CITIZEN PARTICIPATION IN CRIMINAL TRIALS AND REFORMATION OF CRIMINAL JUSTICE IN JAPAN

*Masahito Inouye**

I. INTRODUCTION

Despite various opinions about its historical origins, a system of lay participation in criminal trials has existed for centuries in many Western countries. It takes the form of either a jury, such as in Anglo-American countries, or a mixed panel court consisting of professional judges and selected citizens, such as in many Continental-European countries[1].

Quite recently, on the other side of the globe, Japan and South Korea[2] adopted, and Taiwan[3] also has been planning to adopt, their own systems of lay participation in criminal trials[4]. Each system differs in various aspects, reflecting the social, cultural, political and legal background in each country or area. Still, it is remarkable that these three neighbors have made similar changes almost simultaneously.

The introduction of a lay participation system necessarily accompanies formal or informal reforms of criminal procedure. It might also stimulate certain modifications in the interpretation or application, if not the text itself, of substantive criminal law. As combined, they could induce substantial reformation of criminal justice and, at the same time, bring about new challenges.

That is what has been happening in Japan[5]. And these reforms have been not only changing the way of thinking and attitudes of professionals engaged in criminal justice, but also affecting public understanding of the criminal justice system. There seems to be a growing number of people who have begun thinking more seriously about crime and punishment as a matter closely related to themselves. Thus, the reforms will have a profound effect on Japanese criminal justice in the long run.

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* Professor, Waseda Law School, and Professor Emeritus of Law, University of Tokyo. The author served as a member of the Justice System Reform Council (1999–2001), a chairperson of the Expert Deliberation Committees on the *Saiban-in* System and Criminal Justice Reforms and on the Public Criminal Defense System at the Cabinet's Headquarters for the Promotion of Justice System Reform (2002–2004), and a member of the Council on Legislation Special Division on the Criminal Justice System in the New Era (2011–2014).

Sections II through IV of this article are an updated and substantially revised version of the author's presentation at the 2013 Seoul National University Law Research Center International Conference, which was later published under the title "Introduction of the *Saiban-in* System and Reformation of Criminal Procedure in Japan," in SEOUL LAW JOURNAL, Vol. 55, No. 2 (2014), pp. 441 *et seq*.

[1] *E.g.*, WORLD JURY SYSTEMS (Neil Vidmar ed., 2008); Valerie P. Hans, Jury Systems Around the World (Cornell Law Faculty Publications, Paper 305, 2008)〔available at http://scholarship.law.cornell.edu/facpub/305〕.

[2] The (South Korea) Act for the Participation of Citizens in Criminal Trials, Act No. 8489, June 1, 2007, *enforced* Jan. 1, 2008. *Cf.* Jae-Hyup Lee, *Korean Jury Trial: Has the New System Brought About Changes?*, 12 ASIAN-PACIFIC LAW & POLICY JOURNAL No. 1, 58 (2010).

[3] In 2012, the Judicial Juan of Taiwan proposed to introduce the "Advisory Jury System" in criminal trials and began its trial run by holding mock trials in several major district courts. After the presidential election of 2016, however, they made a new proposal for a mixed panel court type of lay participation, the System of "People's Participation in Trials", which would be much closer to the *Saiban-in* System. In April 2018, the bill to implement it was introduced and is now under deliberation in the legislature. *See* the Website of the Judicial Juan of Taiwan〔http://www.judicial.gov.tw/LayParticipation/〕.

[4] As for the "People's Jury System" in China, *see e.g.* KONG XIAO XIN, CHUGOKU JINMIN BAISHIN-IN SEIDO KENKYU (*A Study on the People's Jury System in Chaina*) (2016); Jinying Zhao, China's New Law for Its Jury System〔http://www.linkedin.com/pulse/chinas-new-law-its-jury-system-jinyung-zhan-l〕.

II. INTRODUCTION OF THE *SAIBAN-IN* SYSTEM

A. Overview

In 2004, Japan enacted a statute (the *Saiban-in* Act)[6] to introduce a system of lay participation in criminal trials. In the new system, six citizens selected randomly from among the voters in each case would serve as *Saiban-in* (or lay judges) and, in collaboration with three professional judges[7], engage themselves in deciding both guilt and sentence in the trials involving capital and other serious offenses[8]

After five years of preparation, the *Saiban-in* Act came into force on May 21, 2009. In the nearly nine years until the end of March 2018, annually 1,000 to 1,500 (a total of 11,045) defendants charged with murder, robbery resulting in bodily injury or some other subject offense (Figure 1[9]) were tried by *Saiban-in* courts at 50 District Courts and 10 of their branches throughout the country[10]. 62,214 citizens already served as *Saiban-in*, and, if we add the number of those selected as supplementary *Saiban-in*, 93,401 citizens participated in criminal trials[11].

B. Historical Background

But why and for what purposes did Japan adopt such a system in the first place? To get a better understanding, we need to look back briefly at the historical background of lay participation in Japan.

1. Former Jury System

The *Saiban-in* system is not an entirely novel experience for lay participation in criminal trials in Japan. From 1928 through 1943, there was a jury system in which twelve selected citizens heard the evidence and decided the guilt of the defendant in trials involving serious offenses[12].

The former jury system was adopted as a result of party politics in the 1910s and 1920s[13] when the so-called *Taisho* Democracy movements appeared temporarily to prevail in various aspects of the Japanese

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[5] The criminal justice reforms in Japan since the turn of the century, including the introduction of the *Saiban-in* system, have already been the subject of many, not only domestic, but also overseas, publications. *E.g.*, the literatures listed in Mark A. Levin & Adam Mackie, Truth or Consequences of the Justice System Reform Council: An English Language Bibliography from Japan's Millennial Legal Reforms, 14 ASIAN-PACIFIC LAW & POLICY JOURNAL 1 (2013); Daniel H. Foote, Citizen Participation: Appraising the Saiban' in System, 22 MICHIGAN STATE INTERNATIONAL LAW REVIEW 755 (2013); Symposium, Citizen Participation in Criminal Trials in Japan: The Saiban-in System and Victim Participation in Japan in International Perspectives, 55 INTERNATIONAL JOURNAL OF LAW, CRIME & JUSTICE 1 (2014); Caleb J. F. Vandenbos, Patching Old Wineskins, 24 PACIFIC RIM LAW & POLICY JOURNAL 391 (2015); Stacey Steele, Proposal to Reform the Japanese Saiban-in Seido (Lay Judge System) to Exclude Drug-Related Cases, 16 AUSTRALIAN JOURNAL OF ASIAN LAW 19 (2015); LEON WOLFF, LUKE NOTTAGE & KENT ANDERSON (eds.), WHO RULES JAPAN? (2015); DIMITRI VANOVERBEKE, JURIES IN THE JAPANESE LEGAL SYSTEM (2015); Harrison L. E. Oweris, Trial by One's Peers, 25 PACIFIC RIM LAW & POLICY JOURNAL 191 (2016); ANDREW WATSON, POPULAR PARTICIPATION IN JAPANESE CRIMINAL JUSTICE (2016); ANNA DOBROVOLSKAIA, THE DEVELOPMENT OF JURY SERVICE IN JAPAN (2017).

[6] The Act for the Participation of *Saiban-in* in Criminal Trials, Act No. 63, May 28, 2004, *enforced* May 21, 2009 (hereinafter cited as the *Saiban-in* Act).

[7] *Saiban-in* Act, art. 2, sec. 2. Exceptionally, in cases where there is no contest about the charge, the court may assign the case to a smaller panel court composed of one professional judge and four *Saiban-in* if it is deemed appropriate to do so, considering the nature of the case and other circumstances, and neither party objects (secs. 3 and 4). As a matter of fact, such exceptional assignment has never been resorted to.

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

[9] Saiko Saibansho Jimu-sokyoku, Saiban-in Seido no Jisshi Jokyo ni tsuite (Seido-Shiko～Heisei 30 Nen 3 Gatsu-matsu) (*General Secretariat of the Supreme Court, the Enforcement Situation of the Saiban-in system until the end of March 2018*), p. 4.

[10] *Id.*, pp. 2–3. The annual number of the defendants tried by *Saiban-in* courts, which account for around 2% of those tried by the District Courts in regular trial proceedings, decreased from the peak of 1,568 in 2011 down to 993 in 2017 in proportion to the general downward trend of criminal cases in these years.

[11] *Id.*, p. 5 and Figure 2. If it is deemed necessary, the court may select an appropriate number (not more than six) of supplementary *Saiban-in*. (*Saiban-in* Act, art. 10, sec. 1). Actually, two are selected in most cases.

[12] The Jury Act, Act No. 50, Apr. 18, 1923, *enforced* Oct. 1, 1928. The cases involving any offense for which the death penalty or life imprisonment was prescribed by law were mandatorily subject to jury trial unless the defendant waived it (art. 3), and those involving any offense for which the imprisonment not less than 3 years was prescribed by law, with some exceptions, were put to jury trials if the defendant applied for it (art. 4).

society before militarism and totalitarianism took over. There were outcries for popular elections and freedom of political speech, for gender equality and laborers' right to organize unions and for liberalism or modernism. A political historian later presumed that the jury system, modeled after the American one, was proposed by the cabinet with the intention of attaining a populist effect in place of popular elections, which they deemed too early to adopt[14].

Although the introduction of the jury trial into the authoritarian, inquisitorial criminal justice system at that time was a remarkable innovation, it deviated from its American model in a crucial point. The judges of the court could overturn 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 at that time guaranteeing the individual's right to "trial by judges determined by law[15]," which was interpreted to prohibit jury verdicts from binding independent judges' decisions.

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 that age group), were eligible to serve as jurors. 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 was a total of 484 jury trials[16], 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)[17].

As wartime came, jury trials decreased year by year, finally down to just one case in 1942. The next year the military government suspended the Jury Act[18], terminating the short life of the early Japanese lay participation system.

2. Post-war Developments under the Constitution of 1946

During the postwar occupation by the Allied Forces, the question of whether to adopt or revive a jury system was temporarily put on the agenda[19] in addition to the criminal procedure reform in which the 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 by an impartial tribunal[20]" "in the court[21]" in place of the former constitutional provision mentioned above. These changes in wording were presumably intended to admit even a jury equipped with full power. The Court Act of 1947 also confirms explicitly that the establishment of a jury system for criminal cases by a separate statute shall not be prevented[22].

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

[14] *Id.*, p. 141.

[15] The Constitution of the Empire of Japan of 1889, art. 24.

[16] 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).

[17] TAKASHI MARUTA, BAISHIN-SAIBAN WO KANGAERU (*Thinking about the Jury Trial*) (1990), pp. 133, 137–138.

[18] The Act concerning the Suspension of the Jury Act, Law No. 88, Apr. 1, 1943, *enforced* on the same day.

[19] 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 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, Keijisosho-ho 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 KEIJISOSHO-HO SEITEI SHIRYO ZENSHU: SHOWA KEIJISOSHO-HO (*Collected Legislative Materials of the Criminal Procedure Laws: Code of Criminal Procedure of 1948*), Vol. 2 (M. Inouye *et al.* ed. 2007), p. 368; Keijisosho-ho Kaisei nitsuki Koryo subeki Mondai (*Issues for Consideration concerning the Revision of the 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 Shiho-sanka (*Postwar Reforms and Citizen Participation in the Justice System*), in SENGO KAIKAKU, Vol. 4 (the University of Tokyo Institute of Social Sciences ed. 1975), pp. 109–130.

[20] Const. art. 37, sec. 1.

[21] Const. art. 32.

[22] The Court Act, Act No. 59, Apr. 16, 1947, *enforced* May 3 the same year, art. 4, sec. 3.

Such an idea, however, was not realized in spite of rapid democratization of all systems of governance during the occupation. Not only the Japanese government[23], but also the occupation authorities[24], were not so enthusiastic about the jury system, probably because of its infeasibility given the destruction, including court houses, and social disorder throughout postwar Japan[25].

Still a certain number of lawyers and scholars, individually or in groups, continuously proposed 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 the then Chief Justice of the Supreme Court, began broad research on the situations of lay participation in several Western countries[26].

The proponents of lay participation were divided into two schools. One school of people urged the adoption of 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 toward the prosecution or had become too much accustomed to rendering judgments of guilt to rule on each case without prejudice against the defendant[27]. Another school of people rather preferred a Continental-European type of mixed panel court because of their concern about possible miscarriage of justice by an inexperienced, emotional 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[28].

Quite the contrary, however, there also were deep-seated basic oppositions against lay participation among lawyers and scholars. In addition to the constitutional objections[29] inherited from the age of the former Jury Act, they convinced themselves that fair and right justice could be done only by independent, legally trained and suitably experienced professional judges[30]. Many of them also doubted whether the

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[23] 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 ended with a deferral mainly because of its uncertain constitutionality. *See* KEIJISOSHO-HO SEITEI SHIRYO ZENSHU: SHOWA KEIJISOSHO-HO (*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 19, pp. 130–141.

[24] 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 a 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 19, pp. 150–153.

[25] *Id*., 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 (legislature), and pp. 158–159, speculating the occupation authorities' basic attitude toward the matter and its backgrounds.

[26] Under the instruction of Chief Justice Koichi Yaguchi, which was not necessarily intended to adopt any Western type of lay participation, several judges were dispatched from 1988 through 1990 to the United States and the United Kingdom on mission to research the actual situation of their jury systems. In the following years, the General Secretariat of the Supreme Court extended the research further on the mixed-panel court systems in several Continental European countries. Saiko Saibansho Jimusokyoku, Baisin-Sanshin Seido: Beikoku-Hen (*General Secretariat of the Supreme Court, Jury and Mixed-Panel Court Systems: Part of the United States*), Vols. 1–3 (1992–1995); Eikoku Hen (*Part of the United Kingdom*) (1999); Doitsu Hen (*Part of Germany*) (2000); France Hen (*Part of France*) (2000); Sweden Hen (*Part of Sweden*) (2001); Denmark Hen (*Part of Denmark*) (2003); Italy Hen (*Part of Italy*) (2004).

[27] *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 Towards the Realization of Jury System*) (Mar. 17, 2000), recounting its position declared in its "Shiho Kaikaku ni mukete no Kihonteki Teigen (*Basic Proposals Towards the Realization of Justice System Reform*) " (Nov. 19, 1999).

[28] *E.g.*, Ryuichi Hirano, Kokumin no Shiho-sanka wo Kataru (*Talking about the Citizen 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) Sanshin-sei no Tachiba kara (*Jury, Mixed Panel Court or Professional Judges (2) From the Viewpoint of a Mixed Panel Court System Supporter*), KEIHO ZASSI Vol. 39, No. 1 (1999), p. 30.

[29] *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.

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[31]. As a matter of fact, results of various polls indicated that the public generally put confidence in the work of professional judges[32].

C. The JSRC's Recommendations and Their Implementation

1. Proposals for Comprehensive Reforms

In 1999, when the Cabinet established the Justice System Reform Council (JSRC) 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, lay participation was put on the agenda, mainly on the initiatives of bar association members who had been longing for a jury system[33]. However, with the above-described sharply divided opinions for and against it, many people were skeptical if any consensus could be reached on the subject.

As it turned out, the JSRC, after two years of intensive discussion, presented comprehensive recommendations that 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) citizen participation in order to establish "the popular base" for the justice system[34]. The highlight of the third pillar was the introduction of the *Saiban-in* system.

2. Proposal for *Saiban-in* System and Its Implementation

At the initial stage of the JSRC's discussion, there seemed to be sharp division of opinion between several members who are enthusiastic for a jury system and the others who were cautious or negative about it[35]. Most of them, however, shared the 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 another should help, not only for that purpose, but also for the people themselves to identify with the justice system.

What marked a turning point is the hearing of opinions of "*hoso sansha*" (three sectors of the legal profession, *i.e.*, the judiciary, the Ministry of Justice and public prosecutors' offices, and the bar). Among others, the General Secretariat of the Supreme Court presented its opinion that it should be desirable to adopt a variant mixed panel court system in which lay assessors could express their judgment on the case, but not formally participate in the final verdict of the court[36]. They were afraid it might cause a constitutional dispute if participating citizens' 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 JSRC, which was virtually deprived of any possibility to totally reject lay participation.

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[30] *E.g.*, KANEKO, *supra* note 29, p. 31.

[31] *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*.

[32] 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 highly 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.

[33] The Act to Establish the Justice System Reform Council, Act No. 68, June 9, 1999, *enforced* July 27 the same year, art. 2, sec. 1; the JSRC, The Points at Issue in the Justice System Reform (Dec. 21, 1999) (English ver.), III 2(4)〔available at http://www.kantei.go.jp/foreign/policy/sihou/singikai/991221_e.html〕

[34] Recommendations of the JSRC: 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〕.

[35] *See* Masahito Inouye, Saiban-in Seido no Donyu ni itaru Keii 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 published on the Prime Minister's Office Web site 〔http://www.kantei.go.jp/jp/sihouseido/gijiroku-dex.html〕.

[36] Saiko Saibansho, Kokumin no Shiho-Sanka ni kansuru Saibansho no Iken (*Supreme Court, Opinion of the Judiciary on the Citizen Participation in the Justice System*), IV, *presented* at the 30th meeting of the JSRC, Sep. 12, 2000〔available at http://www.kantei.go.jp/jp/sihouseido/dai30/30bessi5.html〕.

After these and other twists and turns, the JSRC reached the conclusion that an original style of 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[37]." 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[38].

The *Saiban-in* Act was the fruit of further detailed deliberation in the expert committee, over which I presided, of the Cabinet's Headquarters for the Promotion of the Justice System Reform to materialize the JSRC's recommendations[39].

III. ACCOMPANYING REFORM OF THE CRIMINAL JUSTICE SYSTEM

A. Unique Features of Japanese Criminal Justice in Action

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

The modern criminal justice system of Japan was built by adopting a succession of Western legal traditions: first French[40], then German[41], and most recently, right after World War II, the whole system was drastically changed by the current Code of Criminal Procedure of 1948[42] (CCP), replacing a Continental-European type of inquisitorial system with an adversary system after the model of American law. Such adoption of Western legal traditions, however, was followed by a process of "*Japanization*." This pattern is more evident in the actual practice than on the face of the law, and it produced remarkable, unique characteristics of Japanese criminal justice in action, as explained below[43].

The investigation of a crime is pursued very thoroughly with a special emphasis on the questioning of suspects. Even in the investigation of ordinary cases in which the police play a primary role, public prosecutors also question suspects and principal witnesses in person. They seek to discover the true facts of the case and to become well-informed about the personal details of the suspect and other persons involved so that they can properly exercise their broad discretion in deciding whether to prosecute the suspect, not only from the viewpoint of his/her guilt, but also from the consideration of his/her possible rehabilitation without prosecution[44]. Such thorough case-screening and active use of broad discretion by prosecutors are reflected in the amazingly high conviction rate of over 99%.

After a case goes to trial, court sessions are not held consecutively, but with an interval of several weeks. Trials rely heavily on documentary evidence, including written records of the suspects' and witnesses' statements obtained by prosecutors' as well as police investigative questioning. Most of the documentary evidence is presented just summarily in open court and subject to later careful reading by the judges back in their chambers. Such a practice is most often supported by the consent of the defense and contributes to a

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[37] Recommendations of the JSRC, *supra* note 34, Chap. IV, Part. 1, 1.
[38] Inouye, *supra* note 35, p. 76.
[39] 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〔http://www.kantei.go.jp/jp/singi/sihou/kentoukai/06saibanin.html〕. *See also* HIROYUKI TSUJI, SAIBAN-IN HO, KEIJI-SOSHO HO (*the Saiban-in Act and the Code of Criminal Procedure*) (Shiho-seido Kaikaku Gaisetsu, Vol. 6, 2005).
[40] The Code of Criminal Instruction, Proclamation No. 37 of the Grand Council of State, June 17, 1880, *enforced* Jan. 1, 1882. This Code, originally drafted by Professor Gustav E. Boissonade of Paris University, was replaced ten years later by the Code of Criminal Procedure, Act No. 96, Oct. 7, 1890, *enforced* Jan. 1, 1893, which maintained the substance of the 1880 Code except for the provisions relating to the German style of court organization adopted by the Constitution of 1889.
[41] The Code of Criminal Procedure, Act No. 75, 1922, *enforced* Jan. 1, 1924.
[42] The Code of Criminal Procedure, Act No. 131, June 10, 1948, *enforced* Jan. 1, 1949.
[43] Masahito Inouye, Keiji-Saiban ni taisuru Teigen (*Proposals to Improve Criminal Trial Proceedings*), SHIHO-KENSHUSHO RONSHU, No. 85 (1991), pp. 94–96; *id*., Keiji-Shiho Kaikaku wa Nani wo Kaeruka? (*Criminal Justice Reform: What Will It Change?*) (1), LAW & PRACTICE No.10 (2016), pp. 7–16. *See also* Kazumasa Ishii, Waga-kuni Keiji-shiho no Tokushoku to sono Kozai (*Distinctive Features of the Japanese Criminal Justice and their Merits and Demerits*) SHIHO-KENSHUSHO RONSHU, No. 79 (1987), pp. 304 *et seq*.
[44] CCP art. 248 gives to the prosecutor wide discretion not to initiate prosecution if it is deemed unnecessary "owing to the character, age and environment of the offender, gravity and circumstances of the offense, and situation after it."

less costly disposition of mass of uncontested cases in the system without an expedient method of guilty plea. But even in contested cases, critics have pointed out that trial courts are very lenient in admitting documentary evidence. Trial judges, in their quest for the whole picture of the case, are inclined to examine a large amount of this and other evidence and, based upon it, to make detailed fact-finding even on uncontested issues, including the motives and personal background of the defendant. In such a way, investigative questioning of the suspect and witnesses could substantially affect the trial.

These features, collectively called "*seimitsu shiho*" (minute justice), were so unique that a prominent scholar compared them to the epidemic species which Charles Darwin observed on the isolated Galápagos Islands[45].

Critics even denounced such a structured practice as pathological and abnormal[46] in terms that, deviating far from the original ideal of the adversary system, the criminal trial was deprived of its substance as a legitimate forum for the disposition of each case on the basis of open, fair and lively contests between two parties. They further criticized that excessive eagerness of the police and prosecutors to obtain detailed confessions from the suspects should necessarily cause undue infringement on human rights as well as false confessions, which in turn should lead to serious miscarriage of justice.

Against such criticism, there existed quite opposite opinions that rebutted the criticism as unfounded or one-sided. Some of them even praised the criminal justice system as contributing much to making Japan the safest country in the world[47].

But, it is undeniable, at least, that the investigation of crime and its proof at trial relied too much upon the investigative questioning of the suspects and the written records of their statements and that such excessive reliance had detrimental side-effects. To the general public as well, the nontransparent features disturbed their understanding of, and trust in, the whole system. Although most criminal trials under the existing system were managed promptly, several high-profile cases in which trials took a considerable period of time caused the people's loss of trust in the criminal justice system.

B. Purposes and Items of the Reform

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, preferably relying on live testimony in court rather than documentary records of out-of-court statements, and 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[48].

For that purpose, the Code of Criminal Procedure (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 sorted out on the basis of appropriate disclosure of evidence between two parties according to a new framework set forth by law as described in Section IV, C-2, and a clear plan for trial proceedings could be established in advance[49]. The pretrial arrangement procedure is mandatory for the cases subject to the *Saiban-in* trial[50].

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[45] 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.

[46] Ryuichi Hirano, Genko Kiji-sosho no Shindan (*Diagnosis of the Current Japanese Criminal Procedure*), in DANDO SHIGEMITSU HAKASE KOKI SHKUGA RONBUNSHU (*Essays in Celebration for the 70th Anniversary of the Birth of Justice Shigemitsu Dando*), Vol. 4 (1985), pp. 407 *et seq*.

[47] *E.g*., Yoshihusa Nakayama, Nihon no Keiji-shiho no Tokushoku: Saiban no Tachiba kara ((*Distinctive Features of the Japanese Criminal Justice from the Viewpoint of a Judge*), KEIJI TETSUDUKI, Vol.1 (M. Mitsui *et. al* ed., 1988), pp. 1 *et seq*.; Kazuo Kawakami, Nihon no Keiji-shiho no Tokushoku: Kensatu no Tachiba kara (*Distinctive Features of the Japanese Criminal Justice from the Viewpoint of a Public Prosecutor*), *id*., pp. 11 *et seq*.; Takeshi Tsuchimoto, Mou-Hitotsu no Shindan — Waga Keiji Shiho wa "Byoteki" ka (*Another Diagnosis: Is Our Criminal Justice "Pathological"?*), KENSHU No. 492 (1989), pp. 3 *et seq*.

[48] Recommendations of the JSRC, *supra* note 34, Chap. II, Part. 2, 1.

[49] CCP arts. 316–2 through 316–32.

[50] *Saiban-in* Act art. 49.

The public criminal defense system, which previously had been available only to defendants after public prosecution[51], also was enlarged to the suspects detained for an offense punishable with the death penalty, life imprisonment or imprisonment for more than three years[52]. This would provide 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 cooperation 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[53].

IV. IMPACTS OF THE REFORMS AND NEW CHALLENGES

A. Acceptance of the *Saiban-in* System

1. Constitutional Legitimacy

Even after the enforcement of the *Saiban-in* Act, strong opposition has still continued in and outside the legal profession. Many 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 might be spoiled by unrestrained, emotional judgments of lay people. Others attacked it for its unconstitutionality in terms of violating the defendant's right to trial by an impartial tribunal[54] 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 of happiness[55], freedom from involuntary servitude[56], freedom of thought and conscience[57] and so on[58].

Practically, however, the legitimacy of the *Saiban-in* system has been established since the Supreme Court rejected these constitutional claims in a series of judgments and decisions[59].

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 *Saiban-in* duties. Various official and nonofficial questionnaire surveys had revealed that only a limited percentage of the respondents expressed their willingness to participate (Figure 3[60]).

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[51] Under the current Constitution and the CCP before its revision of 2004, all the suspects and defendants had the right to retain his/her own defense counsel (Const. arts. 34 and 37, sec. 3; CCP art. 30; CCP art. 30). In addition to that, the defendants, which means those who are publicly prosecuted, are also guaranteed the right to have a defense counsel assigned by the court in case he/she cannot retain one on his/her own (Const. art. 37 sec. 3; CCP art. 36).

[52] CCP art. 37–2.

[53] CCP art. 281–6.

[54] Const. arts. 32 and 37.

[55] Const. art. 13.

[56] Const. art. 18.

[57] Const. art. 19.

[58] *E.g.*, Taro Okubo, Saiban-in Seido Hihan (zoku) (*Criticism Against the Saiban-in System: a Sequel*), part 1, HANREI JIHO No. 1172 (2002), p. 3; Toshimaro Kojo, Saiban-in Seido no Goken-sei (*Constitutionality of the Saiban-in System*), GENDAI KEIJI-HO 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 many published articles analyzing and rebutting these arguments. *E.g.*, Masakazu Doi, Nihonkoku Kenpo to Kokumin no Shiho-Sanka (*the Constitution of Japan and Citizen Participation in the Justice System*), in HENYO SURU TOCHI SYSTEM (*Ruling System in Transformation*) (M. Doi ed. 2007), pp. 241 *et seq*.

[59] Sup. Ct. (Grand Bench) judgment of Nov. 16, 2011, KEISHU Vol. 65, No. 8, p. 1285; Sup. Ct. (2nd Petty Bench) judgment of Jan. 13, 2012, KEISHU Vol. 66, No.1, p. 1; Sup. Ct. (2nd Petty Bench) judgment of March 2, 2012, SAIBANSHU KEIJI No. 307, p. 695; Sup. Ct. (3rd Petty Bench) judgment of March 6, 2012, SAIBANSHU KEIJI No. 307, p. 699; Sup. Ct. (3rd Petty Bench) judgment of March 6, 2012, SAIBANSHU KEIJI No. 307, p. 709; Sup. Ct. (3rd Petty Bench) judgment of March 27, 2012, SAIBANSHU KEIJI No. 307, p. 767; Sup. Ct. (3rd Petty Bench) judgment of Oct. 16, 2012, SAIBANSHU KEIJI No. 308, p. 255; Sup. Ct. (1st Petty Bench) judgment of Dec. 6, 2012, SAIBANSHU KEIJI No. 309, p. 67; Sup. Ct. (3rd Petty Bench) judgment of Sep. 2, 2014, SAIBANSHU KEIJI No. 314, p. 267. *See also* Sup. Ct. (3rd Petty Bench) judgment of March 10, 2015, KEISHU Vol. 69, No. 2, p. 219.

I was a little more optimistic because it is rather natural for the people to be inclined 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[61].

It has turned out that 72.6% of those summoned to the court for *Saiban-in* selection showed up (Figure 2), and once selected, most of the *Saiban-in* served until the closing of the trial. This is partly due to the generous policy of the judiciary to excuse flexibly and generously prospective *Saiban-in* from the duty on their application for various reasons[62].

It is not without worries. There has been no substantial change in the public response to subsequent questionnaire surveys about their willingness to participate (Figure 3). While the rate of prospective *Saiban-in* excused in the selection process (*see* Figure 2) increased from 53.1% in 2009 to 66.0% in 2017, the attendance rate of those summoned to the *Saiban-in* selection proceeding in the court decreased from 83.9% to 64.8% in the same period[63]. There have been serious discussions, in and out of the judiciary, about how to improve such situation on the basis of its cause analysis[64].

Still, a sufficient number of candidates have shown up to execute a proper selection of *Saiban-in* for each case. A fair cross-section of the society is generally secured in the composition of *Saiban-in* (Figures 4–1, 4–2, 4–3[65]). Once they were selected, almost all of them served very diligently and sincerely. It is reported that, even in a relatively minor, uncontested case, *Saiban-in* do not like to dispose of it in one day; they prefer spending time to examine and decide carefully because they are conscious of the effects their judgment could have on the defendant's life. That is why a certain amount of time is usually spared for, among others, the final deliberation even in uncontested cases[66]. Also, an overwhelming majority of those who actually served as *Saiban-in* or supplementary *Saiban-in*, including those who had been unwilling or reluctant to participate before it, evaluate the experience very positively (Figure 5[67]).

Thanks to their sincere and serious 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 burdens on *Saiban-in* are emphasized.

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[60] 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 37.6% 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, Report of the Survey on Public Awareness concerning the Saiban-in System*) (Mar. 2008), p. 22.

[61] *Ib.*

[62] The top five reasons for excusing prospective *Saiban-in* at their request in 2016 are (1) important business matters (49.9%), (2) mental/financial disadvantage (27.8%), (3) illness/injury (4.5%), (4) care for a family member (4.4%) and (5) hospitalization of a family member etc. (2.2%). Saiko Saibansho Jimu-sokyoku, Heisei 28 nen ni okeru Saiban-in Saiban no Jissi-jokyo tou ni kansuru Shiryo (*General Secretariat of the Supreme Court, Materials on the Enforcement Situation of Saiban-in Trials in 2016*) (June 2017), p. 23.

[63] Saiko Saibansho Jimu-sokyoku, *supra* note 9, p. 5.

[64] A recent officially entrusted cause analysis by a nongovernmental institute has pointed out the five most probable causes inducing both the increase in the rate of prospective *Saiban-in* excused upon request and the decrease in the attendance rate of those summoned to the *Saiban-in* selection proceeding: (1) lengthening of trial schedule, (2) changes of employment situation such as shortage of workers and increase of non-regular employees, (3) aging of the population, (4) decrease in people's interest in *Saiban-in* trials and (5) reduction of the number of *Saiban-in* candidates put on the master list. NTT Data Institute of Management Consulting, Inc., Saiban-in Kohosha no Jitai-ritsu Josho Shusseki-ritsu Teika no Gen-in Bunseki Gyomu Hokokusho (*Diagnosis Report of the Increase in the Rate of Prospective* Saiban-in *Excused at their Request and the Decrease in the Attendance Rate of Those Summoned to the Saiban-in Selection Proceeding*) (March 2017). The report also indicated that it should improve the situation if they could reduce undelivered summons due to the absence of prospective *Saiban-in* by redelivering them.

[65] *Id.*, pp. 73–76 and Saiko Saibansho Jimu-sokyoku, Heisei 27 nen ni okeru Saiban-in Saiban no Jissi-jokyo tou ni kansuru Shiryo (*General Secretariat of the Supreme Court, Materials on the Enforcement Situation of Saiban-in Trials in 2015*) (June 2016), p. 28.

[66] The average time spent for the final deliberation per one *Saiban-in* trial in the nearly nine years until the end of May 2018, was 640.3 hours (501.1 in uncontested cases and 808.1 in contested cases). Those times have been getting even more prolonged, from 504.4 hours (438.7 in uncontested cases and 623.4 in contested cases) in 2010 to 760.3 hours (580.3 and 916.6 respectively) in 2017. Saiko Saibansho Jimu-sokyoku, *supra* note 9, p. 9.

[67] Saiko Saibansho, Saiban-in tou Keikensha ni taisuru Anketo Chosa Kekka Hokokusho (Supreme Court, Report on the Results of the Questionnaires to Former *Saiban-in* and Supplementary *Saiban-in*) 2017 (March 2018), pp. 47 and 49.

The publicity of many *Saiban-in* trials, including sensational capital cases, has contributed to the people's better understanding of the criminal justice system (Figure 6[68]). Apparently, they have started thinking about crime, punishment and the administration of the criminal justice system as matters of concern close to themselves.

As *Saiban-in* trials become regular daily events, the media, and therefore the general public also, seem to be losing their initially strong interest in them. Yet, on the other hand, a growing concern about, and a spreading practice of, "*ho-kyoiku*" (law-related education) at high, junior high and primary schools after the Justice System Reform, in which the *Saiban-in* system as well as criminal justice is a major subject[69], are expected to promote more substantial, long-lasting understanding and commitment among the next generation of people. Thus, these basic changes might have a profound effect on Japanese criminal justice as a whole in the long run.

B. Transfiguration of Trial Proceedings

The introduction of the *Saiban-in* system has definitely been inducing a wide-range, overt or covert, transformation of Japanese criminal procedure in various ways and is bringing about new challenges to cope with. The most covert and dramatic changes have been witnessed in trial proceedings.

1. Activation, Visualization and Concentration

In order to ensure meaningful participation of *Saiban-in* as well as to reasonably limit the burdens on them, the *Saiban-in* Act requires judges, public prosecutors and defense counsel to make trial proceedings speedy and easily understandable[70]. The Rules for *Saiban-in* Trials also provide that both parties shall present arguments and evidence in an easily understandable way so that each *Saiban-in* can form his/her own opinion based upon the trial hearings[71].

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 key points, making full use of visualization methods, and relying on live testimonies in court instead of documentary evidence.

At the initial stage, trial court judges and prosecutors, who would prefer saving time and unnecessary burden upon witnesses, as well as defense counsel, who would not like to have the victim testify in person at trial, were inclined to agree on the use of written records of the witnesses' statements to the prosecutor or the police, especially in uncontested cases. But, with persistent, repeated reminders and warnings from the judiciary[72], they have evidently changed their attitude in terms of relying much more on live testimony even in uncontested cases[73].

As a 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

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

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[68] Saiko Saibansho Jimu-sokyoku, *supra* note 60, p. 43.
[69] *E.g.*, Homu-sho Ho-Kyoiku Project Team, Chugakusei muke Kyozai: Saiban-in Seido *(Ministry of Justice Law-related Education Project Team, Teaching Materials on the* Saiban-in *System for Junior High School Students)* 〔available at http://www.moj.go.jp/keiji1/saibanin_info_saibanin_kyozai.html〕; *id.*, Keiji Shiho ni tsuite Kangaeyo (*Let's Think About Criminal Justice*) 〔available at http://www.moj.go.jp/housei/shihouhousei/index2.html〕. *See also* the Web-sites of the Japan Society for Law and Education 〔http://gakkai.houkyouiku.jp/〕 and the Law-related Education Forum 〔http://www.houkyouiku.jp/〕
[70] *Saiban-in* Act art. 51.
[71] The Rules on the Criminal Trials with the Participation of Saiban-in, Sup. Ct. Rules No. 7, July 5, 2007, *enforced*, May 21, 2009, art. 42.
[72] *E.g.*, Chief Justice Hironobu Takesaki, Shin-nen no Kotoba (*Words for the New Year*), SAIBANSHO JIHO No. 1545 (2012), p. 1.
[73] For instance, the average number of witnesses who testified at one *Saiban-in* trial have increased from 2.1 (1.5 in uncontested cases and 3.3 in contested cases) in 2010 up to 3.1 (1.9 and 4.2, respectively) in 2017. Saiko Saibansho Jimu-sokyoku, *supra* note 9, p. 8.

According to the official statistics, the period of trial itself has been drastically shortened, from an average of 6.5 months for previous trials involving the same offenses in the three years right before the enforcement of the *Saiban-in* Act down to 7.8 days for *Saiban-in* trials (in contested cases, from 10.8 months to 10.7 days)[74]. While previous criminal trials sometimes took many years in big cases, there have been so far just twelve *Saiban-in* trials that took or will take over two months (Table 7). Even in these cases, actual trial sessions took less than 40 days and the rest were spared for interval or weekend recesses and final deliberation, except for the ongoing longest case that is scheduled to take 207 days, including 76 trial sessions.

Undoubtedly, the longer the period, the higher the rate of prospective *Saiban-in* who ask to be excused, and then the proper selection of *Saiban-in* becomes harder. In anticipation of such hardship, the *Saiban-in* Act was revised in 2015 to empower the court to exclude from *Saiban-in* trial a case in which the selection or service of *Saiban-in* is deemed difficult due to the extraordinary length of the scheduled trial period[75]. This exclusion clause, however, has never been resorted to, even in the lengthy cases listed in Table 7 in which trials were held after the enforcement of the revision[76].

It should not be overlooked that the pretrial arrangement procedures for *Saiban-in* trials have taken an average of 6.9 months (8.8 months in contested cases) and the period has been lengthening from 5.4 months (6.8 months in contested cases) in 2010 to 8.3 months (10.0 months in contested cases) in 2017. It takes over a year or more in a substantial number of cases[77].

Although this is attributable, to a considerable extent, to additional charges filed subsequent to the initial indictment 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 to the prosecutor's offer of proof and to make their allegations after discovery of evidence, which sometimes takes many days. Improvements have been under discussion in and out the judiciary.

3. Understandability

The majority of former *Saiban-in* evaluate the trial proceedings in their cases as easily understandable (Figure 8[78]). At one time, negative respondents increased, though still less than 10%. Worried that this might be attributable to a revival of easy reliance on documentary evidence in uncontested cases, the judiciary warned repeatedly against such a practice, with the result of a decrease in the rate of negative responses.

However, the understandability of the presentations and arguments by defense counsel are evaluated remarkably lower than the performances of professional judges and prosecutors (Figure 9[79]). Although they are in a disadvantageous position of speaking even for the client who makes incoherent or unreasonable assertions, it might be caused by total reliance on the style and ability of each individual defense lawyer without sufficient systematic training. The bar associations have been seriously trying to cope with this challenge, for instance, by holding special seminars to improve defense lawyers' in-court performances and skills[80].

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[74] Saiko Saibansho Jimu-sokyoku, Saiban-in Saiban Jissi Jokyo no Kensho Hokoku *(General Secretariat of the Supreme Court, Report of the Examination on the Enforcement Situation of Saiban-in Trials)* (Dec. 2012), pp. 40–41; *Id*., supra note 9, p. 6.

[75] The Act to Revise a Part of the Act for the Participation of *Saiban-in* in Criminal Trials, Act No. 37, June 12. 2015, *enforced* Dec. 12 the same year.

[76] In eleven out of the twelve lengthy cases listed in Table 7, no substantial trouble was reported in the selection of *Saiban-in* or their service in spite of much more prospective *Saiban-in* being excused than in ordinary cases. However, in the remaining longest case in which the trial is still in progress at a pace of four sessions a week, three out of the six *Saiban-in* have already been discharged at their request within forty days from the beginning of the trial. Although the vacancies have been filled by three of the six supplementary *Saiban-in*, there is concern that the trial proceedings should be suspended and considerably delayed due to the additional *Saiban-in* selection in case four more *Saiban-in* are discharged. Kobe Shinbun NEXT, June 29, 2018.

[77] Saiko Saibansho Jimu-sokyoku, s*upra* note 9, p. 6.

[78] Saiko Saibansho, *supra* note 67, p. 18.

[79] *Id*., p. 20.

[80] *See e.g*., Masashi Akita, Bengonin kara Mita Saiban-in Saiban (*Saiban-in Trials from the Viewpoint of a Defense Counsel*), HO NO SHIHAI No. 177 (2015), pp. 77–79.

4. Other Cases

As described above, the JSRC recommended that the activation, concentration and expediting should be realized in all criminal trials, not limited to *Saiban-in* trials, which the Council expected would give a decisive motive to promote such changes. However, *Saiban-in* trials account for only a small percentage of all criminal trials. As a matter of fact, trials in non-*Saiban-in* cases do not appear to have changed much so far, probably because those concerned have been too occupied by implementing and managing *Saiban-in* trials to spare their energy for other regular cases.

Realistically, there is a need to dispose of the many uncontested cases efficiently as well as to avoid unnecessary burdens on witnesses. Consecutive, concentrated trial proceedings relying mainly on oral testimony will not be suitable for cases involving tax violations as well as business or financial offenses, for instance, in which a large amount of documentary evidence is to be examined.

However, it is evidently undesirable that *Saiban-in* and non-*Saiban-in* trials are administered in two different ways, causing the appearance of "justice by double-standard.[81]" Discussions and efforts for further changes in this respect have just begun among concerned judges and others.

C. New Challenges and Developments of Judicial Precedents

1. Overview

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, new challenges have come up through the continuous efforts in practice to effectively realize the purposes of those statutory revisions as well as the *Saiban-in* system itself. It is noteworthy that, contrary to their conventional negativism, the Supreme Court and other courts have actively and promptly, or even in advance, addressed many of them, with the result of remarkable developments of judicial precedents.

Although the courts adopted such new precedents apparently in anticipation of *Saiban-in* trials, they did so technically by interpreting related statutory provisions that apply to all cases, including those to be tried by professional-judge courts. Therefore, the new precedents impact the whole system. At the same time, they in turn have brought about further challenges that call for serious efforts to cope with.

2. 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. Under the new system, the defense may have a three-phased disclosure of evidence from the prosecution in the course of the pretrial arrangement procedure[82]. *First*, the 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 how each prosecution witness is supposed to testify at trial. *Second*, upon the request of the defense, the 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.) deemed important to evaluate the credibility of the prosecution's evidence, if the prosecutor 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 allegations they intend to make, the prosecutor shall disclose to the defense the evidence which is deemed relevant to those facts and allegations if the prosecutor deems it appropriate based on similar considerations. The defense, if discontented with the prosecutor's disclosure or non-disclosure at any phase, may request review by the trial court (the professional judges in the *Saiban-in* cases), which may order the prosecutor to disclose particular evidence to the defense if it is deemed appropriate[83].

In practice, it is reported that the public prosecutors' offices use their discretion generously to disclose the evidence much earlier and more widely than required by law, and that the defense will have access to any evidence they would need in most cases.

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[81] *E.g.*, Zadankai, Saiban-in Seido no Genjo to Kadai (*Round-table Talk, Present Situation and Challenges of the* Saiban-in *System*) HO NO SHIHAI No. 177 (2015), pp. 39–41 (remarks of Yukihiko Imasaki and Yutaka Osawa).
[82] CCP arts. 316–13 through 316–20.
[83] CCP arts. 315–25 through 315–27.

Still, there remain several points at issue. One of them is whether the disclosure required by law is limited to the evidence which is actually in the custody of the prosecutor. Although some concerned lawyers opined differently, the drafters of the new disclosure procedure apparently had such evidence in mind[84].

Therefore, it is rather amazing that in 2007 and 2008 the Supreme Court, emphasizing the purpose of the disclosure procedure, adopted a liberal interpretation that items (such as the police officers' memoranda of their questioning of the suspect) not filed in the prosecutors' office also should be subject to 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 prosecutor[85]. Discussions have been continuing on how far the scope of the decision extends.

Defense lawyers have kept demanding a list of all the evidence in the prosecutors' custody to be disclosed at an early stage of the pretrial arrangement procedure so that they could make their requests for disclosure more effectively. This demand would eventually become accepted in large part by the subsequent criminal justice reforms as described later in Section V.

3. Law of Evidence

(a) Overview

After the current CCP adopted such evidentiary rules as the exclusion of involuntary confession and that of hearsay evidence[86], which were totally novel at that time, Japanese scholars and lawyers eagerly studied the American law of evidence. Since then, various basic principles of American evidentiary law have been shared commonly in the Japanese legal world. Many pages in criminal procedure textbooks and many hours in criminal procedure classes at law schools are spared on 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 that the Supreme Court and lower courts have adopted[87]. 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.

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 properly determine the facts of the case.

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

(b) Proof beyond a reasonable doubt

In the five-year preparation for the enforcement of the *Saiban-in* Act, judges, lawyers and scholars have elaborated how to instruct or explain to participating lay citizens about difficult legal norms and terms in plain language so that they can understand the elements of each charged offense as a prerequisite for their fact-finding as well as various principles of criminal procedure. Among others, proof beyond a reasonable doubt was one of the hardest.

A model instruction used in the Tokyo District Court describes, "(a)lthough 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 about his/her guilt."

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[84] *E.g.*, Hiroyuki Tsuji, Keijisosho-ho no Ichibu wo Kaiseisuru Houritsu nitsuite (*Commentaries on the Act to Revise Several Parts of the Code of Criminal Procedure*) (2), HOSO JIHO Vol. 57, No. 8, p. 2311.

[85] Sup. Ct. (3rd 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.

[86] CCP arts. 319 and 320.

[87] *E.g.*, Sup. Ct. (1st Petty Bench) judgment of Sep. 7, 1978, KEISHU Vol. 32, No. 6, p. 1672; Tokyo High Court judgment of Sep. 4, HANREI JIHO No. 1806, p. 144.

Anticipating the enforcement of the *Saiban-in* Act, the Supreme Court itself indicated in advance in 2007 that proof beyond a reasonable doubt does not mean the nonexistence of any possibility of opposite facts, and that, even when there is 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[88].

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 professional judges from an early stage of the trial should help ease the hardship *Saiban-in* might feel in forming their own judgment.

(c) Proof by circumstantial evidence

The hardship for *Saiban-in* in this respect, if any, must be much bigger in cases where the proof of guilt relies entirely on circumstantial evidence. As a matter of fact, there has long been a controversy even among professional judges, 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 thought would think it sufficient if the court, assessing comprehensively all the circumstantial evidence, reaches the judgment that the defendant's guilt is proved beyond a reasonable doubt, others would demand proof of at least one fact which is unexplainable unless the defendant actually 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 must be included among the facts proved by circumstantial evidence[89].

Although there are divisions of opinion about the appropriateness of this ruling, it has actually had an evident effect on subsequent *Saiban-in* trials. As a matter of fact, right after the Supreme Court's judgment, a defendant charged with robbery and murders of an elderly couple was found not guilty for the very reason that such an unexplainable fact as required by the Supreme Court ruling was not included in the facts proved by circumstantial evidence. The *Saiban-in* trial court acquitted the defendant, despite the findings that his 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 robbery and murders in question and that his total denial of entering the house was a lie[90].

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.[91]

(d) 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.

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

In a cause célèbre where the defendant was charged with killing four neighbors and injuring many others by serving them arsenic-poisoned curry and rice at a local festival, the prosecutors produced as a evidence of her guilt the proof that she had attempted to murder her husband and an employee for insurance money by serving them foods containing arsenic repeatedly. The prosecutors also produced the proof that she had

[88] Sup. Ct. (1st Petty Bench) decision of Oct. 16, 2007, KEISHU Vol. 61, No. 7, p. 677.
[89] Sup. Ct. (3rd Petty Bench) judgment of Apr. 27, 2010, KEISHU Vol. 64, No. 3, p. 233.
[90] Kagoshima Dist. Ct. judgment of Dec. 10, 2010, HANREI HISHO L06550725.
[91] Fukuoka High Ct. judgment of Nov. 2, 2011, HANREI HISHO L06620534.

served foods containing arsenic or sleeping drug to her acquaintances for the same purpose. Despite the differences in the motive and other circumstances from the instant case, the trial court consisting of professional judges admitted them[92] and 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. The appellate court found inappropriate the admission of the proof concerning the use of sleeping drug, but still affirmed the trial court's judgment[93].

After the introduction of the *Saiban-in* system, however, courts have become more conscientious and self-restrictive about the problem.

In a case involving alleged trespass, theft and arson, the defendant admitted he stole into the victim's empty apartment and took a small amount of money, but denied his involvement in setting fire there, though it happened within the same six-hour time range before dawn. The professional judges of the *Saiban-in* trial court rejected the prosecution's proof of his involvement in the arson by the facts that he had been convicted some 17 years earlier for at least 10 cases of similar trespass, theft and arson, and the court found him not guilty on the charge of the arson. This judgment was reversed by the appellate court, which found the defendant's previous convictions for similar offenses admissible because of their similarity to the instant case both in terms of his habit of setting fire to heating oil in the dwelling and in his frustration over the lack of valuable property within the dwelling as the motive for doing so[94].

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 charged offense unless the previous criminal acts had such significant characteristics considerably similar to the charged criminal act 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's committal in the instant case[95].

Five 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 of the defendant[96].

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 criminal act must be significant before the exception applies.

The difficulty is even more amplified when we take into account the concurring opinion of Justice Kanetsuki to the second Supreme Court decision. He mentioned that a further exception could be admitted in cases where a number of similar offenses repeated by the same defendant in the same short period of time as the charged offense in question are indicted and tried simultaneously in the same proceedings[97]. As Justice Kanetsuki was a prominent criminal law judge, its implication over the scope of the Supreme Court rulings seems to demand detailed analysis[98].

Indeed, a somewhat similar view to his indicated exception has been adopted by an appellate court in another cause célèbre called "Metropolitan-area Serial Suspicious Death Cases." The defendant was charged

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[92] Wakayama Dist. Ct. decision of Oct. 10, 2001, HANREI TIMES No. 1122, p. 132, sentencing the defendant to death.
[93] Osaka High Ct. judgment of June 28, 2005, HANREI TIMES No. 1192, p. 186.
The defendant's *jokoku* 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 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. (3rd Petty Bench) judgment of Apr. 21, 2009, HANREI JIHO No. 2043, p. 153.
[94] 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.
[95] Sup. Ct. (2nd Petty Bench) judgment of Sep. 7, 2012, KEISHU Vol. 66, No. 9, p. 907.
[96] Sup. Ct. (1st Petty Bench) decision of Feb. 20, 2013, KEISHU Vol. 67, No. 2, p. 1.
[97] *Id*., p. 5.

with, among others, killing in a relatively short time period of eight months two middle-aged men, whom she met on online dating sites and allegedly cheated them out of their money with a false promise of marriage, and one 80 year old man, whom she frequently visited and allegedly stole property from, by firing a briquette to generate carbon monoxide gas inside a sealed car, apartment and house, respectively, where she allegedly left her victims behind after drugging them with sleeping pills. 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 in his dwelling. The *Saiban-in* trial court found her guilty on all the charges and sentenced her to death[99].

On appeal, the Tokyo High Court affirmed the trial court judgment, rejecting the defendant's challenge against the prosecutors' reference in the closing argument to a set of common features shared by all the three murders: (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 a sealed place after putting each victim to sleep. The prosecutors' argument that either of the defendant's criminal acts of special modus operandi, if proven, should be admissible as evidence of her committal of another criminal act of similar special modus operandi, the High Court held, was not in contradiction with the above-mentioned Supreme Court rulings because the common features, when considered together, were strikingly similar to the criminal act to be proven.[100]

4. Appellate Review of Fact-Finding

(a) Law and practice of appellate review before and after the introduction of the Saiban-in *system*

In the course of the justice system reform, there was a discussion whether an appellate court consisting exclusively of professional judges could be justified to review and reverse the guilty/not-guilty finding or a sentence of the *Saiban-in* trial court solely based on documentary records without diminishing the purpose of public participation.

In this regard, the CCP of 1948 made a drastic change to its criminal appeal system from the former law under which the second instance court (mainly the High Court), on appeal (*koso*) would hold a *huku-shin* (new trial) just the same way as the first instance trial court, while the highest Court of Grand Instance, on further appeal (*jokoku*), would review, in principle, only legal issues involved in the lower court judgments and decisions. As the Supreme Court, newly founded in place of the latter court, was assigned by the current Constitution to carry out the most important task of reviewing the constitutionality of statutes and other official actions[101] as well as to unify judicial precedents only by fifteen Justices, it was mandated to shift the task of reviewing ordinal legal issues onto the High Courts, of which works in turn also had to be reasonably

[98] The Supreme Court rulings do not mean to further prohibit the production of the defendant's previous convictions or criminal records of similar offenses as 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 on *Saiban-in*. However, a majority, with 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 multiple times. In contested cases, the hearing as well as the intermediate deliberation among the members of the court could be divided into multiple 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 professional 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 reason for his/her judgment in the deliberation, it should be checked and corrected by other *Saiban-in* and professional 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, Jidai ni sokushita Aratana Keiji-s Seido no Kihon Koso (*Council on Legislation Special Division on the Criminal Justice System in the New Era, Basic Plans for the New Criminal Justice System Responding to the Demands of the Times*) (Jan. 2013), p. 34 〔available at http://www.moj.go.jp/content/000106628.pdf〕; 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 〔available at http://www.moj.go.jp/content/000112006.pdf〕.

[99] Saitama Dist. Ct. judgment of Apr. 13, 2012, HANREI HISHO L06750221.

[100] Tokyo High Ct. judgment of Mar. 21, 2014, LEX/DB 25503368, dismissing the defendant's allegation that the trial court unlawfully failed to make the prosecutors correct their final argument to prevent prejudicial effect on the guilt finding by the *Saiban-in*, though the trial court actually did not rely, at least explicitly, on the similar fact evidence as argued for by the prosecutors.

[101] Const. art. 81.

reduced and rearranged. Thus, although the *koso* appeal against trial court judgments for mistake of fact-finding or inappropriate sentence is retained in the current CCP[102], the task of the second instance court is limited principally to doing "*jigo-shinsa*" (post-fact review) on the basis of the trial records, whether such prejudicial mistake of fact-finding existed in the trial court judgment or its sentence was inappropriate as the appellant asserts.

At the same time, however, the CCP allows the appellant to refer to, and the appellate court to take into consideration, changes in circumstances subsequent to the trial court judgment (such as the conclusion of settlement between the defendant and the victim) as a factor that might make the trial court's sentence inappropriate[103]. It further gives the appellate court discretion to conduct an ex officio inquiry whether there were any other detrimental errors in the trial court judgment than those asserted by the appellant and, if necessary, to examine new evidence that is not included in the trial record[104].

While such challenges against the guilty/not-guilty finding or the sentence of the trial courts actually accounted for the overwhelming majority of *koso* appeals[105], the High Courts, especially from the 1960s, actively exercised this discretion. Many of them unhesitatingly examined old and new evidence in addition to the trial record and rendered their own decisions on the defendant's guilt or the sentence to be imposed rather than remanding the case to the original first instance court, even when they quashed the latter's judgment[106]. Critiques have pointed out that this form of appellate review in practice has substantially assumed the nature of "*zoku-shin*" (successive trial) on top of the first instance trial.

Considering this situation, it appeared even more doubtful whether appellate review of the guilty/not-guilty finding or sentence of a *Saiban-in* trial court could be justified.

Despite such doubt, it was a majority opinion of the JSRC that appellate review is indispensable to remedy mistakes of fact-finding and inappropriate sentences possibly caused even by *Saiban-in* trial courts[107]. And in implementing the Council's recommendation, the expert committee rather took a different approach of substantially altering the above practice by inducing appellate courts to return to their originally intended role of post-fact review. Then, the appellate court, the committee thought, could be justified to reverse the *Saiban-in* trial court's judgment principally by carefully examining the trial record, a task which only experienced professional judges would be qualified for.[108] Hence there was no revision to relevant provisions of the CCP.

Still, a very critical question had been presented to appellate court judges, asking how they actually could and should execute their reviewing function properly while paying due respect to the judgment of the *Saiban-in* trial court. Ever since the enactment of the *Saiban-in* Act, serious discussions had piled up[109]. Some people stressed that appellate courts as the "last instance of facts" should not hesitate to fulfil their mission of finding

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[102] CCP arts. 381 and 382.
[103] CCP arts. 382–2, 393, 397, sec. 2, *added* by the 1953 revision of the CCP.
[104] CCP art. 392, sec. 2 and art. 393, sec. 1. *See also* Sup. Ct. (1st Petty Bench) decision of Sep. 20, 1984, KEISHU Vol. 38, No. 9, p. 2810, affirming the appellate court's discretion to examine new evidence as far as it relates to the fact that existed before the trial court judgement.
[105] Among 76,199 criminal *koso* appeals disposed of by all the High Courts in the nine years from 2000 to 2008, 74,066 (97.2%) were those filed only by the defendants and 496 by both parties. 54,267 (72.8% of their total) were for the reason of inappropriate sentence and 18,717 (25.1%) for the reason of mistake of fact-finding. Saiko Saibansho Jimu-sokyoku, Shiho Tokei Nenpo 2: Keiji-hen (*General Secretariat of the Supreme Court, Annual Reports on Judicial Statistics, Part 2: Criminal Cases*), 2000–2008, Table 44.
[106] In 54,391 (71.4%) of all criminal *koso* appeal cases disposed of in the above nine years, appellate courts engaged themselves in examination of the facts, including the questioning of the defendant (31.2%), examination of documentary or tangible evidence (34.55) or hearing of the witnesses' testimony (14.6%). As the result of these appellate reviews, trial court judgments were quashed in 11,027 cases (14.5%), among which only 106 (0.14%) were remanded to the original or other first instance trial court. *Id*., Tables 45 and 48.
[107] Recommendations of the JSRC, *supra* note 34, Chap. IV, Part. 1, 1(4)c.
[108] Masahito Inouye, "Kangaerareru Saiban-in Seido no Gaiyo nitsuite" no Setsumei (*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〕.
[109] *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.*

the true facts and securing justice being done even in *Saiban-in* cases. Others who would pay maximum respect to the results of *Saiban-in* trials, in contrast, demanded limited appellate review, under which the appellate court could or should not reverse the *Saiban-in* trial court judgment unless its fact-finding involves substantial violation of rules of inference or thumb, or its sentence evidently exceeds a reasonably allowable range.

As a matter of fact, for a couple of years right after the beginning of *Saiban-in* trials, prosecutors rarely filed an appeal against the *Saiban-in* trial court judgment, and appellate courts also were very careful in intervening in them[110]. As a growing number of contested, as well as uncontested, cases involving serious offenses that might result in heavy sentences were put to *Saiban-in* trials in the following years, more appeals were filed against their results, even by prosecutors, and appellate courts also began intervening more actively, though it was most often for the reason of subsequent circumstances affecting the sentence that they quashed *Saiban-in* trial court judgments (Figures 11, 13, 15[111].). Thus, the issue became more realistic and urgent to resolve. Then in 2012, the Supreme Court at last defined its position for a limited appellate review on possible mistake of fact-finding in the *Saiban-in* trial court judgment.

(b) Supreme Court judgment of 2012

As the result of customs inspection at the Narita International Airport, it was detected that the defendant, an arriving passenger from Malaysia, carried three chocolate boxes containing some 1 kg of methamphetamine in his bag. He was charged for smuggling the stimulant drugs at the request of his acquaintance, but he disputed his awareness of the contents of the chocolate boxes. He asserted that, in Malaysia where he went to pick up a forged passport on behalf of that acquaintance, he was asked by a local person to bring the chocolate boxes back to Japan as a souvenir. Despite the prosecution's circumstantial proof that the defendant was compensated for his travel to Malaysia by the person who had been indicted for smuggling stimulant drugs, that he actually brought back the chocolate boxes containing stimulant drugs, that the boxes were noticeably heavier that those containing only chocolates, and that he had behaved suspiciously during the customs inspection, the *Saiban-in* trial court found him not guilty because the court could not become "certain according to common sense" that he was aware of the illegal drug being contained in the chocolate boxes (Chocolate Box Case)[112].

Acquittals for similar reasons in several *Saiban-in* trials involving similar stimulant drug smuggling followed this[113], 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 arguments against these trial court judgments were accepted by several appellate courts, which reversed the judgments, including the one in the above Chocolate Box Case[114]. In most of those cases, appellate courts found the defendants guilty, coming to the opposite conclusion based on their evaluation of the circumstantial evidence.

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[110] Probably thanks to a series of serious discussions among appellate court judges about the right way of executing their reviewing power, they seem to have become more careful not to overstep their basic role of post-fact review. For instance, according to the official judicial statistics, the rate of the cases in which appellate courts examined facts dropped from 75.1% in 2000 down to 47.6% in 2016. Saiko Saibansho Jimu-sokyoku, Shiho Tokei Nenpo 2: Keiji-hen (*General Secretariat of the Supreme Court, Annual Reports on Judicial Statistics, Part 2: Criminal Cases*), 2000—2016, Table 45. But, *also note* the latest symptom of possible change described on page 93.

[111] Saiko Saibansho Jimu-sokyoku, Saiban-in Saiban no Jissi-jokyo ni kansuru Sioryo Heisei 21–nen～28–nen (*General Secretariat of the Supreme Court, Materials on the Enforcement Situation of Saiban-in Trials, 2009—2016*), Tables 69, 72 through 74.

[112] Chiba Dist. Ct. judgment of June 22, 2010, KEISHU Vol. 66, No. 4, p. 549.

[113] Until the end of March 2018, 33 defendants have been totally acquitted in cases involving stimulant drug offenses (*see* Table 10); the acquittal rate (that of the totally acquitted defendants among those tried by *Saiban-in* trial courts) is 3.75%, much higher than that (0.75%) in the *Saiban-in* trial cases in general. Table 10 and Saiko Saibansho Jimu-sokyoku, *supra* note 9, p. 4. The number of acquittals by *Saiban-in* trial courts in stimulant drug cases must become larger when the partial acquittals in multiple-count prosecutions are counted.

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 *Saiban-in* Act 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 74, p. 46.

[114] 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.

The Supreme Court, however, quashed the appellate court judgment in the Chocolate Box Case[115]. On the basic understanding that an appellate review of possible mistake of fact-finding in the trial court judgment generally should be conducted from the viewpoint of whether the trial court's evaluation of the credibility of each piece of evidence or its comprehensive assessment of all the evidence was unreasonable such as being in violation of rules of inference or thumb, the Supreme Court stressed that such a limited approach should be observed especially in relation to *Saiban-in* cases. The appellate court judgment in the instant case, the Court concluded, failed to demonstrate concretely that the trial court's fact-finding was unreasonable according to rules of inference or thumb.

Thus, the controversy was settled theoretically. However, it is doubtful if the hardship for appellate court judges has actually been eliminated or reduced. As a matter of fact, the appellate court judgments reversing the acquittals in three other stimulant drug smuggling cases were, in contrast, affirmed subsequently by the Supreme Court[116].

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 the conspiracy between him and the alleged accomplice, which was not deemed "certain according to common sense."[117] The appellate court reversed this judgment for the reason of the unreasonable fact-finding in contradiction with the rules 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, a 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 that the air cargo probably contained stimulant drugs, had agreed and actually attempted to receive it in Japan at the request of that person[118].

The second case was more similar to the above Chocolate Box Case in terms that the *Saiban-in* trial court denied the defendant's awareness of some 2.5 kg of methamphetamine contained in his suitcase which was detected by customs inspection on his arrival from Uganda by way of Benin and Paris. Conceding that the involvement of an organized crime group was inferred from the quantity as well as the artful concealment of the stimulant drugs, the court deemed it conceivable that some group member asked the defendant to transport the suitcase without letting him know its contents or its recipient in Japan[119]. The appellate court found it against the rules of thumb to think that some organized crime group dared to enlist the defendant to transport the suitcase containing that amount of illegal drugs such a long way, bearing his travel expenses, but without telling him the name of the recipient or the destination, and inferred from these and other facts that he was aware that some illegal drugs were probably contained in the suitcase[120].

The prosecution of an 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 of 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 the 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 went to the airport each time when stimulant drug carriers recruited by "A" were supposed to arrive there over the preceding year and that the defendant earned a large amount

[115] Sup. Ct. (1st Petty Bench) judgment of Feb. 13, 2012, KEISHU Vol. 66, No. 4, p. 482.
[116] Sup. Ct. (3rd 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.
[117] Tokyo Dist. Ct. judgment of July 1, 2011, KEISHU Vol. 67, No. 4, p. 632.
[118] 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.
[119] Chiba Dist. Ct. judgment of June 17, 2011, KEISHU Vol. 67, No. 7, p. 853.
[120] 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.

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[121]. Quite contrarily, a detailed analysis of the same evidence and some others led the appellate court to the findings (1) that the call histories lead to the strong inference that many 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 an unknown ringleader as mentioned by the trial court was only an unsupported abstract possibility. The trial court's contrary fact-finding and resulting denial of the defendant's involvement, the appellate court concluded, were unreasonable according to rules of thumb[122].

The Supreme Court affirmed all of the three appellate courts' reversals of trial court judgments as supported by a concrete demonstration that each trial court's fact-finding was unreasonable in contradiction with rules of thumb.

(c) Significance of the Supreme Court rulings

However, it is unclear how consistent the conclusions in the Chocolate Box Case and the three other cases are. Although "rules of inference or thumb" were evidently the common key factors in these rulings, the Supreme Court did not specify what rules of inference or thumb were in question in each case. Even if we could clarify it by a detailed analysis, it cannot be generalized or applied to other cases, because what rules of inference or thumb, especially the latter, are relevant must vary in each case, depending on what fact is to be proved, through what inference process and from what evidence.

Therefore, it has been left to the courts engaged in each individual case. Appellate court judges are required to specify the applicable rules of inference or thumb so that they can exercise their authority to review the trial court's fact-finding appropriately in accordance with the Supreme Court rulings. The trial court judges in their turn, in anticipation of possible appellate review, are supposed to have, and in *Saiban-in* trials to make *Saiban-in* share, a clear idea of what, if any, rules of inference or thumb they should refer to in their fact-finding in each individual case on trial. This does not seem to be an easy task for any of them.

Nevertheless, rather amazingly, the official judicial statistics indicate that appellate courts have not become hesitant, but even a bit more active, in reviewing and reversing the fact-finding of *Saiban-in* trial courts after the above Supreme Court rulings (Figure 15), which possibly have made them more confident in executing their reviewing power over the judgments of *Saiban-in* trial courts.

Moreover, the Supreme Court in subsequent cases either quashed or affirmed the appellate court judgments that reversed professional judges' as well *Saiban-in* trial courts' convictions or acquittals of defendants, by checking if each appellate court complied with the requirements for reversal imposed by the above Supreme Court rulings, without specifying what "rules of inference or thumb" were in question in each case[123]. The Court even quashed both the appellate court and the professional-judge trial court judgments that convicted the defendant for stealing money out of the envelope the victim left on a desk in a bank. The fact-finding of either court, in the Court's majority opinion, was not reasonable "in violation of the rules of inference or thumb" in termies of easily inferring the existence of the money in the envelope solely from the

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[121] Osaka Dist. Ct. judgment of Jan. 28, 2011, HANREI HISHO L06650051.

[122] Osaka High Ct. judgment of Mar. 2, 2012, KOSAI KEIJI SOKUHOSHU 2012, p. 181, remanding the case to the Osaka District Court for a new *Saiban-in* trial.

[123] Sup. Ct. (1st Petty Bench) judgment of Mar. 20, 2014, KEISHU Vol. 68, No. 3, p. 499 (quashing the appellate court judgment that reversed the professional judge trial court's conviction of the defendant for abandonment of a mentally disturbed person in their custody resulting in death); Sup. Ct. (1st Petty Bench) decision of June 8, 2014, HANREI TIMES No. 1407, p. 75 (affirming the appellate court judgment that reversed the professional judge trial court's conviction of the defendant for murder and a forcible obscene act resulting in death); Sup. Ct. (3rd Petty Bench) judgment of Mar. 18, 2016, SAIBANSHU KEIJI No.319, p. 269 (quashing the appellate court judgment that reversed the professional judge trial court's acquittal of the defendant for negligent homicide while driving); Sup. Ct. (1st Bench) decision of Dec. 25, 2017, SAIBANSHO JIHO No.1691, p. 51 (quashing the appellate court judgment that reversed the *Saiban-in* trial court's conviction of the defendant for assisting to attempted murder); Sup. Ct. (2nd Petty Bench) judgment of Mar. 19, 2018, SAIBANSHO JIHO No. 1696, p. 95 (quashing the appellate court judgment that reversed the professional judge trial court's acquittal of the defendant for abandonment of her underdeveloped child).

ambiguous testimonies of the victim and her mother, and concluding that only the defendant could have stolen it despite of the bank's CCTV video of the scene that did not clearly demonstrate the defendant's conduct[124]. But here, neither the majority specified the key phrase any further,

Careful and detailed analysis will be needed to see if the higher courts have been executing their reviewing authority appropriately and consistently in substantial accordance with the Supreme Court rulings rather than just giving a case-by-case ad hoc evaluation with the nominal use of the above key phrase as a mere cliché.

5. Sentencing and Its Appellate Review

(a) Difficulties for Saiban-in

One of the motives for the introduction of the *Saiban-in* system was the public opinion that sentencing by professional judges from time to time differed from regular citizens' sense of justice. Hence the *Saiban-in* 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, the Japanese Penal Code, in this regard, defines each offense in relatively comprehensive ways. For instance, it does not divide a murder into several ranks such as first degree, second degree and so on like in some other countries. And a wide range of penalties is prescribed for each offense. A murder, as well as residential arson, for instance, is punishable by the death penalty, life imprisonment or imprisonment for not less than five years and not more than twenty years[125].

In the conventional practice of professional-judge trial courts, a "market price," or a rough range of usual sentences, has been built up according to nature, type and other principal factors of the offense and the offender. But such customary, unwritten standards are not shared by *Saiban-in* who participate in criminal trials for the first time and, probably, only once in their lifetimes. It is not easy for them to form their own opinions about what is the right sentence for a particular defendant within the wide range of penalties prescribed by law. It must diminish the meaning of *Saiban-in*'s participation if the professional judges would lead them to follow the conventional "market price." But at the same time, it must be inappropriate if, due to the case-by-case, ad hoc decision-making of *Saiban-in* courts, sentences would vary significantly among the cases of similar natures. As mentioned earlier, an appeal can be filed against an inappropriate sentence by a *Saiban-in* trial court because reasonable and objective decision-making as well as equal treatment is required in sentencing. Hence, it became very crucial to consider how we could effectively achieve these twin goals.

(b) Sentencing data search system

The General Secretariat of the Supreme Court confronted the challenge by developing the "*Ryokei Kensaku* System",[126] a system of sentencing data retrieval by computer. Under that system, a range and distribution of sentences in similar cases, defined by more than ten key factors such as premeditation, motives, modus operandi, use of weapon, number of victims, defendant's relationship with the victim and so on, can be retrieved from the database of all the sentencing records after April 2008. If needed, the result of such retrieval will be provided in graphic forms to all the members of *Saiban-in* trial courts as a reference for their sentencing deliberations. This system is available also for prosecutors and defense counsel, who can refer to similar retrieval results in forming their opinions on sentencing.

This system could contribute to achieving the above twin goals wisely, at least under two conditions. First, the retrieval result provided to *Saiban-in* itself must be reasonably relevant to the sentencing in the instant case. For that, it is important to select appropriate key factors to specify effectively the range of similar cases from which sentencing data will be retrieved. Second, the results should not have undue effect of depriving *Saiban-in* of their own initiative to form and express their opinions on sentencing. For that, we need to define how the *Ryokei Kensaku* System should be used in the course of sentencing deliberation.

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[124] Sup. Ct. (2nd Bench) judgment of Mar. 10, 2017, SAIBANSHU KEIJI No. 321, p. 1.

[125] Penal Code arts. 199 and 108, respectively.

[126] Cf. Munehisa Sugita, Ryokei-Jijitsu no Shomei to Ryokei-Shinsa (*Proof of the Facts, Hearing and Deliberation for Sentencing*), RYOKEI JITSUMU TAIKEI, Vol. 4 (Osaka Keiji-jitsumu Kenkyuukai ed., 2011), pp. 210–13; Katsunori Ohno, Saiban-kan kara Mita Saiban-in Saiban Seido (*Saiban-in Trial System from the Viewpoint of a Judge*), HO NO SHIHAI No. 177 (2015), p. 61.

(c) Theoretical framework of sentencing

In this regard, it was rather common in conventional practice that trial courts, in their reasoning for sentence, referred to various factors, including not only those related to the criminal act itself, but also the personal background of the defendant, his/her attitudes subsequent to the criminal act as well as the response of the victim and the general public, without any reasoned order or distinction. But, for the above purposes, we need to have a firm theoretical framework to clarify what factors, in what order and how, they should consider in sentencing.

Serious discussions on that subject among concerned judges, lawyers and scholars produced a fruitful report of a semi-official study group[127]. On the recognition that, under the current Japanese law, the sentence for each convict should be assessed basically according to his/her criminal responsibility, the report stressed that, as the first step of sentencing, we should fix the basic range of sentence considering the factors relevant to the convict's criminal responsibility, such as the manner and results of his/her criminal act, his/her motive or purpose, and circumstances that led to the criminal act and so on. Any other factors, including the convict's personal background and subsequent attitudes, victim's feelings, and public response, should be ranked as subsidiary considerations; those factors may be considered only in deciding the final sentence within the above basic range of sentence. This framework, which represented a majority understanding, has been well received by many judges and lawyers.

(d) Actual situation and appellate review of sentencing by Saiban-in trial *courts*

How, then, have the *Saiban-in* trial courts actually performed in their sentencing? According to an official statistical study, *Saiban-in* trial courts' sentences in general do not seem to differ substantially from the sentences by previous professional-judge trial courts in the same categories of cases, except for the cases involving sex crimes, in which heavier sentences are imposed by *Saiban-in* trial courts probably reflecting the recent public indignation against those crimes (Figures 16–1 through 16–5[128]). As before, *Saiban-in* trial courts also most often impose imprisonment on convicted defendants for approximately a 20% to 25% diminished time period from the recommendation of the prosecutor, though it sometimes happens that the *Saiban-in* trial court imposes heavier or notably lighter sentences than recommended by the prosecutor.

Although appellate courts, respecting the purpose of the *Saiban-in* system, strictly restrained themselves from intervening in the *Saiban-in* trial courts' sentencing for the first few years, they began exercising their reviewing power especially in cases where, in their opinions, an inappropriately heavier sentence had been imposed. However, it seemed that they were searching for the right limit and standards for their intervention until the Supreme Court indicated a basic policy on sentencing and its appellate review in 2014.

(e) Supreme Court judgment of 2014

In the case where a young couple was charged with abusing their infant daughter resulting in death, the *Saiban-in* trial court found them guilty and, stressing the growing social demand for protecting children from domestic abuse, sentenced both of them to 15 years' imprisonment, which surpassed the 10 years' imprisonment recommended by the prosecutor[129]. These sentences were affirmed by the appellate court, which did not deem them as inappropriate[130].

However, the Supreme Court quashed both the trial court's and appellate court's judgments, sentencing the husband to ten years' imprisonment and the wife to eight years' imprisonment[131]. The Court declared that general trends or precedents of sentence for each type of offense should be considered as a first guide in sentencing deliberation to attain objectivity and equal treatment. Respecting the purposes of the *Saiban-in* system, the Court conceded that *Saiban-in* trial courts might be permitted to change or deviate from the customary standards by reflecting sound social commonsense, but it could be permitted, the Court stressed, only if they could demonstrate reasonable grounds to justify it. Apparently based on the theoretical framework of sentencing presented by the above study group report, the Court concluded that the *Saiban-in*

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[127] Makoto Ida *et al*., Saiban-in Saiban niokeru Ryokei Hyogi no Arikata nitsuite (*On How the Sentencing Deliberation in* Saiban-in *Trials Should Be*) (the Judicial Training and Research Institute, 2012).
[128] Saiko Saibansho Jimu-sokyoku, *supra* note 74, Figures 52–1, 52–3, 52–4, 52–7 and 52–8.
[129] Osaka Dist. Ct. judgment of Mar. 21, 2012, KEISHU Vol. 68, No. 6, p. 948.
[130] Osaka High Ct. judgment of Apr. 11, 2013; *id*., p. 954.
[131] Sup. Ct. (1st Petty Bench) judgment of June 24, 2014; *id*., p. 925.

trial court did not successfully demonstrate reasonable grounds because such factors as the growing social demand for protecting children from domestic abuse, which should be ranked as a subsidiary factor in that framework, were not significant enough for that purpose.

(f) Significance of the Supreme Court ruling

Thus, the Supreme Court defined its position by giving priority to the objective reasonableness and equal treatment in sentencing in general and extended it to *Saiban-in* trials as well by indicating the significance of "general trends or precedents" as a first sentencing guide.

Although, theoretically, the Court left room for *Saiban-in* trial courts' innovation in changing or deviating from the customary standards, it is doubtful if the courts actually could do so successfully. The basic range of sentence, under the above theoretical framework, must be fixed by the highest ranked, mostly objective factors relevant to the convict's criminal responsibility, of which significance will hardly be evaluated in a substantially different way even by reflecting "sound social common sense," compared to other subsidiary general circumstances such as the defendant's subsequent attitudes, victim's feelings, and public response.

6. Sentencing in Capital Cases

(a) Background

Most serious, among others, is sentencing in capital cases. As a matter of fact, there has been an argument that it is too heavy a burden for *Saiban-in* to involve themselves in deciding life or death of a 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 the victim's family presented to them. But for the very reason that it is the most serious matter, citizens should be asked, and even entitled, to share the responsibility for making such decisions. Considering there exist various opinions about the death penalty itself, their participation is desirable because it enables decision-making to reflect various views among the public.

Still, it is undeniable that *Saiban-in* have a hard time to reach the final decision on sentencing in these cases. Regarding such hardship, many more days are allocated for the final deliberations in capital cases.

A total of 35 defendants were sentenced to death by *Saiban-in* trial courts in the nearly nine years until the end of March 2018[132]. Although most of them involved the killing of multiple victims, there are four cases of single killing.

In this regard, previous courts had long adhered to the so-called Nagayama Standards indicated by the Supreme Court judgment of 1983[133]. In that judgment, the Court held that death sentences should be permissible only when it is deemed "absolutely necessary" from the viewpoint of the extreme gravity of the defendant's culpability, the proportionality of the punishment to the crime, as well as crime prevention, on comprehensive assessment of various factors, including the number of victims killed. While there were single killing cases in which the defendant was sentenced to death, almost all of them involved a premeditated robbery and murder, a murder for insurance money, a murder by a kidnapper or a convicted murderer on parole[134].

Considering these facts, the above study group report suggested that even the *Saiban-in* trial courts should respect precedents in sentencing in capital cases, where each person might have quite a different opinion[135].

(b) Supreme Court decisions of 2015

As if responding to the suggestion, the same division of the Tokyo High Court overturned the first two death sentences by *Saiban-in* trial courts in single killing cases in 2013[136]. In the first case (Minami-Aoyama Case) where the defendant was found guilty of intentionally stabbing the sleeping victim to death with a

[132] Saiko Saibansho Jimu-sokyoku, *supra* note 9, p. 4
[133] Sup. Ct. (2nd Petty Bench) judgment of July 8, 1983, KEISHU Vol. 33, No. 6, p. 609.
[134] Ida *et al*., *supra* note 127, pp. 110–115.
[135] *Id*., p. 103
[136] Tokyo High Ct. judgment of June 20, 2013, KO-KEISHU Vol. 66, No. 3, p. 1 (Minami-Aoyama Case); Tokyo High Ct. judgment of Oct. 8, 2013, KO-KEISHU Vol. 66, No. 3, p. 42 (Matsudo Case).

cooking knife he carried after stealing into the victim's condominium with the intent to commit robbery, the *Saiban-in* trial court imposed the death penalty in consideration of, among others, the fact that the defendant had served a twenty-year imprisonment sentence for murdering his wife and young daughter until only a half year before the instant robbery and murder[137]. The *Saiban-in* trial court in the second case (Matsudo Case) found the defendant guilty of intentionally killing a female university student who came home after he broke into her room to take her property and sentenced him to death, considering the facts that the defendant repeatedly and cold-bloodedly stabbed the promising female student to death with strong intent, that he returned to the crime scene the next day to conceal his offense by burning the room, that he committed serial offenses of a dangerous nature such as robberies resulting in bodily injuries and robbery-rapes in neighboring areas in the same period, and that he never showed any remorse for his offenses[138].

However, the defendant's previous conviction for murders in the Minami-Aoyama Case was, the Tokyo High Court pointed out, of a different nature because he killed his wife after a quarrel and his daughter as a result of an attempted double suicide, both without premeditation. Neither did the appellate court agree with the *Saiban-in* trial court's assessment of the above sentencing factors in the Matsudo Case in terms, among others, that the murder of the victim itself was not premeditated and that the serial robberies in the same period were not of the nature of endangering the victim's life.

As these appellate court judgments were sensationally reported by mass media and induced public controversy[139], the Supreme Court promptly defined their position in 2015[140]. On the recognition that the death penalty as an ultimate punishment must be applied very carefully and in such a way as to secure equal treatment, the Court declared that, in sentencing deliberations on capital offenses, it is necessary to have a common view, based upon precedent as the results of such careful applications, what factors should be considered as well as from what viewpoint and how each of them should be assessed for choosing the death penalty. And, on the total assessment of those factors, the court must demonstrate concrete and persuasive grounds to deem the death sentence "absolutely necessary" when they choose it. Stressing that *Saiban-in* trials are no exception, the Court upheld both of the appellate court judgments since, in the Supreme Court's view, such concrete and persuasive grounds were not successfully demonstrated by the *Saiban-in* trial court in either case.

(c) Significance of the Supreme Court rulings

Thus, holding on to its basic position of placing more emphasis upon objective reasonableness and equal treatment in sentencing, the Supreme Court made it even more evident in relation to the death sentence. Especially, it is remarkable that the Court did not admit any possibility for *Saiban-in* trial courts to change or deviate from the precedents by reflecting "sound social common sense" like in regular sentencing. This might mean that even the purposes of the *Saiban-in* system are forced to yield to the ultimate nature of capital punishment, which must be chosen as the last resort by absolute, uniform standards.

Still, the Supreme Court rulings could not stop furious criticism arising from every appellate court judgment that reverses the death sentence by *Saiban-in* trial court. The controversy among experts as well as the public will continue, more or less in conjunction with the basic pro and con arguments about the death penalty itself. Neither will it eliminate further contests on the appropriateness of sentencing in subsequent capital cases, each of which may vary with its own unique character different from others.

Despite the Supreme Court rulings, a year later a *Saiban-in* trial court, in another cause célèbre involving a single killing, sentenced to death the defendant who was found guilty of killing a little girl after abducting her for indecent purpose and mutilating her body for abandonment[141]. But this latest and fourth death sentence in single killing cases[142] was quashed by the appellate court for the reason that "concrete and persuasive grounds" were not sufficiently demonstrated, considering that the murder itself was not

[137] Tokyo Dist. Ct. judgment of Mar. 15, 2011, HANREI JIHO No. 2197, p. 143.
[138] Chiba Dist. Ct. judgment of June 30, 2011, KEISHU Vol. 69, No. 1, p. 168.
[139] *E.g.*, News Letter of the National Associations Crime Victims and Surviving Families, No. 46 (Dec. 10, 2013), p. 1, criticizing the two Tokyo High Court judgments as a betrayal to the nation; *id.*, No. 47 (Mar. 31, 2014), pp. 5–6.
[140] Sup. Ct. (2nd Petty Bench) decision of Feb. 3, 2015; KEISHU Vol. 69, No. 1, p. 1 (Minami-Aoyama Case); Sup. Ct. (2nd Petty Bench) Decision of Feb. 3, 2015; *id.*, p. 99 (Matsudo Case).
[141] Kobe Dist. Ct. judgment of May 18, 2016, HANREI HISHO L07150189.

premeditated and that the modus operandi was "not unprecedentedly cruel"[143]. As the prosecutor filed a *jokoku* appeal against the appellate court ruling, it is being closely watched how the Supreme Court will decide.

V. FURTHER CRIMINAL JUSTICE REFORMS

A. Investigation Procedure as a Remaining Area

In contrast to the trial proceedings, reforms were very limited regarding the criminal investigation procedure. There remained unsolved a deep-rooted, structured problem, *i.e.*, the excessive reliance on the investigative questioning of suspects and the written records of their statements in the investigation of crime and its proof at trial.

In this regard, the above-mentioned extension of the public defense system to suspects detained for serious offenses was naturally a significant improvement. Although every suspect had been entitled to retain defense counsel, only a limited number of them actually had done so for financial or other reasons. In most of the cases, unrepresented suspects had been subjected to investigative questioning by the police and prosecutors. Now that the public defense system is available to many of them, nearly 70% of the suspects are represented (Figures 17-1 and 17-2[144]). Probably as its consequence, it is reported that a growing number of the suspects deny the charges or remain silent when questioned by the police or prosecutors.

However, other reforms that had been put on the agenda of the JSRC were not adopted. Among others, defense lawyers and opposition groups who intended to control abusive or improper questioning of suspects by the police and prosecutors proposed several measures, including the mandatory video- or audio-recording of such questioning to "visualize" this invisible process[145]. Because of sharply divided opinions arising from quite different assessments of the current state of affairs as mentioned above, discussions on those proposals could not reach any concrete conclusion, other than mandating prosecutors and investigative agencies to document the time, duration etc. of., as well as names of officers engaged in, each and every questioning of detained suspects[146].

In response to the request the Judicial Affairs Committees of the legislature attached to their decisions for the 1994 revision of the CCP[147], "*hoso sansha*" (three sectors of the legal profession) thereafter continued the discussions, but in vain.

B. Moves toward Further Reforms

It was nothing but the imminence of *Saiban-in* trials that made a breakthrough. Even in former days, it had been a difficult task for the professional judges to find out what actually had happened in the course of investigative questioning when the voluntariness or trustworthiness of the defendant's confession was disputed at trial. There was hardly any proof available other than conflicting testimonies of investigating officers and the defendant. In *Saiban-in* trials where only professional judges are technically empowered to decide the voluntariness issue, *Saiban-in* are also supposed to hear the evidence on what happened in the course of investigative questioning because it is relevant to their evaluation of the trustworthiness of the defendant's confession at issue[148]. If the above situation of poor proof is not improved, *Saiban-in* will experience much greater hardship and confusion.

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[142] In the third case (Okayama Dist. Ct. judgment of Feb. 5), the defendant, who was condemned for the murder, rape and robbery of his former colleague and the mutilation of her body, withdrew his *koso* appeal against the death sentence, which was then finalized and executed later.

[143] Osaka High Court judgment of Mar. 10, 2017, HANREI HISHO L07220108.

[144] Saiko Saibansho Jimu-sokyoku, *supra* note 105, Tables 26, 27; *id*, Tables 26, 27.

[145] *E.g.*, the Japan Federation of Bar Associations, "Kokumin no Kitai ni kotaeru Keiji Shiho no Arikata" nitsuite (*On "How the Criminal Justice System Should Be in Response to the Expectation of the People*) (presentation paper to the JSRC, July 27, 2000), pp. 34–35, recounting its position declared already in its "Vision for Justice System Reform" (Nov. 20, 1998). As to the history of the arguments for visualizing investigative questioning in Japan, *see e.g.* Inouye, *supra* note 42, pp. 19–20; Hisashi Kosakai, Torishirabe Kashika no Jidai (*Era of Investigative Questioning Visualization*), KIKAN KEIJI-BENGO No. 82 (2015), pp. 11–13.

[146] Recommendations of the JSRC, *supra* note 34, Chap. Ⅱ, Part 2, 4(1) and (2).

[147] House of Representatives Committee on Judicial Affairs, Supplementary Resolution of Apr. 23, 2004; House of Councilors Committee on Judicial Affairs, Supplementary Resolution of May 30, 2004.

The mandatory documentation of the relevant facts regarding each questioning of the suspect would offer some help[149], but only to a limited extent. Thus, especially to ease such hardship for *Saiban-in*, the necessity to "visualize" invisible investigative questioning by video- or audio-recording became more keenly recognized among concerned people, including judges[150] and political parties[151]. In response to that, the public prosecutors' offices[152], and then the police[153], decided to make a discretionary trial run to record on video their questioning of suspects detained for an offense subject to *Saiban-in* trial, and gradually expanded its scope.

Defense lawyers and opposition groups who aimed to control the whole process of investigative questioning, however, were not content with such response because it was up to the discretion of prosecutors and the police themselves whether and to what extent the questioning of suspects would be recorded. They demanded that the whole process of investigative questioning of every suspect, detained or not, as well as principal witnesses must be recorded on video in any category of cases[154].

No wonder, these radical demands were not accepted by the public prosecutors' offices or the police. From their standpoint, such a far-reaching measure was not only impracticable, but also harmful because it

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[148] *E.g.* OSAMU IKEDA, KAISETSU SAIBAN-IN HO (*Commentaries on the Saiban-in Act*) (2nd ed. 2009), p. 10. The court may, if appropriate, have *Saiban-in* present at the hearing on the exclusive prerogative matters of professional judges, including the voluntariness of confession, and hear their opinions *Saiban-in* Act art. 68, sec. 3.

[149] The Rules of Criminal Procedures were revised in 2006 to add a new provision obligating the prosecutor to do his/her best to prove speedily and accurately the circumstances of the investigative questioning of suspects or others, when he/she would do so, with the use of the materials including such documentary records as much as practicable (art. 198–4).

[150] Already in 2013, two influential, prominent criminal law judges published their opinions stressing the urgent necessity for such measures in anticipation of *Saiban-in* trials, Makoto Yoshimaru, Saiban-in Seido no Moto niokeru Kohan-tetsuduki no Arikata nikansuru Jyakkan no Mondai (*Several Problems regarding the Administration of Trial Proceedings under the* Saiban-in *System*), HANREI JIHO No. 1807 (2003), p. 3; Fumiya Sato, Saiban-in Saiban ni fusawasii Shoko-shirabe to Gogi nitsuite (*On the Appropriate Manner of Evidentiary Examination and Deliberation* in *Saiban-in* trials), HANREI TIMES No. 1110 (2003), p. 4.

[151] *E. g.*, Komei-to, Saiban-in Seido Sekkei nitsuite (*New Komeito Party, For the Implementation of the* Saiban-in *System*) (December 2004); *id*., So-senkyo manifestos (*Manifestos for the General Election*) (September 2005).

In contrast, Minshu-to (*Democratic Party*) took a more radical position similar to the Japan Federation of Bar Associations, putting more stress upon strict regulation of investigative questioning by mandating the video- or audio-recording of its whole process in every case. *Id*., So-senkyo Manifestos (*Manifestos for the General Election*) (September 2005). The latter party actually proposed an enactment to realize their opinion, which was passed once in the House of Councilors in June 2008, and once more in its Committee on Judicial Affairs in June the next year.

[152] In May 2006, the Supreme Prosecutors' Office adopted the "Trial Run Policy," under which prosecutors, if it is deemed necessary to do so in preparation for later effective proof of the voluntariness of confessions, shall record on a video appropriate parts of their questioning of arrested or detained suspects (mainly the scene of their summing up of what the suspect had stated and the latter's affirmation of it at the end of questioning) unless it would disturb the function of the questioning. Then, after extending the trial run from Tokyo to other districts, the Office adopted the "Full-Scale Trial Run Policy" in March 2008, instructing all the prosecutors' offices to execute such video-recording, in principle, in every case that would be subject to *Saiban-in* trials. *Cf.* Takeru Tanojiri, Kensatsu niokeru Torisirabe no Rokuon-Rokuga no Unyo (*Operation of the Video-/Audio-Recording of Investigative Questioning in Prosecutors' Offices*), KEIJI-HO JOURNAL No. 42 (2014), p. 12. As for the subsequent developments, *see infra* note 168.

Furthermore, after the Democratic Party took over the ruling power in the general election in 2009, the newly appointed Minister of Justice began an internal high-level study meeting to discuss the visualization of investigative questioning, with the intention of realizing the party's policy described in note 151. After a two year study, during which the Council on Legislation began deliberating on the subject, as described below, the study meeting published its conclusion in August 2011, that the questioning of suspects, at first those detained in cases subject to *Saiban-in* trial, should be recorded on a video as widely as practicable, though not mandatorily or without exception, that they should discuss its extension to the questioning of mentally disabled persons or the cases under the independent, direct investigation by the prosecutors' office after a certain period of trial run, and that they should expand the current operational trial run to various cases, subjects and situations. The conclusion is available at http://www.moj.go.jp/content/000077866.pdf.

[153] The National Police Agency decided in April 2008, to begin a trial run recording of the questioning of arrested or detained suspects in the prospective *Saiban-in* trial cases in similar ways to prosecutors' offices, which began in five major prefectures in September that year and gradually extended to other prefectures, *Cf.* Yusuke Kawahara, Torishhirabe no Rokuon-Rokuga oyobi Do Seido nitaisuru Keisatsu no Taiou nitsuite (*Video-/Audio-Recording of Investigative Questioning and Its Handling by the Police*), KEISATSU-GAKU RONSHU Vol. 69, No. 92 (2016), pp. 64–65. As for the subsequent developments, *see infra* note 169.

[154] Among others, the Japan Federation of Bar Associations repeatedly publicized its official opinions demanding such full-scale video-/tape-recording. *Id*., Torishirabe no Kashika nitsuite no Ikensho (*Opinions on the Visualization of Investigative Questioning*) (June 2003).

would make it unduly difficult to obtain even voluntary and trustworthy crucial statements of suspects or key witnesses, for instance, in organized crime cases or cases of a sensitive nature, with the result of seriously disrupting effective law enforcement.

Several acquittal and retrial cases involving misconduct of the police[155] or the prosecutors[156] in their investigative questioning as well as handling of evidence in the following years triggered the second stage of criminal justice reform at the beginning of the 2010s.

In response to the strong demands for a wholescale review of the above-mentioned conventional structure of the criminal justice system, especially that of criminal investigation procedure[157], the Minister of Justice entrusted such review to the Council on Legislation in June 2011.

C. Recommendation of the Council on Legislation of 2014

After three years of research and deliberation mainly in its Special Division on the Criminal Justice System in the New Era[158], the Council recommended a package of reforms in September 2014[159].

From the sequence of events leading to this second stage, the main focus of discussions in the Council was naturally put on the video- or audio-recording of investigative questioning, more specifically, upon such issues as how widely it should be mandated and what situations should be exempted from that mandatory recording. But, here again, differences of opinion were so big that even a deeply involved insider like me could not say for sure the Council would reach any conclusion whatsoever.

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[155] *E.g.*, Kagoshima Dist. Ct. judgment of Feb. 23, 2007, HANREI TIMES No. 1313, p. 285 (Shibushi Case) (finding not guilty a local election candidate, his wife and ten residents charged with election law violations, for the reason of the establishment of an alibi for the candidate and the untrustworthiness of the defendants' confessions obtained by the improper questioning of the police); Toyama Dist. Ct. Takaoka Branch judgment of Oct. 10, 2007, HANREI HISHO L06250309 (Himi Case) (finding innocent at a new trial a convict who served out a three-year imprisonment sentence for rape, after the real perpetrator came out and confessed). *See also* Tokyo High Ct. decision of June 14, 2008, HANREI TIMES No. 1290, p. 73 (Fukawa Case) (affirming the Mito Dist. Ct. Tsuchiura Branch decision to start a new trial for two convicts serving a life imprisonment sentence for robbery and murder, for the reason of the discovery of new evidence that would, in association with the existing evidence, induce a reasonable doubt about their guilt; subsequently, both convicts were acquitted at a new trial in 2011); Tokyo High Ct. decision of June 23, 2009, HANREI TIMES No. 1303, p. 90 (Ashikaga Case) (affirming the Tokyo Dist. Ct. decision to start a new trial for a convict serving a life imprisonment sentence for abduction of a little girl for obscene purpose and murder, etc., for the reason of the contradictory findings of new DNA testing; subsequently, the convict was acquitted at a new trial in 2010).

Considering such situation, the National Public Safety Commission supervising the police entrusted in February 2010 a study for "upgrading the investigative methods and questioning" to a committee composed of various experts, including those enthusiastic for the video- or audio-recording of investigative questioning. Two years later, the committee published its final report, in which they proposed for, at least as a first step, expanding the current trial run of video-recording to many more cases as well as extending it to the questioning of mentally disabled persons. The final report is available at https://www.npa.go.jp/bureau/criminal/sousa/sousa_koudoka_kenkyukai/pdf/saisyuu.pdf.

[156] In 2010, it was revealed that the prosecutor of the Special Investigation Division of the Osaka District Prosecutors' Office in charge of a false official document production case against a high-ranking governmental official forged the log data of an electric file that might have been favorable evidence to the defendant. The revelation of his misconduct shocked the nation and urged the whole-scale review of the entire prosecution service,

The Minister of Justice responded promptly by setting up the "Kensatsu no Arikata Kento-Kaigi" (*Commission to Deliberate on What the Public Prosecutors' Offices Should Be*), composed of fifteen members representing various legal and non-legal sectors, including me. After the six-month intensive discussions, the Commission produced a comprehensive set of proposals for many reforms regarding the organization, internal controls, personnel management, training system, professional ethics, etc. *Id.*, Kensatsu no Saisei ni mukete (*For the Regeneration of the Prosecution Service*) (Mar. 31, 2011) 〔available at http://www.moj.go.jp/content/000072551.pdf〕.

[157] Among others, the above mentioned Commission, in its recommendations, urged the Minister of Justice to start immediately such wholescale review by setting up a "forum for thorough deliberation reflecting both the people's opinions and the expertise of professionals, including relevant organs". *Id.*, Part. 4, 3.

[158] The Special Division, composed of 26 members including me, held a total of 30 meetings (and each of its three sub-committees held ten meetings) from June 29, 2011 through July 9, 2014, to reach its conclusion. Their complete verbatim minutes are published on the Ministry of Justice Web site 〔http://www.moj.go.jp/shingi1/shingi03500012.html〕. *See also* Takashi Kikkawa, Hosei Shingikai niokeru Shingi no Keika to Gaiyo (*Progress and Outlines of the Deliberation in the Council on Legislation*), RONKYU JURIST No. 12 (2015), pp. 4 *et seq.*

[159] The Council on Legislation, Aratana Keiji-shiho Seido no Kochiku nitsuiteno Chosa Shingi no Kekka (*The Results of the Research and Deliberation for Building Up a New Criminal Justice System*) (Sep. 18, 2014) 〔available at http://www.moj.go.jp/content/001127393.pdf〕.

At the very end of the deliberation, however, the Council finally managed to decide with unanimity to take a realistic approach, *i.e.*, improving the matter step-by-step from the starting point on which consensus could be obtained. The Council recommended to mandate in principle video-recording of every investigative questioning of detained suspects regarding the cases subject to *Saiban-in* trial as well as those under the independent, direct investigation by public prosecutors[160]. Additionally, the Council expressed its expectation that the trial-run video-recording by the prosecutors as well as the police should be extended to the extent possible and that, on the basis of its result, the scope of mandatory video-recording should be reconsidered within an appropriate period of time[161].

In addition to that measure, the Council further proposed a more comprehensive, structural change to decrease excessive reliance on the investigative questioning of suspects and the written records of their statements throughout the process of criminal investigation and proof at trial by a combination of three groups of measures:

(1) Measures to deter or to check improper investigative questioning

In addition to the video-recording of investigative questioning itself, the Council recommended the extension of the public defense system so as to cover all the suspects in detention for that purpose[162].

(2) Measures other than investigative questioning to obtain useful, trustworthy statements from the persons involved

Included is a negotiation procedure between the prosecutor and the defense counsel in which favorable prosecutorial treatment, such as suspension of prosecution, reduction or non-prosecution of certain charges, and recommendation for a lenient sentence, could be promised to the suspect or defendant in exchange for his/her cooperation to solve a case against others involving an organized, financial or business crime. The Council also proposed the adoption of an immunity procedure with which an accomplice could be forced to give crucial testimony to convict a major figure in an organized crime or conspiracy[163].

(3) Effective measures to collect objective evidence

Among others, the Council proposed the reinforcement of interception of telecommunications by making it more efficient, easier to use as well as more reliably controlled with the use of electronic encryption techniques[164].

Accepting these and other recommendations, the government introduced a bill to revise related laws, which was passed in the legislature in May 2016[165], and the new law is being put into force in four steps, finally becoming effective by June 2019.

D. Prospect for the Effects of the Reforms

Proponents for much stricter restriction on the investigative powers of prosecutors and the police are naturally discontent with the new law. They are criticizing the reforms as providing less than minimum restrictions necessary, while increasing investigative powers, any of which, in their opinion, will induce abuse or other serious problems. They assert, among others, that the video-recording of investigative questioning is legally mandated only in two categories of cases that account for an extremely small portion, probably 3% or so, of all criminal cases and that several exceptions to that already limited extent of mandatory video-recording further will make a big loophole[166].

However, considering the long-standing structured practice, as mentioned earlier, as well as sharply divided opinions about it, it should not have been realistic or appropriate to insist on a one-point breakthrough

[160] *Id.*, Outline of the Recommendations 1, *implemented* in CCP art. 301–2.
[161] *Id.*, Outline of the Recommendations 1.
[162] *Id.*, Outline of the Recommendations 5(1), *implemented* in CCP art. 37–2.
[163] *Id.*, Outline of the Recommendations 2(1), (2), *implemented* in CCP art. 350–2 and arts. 157–2, 157–3, respectively.
[164] *Id.*, Outline of the Recommendations 3, *implemented* in the Interception of Tele-Communication Act, arts 3, 5, 6, 14, 20, 21, Table 2 etc.
[165] The Act to Revise a Part of the Code of Criminal Procedure and Related Laws, Act No. 54 of June 3, 2016. *Cf.* Hiroyuki Tsuji, Keiji Sosho-ho tou no Ichibu wo Kaiseisuru Horitsu no Seitei Keii tou nituite (*Background of the Enactment of the Act to Revise a Part of the CCP and Related Laws and Its Outlines*), KEISATSU-GAKU RONSHU Vol. 69, No. 8 (2015), p. 1.

only by such drastic, maximum extension of the mandatory video-recording without taking any concrete action to change the basic structure as a whole. If members of the Council had stuck to an all-or-nothing approach, nothing would have changed. It was, in my opinion, very important to take one actual step forward, which we can and should keep extending.

The video-recording in the new law itself is legally mandated in the most serious or high-profile cases where large-scale investigation is normally pursued by numerous investigating officers and suspects are most likely subject to tough questioning in the custody of the police and prosecutors. Its scope is substantially enlarged from the former trial-run in that the whole process of every investigative questioning of a suspect regarding such case must be recorded from right after his/her arrest. I believe this will have much larger and penetrating impacts than it may appear.

Furthermore, whenever the voluntariness of a defendant's self-incriminating statement obtained by investigative questioning is disputed at the trial involving such offense, the prosecutor must present the video of the investigative questioning at issue[167]. Otherwise, the prosecutor could not prove the voluntariness successfully unless the court finds the questioning at issue was exempted from mandatory video-recording. Once such videos become indispensable to prove effectively the voluntariness of the suspect's confession in those cases, it must be practically hard to do so without similar video in contested cases involving other offenses as well. Thus, it is highly probable, I think, that this eventually will become a de facto standard method of proof in other contested cases as well.

As a matter of fact, the public prosecutors' offices have already decided to record, and actually have been recording, on a video, as far as practicable, the whole process of their questioning of every arrested or detained suspect in (1) the prospective *Saiban-in* cases and (2) the cases under the independent, direct investigation by the prosecutors' office, as well as that of (3) mentally disturbed or mentally disabled suspects in detention. They even further expanded their trial run to (4) their questioning of suspects in other categories of cases and major witnesses in the cases where its legality or properness is likely to be disputed at trial[168]. The police also, though more slowly and conservatively, have been taking after the prosecutors especially in the cases where the voluntariness or trustworthiness of confession and other statements obtained by their questioning might be seriously disputed at trial[169].

While many front-line investigating officers still feel resistance against it, video-recording, from a broad perspective, should prove itself beneficial to prosecutors and the police as well because it certainly would reduce unfounded accusations against them for illegal or improper questioning and troublesome disputes over the voluntariness of suspects' statements.

VI. CONCLUSION

These and other new reforms could certainly have substantial effects on various aspects of Japanese criminal justice. But it will depend much upon the persistent, patient, attentive, sincere and constructive

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[166] *E.g.*, KEIJI-SHIHO KAIKAKU TOWA NANI KA (What Is the Criminal Justice Reform) (H. Kawasaki and S. Mishim ed., 2014)); Nanae Toyosaki, Torishirabe oyobi Sintai Kosoku no Kaikaku (*Reforms of Investigative Questioning and Detention of Suspects*), KEIHO ZASSI Vol. 55, No. 1 (2015), pp. 89–101; Shinichiro Koike, Torishirabe no Rokuon-Rokuga (*Video-/Audio-Recording of Investigative Questioning*), HO TO MINSHU-SHUGI No. 510 (2016), p. 10. *See also* Yuji Shiratori, Hoseishin Tokubetsu-bukai wa Kadai ni kotaeta ka (*Has the Special Division of the Legislation Council Fulfiled Its Task?*), HORITSU JIHO Vol. 86, No. 10 (2014), pp. 5–6; Hiroyuki Kuzuno, Torisirabe no Rokuon-Rokuga Seido (*System of Video-/Audio-Recording of Investigative Questioning*), *id.*, p. 16; Akira Goto, Keiso-ho tou Kaisei-an no Zentai-zo (*General Outlines of the Bill to Revise the CCP and Related Laws*), HORITSU JIHO Vol. 88, No. 1 (2016), pp. 6–7.

[167] CCP art. 301H-2 (to be enforced by June 2019).

[168] *Cf.* Tanojiri, *supra* note 152, pp. 12–13. According to the latest official report, the video-recoding execution rate has reached to 100% or so in the first three categories; the whole process of the questing was recorded in 99.6% of the cases in the first category, 100% in the second category, 85.2 to 88.8% in the third category in the six months from April through September 2017. The number of trial-run video-recodings executed in the fourth category also have been increasing. Saiko Kensatsu-cho,, Kensatsu niokeru Torishirabe no Rokuon-Rokuga nitsuiteno Jissi Jokyo (*Supreme Prosecutors' Office, Enforcement Situation regarding the Video-/Audio-recording of the Investigative Questioning*) (Feb. 2018) 〔available at http://www.kensatsu.go.jp/kakuchou/supreme/rokuon_rokuga01.html〕.

[169] *Cf.* Kawahara, *supra* note 153, pp. 64–69.

efforts of all the parties involved, as well as lasting public support for them, to what extent and how the reforms actually change the above-mentioned conventional structure and improve the total quality of Japanese criminal justice. There still is a long way to go.

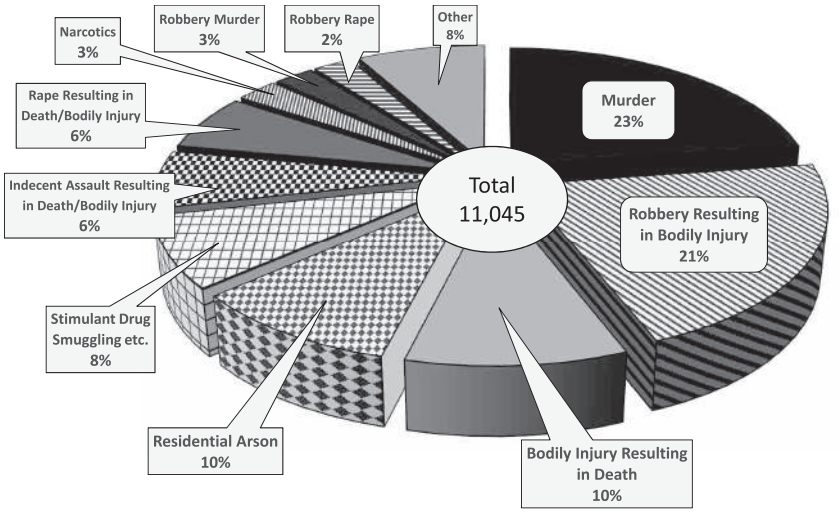

Figure 1: Charges Against the Defendants who Received Final Judgment by *Saiban-in* Trial Courts (2009.5 ～ 2018.3)

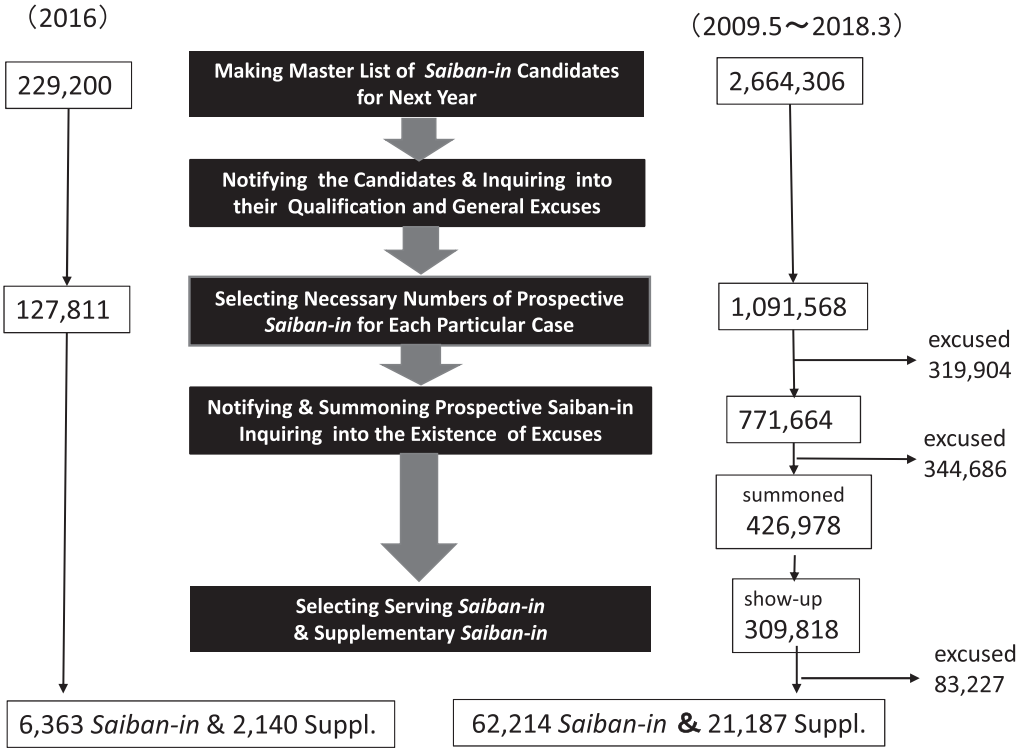

Figure 2: *Saiban-in* Selection Process

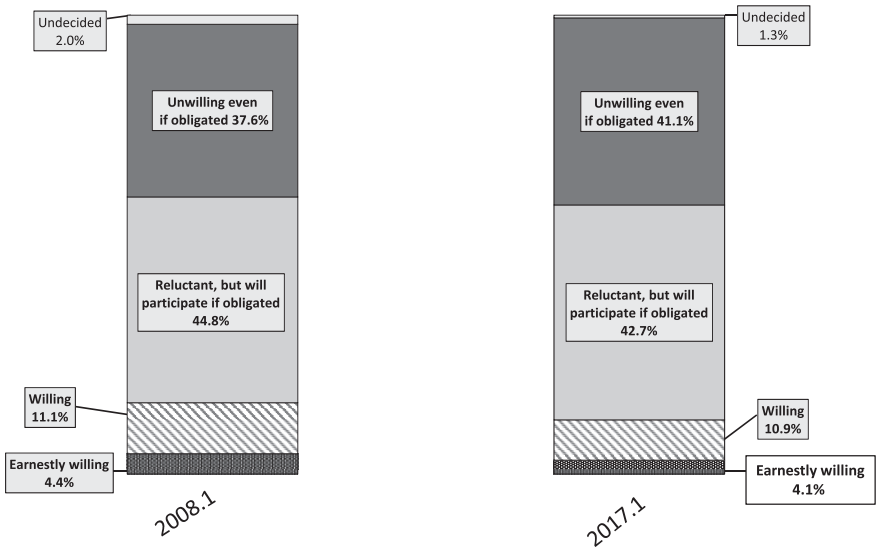

Figure 3: Public Willingness to Participate Before and After the Introduction of *Saiban-in* System

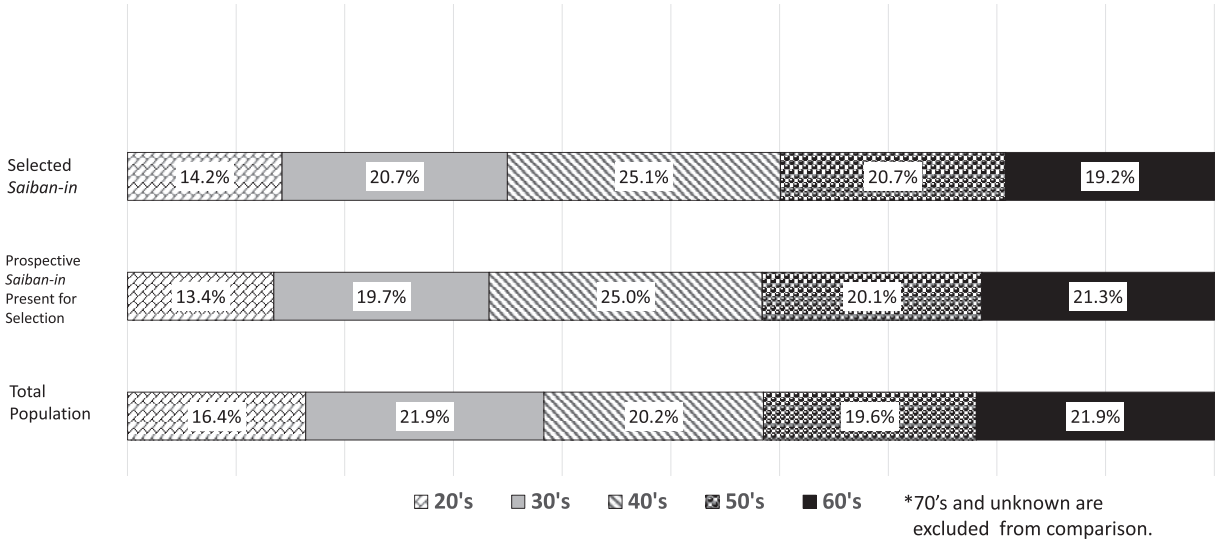

Figure 4-1: Age Distribution in Comparison: Total Population, Prospective *Saiban-in* Present for Selection and Selected *Saiban-in*（2015）

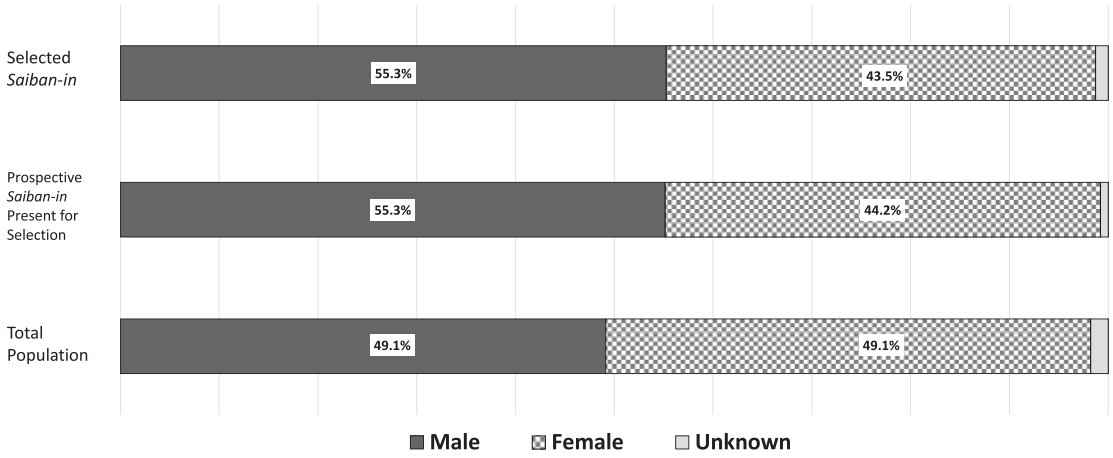

Figure 4-2: Gender Distribution in Comparison: Total Population, Prospective *Saiban-in* Present for Selection and Selected *Saiban-in*（2015）

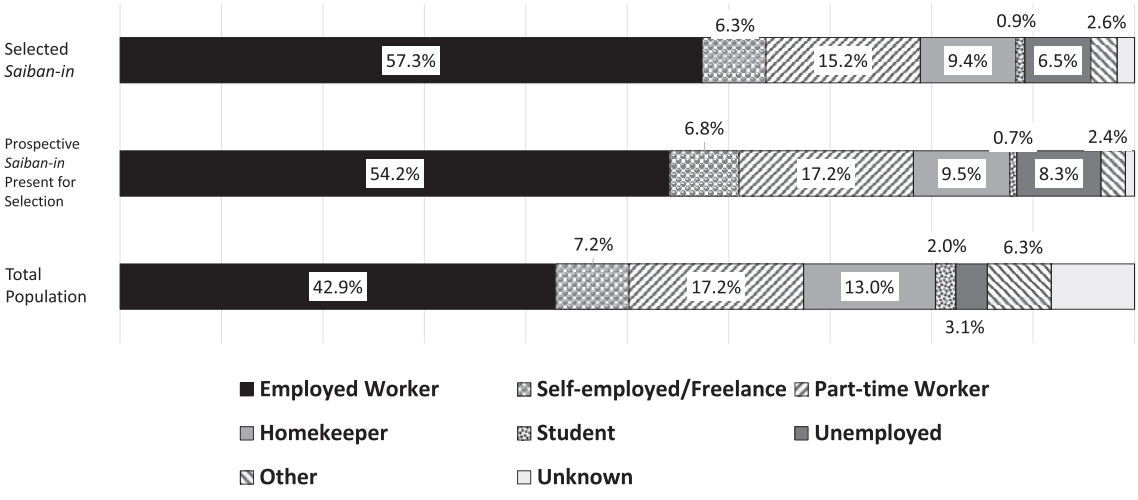

Figure 4-3: Occupational Distribution in Comparison: Total Population, Prospective *Saiban-in* Present for Selection and Selected *Saiban-in*（2015）

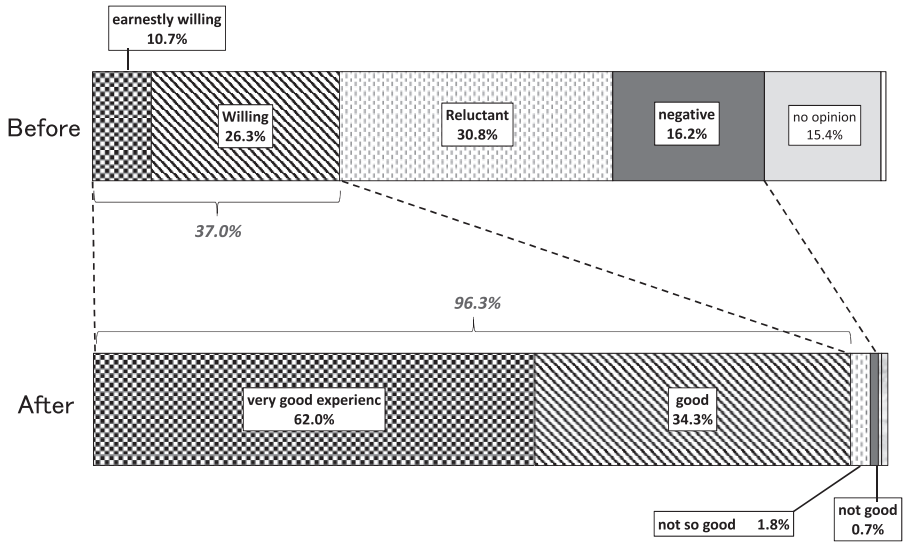

Figure 5: Feelings of Former *Saiban-in* Before & After Their Service（2017）

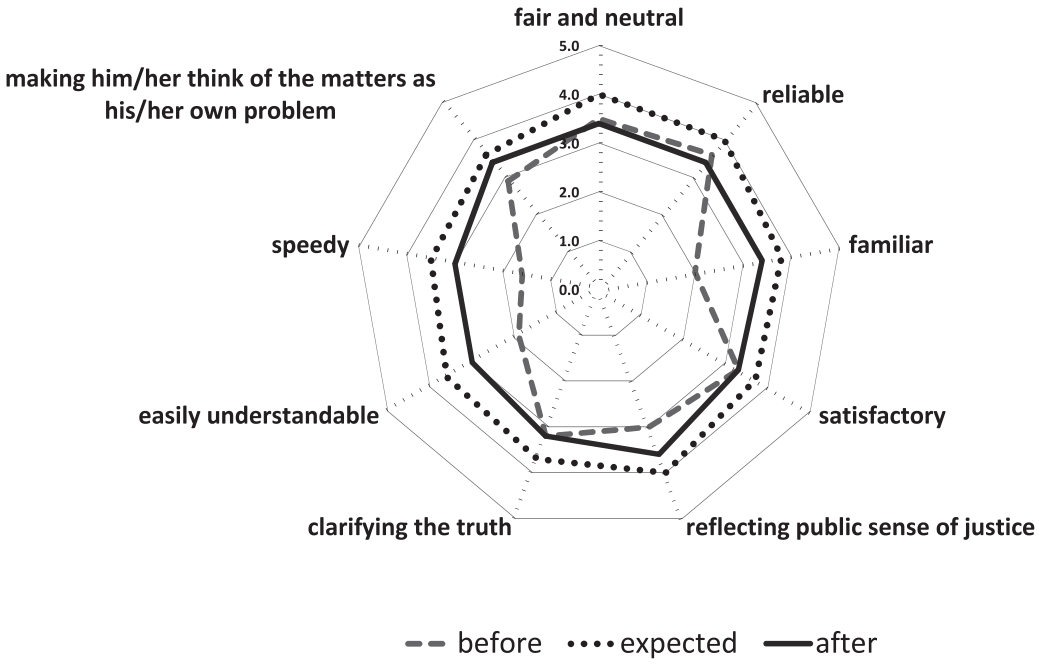

Figure 6: Public Image of Criminal Justice System Before and After the Enforcement of *Saiban-in* System（2017）

Table 7: Long *Saiban-in* Trials

Dist. Ct. Year	1st Sesssion to Judgment	Number of Trial Sessions	Charges	Sentence
Kobe（Himeji Br.） 2018	207 days （scheduled）	76 days （scheduled）	3 Murders etc.	
Nagoya，2016	160 days*	18 days	2 Murders, 1 Injury Resulting in Death	Life Imprisonment, *appealed*
Kyoto，2017	135 days	38 days	3 Murders, 1 Attempted Murder	Death, *appealed*
Kobe，2015	127 days	28 days	3 Murders, Corpse Abandonment etc. against 3 Defendants	21 years' Imprisonment, *1 defendant appealed*
Kobe，2015-16	121 days	25 days	3 Murders, Unlawful Confinement etc.	23 years' Imprisonment
Kobe，2014-15	116 days	29 days	2 Murders, Corpse Abandonment etc.	17 years' Imprisonment
Tokyo，2015	105 days	39 days	14 Murders, Attempted Murders etc.（Aum Cult Case）	Life Imprisonment *appealed*
Saitama，2012	100 days	36 days	3 Murders, Frauds etc.（Metropolitan Area Serial Suspicious Death Cases）	Death *appeals rejected*
Kobe，2015	87 days	19 days	3 Murders, Bodily Injury Resulting in Death etc.	Life Imprisonment *appealed*
Tottori，2012	74 days	20 days	2 Robbery Murders, Fraud etc.（Tottori Serial Suspicious Death Cases）	Death *appeals rejected*
Nagoya，2017	68 days	21 days	1 Murder, 3 Attempted Murders	Life Imprisonment
Tsu，2013	67 days	22 days	1 Murder	17 years' Imprisonment

* Including 78 days of suspension due to the partial change of charges against the defendant.

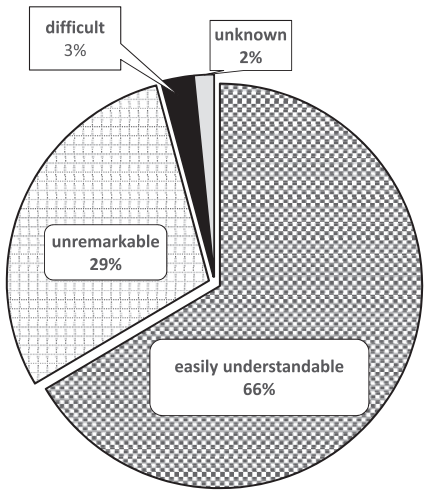

Figure 8: Understandability of Trial Proceedings as Evaluated by Former *Saiban-in*（2016）

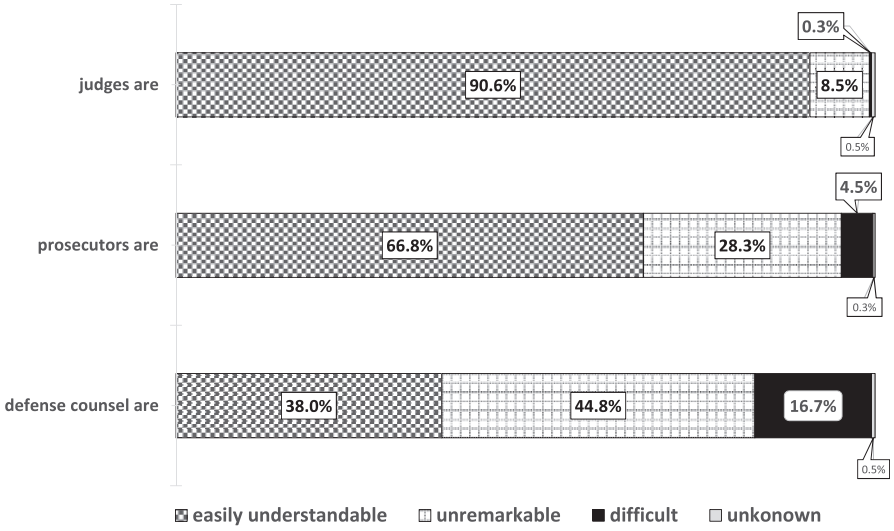

Figure 9: Understandability of the Presentation & Arguments of the Prosecutor and Defense Counsel and the Instruction of Professional Judges as Evaluated by Former *Saiban-in* (2016)

Table 10: Final Disposition by *Saiban-in* Trial Courts and *Koso*-Appeals Filed against It (2009.5 ～ 2018.3)

	Defendants Receiving Final Disposition	Convicted	Acquitted	Transferred to Family Courts	Prosecution Dismissed etc..	*Koso*-Appeals Filed
All Cases	11,045	10,723	86	101	225	3,908 (36.1%)
Stimulant Drug Cases	880	835	33	0	12	418 (38.6%)

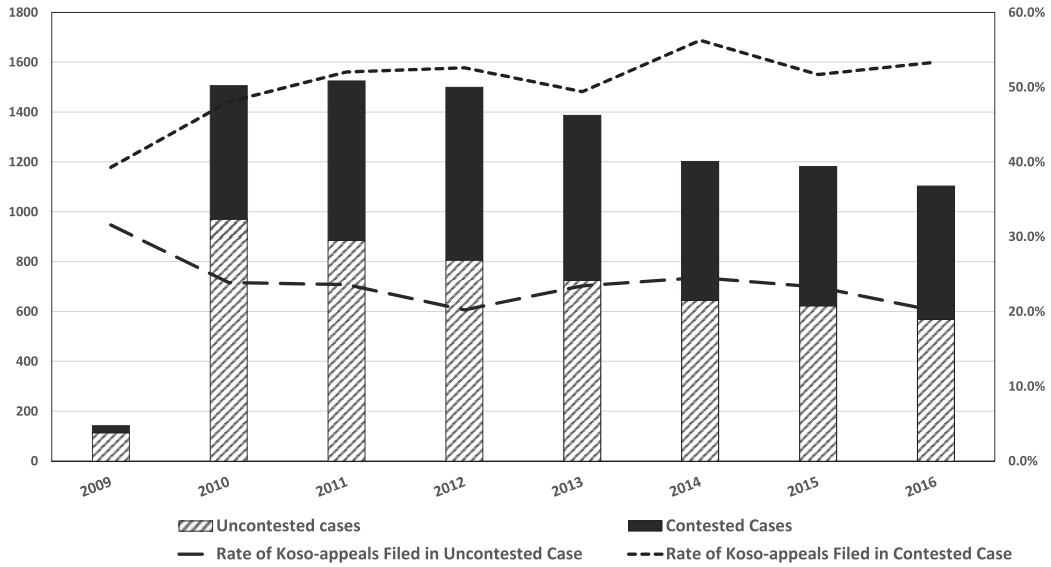

Figure 11: Distribution of Contested and Uncontested Cases Tried by *Saiban-in* Courts & Rate of *Koso*-Appeals Filed against Their Judgments in Each Category（2009 ～2016）

Table 12: Reasons for *Koso*-Appeals against *Saiban-in* Trial Court Judgments（2009 ～ 2016）

Defendants Receiving Appellate Courts' Final Disposition	Insufficient Reasoning *etc.*	Legal or Procedural Error	Mistake of Fact-Finding	Inappropriate Sentence	Subsequent Circumstances	Other
3,020	122 （4.0%）	670 （22.2%）	1,867 （61.8%）	2,232 （73.9%）	293 （9.7%）	16 （0.5%）

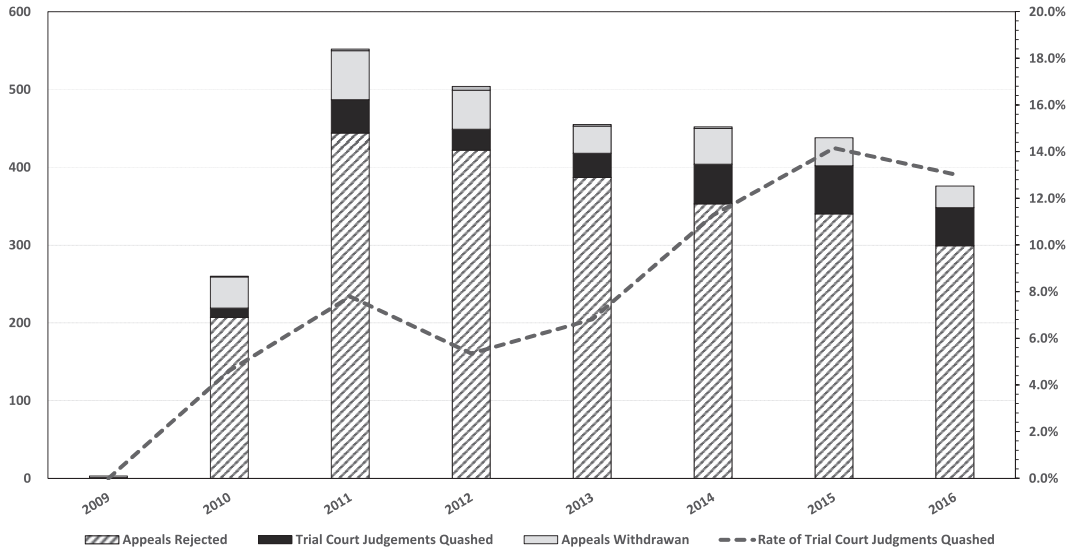

Figure 13: Disposition of *Koso*-Appeals by Appellate Courts in *Saiban-in* Cases（2009 ～2016）

Table 14: Reasons for Quashing *Saiban-in* Trial Court Judgments on Appeal（2009 ～ 2016）

Total	Insufficient Reasoning etc.	Legal or Procedural Error	Mistake of Fact-Finding	Inappropriate Sentence	Subsequent Circumstances	Other
220 （Rate of Quashed Cases 9.9%）	6 （0.3%）	21 （0.9%）	58 （2.6%）	21 （0.9%）	124 （5.6%）	0 （0.0%）

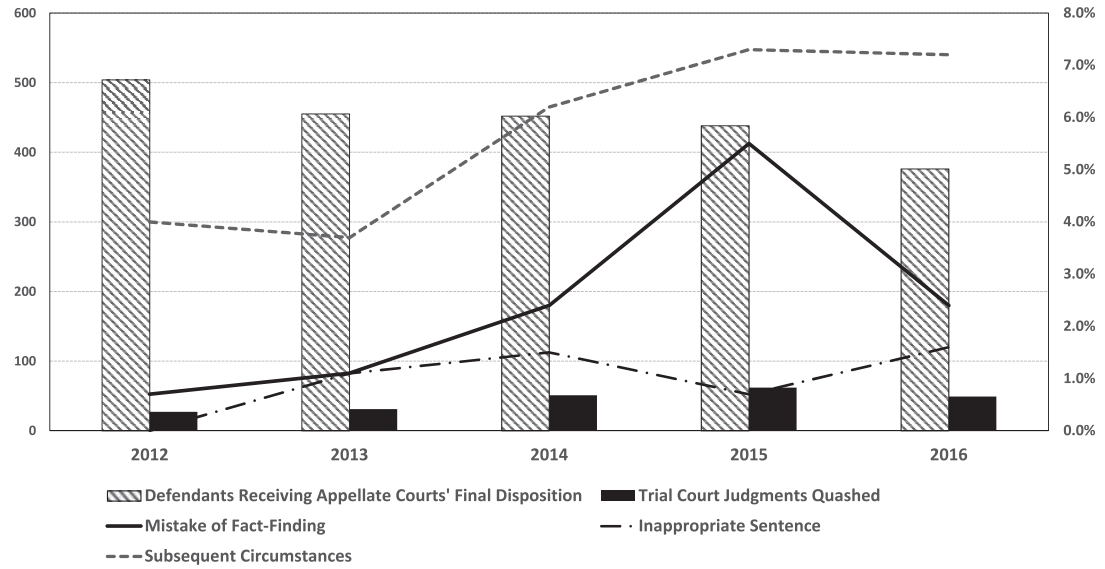

Figure 15: Rate of *Saiban-in* Trial Court Judgments Quashed by Appellate Courts by Reason
(2012 ～ 2016)

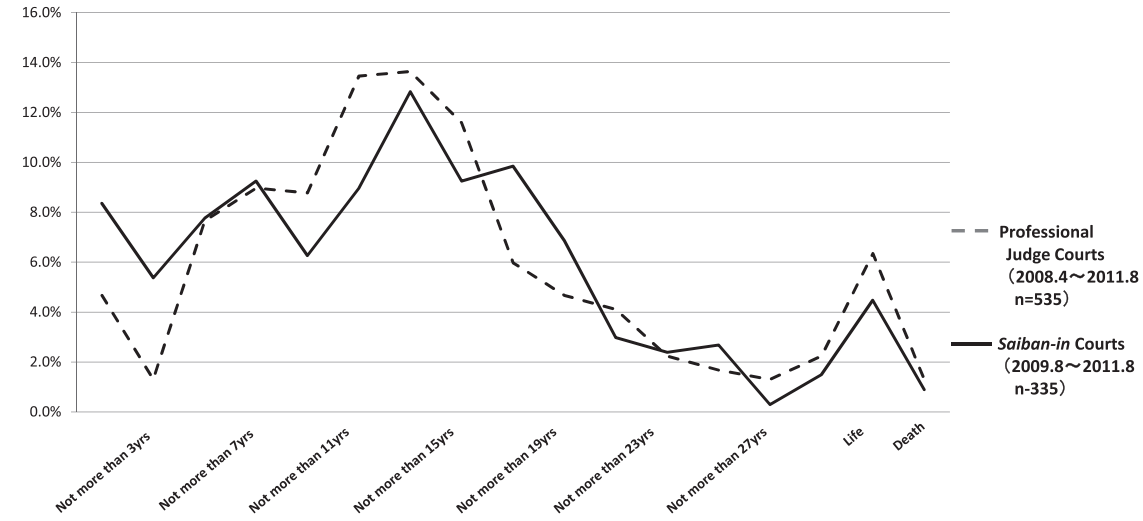

Figure 16-1: Comparison of Sentences Between *Saiban-in* & Professional-Judge Trial Courts in Murder Cases

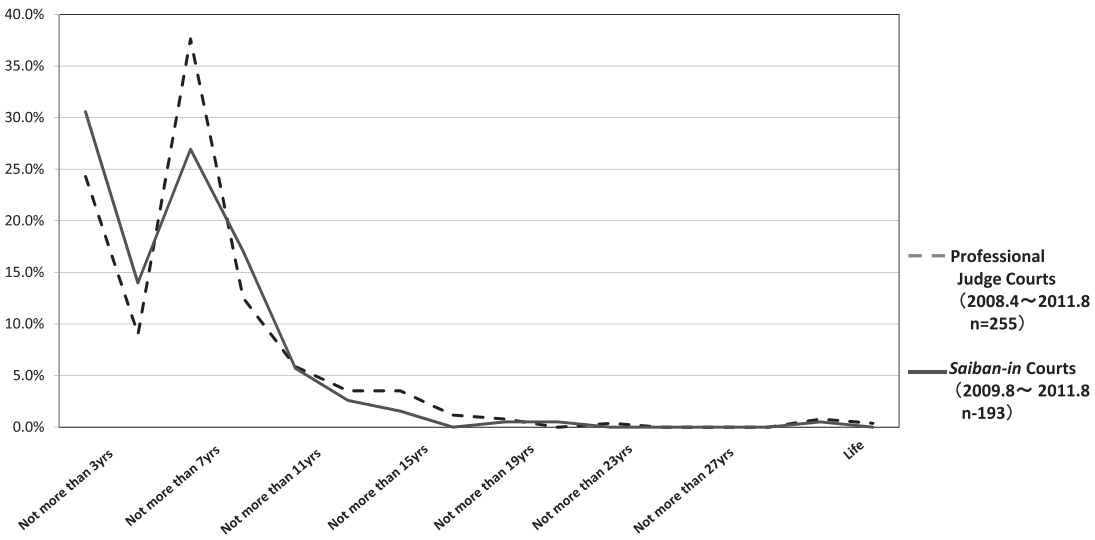

Figure 16-2: Comparison of Sentences Between *Saiban-in* & Professional-Judge Trial Courts in Residential Arson Cases

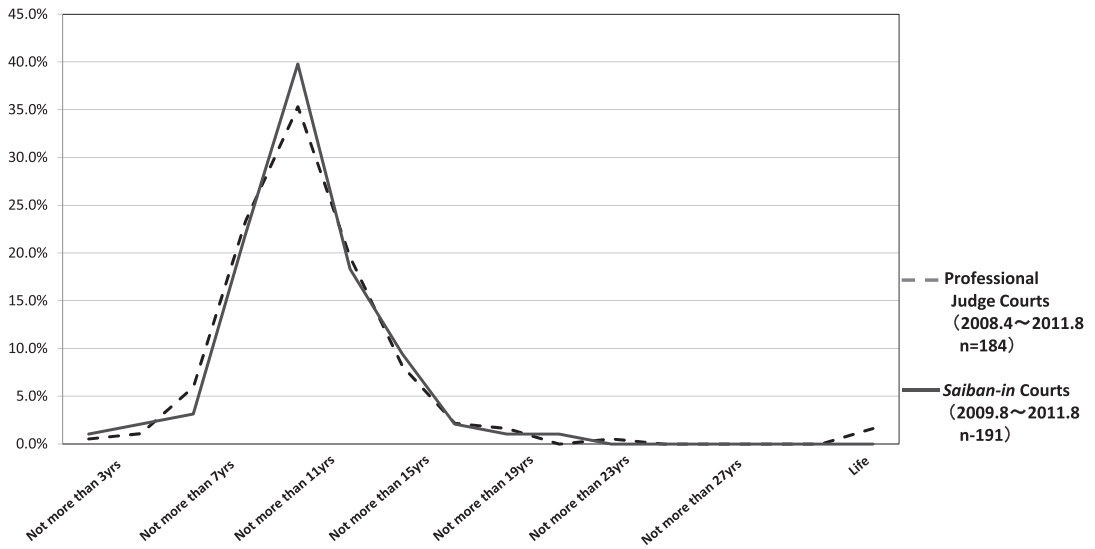

Figure 16-3: Comparison of Sentences Between *Saiban-in* & Professional-Judge Trial Courts in Serious Stimulant Drug Offense Cases

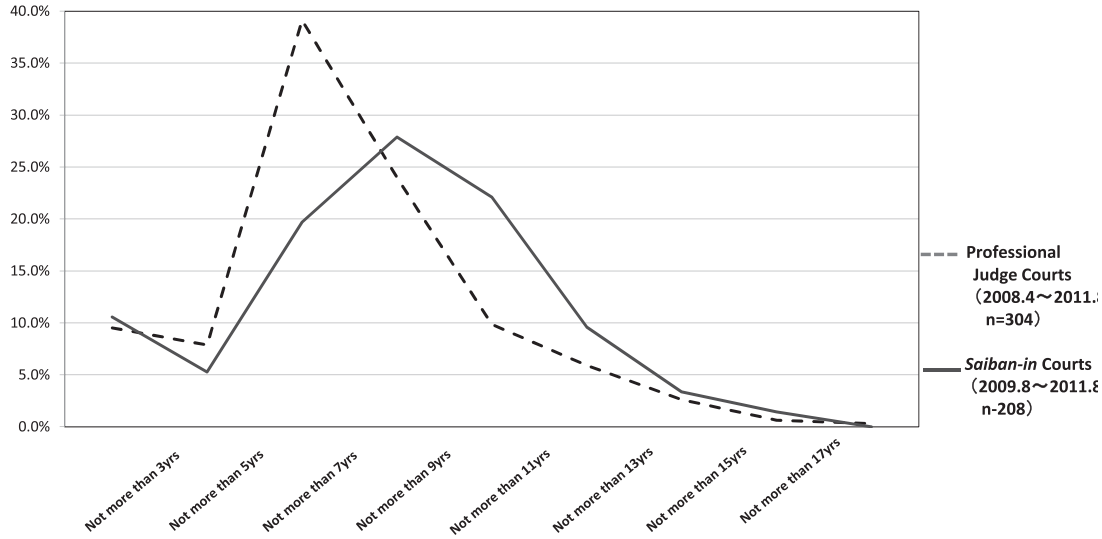

Figure 16-4: Comparison of Sentences Between *Saiban-in* & Professional-Judge Trial Courts in Cases of Bodily Injury Resulting in Death

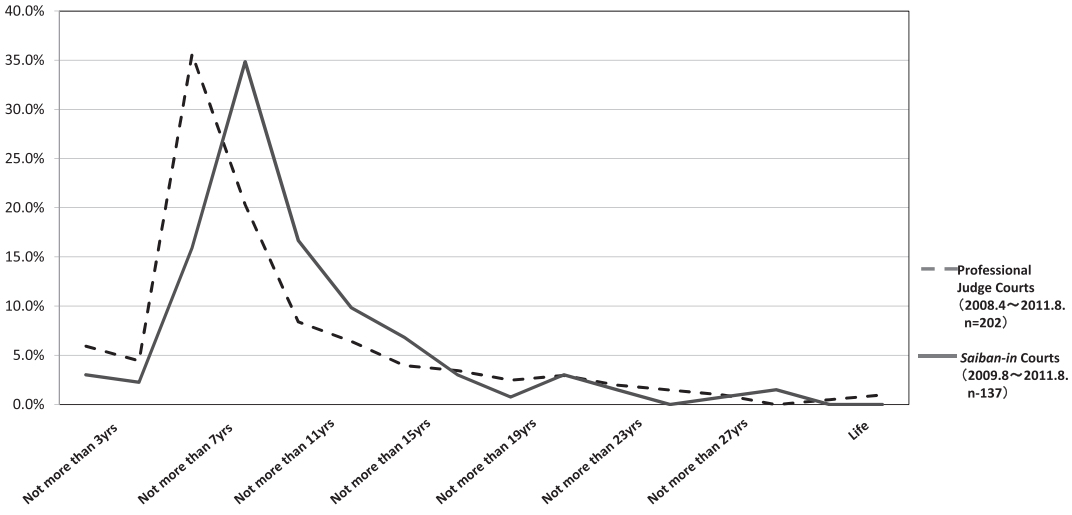

Figure 16-5: Comparison of Sentences Between *Saiban-in* & Professional-Judge Trial Courts in Cases of Rape Resulting in Bodily Injury

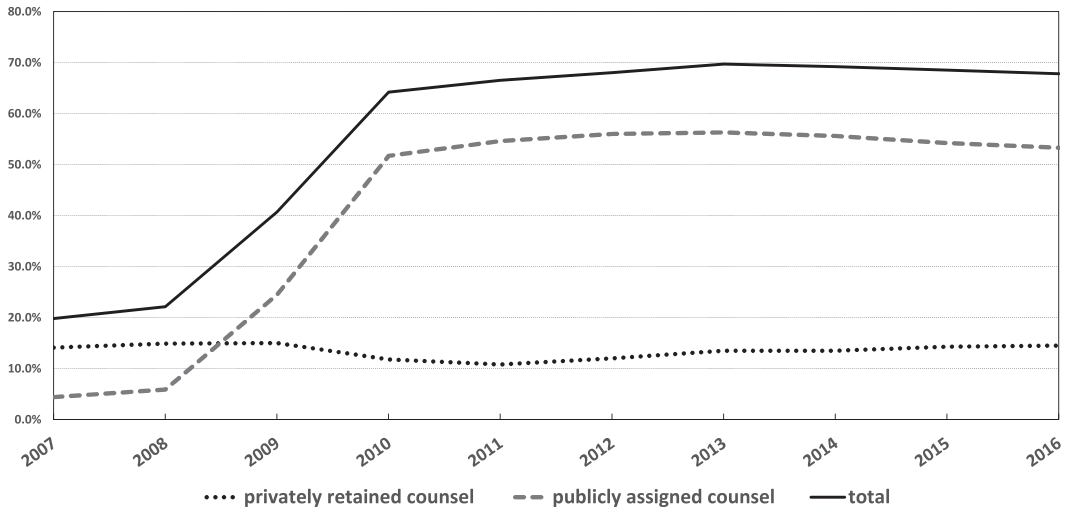

Figure 17-1: Rate of the Defendants Receiving Final Disposition by District Courts Who Had the Assistance of Defense Counsel from Investigation Stage（2007 ～ 2016）

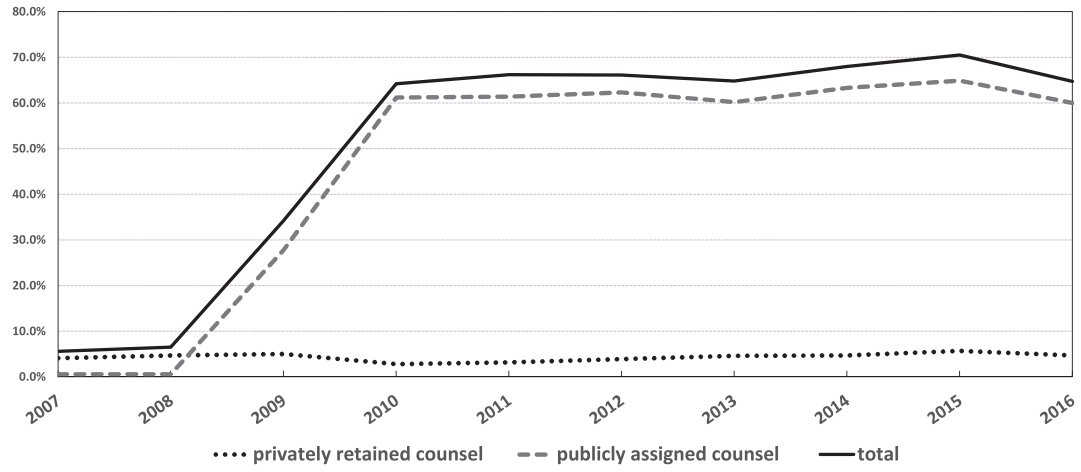

Figure 17-2: Rate of the Defendants Receiving Final Disposition by Summary Courts Who Had the Assistance of Defense Counsel from Investigation Stage（2007 ～ 2016）