

# CITIZEN PARTICIPATION: APPRAISING THE SAIBAN'IN SYSTEM\*

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\* This essay is based on the keynote address, presented on October 11, 2012, at the annual meeting of the Chugoku Region Federation of Bar Associations, in Fukuyama City, Hiroshima Prefecture. The address was part of a symposium on the theme: "Achievements and Issues of the Saiban'in System: Have Criminal Trials Changed? Can They Change?" The content has been revised and updated. A version of this essay was published in Japanese, as *Saiban'in seido no seika* [Achievements of the Saiban'in System], 36 KEIJIHŌ JĀNARU 56 (2013).

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## INTRODUCTORY REMARKS

Of the many reforms affecting the Japanese judiciary that were undertaken in connection with the recommendations of the Justice System Reform Council,<sup>1</sup> one reform above all attracted widespread public attention: the introduction of the so-called *saiban'in* system.<sup>2</sup> In this system, mixed panels of professional judges and lay jurors judge guilt and assess penalties in serious criminal cases. Following a five-year preparation period, the new system went into effect for the specified categories of crimes for which indictments were issued on or after May 21, 2009, with the first trials under the new system commencing in August 2009. Pursuant to the enabling legislation, the *saiban'in* system was subject to review three years after going into effect, and the Supreme Court issued its three-year evaluation in December 2012.<sup>3</sup> While this essay introduces some of the results of that

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1. Over a two-year period, the Justice System Reform Council undertook a comprehensive examination of a wide range of matters relating to the Japanese justice system; it issued its final report on June 12, 2001. See Daniel H. Foote, *Introduction and Overview* to LAW IN JAPAN: A TURNING POINT, xix-xxxix (Daniel H. Foote, ed., 2007), for an overview of the Reform Council's activities and recommendations, and a summary of the resulting reforms.

2. The word *saiban'in* (裁判員), which literally means "trial member(s)" and signifies the lay members on the panel, was newly coined in connection with the debate over the system. The existing terms *baishin'in* and *sanshin'in*, respectively, clearly designated either jurors (in an all lay member jury system) or lay member (in a mixed panel of professional judges and lay members). As discussed below, during the deliberation stage one faction insisted on a pure lay member jury system and another faction insisted on a mixed panel; the term "*saiban'in*" was coined as a neutral term that could take on either meaning. The term stuck, even though the system that was adopted is a mixed panel for which the term *sanshin'in* would be appropriate. The term "*saiban'in* trial" is widely used to refer to a trial heard by a mixed panel including lay members.

3. See generally SAIKŌSAIBANSHO JIMUSŌKYOKU [GENERAL SECRETARIAT, THE SUPREME COURT OF JAPAN], SAIBAN'INSAIBAN JISSHIŌKYŌ NO KENSHŌHŌKOKUSHO [REPORT ON EVALUATION OF THE CIRCUMSTANCES OF

evaluation, the following remarks primarily reflect my own appraisal.

Of course, the saiban'in system is by no means perfect. Many issues warrant consideration. Some issues have become clearer during the four years the system has been in operation; others have become apparent since the system went into effect. To my mind, however, the achievements of the system far outweigh the issues relating to it, and it is on those achievements that I focus in this essay.

## I. CIRCUMSTANCES OF THE DEBATES PRIOR TO INTRODUCTION OF THE SAIBAN'IN SYSTEM

### A. Debate Over Introduction of a Lay Participation System

In considering the achievements of the system, it is worthwhile looking back to the heated debates that surrounded the system prior to its introduction. Virtually all laws and reforms are products of compromise, but the level of compromise involved in the saiban'in system was quite extraordinary. One broad body of opinion bitterly opposed introduction of any form of lay participation, with reasons for opposition including the view that allowing lay participation would violate the right to trial guaranteed by the Constitution and the view that ordinary Japanese simply are not suited to expressing their own views in front of others. Another broad group expressed willingness to consider the possibility of introducing some form of lay participation, but took the view that so many major issues needed to be resolved that introduction would of necessity be a long, slow process. Still another broad group held to the stance that introduction of lay participation was absolutely indispensable, with supporters of this view expressing the opinion that meaningful reform of the Japanese criminal justice system would be impossible otherwise.

Each of these broad groups contained sub-factions, as well, with members of the various factions often expressing their views vociferously. As just one example, within the pro-lay participation group, one faction insisted that the only acceptable option was a true jury system, composed entirely of lay members, whereas another faction insisted that the only acceptable option was a mixed panel of judges and lay members. The degree of conflict was so great that, when a member of the relevant expert consultation committee, who had been a prominent advocate for the true jury position, indicated he was willing to compromise and accept the mixed panel approach, he was attacked as a “traitor” to the cause.

#### B. Debate Over the Motivations and Objectives for the System

The motivations and objectives for introducing the system also varied widely. The so-called “three branches” of the legal profession – the lawyers, the prosecutors, and the judges – each offered different rationales for the new system, with those differing rationales reflected in films about the system produced, respectively, by the Japan Federation of Bar Associations, the Ministry of Justice, and the Supreme Court. For the organized bar, key objectives were achieving true respect for the presumption of innocence and the reasonable doubt standard and preventing miscarriages of justice. For the Ministry of Justice, in a view advanced more forcefully by victims’ advocacy groups, an objective was reflecting the views of the general public in the sentencing process. The films produced by the Supreme Court conveyed the message that, while Japan already possessed a system in which it should take pride, the inclusion of the views of ordinary citizens would further enrich the system.

#### C. Deliberations of the Justice System Reform Council

If one considers the Recommendations of the Justice System Reform Council and the discussions in the Expert Consultation

Committee on the Saiban'in System and Criminal Justice (a subsequent advisory body charged with considering necessary legislation and other matters related to effectuating the Reform Council's recommendations), one can identify several other important objectives. Of those, I regard the following two objectives as especially important. First, the introduction of the saiban'in system was seen as providing the opportunity for the effectuation of a wide range of other reforms to the criminal justice system as a whole, including establishment of a system for affording publicly-provided counsel for suspects (in contrast to the prior system, in which the right to publicly-provided counsel only attached upon indictment, by which point the investigation – typically including lengthy interrogation of the suspect – had largely been completed), expansion of the discovery system, instituting pre-trial coordination procedures, and invigorating criminal trials through measures such as achievement of the so-called principles of “orality” and “directness” (meaning, in effect, basing the trials primarily on live, in-court testimony by witnesses, rather than on affidavits and other written documents, as was the dominant pattern in the past). Second, the Reform Council expressed the view that “ensuring the central and substantial participation” of ordinary citizens in the criminal justice process was an important step in strengthening participatory democracy.

## II. ESTABLISHMENT OF THE SYSTEM

As the preceding summary reflects, realization of the saiban'in system involved the interaction of a wide range of motivations. Moreover, while perhaps not technically contradictory in nature, certain motivations lay in considerable tension, such as the goal of making the system more protective of the rights of defendants by heightening respect for the presumption of innocence, on the one hand, and the goal of making the system stricter by increasing sentences, on the other.

### A. Criticisms and Doubts Raised by the Mass Media

Before turning to an appraisal of the saiban'in system, it is also useful to think back on the criticisms and doubts that surrounded the system prior to its introduction. The mass media was harsh in its coverage. This strikes me as rather ironic. In the 1980s, a series of judicial decisions revealed miscarriages of justice in four cases in which defendants had been convicted and sentenced to death.<sup>4</sup> At that time, many articles in the Japanese mass media were highly critical of the existing criminal justice system, and quite a few of those articles expressed the view that, unless a lay participation system was introduced, one could not expect meaningful reform of the criminal justice system.

Yet, as soon as it became apparent that a system of lay participation would be introduced, the mass media embarked on what can only be described as a campaign of saiban'in system bashing. Some articles, embracing the view that Japanese are not suited to expressing their views in front of others, especially figures of authority such as professional judges, expressed doubts as to whether the system would function effectively. Some articles expressed doubts about whether prosecutors and defense counsel could handle the new type of trials. Many articles emphasized the time, financial, and psychological burdens on lay jurors. Many others criticized the confidentiality provisions in the relevant legislation, which imposed seemingly sharp limits on whether lay jurors could talk about their experiences. These are simply some of the more prominent examples; the list of doubts, concerns, and criticisms of the new system that appeared in newspapers, magazines, books, and on television and radio went on and on.

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4. See generally Daniel H. Foote, *From Japan's Death Row to Freedom*, 1 PAC. RIM L. & POL'Y J. 11 (1993); Daniel H. Foote, 'The Door that Never Opens': *Capital Punishment and Post-Conviction Review of Death Sentences in the United States and Japan*, 19 BROOK. J. INT'L L. 367 (1993), for examinations of these cases and their impact.

## B. Criticisms and Doubts by the General Public

Of course, the doubts and concerns were not limited to the mass media. Members of the legal profession and academics also voiced many doubts and criticisms. One set of concerns related to the impact on achievement of fair trials that would result from pre-trial and trial publicity by the mass media. The largest concern of all was almost certainly the doubt felt by many members of the general public regarding why the new system was being adopted in the first place (or, to use a somewhat more colorful phrase, why the new system was being foisted upon them), and, coupled with that doubt, strong resistance to participation in the new system. According to an opinion survey conducted by the Cabinet Office in 2005, 70% of the respondents answered either that they “did not want to participate” or “did not much want to participate” as saiban'in, and only 4.4% said they “did want to participate.”<sup>5</sup> Even after a long public relations campaign to educate the public about the new system and garner support for it, when the Cabinet Office conducted a similar survey in June 2009, the month after the new system went into effect, resistance remained high. While the percentage who indicated they wanted to participate had risen somewhat, to 13.9%, almost twice as many respondents, 25.9%, answered, “even if it is a duty, I do not plan to participate.”<sup>6</sup>

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5. Naikakufu daijinkanbō seifukōhōshitsu [Gov't Publicity Bureau, Minister's Secretariat, Cabinet Office], *Saiban'in seido ni kansuru yorochōsa* [Public Opinion Poll Regarding the Saiban'in System] fig.12 (Feb. 2005).

6. Naikakufu daijinkanbō seifu kōhōshitsu [Government Publicity Bureau, Minister's Secretariat, Cabinet Office], *Saiban'in seido ni kansuru yorochōsa* [Public Opinion Poll Regarding the Saiban'in System] (June 2009 survey), fig.11.

### III. THE SUPREME COURT'S THREE-YEAR EVALUATION

#### A. Issues Identified by the Supreme Court Report

As we have seen, when the new system went into effect in mid-2009, many doubts and concerns remained. What has happened with those concerns since? The three-year evaluation by the Supreme Court noted a rather wide range of issues. These included an increase in the proportion of those seeking to be excused from serving and a rise in the percentage of those summoned for service who fail to show up, a topic to which I will return shortly. Other potential issues raised in the Supreme Court's report include: a trend toward longer trials, various matters relating to how opening arguments and investigation of evidence should be conducted, how deliberations should be conducted, consideration of the proper style and content of judgments, handling of lengthy trials and trials that involve evaluations of mental state, handling of cases where the death penalty is requested, handling of appeals, and the burdens on the lay members, including the burden imposed by the confidentiality standards. As this list reflects, the Supreme Court identified many issues.

#### B. Importance of Introducing a Bifurcated Trial Process

One issue the report did not note that has received considerable attention and that, in my view, warrants further reform, is the so-called bifurcation of the trial process, splitting the guilt determination phase from the sentencing phase. This issue is of special significance in cases that involve evidence or other matters that go to the question of the proper sentence but that might prejudice the determination of guilt if introduced earlier in the proceeding, such as evidence of prior crimes, victim impact statements, or participation by victims (or their representatives) in requesting harsh sentences (pursuant to a recently introduced system permitting such participation, under specified conditions). As with many of the other issues that have been raised in connection with the saiban'in system, this issue



typically is discussed as a matter that relates purely to lay jurors. The evident assumption is that, whereas lay jurors will be unable to exclude the potential prejudicial impact of such materials in their consideration of guilt, professional judges – with their cool and detached demeanor and their specialized training and experience in fact-finding – are not susceptible to the same sorts of unconscious bias. My personal hope is that the introduction of the saiban'in system may lead to a reexamination of these assumptions about professional judges and consideration of the use of bifurcated trials and introduction of other reforms for non-saiban'in trials, as well as saiban'in trials.

#### IV. ACHIEVEMENTS OF THE SAIBAN'IN SYSTEM

##### A. Overall Evaluation

Needless to say, many issues remain, but when one thinks back on the situation at the time the new system was introduced, the level of success is quite remarkable. Judging from the nature of press coverage prior to introduction, one might have assumed the three-year review process would entail a thorough reexamination of all aspects of the system, with one major line of consideration being whether the system should even be continued. While there certainly are some significant issues to consider, in the grand scheme of things, the three-year review process, rather than entailing a thorough re-appraisal, for the most part instead amounted essentially to a fine-tuning. In this connection, while the Supreme Court report did include a long list of potential issues, on most of those matters the report found that the issues were not so serious as had been feared before the system went into effect.

##### B. Appraisal in Terms of the Original Motivations and Objectives

Returning to the various motivations and objectives I mentioned earlier, it is still early and the number of cases remains small, so evaluation is difficult. Moreover, one can

interpret the results to date to support sharply contrasting conclusions. With those caveats in mind, I'll take a stab at offering my thoughts.

### *1. Achieving the Presumption of Innocence*

First, let us consider the objective of ensuring proper regard for the presumption of innocence and protecting against mistaken convictions. Over the first three years of saiban'in trials, the acquittal rate was under 0.5%.<sup>7</sup> As the Supreme Court report observed, "When viewed in terms of the overall acquittal rate [for the same categories of crimes in the three years preceding introduction of the system], there has been no major change."<sup>8</sup> Yet, if one focuses on specific cases, one can find clear signs of careful attention to the presumption of innocence and the reasonable doubt standard. As concrete examples, I would offer, most notably, the repeated acquittals (eight acquittals over the first three years) of defendants accused of drug smuggling,<sup>9</sup> in which the defendants typically professed being unaware drugs were contained in luggage they had been asked to carry, and the Kagoshima District Court judgment of December 10, 2010, in which the court acquitted the defendant of robbery and murder based on a searching review of circumstantial evidence, notwithstanding the existence of a DNA match.<sup>10</sup>

### *2. Preventing Miscarriages of Justice*

In the past, it has often taken many years for mistaken convictions to come to light, so it remains far too early to assess whether the saiban'in system is helping to reduce miscarriages of

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7. EVALUATION REPORT, *supra* note 3, at 46 fig.3.

8. *Id.* at 1-2.

9. *See id.* at 46 fig.3.

10. Kagoshima Chihō Saibansho [Kagoshima Dist. Ct.], Judgment of Dec. 10, 2010, available at <http://www.courts.go.jp/hanrei/pdf/20110322105943.pdf>.

justice. In this connection, though, it is worth noting that the level of indictments in the categories of cases subject to saiban'in trials has dropped significantly. The largest reason for this drop, presumably, is that prosecutors have reduced the severity of charges to place cases outside the categories subject to the saiban'in system. Yet, to the extent these statistics suggest that prosecutors have become even more careful in borderline cases, the drop in indictments may lead to further declines in wrongful convictions. If so, that too should be seen as an indirect impact of the saiban'in system.

To my mind, however, in connection with protecting against mistaken convictions, the most important implications of the introduction of the saiban'in system do not lie in the identity of the trier of fact (in other words, whether the judgment is made by professional judges alone, or by a mixed panel of professional judges and lay jurors, or by a jury comprised entirely of lay members), but rather in the many other reforms to the criminal justice system that have been undertaken in concert with the introduction of the saiban'in system. More concretely, these reforms include affording publicly provided counsel for suspects prior to indictment, along with other steps to strengthen the defense counsel role; expanding the discovery system; and shifting trials away from domination by written witness and confession statements (notably, non-verbatim in nature in Japanese practice) to in-court testimony by live witnesses subject to cross-examination. These wide-ranging reforms are of great importance for ensuring the rights of suspects and defendants and protecting against mistaken convictions. Technically speaking, these reforms are not dependent on the saiban'in system; in principle, they could have been introduced on their own. Yet calls to implement each and every one of these reforms date back decades. In the past, those calls never bore fruit. As a practical matter, introduction of the saiban'in system was an essential step for achieving the other reforms.

### 3. *Influence of Views of the General Public on Sentencing*

Turning to another major objective, have the views of the public affected sentencing? Here, statistics do suggest some impact. With respect to rape and other sex-related crimes, sentences under the saiban'in system have become significantly more severe, as compared with sentences handed down in recent years by professional judges only.<sup>11</sup> For some other categories of crime, including murder, the median sentence remains about the same, but the level of variability has increased. Sentences by professional judges tended to fall within a rather narrow range. In contrast, sentences in saiban'in trials are more widely distributed.<sup>12</sup>

Notably, however, apart from sex-related crimes, the pattern has not simply been one of greater punitiveness, as some observers had expected. In the case of murder, for example, while there has been a modest increase, as compared with sentences by professional judges alone, in sentences over fifteen years, there has been an even greater increase in sentences of less than five years. For several categories of crime, including murder, the rate of suspended sentences has increased.<sup>13</sup> There also has been a sharp increase in the use of suspended sentences with mandatory supervision by a probation officer.<sup>14</sup> These figures suggest a rather nuanced view, with harsher (by Japanese standards, at least) sentences imposed in some cases, but on the whole reflecting considerable faith in defendants' potential for rehabilitation.

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11. See EVALUATION REPORT, *supra* note 3, at 85 fig.52-3, 86 fig.52-4, 87 fig.52-5.

12. See *id.* at 83 fig.52-1, 84 fig.52-2, 89 fig.52-7.

13. See *id.* at 83 fig.52-1, 88 fig.52-6, 89 fig.52-7.

14. *Id.* at 92 fig.54.

#### *4. Enriching Deliberations?*

In order truly to assess whether the saiban'in system has enriched the deliberative process, not only would one need to investigate how thorough deliberations are under the new system, one would need to be able to compare that with how thorough deliberations by panels of professional judges have been in the past. At the very least, however, data on the new system suggest that deliberations are quite active. The Japanese judiciary has asked all lay jurors to complete questionnaires, following completion of their duties, relating to various aspects of the experience. One question concerns how easy it was to talk during the deliberation process; another asks about the thoroughness of the deliberations. In each of the first three years, over 70% of the respondents selected, "there was an easy-to-talk atmosphere," and over 70% answered that "we could discuss thoroughly."<sup>15</sup> From these responses, and from comments offered by lay jurors in meetings with the press organized by the courts after trials and in other settings, it seems evident that most lay jurors feel they have had considerable opportunity to express their own views. Whether or not the deliberations have affected the ultimate outcomes of the cases, it seems beyond doubt that the deliberation process itself has become livelier under the saiban'in system.

From the above survey results, one can quite confidently assert that the fear that Japanese are not suited to expressing their views in front of others was off the mark. Many of the other concerns that were raised about the saiban'in system also have been considerably less severe than feared. The most important concern was how the Japanese public would react to the system and whether they would willingly participate in it. In this regard, one cause for concern is that, based on statistics for the first three years, of those who received notices that they had been selected for saiban'in service, 57% were excused from serving after

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15. *Id.* at 79-80 figs. 46, 47, 48 & 49.

applying for waiver,<sup>16</sup> and even among those who were not excused, slightly over 20% of those who received summonses did not appear.<sup>17</sup> Making these figures even more troubling are the trends: the proportion of those who have sought and have been granted waivers has increased over time, and so has the percentage of those who have received summonses but have not appeared.

On a much more optimistic note, those who have served have evaluated the experience very highly, with over 95% describing the experience as either “very good” or “good.”<sup>18</sup> As time passes, these high satisfaction levels seem likely to increase public acceptance for the system and willingness to serve. (Incidentally, one finds similar reactions even in the United States, with its deep jury system tradition. Among those who receive jury summonses, many are reluctant to serve; but those who do serve report high levels of satisfaction with the experience.<sup>19</sup>)

### 5. Other Concerns

As for other concerns, at least to date the fears over the impact of sensational pre-trial publicity have not become a major problem, in part presumably as a result of self-regulation by the mass media. And while the rather strict legal standards relating to confidentiality remain unchanged, in practice those standards have been applied to date in a relatively relaxed fashion.

#### C. The Saiban'in System and the Strengthening of Participatory Democracy

It is too early to assess whether the saiban'in system has contributed to a strengthening of participatory democracy. In

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16. *See id.* at 49 fig.7.

17. *Id.* at 52 fig.12.

18. *See id.* at 120 fig.86.

19. *See, e.g.,* JOHN GASTIL ET AL., THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION 52-58, 62 & n.26 (2010).

Japan, alternates as well as the principal saiban'in are all permitted to participate in the deliberations, and one would expect that the opportunity to deliberate with professional judges, on an equal footing, would give those participants a sense of having played a direct role in an important aspect of governance. That experience, one would hope, may provide a positive influence on attitudes toward civic responsibility and in turn may lead to greater participation in the civic sphere.<sup>20</sup>

That said, even including alternates, only about 12,000 saiban'in participate in deliberations each year. If those participants were able to talk about their experiences freely, one might expect some multiplier effect through their conversations with family members, friends, and workplace colleagues. In that respect, though, the strict confidentiality standards in Japan likely limit any potential multiplier effect. Accordingly, even if saiban'in service is resulting in a greater sense of civic engagement by those who have experienced it, the numbers remain so small it is likely to take many years before the impact will become visible.

#### D. Shifts in Attitudes and Appraisals Within the Judiciary

It is heartening to see the high levels of satisfaction expressed by those who have served as saiban'in. The stance of the mass media has also shifted; while some critical reports still appear, overall the tone of coverage has been highly positive. To my mind, even more striking is the shift in attitudes within the judiciary. It is probably safe to say that, if former Supreme Court Chief Justice Yaguchi Kōichi had not evinced the willingness of the Japanese judiciary to consider lay participation, by

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20. See generally GASTIL ET AL., *supra* note 19 (providing evidence of the impact the experience of jury deliberation has on civic engagement and political participation based on large-scale surveys). I'd love to see the Japanese judiciary authorize a similar study in Japan. A team of former students has nearly completed the translation of *THE JURY AND DEMOCRACY* into Japanese. I'm hopeful that when it comes out, it may help provide impetus for such a study in Japan.

expressing his own fascination with the potential of lay participation and by delegating a group of younger judges to investigate the jury system and other lay participation systems in the United States and Europe in the late 1980s and early 1990s, lay participation would not have been achieved for many years to come.<sup>21</sup> At the same time, it is no secret that, even after Chief Justice Yaguchi expressed interest, there was deep-seated resistance to lay participation by many within the Japanese judiciary. Even after the decision to introduce the *saiban'in* system was reached, if the judiciary had wanted to undermine the system, it could have done so rather easily.

That was not at all the case. Quite the contrary, the judiciary has devoted great effort to ensure the success of the system. Furthermore, in designing and implementing the system, the judiciary has displayed its commitment to achieving the ideals of the *saiban'in* system, including effectuating trials centered on live, in-court testimony (trials that, in a widely used phrase that appeared in the Justice System Reform Council's Recommendations, "one can understand by watching and listening") and seeking to ensure that lay members are able to participate actively and freely in the deliberation process.

During the five-year preparation period that preceded the introduction of the *saiban'in* system, the judiciary conducted numerous mock trials, surveys and other studies, and extensive training programs, and through these efforts considered a very wide range of matters concerning the new system, including conduct of trials, conduct of deliberations, and conduct of post-trial meetings with the press. The judiciary carefully studied the concerns and fears of the general public and perceived burdens of and barriers to participation, and sought to alleviate those concerns. At the same time, the judiciary undertook great efforts to ensure that participation would be meaningful.

Since the system has gone into effect, the judiciary has continued to exert efforts to support and improve the system. In

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21. See, e.g., YAGUCHI KÔICHI, SAIKÔSAIBANSHO TO TOMO NI [TOGETHER WITH THE SUPREME COURT] 114-115 (Yûhikaku, 1993).



November 2011, the Supreme Court decisively rejected arguments that the saiban'in system is unconstitutional, with all fifteen justices joining in a unanimous Grand Bench decision.<sup>22</sup> Among other activities in support of the saiban'in system, to avoid a reversion to the old-style trial by documents, the judiciary has pushed the parties to ensure that saiban'in trials are centered on oral, in-court testimony. As the Supreme Court General Secretariat commented in its three-year assessment:

What is important above all is that proceedings be undertaken in such a way that, through assertions and presentation of evidence made in open court in front of the saiban'in (lay jurors), the substance of the case is made clear and determination of appropriate sentence becomes possible. For this purpose, it is essential that the practice in which the key facts are established through examination of witnesses in open court becomes established as the standard practice. Furthermore, it goes without saying that techniques for examination of witnesses must be improved. It is easy to mouth the phrases "primacy of in-court testimony" and "breaking away from trial by dossier," but those goals can only be achieved through the accumulation of steady practice in case after individual case.<sup>23</sup>

With respect to the appeals process, in February 2012 the Supreme Court reversed a High Court decision that had overturned a saiban'in panel's acquittal of a defendant in a drug smuggling case, and instead had declared the defendant guilty. In doing so, the Supreme Court strongly affirmed the principles of orality and directness, stressing the importance of respecting the findings of fact by the court of first instance, which "directly investigated the witness(es) regarding the issues, and evaluated

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22. Saikō Saibansho [Sup. Ct.], Grand Bench, Judgment of Nov. 16, 2011, 2010 (A) No. 1196, 65 SAIKŌ SAIBANSHO KEJI HANREISHŪ [KEISHŪ] 1285, <http://www.courts.go.jp/english/judgments/text/2011.11.16-2010.-A-No..1196.html> (Japan).

23. See EVALUATION REPORT, *supra* note 3, at 20.

the reliability of the testimony based on matters such as the attitude of the witness.”<sup>24</sup>

In some respects, the judiciary’s support has gone beyond the saiban’in system itself to other associated reforms. As one example, it is my understanding that individual judges have pushed the prosecutors for greater cooperation with respect to discovery, and in a number of cases the Supreme Court has issued decisions calling for broader discovery, including a ruling that sent shock waves through the offices of police and prosecutors, in which the Supreme Court upheld a demand for the disclosure of handwritten notes made by the police during the investigation process, finding them relevant to determining the voluntariness of a confession.<sup>25</sup> While defense counsel and prosecutors undoubtedly have many concerns and complaints about the judiciary’s handling of saiban’in trials, my own view is that the judiciary’s careful preparation and continuing diligent efforts have contributed greatly to the smooth launch of the system.

I would like to add one more observation regarding the judiciary. From what I have heard, before the saiban’in system went into effect, quite a few judges were reluctant to handle saiban’in trials. Now, though, a mere four years later, it is my understanding that judges want to be assigned to handle saiban’in trials, viewing such posts as an opportunity to exert their influence and develop their skills. If what I have heard is accurate, this shift in attitudes suggests the system is already

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24. Saikō Saibansho [Sup. Ct.], 1<sup>st</sup> Petty Bench, Judgment of Feb. 13, 2012, 2011 (A) No. 757, 66 KEISHŪ 482, <http://www.courts.go.jp/hanrei/pdf/20120213161911.pdf> (Japan).

25. Saikō Saibansho [Sup. Ct.], 3<sup>rd</sup> Petty Bench, Ruling of Dec. 25, 2007, 2007 (Shi) No. 424, 61 KEISHŪ 895, <http://www.courts.go.jp/english/judgments/text/2007.12.25-2007.-Shi-.No..424.html> (Japan). Other decisions calling for broader discovery include Saikō Saibansho [Sup. Ct.], 1<sup>st</sup> Petty Bench, Ruling of Sept. 30, 2008, 2008 (Shi) No. 338, 62 KEISHŪ 2753, <http://www.courts.go.jp/english/judgments/text/2008.09.30-2008.-Shi-.No..338.html>, and Saikō Saibansho [Sup. Ct.], 3<sup>rd</sup> Petty Bench, Ruling of June 25, 2008, 2008 (Shi) No. 159, 62 KEISHŪ 1886, <http://www.courts.go.jp/english/judgments/text/2008.06.25-2008.-Shi-.No..159.html>.

well accepted within the judiciary, and that bodes very well for the future.

## V. SIGNIFICANCE OF THE SAIBAN'IN SYSTEM

In closing, I would like to add a few observations regarding the broader significance of the saiban'in system. As I have already mentioned, the saiban'in system's introduction provided the opening for several other major reforms to the criminal justice system as a whole, including strengthening the defense counsel function and expanding discovery. Moreover, while steps for videotaping or audio-taping of interrogation sessions remain far from adequate, I am firmly convinced that it is thanks to the existence of the saiban'in system that the movement for taping of interrogations has begun to make progress.

Many of the changes to date have extended only to saiban'in trials. For example, with the judiciary's support and encouragement, the principles of orality and directness, with trials based on in-court testimony, that one can "understand by hearing with one's ears and seeing with one's eyes" – those principles have largely been achieved in saiban'in trials. But the pattern in non-saiban'in trials remains unchanged, with trials dominated by so-called *chōsho* – written confession statements and written witness statements, prepared by the prosecutors, submitted into evidence without ever being read aloud in court or disclosed to the public. Notably, though, many of the other attendant reforms, including expansion in access to counsel and expansion in discovery, have extended much more broadly.

Going a step further, I would like to suggest that introduction of the saiban'in system has provided the impetus for renewed reflection on the fundamental meaning and significance of the criminal justice system as a whole, along with many of its specific features. For those of us who have been involved in the criminal justice system for many years, including lawyers and academics alike, there is a tendency to become accustomed to the system as it is, and to take many aspects of the system for granted. Involving members of the general public has provided

the opportunity to revisit these aspects that we have long taken for granted, and to view them through fresh pairs of eyes.

One concrete example relates to suspended sentences with mandatory supervision by a probation officer. Notwithstanding its image as a valuable tool for facilitating the rehabilitation and reintegration into society of offenders, the system for suspended sentences subject to supervision has not been widely used in recent years; and it seems that a key reason for the system's low utilization was the widespread acceptance among those involved in criminal justice that the supervised probation system did not work very well. Among the commonly voiced "reasons" for this state of affairs were the views that the probation officers tended to be older and had trouble relating to young offenders, and that the probation officers had such a heavy case load they could not adequately handle all their cases. Lay jurors, who are not inured to this "accepted knowledge," have displayed much greater faith in the rehabilitative ideal underlying the supervised probation system (or, alternatively, in that system's true potential), by insisting on much greater utilization of that system. As a practical matter, if the supervised probation system does not function effectively, its increased use may end in failure. Another possibility, though, is that the increased utilization may spur renewed attention to a system that had fallen into desuetude, and in turn may lead to needed improvements in that system. In a similar fashion, the involvement of members of the general public in fact-finding and determination of sentences may lead to reexamination of matters such as the parole system and the significance of restitution, apology, and extenuating circumstances, and even the very concept of the role of punishment itself, through fresh eyes, with concern for rehabilitating offenders.

In an essay that appeared last year in a special issue of the journal *Jurisuto*, former Supreme Court Chief Justice Shimada Nirō described a very similar phenomenon within the judiciary. He wrote:

I have heard the sentiments expressed by judges who have handled *saiban'in* trials, that, by forming impressions in open

court through concentrated hearings centered on questioning of witnesses, they have rediscovered what the true nature of criminal trials should be, and, at the same time, they have come to the self-realization that in the past they were apt to fall into the rut of doing things in the same routine fashion. I have also heard the views expressed by such judges that, where concepts such as self-defense, intent, or criminal responsibility for one's actions were at issue, and where in the past the judges had applied the concepts in accordance with standards from academic theories or judicial precedents they had input into their brains just like stereotyped formulae, it had been highly educational to have to return to first principles and reconsider the true meaning of the concepts, in order to explain them clearly to lay judges in the context of concrete cases. And I have heard judges who have experienced saiban'in trials express the view that, by coming into contact with the keen questions or innovative views raised by lay judges, they feel as though their eyes have been opened to new ways of seeing things.<sup>26</sup>

These views are not limited to judges. I have heard nearly identical comments from defense lawyers and prosecutors. As these comments reflect, the introduction of the saiban'in system is shaping up as a watershed event, with an impact extending far beyond individual cases to fundamental dimensions of the justice system as a whole.

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26. Shimada Nirō, *Saiban'in saiban ni taisuru kokumin no rikai to shinrai* [*The People's Understanding of and Trust in Saiban'in Trials*], 2 RONKYŪ JURISUTO, Summer 2012, at 97.

