes.co.jp/cgi-bin/nn20100226f1.html>.

⁶⁵ For the statistics of the Committee of Inquest for the Prosecution from 1949 to 2001, see Cabinet Office, *Tokei Shiryo: Ichiran [Statistical Materials: Summaries]*, available at <http://www.kantei.go.jp/jp/sihouseido/kentoukai/saibanin/dai3/3siryou1.pdf>. For the data from 1996 to 2005, see Ministry of Justice, *Dai-Issetu, Keiji Tetsuzuki to Higaisha Tono Kakawari [Chapter 1: Criminal Procedure and the Involvement of Crime Victims]*, 2006, available at http://hakusyo1.moj.go.jp/jp/52/nfm/n_52_2_5_2_1_1.html. For the data from 2002 to 2009, see Supreme Court of Japan, *Kensatsu Shinsakai No Juri Kensu, Giketu Kensuto [Acceptance of Cases by the Committee for the Inquest of Prosecution: The Results of Recommendations]*, 2010, available at http://www.courts.go.jp/kensin/pdf/jyuri_giketu_kensuu.pdf.

⁶⁶ See, Takashi Watanabe, "Mou Hitotsuno Kokumin no Shiho Sanka" (http://www.sangiin.go.jp/japanese/annai/chousa/rippou_chousa/backnumber/2009pdf/20091201016.pdf), RIPPON TO CHOSA Vol. 299 (Dec. 1st, 2009). In this article, note 19 introduced a survey for the pre-participation answer and the post-participation.

⁶⁷ See, Yoshikazu Uto, "Shiho Eno Shimin Sanka ni Miru 'Shimin-

In December 2006, three years before the introduction of the saiban-in trial, the Supreme Court Office conducted a national survey and examined Japanese citizens' opinions and attitudes towards lay judge service. The sample of 1,795 citizens were contacted, in which only 20.8 percent of them indicated that they looked forward to serving in the lay judge trial, while 44.5 % replied that they might serve with great hesitancy, and 33.6% refused to serve, even though it is an official duty.⁶⁸ Some media outlets criticized that the task of serving as a lay judge can create a tremendous burden for ordinary citizens, casting strong doubts about the successful implementation of the lay trial system.

Lay judges' remarkably positive experience must be welcomed by the original drafters of the Final Report for the Judicial Reform Council and the supporters of civic participation in criminal trials. The Final Report recommended that the Japanese people must become the foundation of Japan's power by playing a vital function in the operation of the justice system, just as they already are in the Japanese legislative system. The Saiban-in Act equally expressed this purpose of the civil participation as promoting public understanding of the judicial process and enhancing people's confidence in the criminal justice system.⁶⁹ The positive feedback of the former lay judges illustrates the success of this new lay judge system in Japan.

IV. IMPACT ON THE JUDICIAL ARENA

This section analyses the impact of the saiban-in trial on the Japanese judicial system and evaluates what effects the new lay-judge system had on the pre-trial procedures, trial proceedings, and post-trial processes in the criminal justice system. Changes in the criminal procedure and the role and functions of actors within the criminal justice system are addressed and examined. By critically assessing the impact of

teki Noudo sei' no Ryogi-teki Seikaku", Kyudai Hogaku vol.100 (2010) pp. 87-123. For the voice of former Shinsa-in, for example, Mieko Matsumoto, "Kensatsu Shinsa-in wo Keiken Shite", Houritsu no Hiroba vol. 62 no.6 (2006) pp.28-29; Tadashi Sakurai, "Kensatsu Shinsa in wo Taikenshite" Houritsu Jiho vol. 50 no. 9 (1978) pp. 61; Sakura Ihara, "Kensatsu Shinsa in no Keiken to Teigen" Houritsu Jiho vol. 50 no. 9 (1978) pp. 60-61.

⁶⁸ Cabinet Office, *Report of Special Questionnaire Survey for Saiban-in Trial* (Feb. 2008), available at http://www.saibanin.courts.go.jp/shiryo/pdf/kondan9_1seron_yousi.pdf. A total of 3,000 Japanese citizens were selected for the survey and 1,795 of them (59.8%) of them responded.

⁶⁹ Saiban-in Act, art 1.

the lay judge system, the author focuses, not only on the topic of the function of lay judge trial itself, but also on the entire process of the criminal justice system in Japan.

A. *Lawyer performance*

The first significant impact of the saiban-in trial was reflected in the performance of lawyers. The prosecutors refined their performative skills and courtroom proficiency through systematic training programs given by the prosecutor's office. In order to prepare successfully for the new system, young prosecutors and trial advocators learned new techniques such as the use of Power Point presentations and useful oratory skills in order to communicate more effectively to lay judges in the courtroom. The prosecutor's office also made available those training sessions and programs to every prosecutor in the prosecutor's office with the exception of high-ranking executive officers.

The defense attorneys, on the other hand, did not have sufficient time or resource to learn these crucial skills and prepare for the new trial system. Additionally, defense lawyers failed to obtain sufficient support from their staff to assist in their preparation for the new trial. The difference in the amount of available resources for preparatory work was directly reflected on lay judges' different assessment of courtroom performance by prosecutors and defense attorneys. More than eighty percent of lay judges said that the prosecutors' explanation was easy to understand (80.3 percent), while only less than a half felt that the defense lawyers' explanation was easy to understand (49.8 percent) – more than 30 percentage-points below those of the prosecutor. Furthermore nearly two-fifths of lay judges said defense lawyers' explanation was difficult to follow (37.8 percent). The huge discrepancy in the lay judges' assessments illustrates the major victory for the prosecutor's office and their effort to offer effective training programs for young prosecutors

A post-trial survey of lay judges also showed that the majority of them thought that the entire court proceeding was generally easy to understand (70.9 percent).⁷⁰ When questioned whether they encountered any difficulties in understanding the specific area of trial process, the minority of lay assessors complained about complexity of the case (11.5 percent) and the context of courtroom dialogues (13.2 percent) while 43.6 % indicated that the trial process was not confusing.⁷¹

B. *Sentencing*

The second impact of the saiban-in trial on the criminal justice system is found on the patterns of sentencing. Sentencing in lay-judge

⁷⁰ *Lay Judge Survey*, *supra* note 62, at 7.

⁷¹ *Id.* at 9.

trials is, I believe, largely affected by two forms of lay judge reactions to their in-court experience. The first type of reaction is their strong response to the presence of crime victims' voices and narratives during the trial proceeding.

Since December of 2008, victims and their families were allowed to stand inside the bar rather than in the audience seat because of the enactment of the system called "higaisha sanko seido" (a system of victim participation).⁷² This law permits the victims or their families to question the witnesses if necessary, provide statements as victims, submit their recommended sentences, and give their own closing arguments separate from those of the prosecutor.⁷³ The victims' rights such as compensation, restitution and victim statements were not included in the judicial reform of the late 1990s. The recent enactment of the law reflects the combination of political actions initiated by victims' rights organizations, media attention to rights campaigns, the response of police bureaucrats to rights organizations, and politicians' reactions to the demands of grassroots rights organizations in the early 2000s.⁷⁴

Although, legally speaking, the presentation of victim statements and crime victims' courtroom participation are not considered as part of substantive evidence of the trial, some lay judges readily expressed their compassion and sympathy for the victims and their families during the post-trial conferences.⁷⁵ While it is difficult to evaluate how much their participation influenced lay judges' decision-making, it is possible to

⁷² Toshihiro Kawaide, *Victim's Participation in the Criminal Trial in Japan*, September 12, 2008, <http://www.j.u-tokyo.ac.jp/~sota/info/Papers/kawaide.pdf>. For the criticism of this participation, see, Masami Ito, *Victim Participation in Trials Risky, Experts Say*, JAPAN TIMES, March 30, 2009, available at <http://search.japantimes.co.jp/cgi-bin/nn20070330a3.html>.

⁷³ These functions of victim party were implemented using examples from French and German systems.

⁷⁴ For this movement, see, Koichi Hamai & Tom Ellis, *Genbatsuka: Growing Penal Populism and the Changing Role of Public Prosecutors in Japan*, 33 JAPANESE J. SOC. CRIMINOLOGY, 67 (2009), available at http://ci.nii.ac.jp/els/110006967460.pdf?id=ART0008876675&type=pdf&lang=jp&host=cinii&order_no=&ppv_type=0&lang_sw=&no=1280417669&cp.

⁷⁵ The rate of victim participation in criminal trials is not high. In 2009, the victim participated in only 18 of 118 cases (15.2%).

speculate that, without victim participation, some defendants might have received a lighter sentence by the lay judge panel.⁷⁶

Different patterns of sentencing were also observed in the saiban-in trial. If a trial involved tragic stories in regards to the defendants or their family victims, the sentence was dramatically mild. On May 27th 2010, in the Chiba District Court, a fifty-four-year-old female defendant, who killed her seventy-eight-year-old mother, received a suspended sentence because of the perceived psychological and physical burden placed on her due to the prolonged nursing care she had to provide the victim with serious illnesses.⁷⁷ In another instance, on December 3, 2009, in the Kobe District Court, a male defendant who killed his sister-in-law was given a suspended sentence for similar reasons.⁷⁸ Lastly, in the Saitama District Court, on June 29, 2010, an eighty-three-year-old female defendant was also given a suspended sentence after she had killed her own son who was suffering with Parkinson's disease.⁷⁹

From examining the sentencing patterns in these sensitive cases, some speculations may be drawn. First, the sentencing by lay judges may have been guided by emotionalism and personal reactions to sympathetic narratives rather than an objective evaluation of the factual evidence presented in trial and the equitable application of legal principles of criminal justice policies surrounding such crimes. In order to ensure that the lay judges make fair and proper sentencing decisions in those trials, professional judges must provide legal assistance and support, including guidelines for the proper application of legal principles and the objective evaluation of factual evidence. In some saiban-in trials, however, even professional judges were not equipped with knowledge of criminal justice policies necessary to guide the lay judges. Since, nearly twenty years ago, the government decided to exclude the subject matter of criminal policies

⁷⁶ Some research tried to figure out the actual effect of penal populism, see, Yoshiyuki Matsumura, *Hitobito No Saiban-in Saiban To Keiji Shiho Heno Taido* [*Japanese Attitudes Toward Criminal Justice and Lay Judge System: Focusing on Their Evaluation*], 72 SOC. L. 70 (2010). Professor Matsumura shows that "populism tendency has been spread without regard to social stratum" based on his questionnaire survey of 1,160 respondents.

⁷⁷ See, YOMIURI SHIMBUN, May 28th, 2010.

⁷⁸ See, ASAHI SHIMBUN, December 3rd, 2009. (<http://www.asahi.com/special/080201/OSK200912030102.html>)

⁷⁹ See, SANKEI SHIMBUN June 29th, 2010 (<http://sankei.jp.msn.com/region/kanto/saitama/100729/stm1007291719006-n1.htm>).

and criminal law related scholarships from the state-certified bar examination, inexperienced judges and the forth-coming generation of young judges still lack legal knowledge and the special training necessary to understand correctional policies, the field of victimology, and/or crime prevention policies. Thus if these issues are not properly addressed, saiban-in trials and the outcomes may potentially become emotionally driven ordeals for both lay judges and crime victims, providing a hindrance to the proper implementation of innovative criminal policies in the future.

C. *Evidential Issue*

Thirdly, the saiban-in system made considerable impact on the professional judges' decision-making in the field of evidence law. A typical example is the exclusion of hear-say evidence, especially ones extracted from prosecutorial interrogation records. Up until now, Japan's professional judge court has been called "cho-sho saiban," which means that the trial was dominated by a massive amount of dossiers, i.e., written records of pretrial interviews made by the prosecutors. The introduction of the saiban-in trial transformed the document-dominated trial into the a trial that permitted the oral presentation of factual records in the courtroom.

Another impact on the evidential issue is observed in the judges' decisions on the disclosure request by the defense. The court recognized that a fair and effective presentation of arguments by both parties in the courtroom was considered to be one of the top priorities specified in Japan's judicial reform, and the court gradually developed the stance of enforcing the prosecutors to open up their evidentiary records for the defense attorneys. Indeed, it is commonly recognized that a fair and proper trial proceeding is unattainable without a sufficient disclosure of evidence, and these changes are welcomed not only for the equitable operation of the saiban-in trial, but also in all criminal trials outside the saiban-in jurisdiction.

D. *Prosecutorial Decision-Making*

The forth impact of the lay judge system is on prosecutorial decision-making. The prosecutors' superior performance in the courtroom reflects not only the well-coordinated preparatory work given by the prosecutor's office, but also their careful selection of the criminal cases for lay adjudication, meaning that the prosecutor's office carefully exercised their discretion in deciding which criminal case are to be indicted and thus recommended for the lay judge trial.

It is extremely difficult to unearth the presence of such internal case-selection schemes because non-indicted criminal cases are generally undisclosed to the public. However, there have been media reports that the prosecutor consciously changed the content of indictable offenses in some cases. For example, in one instance, the prosecutor decided to drop the

charge of “rape resulting in bodily injury” from the list of indictable offenses and instead indict the defendant with a simple rape charge, thereby avoiding the adjudication by the saiban-in panel.⁸⁰ This act was reportedly made due to a specific request made by the rape victim who was afraid that the facts of victimization and circumstances surrounding the crime might be revealed to, and scrutinized by, lay citizens.⁸¹ Without the “threat” of the lay judge trial, the victim may not have asked the prosecution to change the criminal charges, or the prosecutor’s office might not have accepted a victim’s request.

Other reports indicated that a district prosecutor’s office often changed the class of indictable offenses into less serious crimes in an effort to relieve some of the heavy responsibility of the lay judges adjudicating the crimes. The prosecutorial discretion in changing the class of indictable offenses also allowed the prosecutor’s office to forgo the saiban-in trial. This prosecutorial discretion in selecting and deselecting the applicable criminal cases may explain why a total number of the saiban-in trials failed to reach the numbers previously anticipated.

E. *Appellate Court*

The fifth impact of the lay judge system is on the court’s responses and attitudes toward the appeals, questioning the legality of fact-finding, and requesting the review of the propriety of sentencing in the first trial. As of February 28, 2010, out of 308 defendants who received sentences in the saiban-in trial, 32.1% of them appealed (see Figure 9). The highest rate of appeal was made in cases involving robbery and murder (75 percent), followed by special drug control law violation (50 percent) and the use of amphetamine (48.6 percent).

Under the traditional bench trial system, the rate of appeals in all categories of the crime combined has been consistently low, i.e., 10.7% in 2006, 10.6% in 2007 and 10.7% in 2008.⁸² Nonetheless, for the criminal case applicable for the lay judge trial in 2008, appeals were made in 34.6 percent of cases, much higher than in other criminal cases.

A recent report issued by the Supreme Court Office indicated that the rate of appeals in the saiban-in trial was 29 percent, which is lower than the professional judge trial for the same crimes.⁸³ One possible reason

⁸⁰ See, MAINICHI SHIMBUN May 31st, 2010; Kyodo Tsushin April 9th, 2010.

⁸¹ See, SANKEI SHIMBUN, May 20th, 2010 (<http://sankei.jp.msn.com/affairs/trial/100520/trl1005202209016-n1.htm>).

⁸² The data is based on each year volume of the Crime Statistics [Hanzai Hakusho], available at <http://hakusyo1.moj.go.jp/>.

⁸³ Supreme Court Office, *Saiban-in Saiban No Jisshi Jokyō*

for the lower appeal rate is that most defendants did not contest the original criminal charges and plead guilty. A second reason is that the defendants were generally satisfied with the lay-judge's decision. Similarly, the defendants were hesitant to make an appeal because their appellate action creates additional emotional burdens and financial costs. Unfortunately, there have been no surveys conducted in an effort to uncover the reasons as to why the defendants decided to give up their rights to appeal. Such studies are necessary in order to examine the background of the decisions for appeal.

At this time, there have been very few decisions in the appellate courts that reversed the original judgments in a saiban-in trial. One such case was from the Sapporo High Court in 2009, during which the court set aside the original sentence in the case of death caused by negligence.⁸⁴ Another rare instance was from the Tokyo High Court in July of 2010 that vacated the original sentence because of the fact-finding error in a murder trial. In this case, the Court criticized that the lay judge panel incorrectly accepted the finding of an "erroneous self-defense" argument ("goso kajo-bogyo") because the defendant's confession was not reliable to warrant the mental state for the fatal use of excessive self-defense force.⁸⁵ The case from Sapporo was a typical example of harsh sentencing and legal malpractice. The case from Tokyo was unique in the view of the adversarial system because the appellate court rarely intervenes in the application of a legal issue, in which both parties did consent to the facts regarding the mental state of the defendant.

There have been other cases on the appellate level, where the original sentences were vacated and replaced with lighter penalties. This emerging tendency of the appellate courts to give lighter sentences should be welcomed in protecting the delicate balance between the established sentencing practice in the professional judge court and the general tendency to impose harsher sentences in the saiban-in court. Nonetheless, if the High Court's decision to vacate the original sentence is becoming more frequent, it might face increased criticisms from the public and the

Nitsuite [The Status of the Implementation of the Lay Judge Trial], July 26, 2010, at 10, available at http://www.courts.go.jp/saikosai/about/iinkai/saibanin_kondan/siryo_07/pdf/siryo_5.pdf.

⁸⁴ Decision by Sapporo High Court, August 27th, 2009. See, <http://www.courts.go.jp/hanrei/pdf/20090908084452.pdf>

⁸⁵ *Yokohama Ryo Kanrinin Shisatsu: 'Jijitunintei ni Fubi' to Saiban-in Hanketsu o Haki: Tokyo Kosai [Murder of Yokoyama Dormitory Manager: "Deficiency in Fact-Finding Mission," Reversal of Saiban-Decision by the Tokyo High Court]*, SANKEI NEWS, July 14, 2010.

media who may claim that the judges are not appreciative of the citizen's participation in sentencing decision-making, questioning the effectiveness of lay judge participation in criminal trials. At the same time, the public scrutiny and media attention can help foster discussions about the fairness of Japanese criminal policy and establish a more robust and equitable penal policy and reasonable sentencing guidelines in the future.

Figure 9: The rate of appeal in the saiban-in trial (As of February 28, 2010)

	Number of defendant	Number of appeal	Appeal rate
Robbery resulting bodily injury	83	28	33.7
Murder	68	25	36.8
Arson	25	5	36.8
Bodily injury resulting in death	25	7	28.0
Use of amphetamine	35	17	48.6
Indecent assault	16	2	12.5
Rape resulting in death and bodily injury	19	6	31.6
Gang rape resulting in death and bodily injury	5	--	--
Uttering counterfeit currency	4	--	--
Gang rape	7	3	42.9
Illegal weapon (gun/knife)	3	--	--
Dangerous driving	3	1	33.3
Negligence as guardian resulting in death	2	--	--
Abduction	3	1	33.3
Non-residential arson	1	--	--
Rape	1	--	--
Assault	1	--	--
Robbery	1	--	--
Robbery and murder	4	3	75.0
Special drug law violation	2	1	50.0
Total	308	99	32.1

V. ANALYSIS

Who is the winner in the first year of this new judicial program?

Professor Colin Jones from the United States believes that the judges and government bureaucrats are clear winners of the saiban-in system.⁸⁶ He suggested that their superior positions within the trial process may not change anytime soon.⁸⁷ I argue, however, that the chief beneficiary of the saiban-in trial is the prosecutor. Three reasons can be given for this view.

First, the prosecutors learned and improved their court performances and honed their skills of presentation in the courtroom through the systematic training program offered by the government. As the questionnaire surveys to the former lay-judges show, the prosecutor received the higher level of positive approval in the evaluation of courtroom performance than defense attorneys.

Second, the prosecutor succeeded in obtaining the citizens' support for their case narratives and arguments by purposely excluding a large number of highly contested cases and politically very controversial criminal cases including death penalty from the lay judge trial. As results, as of May 31, 2004, the prosecution has secured the conviction of all criminal cases and never lost a case in the first year of the saiban-in trial.

Third, the prosecutor succeeded in controlling the sentencing phase of the saiban-in trial. Only one case among the 444 cases of the saiban-in trials in the first year was appealed by the prosecutor's office for reasons of the sentencing being much too lenient. This shows that the prosecution office was extremely satisfied with the judgments and sentences of the saiban-in panel. The fact that there was no appeal from the prosecutor

⁸⁶ Colin Jones, *Big Winners in "Jury" System May be Judges, Bureaucrats* JAPAN TIMES, March 10, 2010, available at <http://search.japantimes.co.jp/cgi-bin/fl20090310zg.html> ("One possible conclusion, therefore, is that the system is for the professional judges and other legal system bureaucrats, since so many of its special features seem to have been designed to retain their control and flexibility over criminal trials while diminishing their responsibility for the results.").

⁸⁷ *Id.* Professor Jones points out that the situation will not be changed because the honest criticism from the former lay judges shall be blocked by the secrecy obligation of saiban-in. "The government is supposed to review the system after three years and, thanks to the secrecy obligation, it will probably be able to do so with a minimum of troublesome unfiltered input from people who have actually been lay judges."

until the end of March 2010 proves the extent of the prosecution's overall satisfaction with the lay-judges' decisions.⁸⁸

What about the performances of defense attorneys? In the saiban-in trial, the sentencing process has always been at the center of extensive media attention due to the fact that the saiban-in sentencing process is profoundly different from the sentencing procedures of jury trials in common law countries, where civil participation is not applied for in case of guilty pleas. In Japan, the saiban-in trials look somewhat similar to that of public meeting where both sides engage with each other to discuss and determine the appropriate sentence --unlike the judicial battles commonly witnessed in the adversarial atmosphere of the jury trial.

The timing of the start of the saiban-in system was rather problematic for the defendant's interest because the victim participation program also started almost at the same time. In the saiban-in courtroom, the defense had to prepare for the counter-argument not only against the prosecutor, but also against the victim and/or victim families. The defense attorneys encountered many unexpected situations and faced extra work that they have never experienced in past trials.

It is also difficult to predict whether or not the Japanese prosecutors can maintain their superior position in the future saiban-in trial. There are primarily two factors, both of which are unrelated to the saiban-in system, but nonetheless present considerable challenges to the prosecutor. First, the judicial reform created crucial changes in the basic function of the prosecutorial decision-making process. In 2009, another instrument of civil participation launched in the criminal justice system of Japan -- the amendment to the "kensatsu-shinsa-kai" (the Committee for the Inquest of Prosecution)⁸⁹. In Japan, anyone can submit a request to the CIP to investigate the propriety of the prosecutor's decision not to indict the criminal suspect. Unlike the saiban-in panel, the CIP is solely composed of citizens chosen randomly from a local community. Previously the CIP's decision had no legally mandatory power to initiate the prosecutorial process. However, through the 2009 amendment to the criminal procedure, if the CIP returns the second recommendation for the indictment of the criminal suspect, the recommendation becomes legally binding and the court must appoint lawyers to prosecute the given case.

⁸⁸ The prosecutor office had first appeal against not-guilty verdict of Chiba District Court in an saiban-in trial of drug trafficking case at July 2010. See, Sankei Shimbun July 3rd, 2010 (<http://sankei.jp.msn.com/affairs/trial/100703/tr11007031122000-n1.htm>).

⁸⁹ For the original function and the history of CIP, see, Mark West, *Prosecution Review Commissions: Japan's Answer to the Problem of Prosecutorial Discretion*, 92 COLUMBIA L. REV. 684 (1992).

This power certainly has the potential to influence the prosecutorial discretion in making indictment decisions. Consequently, the prosecution may gradually lose its exclusive control over the prosecutorial process. Furthermore, since the recommendation by the all-citizen CIP is open to the public, the attention by the public and the media to the CIP recommendation can make the prosecutorial work more transparent, increasing the prosecutorial accountability for indictment in criminal cases.

The second factor is the introduction of the discovery proceeding in the pretrial process. Since 2007, the new pre-trial procedure has been enforced and pre-trial prosecutorial disclosures have become common. The courts showed a general tendency to support the evidential discovery and demanded the prosecutorial disclosure of evidentiary records request by defense attorneys⁹⁰. This new discovery process can prevent an innocent person from unnecessary prosecution and also provides legal protection for innocent defendants even after the saiban-in trial has already begun. Furthermore, the prosecutor cannot exclude from the defense attorneys crucial information pertaining to a crime, including their discretionary work used for indictment. Thus, the new discovery procedure has exerted a significant influence on the greater disclosure of prosecutorial evidence used during the indictment process.

In the future, many young prosecutors who have received excellent training in courtroom performance by the governmental funded programs may decide to change their careers and become defense attorneys, thereby creating a new group of specialists in the legal community as highly skilled and trained lawyers. This prospect also brings greater benefits to the criminal defendant's interest. Ironically, it is only then that truly adversarial trials may become a reality in the saiban-in court. The defense attorneys' acquisition of strong skills of oratory methods, in-court presentation, and critical analysis and observation must be some of key factors in order to establish the highly reliable, competent, and accountable judicial system and trial proceedings in Japan.

⁹⁰ The recent Supreme Court's judgments suggest the disclosure to be favorable for the defense. For examples, the Court sustained the original order by the district court to disclose a police memorandum held by the prosecutor to the defendant and the Court also sustained the district court's order that the prosecutor must disclose a personal memorandum which was personally purchased by the police, to the defendant (Supreme Court Decision, 62 KEISHU 2753 (2008); Supreme Court Decision, 61 KEISHU 895 (2007)).

VI. CONCLUSION

Quo Vadis (“Where are you going”)⁹¹ is an important phrase of St. Peter in the New Testament. He met the Lord while he was escaping from the town of Jerusalem. After hearing the answer for this question, St. Peter went back to the town and suffered martyrdom. The future success of the lay judge system in Japan depends on the strong commitment of defense attorneys who are about to face the similar fate of martyrdom in the innovated system of lay participation in Japan. Without the “sacrificial” and passionate contribution by the defense attorneys in trying to change and positively influence the criminal justice process, the judges and the prosecutors might have no incentive to change their dominant position in the new judicial arena.

Except for the introduction of the new discovery procedure in the pretrial process and its positive impact on the greater disclosure of prosecutorial evidence and records, there was no overt benefit for the defendant or the defense function within the criminal justice process. Needless to say, one of the most important purposes of the criminal procedure is to assure the fair practice of procedural due process for every criminal defendant. Thus, the important legal mechanisms to support the defense activity must be implemented in order to ensure the fair application of due process for each individual defendant.⁹²

Without a doubt, the touchstone of any success of the defense activity in the saiban-in court will be observed in the case of capital punishment.⁹³ Up until the end of July 2010, there have been no cases, in

⁹¹ “*Quo Vadis?*” is a Latin phrase meaning, “Where are you going?”. The modern usage of the phrase refers to Christian tradition, related in the apocryphal Acts of Peter (Vercelli Acts XXXV) in the New Testament.

⁹² The JFBA announced their strategy to concentrate specific well-trained lawyers at the saiban-in trial as soon as possible because in the current nomination system of the defender, many matured lawyers would not be appointed as the defense attorneys. See, *Chiken No Zenkenji Sanka: Bengoshi-kai Wa Seieide Shinsakusen* [Participation of Chief Prosecutors from All Districts: The Best of JFBA— New Strategies], YOMIURI SHIMBUN, Feb. 16, 2010, available at <http://www.yomiuri.co.jp/national/news/20100216-OYT1T00070.htm>.

⁹³ One article suggested all of the citizen shall consider about capital punishment because each year in around ten cases the death penalty might be required by the prosecutor. *Saiban-in To Shikei: Tomo Ni Nayami, Kangaetai* [Saiban-in and Death Penalty: Let’s Wrestle and Explore] TOKYO SHIMBUN March 4, 2010, available at <http://www.tokyo-np.co.jp/article/column/editorial/CK2010030402000105.html>.

which the prosecutor or victim participants recommended death penalty.⁹⁴ However, defense attorneys' poor in-court performance and the insufficient resources to mount the competent defense argument will also play a critical role in the future death penalty case. The improvement of criminal defense strategies at the sentencing phase of the saiban-in trial is the urgent matter in order to ensure the just and equitable operation of the lay judge system in Japan.⁹⁵

⁹⁴ Atsushi Fukui, *Saiban-in System and the Theory of "Democracy Dilemma,"* 6 HOSEI L. REV. 33 (2010). Professor Fukui pointed out, "For the development and progress of the saiban-in system, the first death penalty case would be an augury."

⁹⁵ For my suggestion in constructing new schema for capital defense, see, Makoto Ibusuki, *Saiban-in System and Capital Defense,* 59 KIKAN-KEJI-BENGO 8 (2009).