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5th Annual BESETO Conference

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Global COE (Centers of Excellence) Program "Soft Law and the State-Market Relationship: Forming a Base for Education and Research of Private Ordering"

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Session 1 Recent Trend in Consumer Protection

Recent Developments of Consumer Protection Law in Korea

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I. Introduction

Consumer Law is very difficult to define and circumscribe its boundary. Generally, the consumer law has been used in broader terms as all of the norms directly concerning consumer protection except for competition law. Thereafter consumer law can be divided into two categories; consumer transaction law and consumer protection law. The former is understood as a special branch of civil law, the latter as another pillar of the economic law.

In Korea, the law of consumer protection is characterized by the regulatory intervention of the Korean Fair Trade Commission (hereafter as "KFTC"). Though a lot of Acts contain some clauses fit for consumer protection, the regulatory consumer law is above all composed of 5 Acts, namely the Framework Act on Consumers, the Act on the Regulation of Adhesion Contracts, the Installment Transactions Act, the Door-to-Door Sales, etc. Act, the Act on Consumer Protection in Electronic Commerce, etc. The reason is simple, because the Act concerning Judicial Examination and the Act on Bar Examination of Korea enumerate the subjects of consumer protection law for the exam to that extent. Furthermore, these 5 Acts are applied and enforced by the KFTC.[1]

In this Context, professors majoring in economic law are holding lectures and seminars on consumer protection law in Korean law schools, whereas just a few lectures are opened just for consumer transaction law. So this paper will touch mainly regulatory consumer law. It will be described in the following some features found in recent developments of consumer protection law and policy in Korea.

II. Paradigm Shift from Protection toward Sovereignty

1. A Jurisdictional Change

In Korea, the legal framework of consumer protection had been established by the enactment of the former Act on Consumer Protection in January 1980. Since that, the former Ministry of Finance and Economy (now the Ministry of Planning and Finance) as the control

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1 Besides, the KFTC is in charge of the Product Liability Act, the Fair Labeling and Advertising Act, the Consumer's Cooperative Act, etc.

tower of consumer protection, planned basic consumer policy, enacted several relevant regulations and coordinated policy instruments pursued by other regulatory agencies for banking, insurance, telecommunications services, etc. In September 27, 2007 the Ministry revised (more exactly, re-named) the Act on Consumer Protection onto the Framework Act on Consumers and transferred to the KFTC its major functions like consumer education, information service and supervision of the Korea Consumer Agency, whereas the macro coordinative functions was reserved to the Ministry.

This functional change, i.e. dual system for consumer policy, had been criticized for it caused unnecessary conflicts and enforcement inefficiencies resulting from dividing artificially various interdependent roles in consumer policy. Therefore, the new Government in 2008 unified consumer policy system into the KFTC by transferring the coordinative and legislative function of the Ministry and the jurisdiction over the Framework Act on Consumers, the Act on Product Liability and the Consumer's Cooperative Union Act to the KFTC. Since then, the KFTC as a primary agency for consumer policy coordinates similar functions dispersed on several regulatory agencies and plans middle and long-term framework consumer policy.

2. Re-setting of Consumer Model

The KFTC has mainly the task to protect competition and thereby to enhance consumer interest. For decades, the consumer protection law in Korea had been based on consumers who are *sui specie* inferior to undertakings in terms of information, negotiating power, technical knowledge, transfer of economic risk, etc. Therefore, consumer law and policy in Korea had been focused on the intrusive protection of unreasonable consumers.

The institutional change mentioned above implies that for setting consumer policy more weight shall be given to competition- and consumer choice -oriented approach. In a sense, the change toward rational consumer model has begun. Since about 1990s consumer economists argue that the goal of consumer law and policy should be the establishment of consumer sovereignty, consumer is not the passive object of governmental protection any longer. The antitrust theories that try to combine competition and consumer welfare, based on the overarching status of consumer sovereignty, contribute to that conceptual change of consumer law.[2] This model of reasonable consumer prevails more and more at least in the academic circle of Korean economic law and has not a little influence on the practices of consumer protection by the KFTC. In this context, consumer information and education are of more increasing importance.[3]

The KFTC, however, does not overlook the necessity of somewhat aggressive consumer remedy in the individual transactions, which may not be sufficiently feasible just by guaranteeing the right of consumer choice based on the model of reasonable, well-informed consum-

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2 Especially, Robert Lande, "Consumer Choice as the Ultimate Goal of Antitrust", University of Pittsburgh Law Review Vol. 62 No. 3, pp. 503, Spring 2001.

3 KFTC, White Paper on Fair Trade 2010, 2011, pp. 321. Typically, measures strengthening the obligation of undertakings to provide consumer information to a larger extent have been made.

er. In Korea, consumer remedies via special clauses had been strengthened consistently, i.e. extending withdrawal period of consumers from 7 days, through 10 to finally 14 days in case of door-to-door sales in a serious of amendments of the Act. Moreover, the KFTC has the power to order corrective measure and impose surcharge on undertakings in violation of obligations and prohibitions contained in some consumer protection law. Finally, it could not be disregarded that political and public pressures demand the parental role of the KFTC, which is to reinforce this tendency.

III. Prevailing Standardized Contracts

1. Regulation of Adhesion or Standardized Contracts

Germany was the first that became to control adhesion or standardized contracts by special legislation, i.e. the Act on the Regulation of Standardized Contracts of 1976. After the German model, the Act on the Regulation of standardized contracts was enacted November 1986 in Korea. Though in Germany the Act was incorporated into the Articles 305 seq. of the German Civil Code in 2002 through the Act on the Modernization of Obligations Law ("das Gesetz zur Modernisierung des Schuldrechts"), such fundamental reconstruction of consumer law system had no mentionable influences on the Korean legislator.

The detailed substantive contents of the Act are much similar to those of the former German Act, whereas the Korean Act can be characterized as much more regulatory function. Above all, the Act imposes an undertaking the obligation not to use in his/her contracts any unfair contractual terms illustrated in Article 6 or 14 (Article 17). In connection with this legally binding ex ante obligation, the KFTC may recommend or order an undertaking in violation of Article 17 to take corrective action such as deleting or modifying the contractual terms in question. The corrective order may be imposed especially if the undertaking in question is market dominant, concludes contracts via misuse its superior position or an undertaking's failure to comply with actions recommended by the KFTC has caused or is highly likely to cause injury to many customers (Article 17-2).

2. The Standard Contractual Terms

The Act enacted in 1982 contributed to the formation of sound order in the field of consumer contracts. The revised Act of 1992 introduced the so called Standard Contractual Terms in order to prevent unfair trade terms to prevail and then reinforced its regulatory feature more strongly by artificially facilitating a widespread use of Standard Contractual Terms. The formation of Standard Contractual Terms can be divided into following three cases (Article 19-2).

First, undertakings or trade associations, in an effort to establish a sound trade order and prevent unfair contractual terms from circulating, may prepare a set of Standard Contractual Terms to be used in a particular field of trade and request that the KFTC examine the terms to determine whether they are in violation of the Act or not. This is the most common case.

Second, consumer organizations registered under Article 29 of the Framework Act on

Consumers or the Korea Consumer Agency (hereinafter as "consumer organization, etc.") may request that the KFTC prepare a set of Standard Contractual Terms to be used in a field of trade in which consumer injury is frequent. Upon request from consumer organization, etc. or when an investigation attributes frequent consumer injury reported in a particular field of trade to the absence of adhesion contracts or the use of unfair standardized contracts, the KFTC may recommend that an undertaking or trade association prepare a set of Standard Contractual Terms for the field and submit them to the KFTC for examination.

Third, this is the case the KFTC make the Standard Contractual Terms by itself. If an undertaking or a trade association fails to follow through with a recommendation mentioned above within 4 months from the day of receiving it, the KFTC may prepare a set of Standard Contractual Terms in consultation with interested parties and consumer organizations as well as the relevant central government agencies.

The KFTC may give public notice of Standard Contractual Terms that have passed a legality test and recommend that undertakings and trade associations use them. If an undertaking or trade association uses adhesion contracts different from the Standard Contractual Terms recommended by the KFTC, the said undertaking or trade association shall indicate such differences to consumers in a clear and easily understandable manner.

The KFTC may create an official cover page for contracts using Standard Contractual Terms and permit undertakings or trade associations to use such cover page for their contracts if they want to use Standard Contractual Terms. An undertaking or trade association shall not use the official cover page for a adhesion contract different from the Standard Contractual Terms. If an undertaking or trade association uses the official cover page in violation of this prohibition, any contractual terms of that adhesion contract less favorable to the customer than comparable Standard Contractual Terms shall be null and void.

IV. Regulation of Door-to-Door Sales and Multilevel Marketing

1. Protection of consumers from impulsive purchase decision

Like the Installment Transactions Act, the Act contains various instruments to protect consumers who make contract with door-to-door sellers, telemarketers or multilevel marketers. From these types of somewhat aggressive marketing, consumers are exposed to the risk that they make decisions while unprepared or unsolicited. Here it has a priority among other policy instruments to guarantee the right of withdrawer with which a consumer, after concluding contracts without any flaws of will like fraud or mistake, can withdraw his/her offer unconditionally within certain period of time (so called "cooling-off"). That is an extreme exception for the grand rule of civil contract law; "pacta sund servanda". Therefore, the right of withdrawer should be legitimated in terms of necessity and proportionality.

Under the Act, a consumer who has entered into a contract through a door-to-door sale or multilevel marketing may withdraw the contract within 14 days from the date on which a copy of the contract was received or the date in which the consumer came into knowledge of the address of the seller or multilevel marketer (Article 8 I, 17 I). For compensation of con-

sumer damage from these direct marketing methods, door-to-door sellers or multilevel marketers may, upon approval of the KFTC, establish a Mutual Aid Cooperative to conduct an insurance business for paying damages to injured consumers, etc. (Article 35). Besides, multilevel marketers shall conclude one of the following contracts;

1. a contract with an insurance company for payment of indemnity for consumer injury
2. a debt payment guarantee contract with a bank, aimed at protecting consumers against delayed compensation
3. a contract with a mutual aid cooperative mentioned above (Article 34).

In case of multilevel marketing, it should be pointed one more issue. Under the Article 17 II, a multilevel marketing agent may withdraw or cancel a sales contract with a multilevel marketer within 3 months of conclusion of such contract, except in cases in which he/she holds an excessive inventory of goods or services as a result of false inventory reporting to the multilevel marketer, when he/she has damaged goods or services beyond their resale value or other cases specified by the Article 23 of the Presidential Decree. There are doubts whether a multilevel marketing agent should be unexceptionally protected as a consumer or more than a consumer, because many of them act substantially as an undertaking. That is the why a differentiation between genuine agents and real consumers should be made.

2. Multilevel Marketing – Searching for boundaries

Multilevel marketing is legally defined as the practice of selling goods or services through a multi-layered sales organization (including two-layered organizations specified by a presidential decree that are practically managed and operated as three or more layers) in which the seller recruits people as sales agent of a multilevel network forming three or more levels under an agreement that they can receive certain economic interest from engaging in the following activities;

1. selling products supplied by the multilevel marketer directly to consumers
2. recruiting some or all of the consumers mentioned in subparagraph (a) as sales agents directly below the initial seller's level who then engage in the same activities as the initial seller (Article 2 No.5).

The main two elements of the multilevel marketing are "more than two-layered organizations" and "retail profits". Although the Act does not use the term "pyramid marketing" or something like that, it prohibits anyone to use a multilevel marketing organization or a similar organization made of multiple levels of sales agents to conduct financial transactions without trading goods, etc. or disguising what is actually a financial transaction as a transaction in goods, etc. Specific cases of disguising a practically financial transaction as a transaction in

goods or services shall be determined by a presidential decree.[4] Nevertheless, the definition of "pyramid marketing" remains unclear.

Another definitional problem is to be found that door-to-door sales and multilevel marketing can not always be clearly distinguishable. However, there are some regulatory differences between the two and most of the multilevel marketers including sales agents are shunning from being exposed or misunderstood to the public as multilevel or pyramid marketing. The KFTC interpreted the definition clause of Article 2 and considered above all if a marketing system has more than two layers of sales agent.

Under this approach, several undertakings like AmorePacific, LG Household & Health Care, Woonjin and Daekyo, etc., which had simply notified to the KFTC as a door-to-door seller, were sanctioned for not abiding by the obligation of "*ex ante* registration" as multilevel marketers to the KFTC, but the Korean Supreme Court reversed the KFTC's decision in that the multilevel marketing agent should always be recruited among the purchasers from that challenged multilevel marketer, not non-purchasing consumers.[5]

More serious problem emerging after that decision seems to be the tendency that the KFTC is trying to strengthen regulation and sanction to more widely defined multilevel marketers. Such efforts are supported by the argument that (quasi-) pyramid marketing should be exhaustively covered and massive damage of consumers could be thereby *ex ante* prevented. However, the attempt to revise the Act in this direction must be cautiously reviewed. The much troublesome (quasi-) pyramid marketing is criminally a fraud and such marketers has not been registered to the KFTC. All of the big cases concerning fraudulent pyramid marketing like Hongsamnara, JU Network, etc. were investigated and criminally sanctioned by the prosecutors. The purpose of the Act is, however, primarily to incorporate various forms of

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4 Acts of practically engaging only in financial transactions are as following;

1. when a seller sells goods to his/her multilevel marketing agents at prices far higher than the ordinary market price of identical or similar goods, such as the case that the seller sells goods at a price over 10 times what it cost him/her to acquire the goods and pays commission or other comparable economic benefits (hereinafter as "commissions") to the multilevel marketing agents
2. when a seller, after concluding a contract for a sale of goods with the multilevel marketing agents, does not supply the goods, while paying commissions to the multilevel marketing agents
3. when a seller sells gift certificates to multilevel marketing agents in either of the following manners
   a. the seller repurchases, or enlists a thirty party to repurchase the gift certificates from the multilevel marketing agents or.
   b. commissions are paid for the sales of gift certificates, which cannot be viewed as intended for a transaction of goods or services, judging from the issuer's capacity to supply the goods, the multilevel marketing agents' records of supplying and the number of certificates issued
4. other situations in which a seller is presumed to be practically engaged in financial transactions in light of the seller's capacity to supply goods, the multilevel marketing agents' records of supplying, the nature of supply or sales contracts with multilevel marketing agents and the conditions for payment of commissions, etc. (Article 32-2 of the Presidential Decree).

5 The Korea Supreme Court 2009.4.9. Decision No.2005Do977. After that, the KFTC repealed its corrective measures.

marketing into the legal framework and to protect consumer rights in case of legal contracts. Furthermore, the KFTC is not inapt for searching, investigating and sanctioning criminal misbehavior like pyramid marketing because it is equipped poorly with instruments for such activities.

V. Developments of Remedy Procedures

The KFTC has exposed great eager to introduce or devise new instruments for effective enforcement of consumer protection as illustrated in the following.[6] Their effectiveness has not been proved because of short history.

1. Collective Dispute Settlement

The Framework Act on Consumers, revised in 2006, provides a special mediation procedure for dispute involved by a group of consumers (Art.68). For cases specified by a presidential decree, in which a number of consumers claim to have suffered injury of the same type or in a similar pattern, the central government, a local government, the Korea Consumer Agency, a consumer organization or an undertaking may request the Settlement Commission for a collective resolution of such disputes. The Article 56 of the enforcement decree specifies the cases should have all of the following elements;

1. the number of consumers injured in the same or similar manner by a product, etc. shall be 50 or more.[7]
2. the cases shall share the same point of contention in a practical and legal sense.

If an undertaking accepts a settlement mediated by the Settlement Commission, the Settlement Commission may recommend the undertaking to submit a plan for compensating other injured consumers who are not participating in the procedure. In the event one or more consumers who are a party to a Collective Dispute Settlement case initiate a legal proceeding with respect to the case, the Settlement Commission shall exclude those consumers without suspending its procedure itself.

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6 The recently revised Act on Subcontractor Contracts of 2011 introduced up to treble damage action due to unfair exploitation of subcontractor's technologies (Article 35 II).

7 Consumers specified below are excluded from the procedure;

a. a consumer whose injury dispute with the undertaking in question has been resolved or who has reached an agreement on compensation with the undertaking, through Autonomous Dispute Settlement under Article 31 I of the Act, a settlement recommended by the President of the Korea Consumer Agency under Article 57 of the Act and other arrangements

b. a consumer whose dispute with the undertaking is in the process of being handled by any of the dispute settlement bodies mentioned in Article 25

c. a consumer who has filed a lawsuit with a court concerning an injury sustained from the product, etc. in question.

2. Lawsuits by Consumer Organizations, etc.

The Framework Act on Consumers which was revised in 2006 and came into force in January 1. 2008, introduced "organization lawsuits" (Verbandsklage) for the first time in Korea. Under the Act, an organization falling under any of the following categories may file a lawsuit, seeking an injunction prohibiting or suspending an undertaking's act that directly or repeatedly infringes on consumers' right to the safety of their lives, bodies and property in violation of Article 20 (Compliance with Standards for Enhanced Consumer Rights).

1. a consumer organization registered with the KFTC, which satisfies the following requirements;
   a. engaged in consistent efforts to enhance consumer rights as their main purpose
   b. having a membership of a 1,000 or more
   c. having been existence for at least 3 years after registration
2. The Korea chamber of Commerce & Industry, the Korea Federation of Small & Medium Enterprises and other nationwide trade associations
3. a non-profit civil organization, which satisfies the following requirements;
   a. having received a request from 50 or more consumers to file a organization lawsuit on their behalf for infringement of their rights, which are legally and practically considered of the same nature
   b. stating the enhancement of consumer rights as its purpose and having worked for the last 3 years or longer
   c. having a membership of 5,000 or more
   d. registered with the competent central government agency.

The organization that brings a lawsuit shall, together with a complaint, an application for permit of a lawsuit to the court and the court shall allow that lawsuit to proceed, if (i) it is necessary to serve public interests, (ii) there are no questions about the integrity of the submitted information and (iii) 14 days has passed after the organization request to the undertaking an injunction of that infringement in a written form (Art.73 and 74). If the court dismisses the cause of action offered by the plaintiff organization, no other organizations could bring a lawsuit on the same basis, except for certain circumstances (Art.75).

For this sort of lawsuits concerns only the prohibition or injunction of the questioned infringement, individual consumers should bring additionally a damage action or file an application for the above mentioned Collective Dispute Settlement in order to redress their actual damages.[8] The first case of Lawsuit by Consumer Organization was that a civil organization including Kyungsilryeon, the famous civil organization of Korea, and Green Consumer Federation, etc. brought an action against Hanaro Telecom in July 2008, whose name was changed to SK Broadband after being taken over to SK Telecom in September 2008, for it mismanaged

8 The class action as of U.S. type, which is contained in the Securities Transactions Act of Korea, has not been adopted in consumer law.

information of users. The action was approved by the court in October 2008, but the users of about 23,000 had to bring an action collectively in order to get compensation from the company.

VI. Resume

In Korea, Consumer law is generally seen as an instrument to protect consumer interest. This raises the fundamental questions whether consumer interest is best served by regulatory intervention of the KFTC, whether consumer law is an independent area of law. For several decades, such questions had not been seriously debated in Korea and consumer law has developed toward separate directions; a branch of economic law on the one hand, a branch of special civil law.

The main characteristics of Korean consumer protection law are *inter alia* the extension of the KFTC's jurisdiction and thereby increased intervention of its regulatory power. It is widely accepted that consumer protection, evolving as a public law, functions well in our oriental culture. Experimental is the active adoption of new instruments to prevent or remedy consumer damages, whose effectiveness we should be skeptical about.

The market itself, or even competition law and policy, could not yield consumer interest to a sufficient degree. The government has to take care of consumer interest by *ex ante* regulation, e.g. improving market transparency, information symmetry and promoting competition. Furthermore, it should establish remedies system as *ex post* regulation, because market seems to be imperfect to guarantee consumer sovereignty in an early stage of transactions to a sufficient degree. For more intervention of the KFTC to be justified, cautions should be given not to substantially threaten private autonomy and misguide consumers toward irrational or opportunistic behaviors.

Session 1 Recent Trend in Consumer Protection

Recent Developments in Consumer Protection in Japan

Prof. Masami OKINO*

I Introduction

Consumer law in Japan recently has been affected by significant developments that are legislative, administrative, judicial and organizational. In this report, I address two developments from among the many that concern me: first is the judicial review of unfair contract terms in residential lease agreements (II); second is the proposal of the establishment of a new procedural regime of collective action (III). I then refer to the ongoing work of the revision of the Civil Code (IV).

II Judicial Review on Unfair Contract Terms in Real Property Lease Agreements

Recently, the Supreme Court decided on the validity of three dubious clauses in residential lease agreements between an individual tenant and a company landlord.

The situations and clauses in question are follows:

(1) Restoration and charge clause

A lessee has a duty to restore the property (room rented) to the original state when he/she returns it and vacates the premises at the end of the lease. “The original state” means the state that the premises would have been in after ordinary use and utilization of the property during the lease period. Furthermore, the cost of fixing any change or wear and tear natural or artificial that may occur in the ordinary course of utilization of the property should be borne by the lessor not the lessee. The idea is that such depreciation or fee is to be covered through the rent. A question arises when the lease agreement includes a clause that puts the lessee responsible for the cost of fixing any change that has occurred during the lease period, such as costs of cleaning, renewing wallpaper, floor carpet, tatami, or any repair, etc., including natural or ordinary deterioration.

(2) Automatic deduction clause

It is customary that a lessee pays a security deposit in the amount of one to three months of rent or more as a guarantee deposit. The security deposit is to be released at the end of the lease and after the premises are vacated, with the deduction of the amount of all unpaid charges, such as unpaid rent, late charges, damages, and restoration fees. A question arises

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when the lease agreement includes a clause that provides a certain amount (fixed amount or percentage), which is to be automatically deducted from the amount of the security deposit to be returned to the lessee independent of the current state of the property.

(3) Renewal fee clause

Some residential lease agreements include a clause that provides that the lessee agree to pay renewal fees, the amount of which is usually one or two months of rent, when the agreement is renewed.

Compared with a situation without these clauses, their inclusion in a residential lease agreement puts an extra charge on the consumer lessee. In addition, it is unclear in the second and the third clauses what and whether the consumer lessee gains by the payment or charges. Thus, these clauses beg the question of their validity, according to article 10 of the Consumer Contract Act, which provides the following:

> Article 10 (Nullity of Clauses that Impair the Interests of Consumers One-sidedly)
>
> Clauses that restrict the rights of consumers or expand the duties of consumers beyond those under provisions unrelated to the public order applicable pursuant to the Civil Code, the Commercial Code, and such other laws and regulations and that impair the interests of consumers unilaterally against the fundamental principle provided in the second paragraph of article 1 of the Civil Code, are void.

Decisions of the lower courts were divided on the question of the binding force of the clauses. Hence, the judgment of the Supreme Court was eagerly awaited. Three judgments were made, one in 2005 and two in 2011.

The first decision was on the binding force of the first clause on the restoration charge, the decision of the second Petty Bench, the 16th of December, 2005. It says that such a restoration charge clause, which puts a burden on the lessee to repair and restore ordinary depreciation mounts, puts an unexpected special charge onto the lessee; therefore, such duty must be precisely and clearly agreed upon by the lessee. For instance, it should be required that either the range of the charge at least is specifically and clearly described in the lease agreement document, or in a case where it is unclear in the face of the agreement document, the lessor orally explains the content of the clause to the extent that the lessee precisely understands and agrees to include the duty in their agreement. In this case, the Supreme Court found that the requirements are not fulfilled: no precise clause is in the agreement document, no descriptions are in the attachment to the agreement, nor is a precise explanation given by the lessor to the lessee at the time of the conclusion of the contract.

It should be noted that the Consumer Contract Act was not applicable to the case because the lease agreement had been concluded before the effectuation of the Act. With this reservation, however, the decision is characteristic in that it deals with the question of agreement formation, existence of agreement or will on the part of the lessee, not the validity of the clause.

The second decision was on the validity and the application of art. 10 of the Consumer Contract Act, specifically the second clause regarding the automatic deduction of a security deposit, the decision of the first Petty Bench, the 24th of March, 2011. It examines "a special provision on a deduction from the security deposit which is attached to a lease contract for a residential building, unless the parties to the contract otherwise agree on the purpose thereof, is intended to have the lessee also bear the maintenance expenses for any normal wear and tear, etc."

The decision continues on the validity question under article 10 of the Consumer Contract Act:

> Where a special provision on a deduction from the security deposit is attached to a lease contract and the amount of money to be obtained by the lessor (as such deduction from the security deposit) is clearly specified in the written contract, the lessee concludes the contract while clearly recognizing the amount of the deduction from the security deposit in addition to the amount of the rent, and in such case, the parties clearly agree to the lessee's bearing the burden of payment of the deduction from the security deposit. Even supposing that it is a common practice to recoup the maintenance expenses for any normal wear and tear, etc. as part of the rent, if the parties agree to pay and receive any money to be used as such recoupment in the form of a deduction from the security deposit, it is reasonable to construe, on the contrary, that the parties agree that the amount of the rent does not include such maintenance expenses. A special provision on a deduction from the security deposit cannot be regarded as doubly imposing the maintenance expenses on the lessee. Furthermore, from the perspective of preventing a dispute over the necessity of maintenance of any normal wear and tear, etc. or the amount thereof, it is not always unreasonable to fix the amount of money that is to be obtained by the lessor and used as the maintenance expenses at a specific amount. In this context, a special provision on a deduction from the security deposit cannot immediately be regarded as impairing the interest of the lessee unilaterally against the principle of good faith.
>
> It is true that, under a lease contract that is categorized as a consumer contract, the lessee does not have sufficient information about the amount of maintenance expenses for any normal wear and tear, etc. that would normally be caused to the property that he/she leases. Furthermore, it is difficult for the lessee to delete a special provision on a deduction from the security deposit through negotiation with the lessor. Accordingly, where the amount of a deduction from the security deposit is too high for the purpose of the special provision on a deduction from the security deposit, it is often the case that the lessee is presumably forced to bear a unfair burden unilaterally because of the inferiority of the quality and quantity of the information available to the lessee as well as of the lessee's bargaining power compared to that of the lessor.
>
> Consequently, where a special provision on a deduction from the security deposit is attached to a lease contract for a residential building that is categorized as a consumer contract, and the amount of the deduction from the security deposit set forth therein is

> judged to be too high in light of the amount normally expected as the maintenance expenses for any normal wear and tear, etc. that would be caused to the building, such as the amount of the rent, whether or not key money or any other lump-sum money has been paid and received, and the amount of such money if there is any, it is reasonable to construe that such special provision impairs the interest of the lessee, a consumer, unilaterally against the principle of good faith, and it is void under Article 10 of the Consumer Contract Act, unless there are special circumstances, such as where the amount of the rent is considerably lower than the standard rent for a similar type of building located in the vicinity of the building in question.

In this decision, it was decided that the amount of the deduction from the security deposit was not too high to render the provision void under article 10 of the Consumer Contract Act.

The adjudication is basically supported by another decision of the third Petty Bench, on the 12th of July, 2011. This time, however, it was accompanied with one dissenting opinion and two supporting opinions.

The third decision was on the validity under article 10 of the Consumer Contract Act of the third clause on the renewal fee, the decision of the second Petty Bench, on the 15th of July, 2011. It examined that the renewal fee is a complex of several functions, such as subsidization of rent, prepayment of rent, and price and expenses for continuation of the lease contract. On the examination of the functions of the renewal fee, it says that payment of renewal fee bears economic rationality. It continues:

> based on the facts that it is customary and well known that a lessee pays renewal fee to the lessor at the completion of the lease period in many districts, and that clearly such renewal fee provisions have never been deemed as void against public policy in court settlement proceedings, when such payment of the renewal fee is clearly and precisely written in the lease agreement and precisely agreed between the lessee and lessor, such clause does not "impair the interests of consumers unilaterally against the fundamental principle provided in the second paragraph of article 1 of the Civil Code", unless the amount of payment is too high in consideration with the amount of rent, renewal period and other factors.

With the case, the Supreme Court decided that the clause in question does not oblige the lessee to pay too high an amount; thus the clause is valid.

The question of the binding force of these clauses could be categorized as the validity of the externalization payment of rent by agreement in the consumer residential lease contract. The Supreme Court seems to stress transparency in the respect. In spite of the Supreme Court decisions, the validity question remains controversial. An additional piece of information is that real estate businesses are trying to establish practices to show clearly up front the

total amount of payment or charges the lessee would bear regardless of the name of the charges at the conclusion of the lease agreement.

III Collective Action Regime

On the 22nd of August, 2011, the Consumer Commission publicized a report on a new collective action regime for the realization of remedies for consumers in large numbers.

Let me refer back to the cases in the preceding section. The amount of the claim in the first case on the binding force of the restoration clause was 302,547 yen (plus a late payment charge). That of the second was 228,000 yen (In addition, the plaintiff demanded 120,000 yen for return of the repair fee and a late payment charge.), and that of the third was 808,074 yen (plus a late payment charge). These are goodly sums for an ordinary individual consumer if he/she could acquire the amount without much cost. However, they are not a strong incentive for bringing a lawsuit, not to mention fighting it up to the Supreme Court. In many cases, the amount of claim is much smaller, thus making a lawsuit inefficient. There are also considerable cases where consumers do not find a way into courts, due to the difficulty of legal issues, small expectations of winning, or lack of recognition of their possible rights.

The right to demand an injunction by authorized and qualified consumer organizations was established and introduced into the Consumer Contract Act in 2006, and effectuated in 2007. In 2008, the Consumer Contract Act, the Act on Specified Commercial Transactions, and the Act against Unjustifiable Premiums and Misleading Representations were revised to enlarge the right to demand an injunction by qualified consumer organizations. The system has proved to be useful to prevent consumers from being victimized by unfair contract terms, inappropriate solicitations that are deceptive or coercive, or misleading presentations. However, the system is powerless to realize retrospective remedies, such as damages, restitutions, and so on for individual consumers.

The lack of and the need for another effective remedy for the right of consumers to damages and so on, has been widely recognized. Paragraph 6 of the Supplementary Provisions, the Act Establishing Consumer Affairs Agency, and the Consumer Commission of 2009 requests the Government to take necessary measures within three years from the effectuation of the Act. Paragraph 6 calls for the examination of systems to relieve large numbers of victimized consumers, deprive wrongdoers of illicit profits, through a system of preventing concealment and dissipation of the funds of the wrongdoers. The time limit is set to 2012.

Before the enactment of the Act Establishing the Consumer Affairs Agency and Consumer Commission of 2009, the Government had started deliberations to form a study group, which was the first under the Quality-of-Life Policy Bureau, the Cabinet Office. Its report was publicized in 2009, and the work has been carried on. The second study group was established under the Consumer Affairs Agency, whose report was publicized in 2010. The above report of the Consumer Commission, Expert Subcommittee, was the third report, which framed and proposed a new regime of collective action by consumer organizations.

The basics of the proposed system are as follows:

(1) The system is layered and consists of two stages: The first stage decides and confirms the legal or factual issues that are common among a number of consumers who have potential rights against corporations, companies, organizations, businesses or professional individuals. The second stage follows only when the plaintiff, that is, the consumer organization, wins and obtains a judgment confirming the factual situation or legal interpretation for the plaintiff. In the second stage, the plaintiff, the same consumer organization as in the first stage, exercises the rights of many consumers based on the issues confirmed in the first stage judgment, with a delegation by each consumer. The range of consumers is specified in the first stage.

(2) The proposed system is a so-called opt-in system, in that each consumer affirmatively chooses to participate in the second stage by individually delegating to the plaintiff consumer organization to deal with his/her right. The judgment of the first stage has binding force on the parties to the lawsuit, the plaintiff consumer organization, and the defendant business entities or persons. The force also extends to the other qualified consumer organizations. The effect of the first stage judgment extends to background consumers who have rights based on the critical issues that are the subject matter of the first stage lawsuit, only when the plaintiff consumer organization wins the case. For substantial assurance of the opportunity for participation by the consumers, individual notification and/or publication is to be given or performed on and immediately after the commencement of the second stage lawsuit.

(3) The plaintiff to be is limited to qualified consumer organizations, with new regulations on their duties, responsibilities, and requirements, such as the lawyer's involvement, authorized by the Government.

(4) The cases for the new regime, which are exceptional civil proceedings, are to be limited in ways both general and specific. Generally, the case for the new regime must involve the homogeneous rights of many consumers against corporations, companies, organizations, businesses, or professional individuals. It is also required that the defendant grasp all the interests at stake that involve the subject matter of the lawsuit through both stages for the appropriate protection of the defendant, since the judgment extends to consumers in the range specified when the defendant loses the first stage lawsuit. Specifically, types of cases or rights of consumers for which the new regime is available are to be listed. The types are the following: one on the conclusion of contracts based on false or exaggerating advertisement; one on the conclusion of contracts through identical or similar ways of unfair or illicit solicitation; one on unfair contract terms; one on defective goods or services; and so on. Arguably, the regime is to be available for cases of the purchase of stocks based on securities reports containing false statements, or on the loss, leaking, theft or misuse of the collected personal information of consumers.

(5) Issues that are matters to be confirmed in the first stage must be of common nature among the potential right-holder consumers and should have predominance or critical importance in realizing the rights of consumers.

<Outline of the Procedure>

The First Stage

A qualified consumer organization files a lawsuit

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The court examines common issues

↓

Judgment on the common issues

(↓)

Appeal against the judgment

Fixed judgment

The Second Stage

The qualified consumer organization files a lawsuit to the same court

↓

The commencement of proceeding

↓

Notification and publication to the individual consumers

↓

The consumers participate in the proceedings

↓

Ruling on the individual rights through simplified procedure

(↓)

Objections

(↓)

The court examines through ordinary civil procedure

(↓)

Judgment rendered

Appeal

Fixed judgment

(↓)

Enforcement

It is planned that the Government will propose a bill to the Diet in its regular session of 2012, based on the mandates of the Consumer Master Plan endorsed in 2010 and revised in 2011 by the Cabinet.

IV Revision of the Civil Code and Introduction of the Concept of Consumer or Consumer Contracts into the Civil Code

Lastly, I would like to mention another legislative project in relation to private consumer law, although it is not quite in the category of consumer protection. It concerns the ongoing deliberations on the revision of the Civil Code, specifically reform of the law of contracts, obligations in general, and related systems in the part of general provisions.

The Legislative Council of the Ministry of Justice, Subcommittee on Civil Code (obligations and related matters), has been working on the project since November 2009. In April 2011, an interim report was publicized for public comment, which specifies issues to be examined further in addition to possible topics for the revision. The Subcommittee continues to work, and an interim draft is expected to be publicized in 2013.

One of the many issues on the table is whether the concept of consumer and/or consumer contracts should be introduced into the Civil Code or provisions specific to consumers or consumer contracts should be in a separate special act or acts. Two observations are made here.

The first concerns the future of consumer law. We already have a separate act on consumer contact of a general nature in the sense that it covers all types of consumer contracts excluding labor contracts. However, it is incomplete in the sense that it covers only the defect of declaration of intention at the conclusion of a contact and unfair contract terms with general provision and a poor list of particular per se void clauses (black list). If we choose to introduce the concept of consumer or consumer contracts with rules specific to them, adjustments are required. One possible way is to remove substantive rules from the Consumer Contract Act and instead make a special legislation on Actions by the Consumer Organizations. On the contrary, if we choose to leave the specific rules to consumers or consumer contracts outside the Civil Code, the developments, legislative in particular, will be made on the basis of the current Consumer Contract Act. One consideration is which way is best or better for future developments of consumer laws and consumer protection. One might say that the Consumer Contract Act is still a baby to be brought up appropriately. The ultimate image might be that of a Consumer Code as a complex of various rules that are substantive, proce-

dural, private, administrative, and criminal.

The second concerns the image of the Civil Code. It relates to our view on both current and future society. The Civil Code is a fundamental law in the area of private law and is sometimes described as the Constitution of the Civil Society. It is fundamental in the legal sense that it provides basic general rules that apply regardless of the category of persons, types of transactions, places, or any indications of parts. One argument is that the fundamental, basic, and general nature of the Civil Code should be maintained. The other argument is that consumers and consumer contracts have become a concept that has broad and general implications for relations in contemporary society. There is no natural person who is not a consumer nor involved in consumer transactions. Furthermore, the Civil Code should be perceived as a fundamental law of contemporary society that does not contradict the realization of the systemization of consumer-related rules in the Consumer Code.

V Concluding Remarks

Consumer law covers wide range of questions. The two topics I chose for my presentation, judicial development on the unfair contract terms in the real property lease agreement and legislative work on the establishment of a new regime of the collective action, are only fragments of the recent developments in consumer law. However, I hope that my presentation gives you some idea of what is happening in the area of consumer law in Japan.

We note the coincidence that the three countries, China, Korea and Japan, are all working on the revision of the Civil Code. I believe the inclusion of the concept of consumers and/or consumer contracts in the Civil Code is an issue we have in common. In this respect, I hope my presentation provides a sound basis for further discussion.

Session 2 Recent Trend in Criminal Procedure

Trust and Confidence In The Judiciary
— Open the door of the judiciary —

Prof. Sang Won LEE*

I. Introduction

Our human history shows us that more and more people have joined the power group, from aristocrats to ordinary people. Especially, democracy in modern days has drastically enlarged the border of the power group and now most of the democratic constitutions have provisions declaring the sovereignty of the people. The Korean Constitution also stipulates that the sovereignty of the Republic of Korea shall reside in the people and all state authority shall emanate from the people.[1]

The sovereignty of the people is now acquiring actual and substantial meaning owing to the development of modern technology such as the Internet. For example, with the help of the Internet, people or the public can communicate reciprocally, share their ideas, accumulate their power, stand up together, and change what they want to change. People are no longer a mere abstract group or mass. They have actual power. They are the power.

In the absence of sufficient support from the public, state agencies can neither flourish nor function properly. On top of that, they cannot even survive without public support. This is clear to the political institutions like congress based on elections. Although the relationship between the public and the judiciary is not as clear as with the political branches, it is also true of the judiciary. Even in countries where judges are appointed rather than elected, public support is all the more essential because the judiciaries of those countries do not have direct democratic legitimacy.

Public support for the judiciary comes from its trust and confidence. If the public lack trust and confidence that the courts offer a fair, efficient and accessible forum for the resolution of disputes,[2] they will not support the judiciary. Without public support, the judiciary cannot perform its proper functions. This in turn decreases public trust and confidence, which results in less support. The judiciary caught in such a vicious circle cannot expect to function for long as an effective resolver of disputes, a respected issuer of punishments, or a

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1 Korean Constitution § 1.

2 *See* Dougherty et al., Evaluating Performance, 176.

valued deliberative body.[3] Such judiciary will lose legitimacy and power, and eventually vanish.

Recently Korea introduced the jury system in 2008 in the hope that it will bring more trust and confidence. This, however, is not the only effort for the Korean Judiciary. To mention recent efforts only, we can find several commissions or committees. First, the Supreme Court of Korea organized the Commission for Judicial System Development in 1993. This Commission proposed establishment of Municipal Courts, introduction of an examination process for a warrant of detention, establishment of the Patent Court and Administrative Court, and adoption of an apprentice judge system. Secondly, the executive branch set up the Globalization Committee in 1995 under the direction of the President. This Committee announced a plan for globalization legal services and education in the same year, which included increasing the number of successful candidates for the National Judicial Examination, strengthening public defense, and encouraging the growth of law firms. Thirdly, the Judicial Reform Promotion Committee was organized as a Presidential advisory group in 1999. The proposal of the committee included fair and expeditious judicial aid, higher quality legal services, and eradication of corruption. Fourthly, the Task Force Committee organized in the Ministry of Court Administration announced Judiciary Development Plans for the 21st century in 2000. These efforts gave a big progress in the Korean Judiciary and trials, but more drastic changes came with the Judicial Reform Committee. The Committee was organized in the Supreme Court in 2003 and produced a Reform Proposal regarding various fields of the Judiciary and trials in 2004. In the aftermath of the Committee a Presidential Committee on Judicial Reform was organized. This Committee focused on fairer and more human-right-protecting judiciary with more openness and transparency. The Committee proposed various judicial reform plans including establishment of law schools, promoting citizen participation in the judicial proceedings, and reforming criminal justice system. The current law school system and jury system are the products of this proposal, and the amendment of the Criminal Procedure Act in 2007 was also one of the fruits of the proposal. This amendment was one of the biggest and aims at expansion of the human rights.

Among all the above, this study will address more recent reforms or changes in the Korean Judiciary and trial systems during the past decade, will try to find what is a common trait in them and will suggest a theoretical hypothesis explaining the relationship between the common feature and the trust and confidence in the Judiciary.

II. Recent Changes in Korea

1. Changes

(1) Civil Procedure focused on Oral Hearing

Korean civil trial system had long heavily relied on documents rather than oral argument

3 *See* Rottman & Tomkins, Trust and Confidence, 24.

in courtrooms. It gave some efficiency and expedition to trials. However, these document-based trials made proceedings in courtrooms nothing but formal procedure to submit documents. The efforts to make trials substantial proceedings led to changing the fundamental structure of civil trials. The courts all over the country adopted "the New Case Management Model" in 2001 and this was legislated in the Civil Procedure Act through the amendment of 2002.

The core of this New Model resides in oral hearing (口述審理), that is, Argumentation and Proving by verbal language rather than written language. In many cases, of course, we cannot reach the proper conclusion if trials are based on oral hearings only. The New Model tries to harmonize verbal hearings and documentary hearings (書面審理). The features of this model include: (i) to distinguish between verbal proceedings and documentary proceedings; (ii) to divide the procedure into two phases (inside and outside the courtroom) and let parties offer evidences outside the courtroom; (iii) to concentrate on key issues in courtroom proceedings; (iv) to pursue "trials with replete hearings" and "trials with sufficient explanations"; and (iv) to give parties ample opportunities to cross examine the witnesses.[4]

(2) Trial Priority Principle in Criminal Procedure

Criminal procedure in a broader sense includes investigation, trial and execution. It has been a solid principle since the first enactment of Korean Criminal Procedure Act that it should be decided in the courtroom whether a person has committed a crime and what penalty he deserves.[5] The Supreme Court ruled in as early as 1955 that an out-of-court statement of a third party does not have probative value if the declarant denies the truth of the statement as a witness in a courtroom.[6] This shows statements offered in courtrooms outweigh those made outside the courtrooms.

Even though courtroom proceedings were deemed more important theoretically, the reality was somewhat different. In reality, similarly to civil procedure, criminal trial system also heavily relied on documents, most of which made or gathered by investigatory agencies. Prosecutors submitted all the investigative records when they submit indictments. This allowed judges to be informed of the prosecutor's side of the story prior to that of the defendant. Thus, judges encountered defendants with some sort of bias from the first stage of the case.

Korean Judiciary tried to overcome this sad reality. The Rules of Criminal Procedure of 1982 stipulated the rule that evidentiary records may not be submitted when presenting the case for prosecution (公訴狀一本主義). Several other efforts were made. However, they could not change the long working practice of document-oriented criminal procedure. Since around 2002, more substantial and practical efforts have been made under the leadership of the Judiciary. Among all these efforts, the amendment of Criminal Procedure Act in 2007 was

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4 *See* Oral Hearing Manual, 19-28.

5 The Gist of Criminal Procedure Act at the time shows this. *See* Legislation Data, 14. *See also* Shin, How, 3-6.

6 *See* KSC 1955. 2. 4. 4287hyungsang17.

the most extensive and important so far.

To pick up one of the most distinctive characteristics of the amendment, I would point out without hesitation that it has moved the core of the criminal procedure from substantially closed rooms of police officers, prosecutors, and judges to open courtrooms. This is known as "Trial Priority Principle" (公判中心主義). Instead of investigatory documents, oral arguments and proving process in courtrooms became crucial to the conclusion, that is, conviction and sentencing. Defendants and their counsels have more opportunities to access the substance of the procedure.

Meanwhile, the amendment of 2007 stipulates several provisions helping victims to participate in the relevant criminal procedure. Presence of persons with reliable relationship,[7] examination of witness through video or other transmission system,[8] notice to the victims,[9] victim's rights to make statements,[10] victim's rights for perusal and copying of the trial records[11] are the provisions added or revised by the amendment. In addition, a newly passed amendment to the Act for Protection of Youths against Sexual Assault introduced the victim counsel system. According to this Act, victims under the age of 19 children have the right to counsel in the relevant criminal procedure and, if no counsel is available, the prosecutor can appoint a victim counsel ex officio.[12]

(3) Examination for Warrant of Detention

The above two[13] gave both civil and criminal procedures structural changes, resulting in fundamental changes. Recently Korea has also witnessed other changes, which are not so extensive but not less important. The revision of warrant proceedings is one of them.

In Korea, suspects against whom a warrant of detention was requested did not have the right to see judges in order to plead his cases. Judges got the necessary information only from the documents mainly gathered by the police or prosecution. The amendment of the Criminal Procedure Act in 1995 bestowed the opportunity to see a judge upon the suspects. The Act gave judges the discretion whether to see the suspects but the Rules of Criminal Procedure revised after the amendment of the Act provided that judges should see the suspects with a few exceptions. This was revised again in 1997 due to the effort of investigative agencies. The Criminal Procedure Act of 1997 allowed the suspects to choose whether to see a judge or not. This seemed to give more freedom to the suspects and protect more human rights. In reality, however, it was retrogression in human rights because many suspects waived their rights to see a judge. There was some doubt about whether those waivers were solely voluntary. The

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7 *See* Criminal Procedure Act § 163-2.

8 *See id*. at § 165-2.

9 *See id*. at § 259-2.

10 *See id*. at § 294-2.

11 *See id*. at § 294-4

12 *See* Act for the Protection of Youths against Sexual Assault § 18-6. This amendment was passed on August 23, 2011 at the National Assembly and is expecting promulgation by the President.

13 *See supra* (1) and (2).

amendment of the Act in 2007 made hearings mandatory and judges should see the suspects in all cases. Now Korea has a 'full-scale warrant examination system' (全面的 令狀實質審査制度).

(4) Citizen Participatory Trial

Korea introduced Citizen Participatory Trial (國民參與裁判) with the enactment of the Act on Citizen Participation in Criminal Trial in 2007.

The Korean Participatory Trial can be characterized as follows: (i) it is not allowed to every criminal case, and it is allowed to some crimes most of which are serious crimes (eligible cases);[14] (ii) jurors are selected from among lay citizens (qualification of jurors);[15] (iii) jurors have the power not only to find facts but also to present opinions about law and sentencing (power of jurors);[16] (iv) the jury may deliver a verdict if it reaches a unanimous verdict or may deliver a verdict by the majority decision after having heard judges' opinions (delivery of verdict);[17] (v) upon a guilty verdict, jurors debate sentencing with judges and give their opinions (sentencing debate);[18] and (vi) verdicts and opinions of the jury have no binding force but have mere advisory force (effect of verdict).[19]

Thus, the Korean Participatory Trial is a unique system different from both Anglo-American jury system(陪審制) and German lay-judge system(參審制). On the one hand, it is similar to the jury system in that the jury reaches the verdict independently from judges. On the other hand, it is similar to lay-judge system in that the jury shall hear the opinions of judges in the cases of split verdicts or sentencing debates. In addition, it is a revised jury system in that the jury verdict has no binding force.[20]

(5) Sentencing Guidelines

The needs for fair, objective and predictable sentencing resulted in the amendment of the Court Organization Act in 2007.[21] It created the Sentencing Commission as an independent agency of the judicial branch of the government. The Commission has been establishing sentencing guidelines one by one. The Commission of the first term established sentencing guidelines on such crimes as homicides, bribery, sex crimes, perjury, slandering (false accusation), embezzlement, misappropriation and robbery. These guidelines took effect on July 1, 2009. The Commission of the second term established sentencing guidelines on such crimes as kidnapping, fraud, theft, forgery, obstruction of justice, health crimes and narcotic crimes on the one hand, and revised some of the first term guidelines on the other hand. Now the

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14 *See* Act on Citizen Participation in Criminal Trials § 5.

15 *See id*. at § 16.

16 *See id*. at § 12.

17 *See id*. at § 46 ②,③.

18 *See id*. at § 46 ④.

19 *See id*. at § 46 ⑤.

20 *See* Participatory Trial, 14.

21 *See* Court Organization Act Chapter 8.

Commission is under its third term.

It is one of the most eminent features of the Korean sentencing guidelines that the guidelines classify a group of crimes with the same characteristics into several categories according to the severity, and set a basic class to each category providing a default range for sentencing, which has an aggravated class and a mitigated class. Thus, judges have still some discretion under the guidelines.

(6) Open Written Judgment and Trial Records

Scholars and lawyers have consistently argued that written judgment and trial records be made open. Several laws such as Official Information Disclosure Act and Rules of Judicial Information Disclosure, Civil Procedure Act and Rules of Civil Procedure, and Criminal Procedure Act and Rules of Criminal Procedure regulate the disclosure of written judgment or trial records. These laws allow access to the documents for not only the direct parties of a case but also a third party. Actually, the Korean Judiciary provides judicial information in various ways like Judicial Reports, Integrated Legal Information System (E-system), and Delivering Service of Judgments. However, these are provided within limited scope and on a request basis.[22]

Recent amendment to the Civil Procedure Act and the Criminal Procedure Act stipulate epoch-breaking provisions.[23] These provide that all the written judgments be posted on the Internet in principle. The Criminal Procedure Act goes further to provide that the court shall make public on the Internet the evidence lists, etc. The eminent points of the amendments are: (i) the amendments regulate only the closed cases; (ii) they expand the scope of disclosure to all cases (in principle); (iii) they provide for general disclosure rather than disclosure on request basis; and (iv) they ask the disclosure of not only written judgments but also part of trial records.

2. Common Feature of Changes

Although the changes as seen in the above took place in various fields and seem diverse in nature, we can find common features. This article will focus on the feature of “openness,” that is, to make the Judiciary wider open.

The civil procedure focused on oral hearing will show the process for the substance of the case to be formed. It will make the parties to participate actively in the procedure by giving them more opportunities to argue or prove. This will make the process of adjudication open to the parties.

The Criminal Procedure with Trial Priority has similar effect. It will give the defendant or his counsel more opportunities to participate in the process by making judges hear directly in the courtroom rather than read documents in their office rooms. The defendant or his coun-

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22 Records of Closed Criminal Trials Act (刑事確定訴訟記錄法) of Japan is not different in this regard.

23 These amendments were promulgated on July 18, 2011 and will take effect on 2013, 2014 or 2015 according to cases.

sel will be able to see how the substance of the case is being formed and even able to assess what the judge is thinking. It means that the process of adjudication becomes open to the defendant and his counsel. Similarly, the participation of victims in the criminal procedure leads to openness to the victims.

Examination procedure for a warrant will give the suspect to participate in the process, which will make the procedure open to the suspect.

The Citizen Participatory Trial has fundamental difference in that citizens participate in the procedure as the subject of the trial rather than an object of the trial. Citizens have the same status as judges. This is the strongest form of participation. Although the verdicts or opinions of the jury have only advisory force, it is substantially very strong force because the Supreme Court banned appellate courts from easily reversing the verdicts of trial court juries.[24] In addition, a court may have alternative jurors up to five, although the number of jurors is originally from five to nine according to cases. Furthermore, court practices increased the number of substantial jurors by having shadow jurors. Thus, many citizens have the opportunity to participate in criminal trials as legal jurors or practical juror, which means the scope of openness becomes wider and wider.

Sentencing guidelines have strong effect of making public the adjudicative process. Traditionally, sentencing has been deemed to belong to the inherent realm of judicial discretion. Sentencing guidelines impose external regulation to the judicial discretion. Judges lose some of their discretion and have to open the secret castle to the public. The sentencing guidelines of Korea are not mandatory. However, judges shall respect the guidelines when sentencing and shall provide the reason in written judgments if they deviate from the guidelines.[25] Hence, the fact that the guidelines are not legally binding does not weaken the degree of openness effect.

Recent amendments about the disclosure of written judgment and trial records brought qualitative change in the range of open adjudication. Considering the widespread characteristic of the Internet, it can be well said that at least written judgments will be under unlimited disclosure.

Thus, we can find a common feature in the changes during the last decade, which is “to make trials and adjudication open.” There are some differences in the scope or meaning of the openness among cases, though. The following chart shows it.

Changes	To whom open	Meaning	Way to open	When changed
warrant examination	suspects	guarantee of the right to see a judge	involvement	1997-2008
oral hearing in civil procedure	parties	participation	involvement	2008
trial priority in criminal procedure	parties, victims	participation	involvement	2008

24 *See* KSC 2010. 3. 25. 2009do14065.

25 *See* Court Organization Act § 81-7.

Changes	To whom open	Meaning	Way to open	When changed
citizen participation trial	citizens	participation	involvement	2008
sentencing guidelines	public	opening the process	knowledge	2009
disclosure of judgments & records	public	opening the adjudication	knowledge	2011

III. Open Judiciary and Trust

1. Trust and Confidence

(1) Two Dimensions of Trust

"Trust" in a traditional political meaning has been understood as a fiduciary concept involving whether government has fulfilled its responsibility to the people to operate according to their normative expectations.[26] People trust political actors or institutions when they believe they will act "as they should."[27]

In contrast, we can also reach the concept that people believe political institutions act competently in the sense that they are able to perform the functions legally or constitutionally assigned to them. Some call this "confidence"[28] and others call this "a second dimension of trust."[29]

Anyway, 'trust' focuses on moral commitment that the government does not betray the people, while 'confidence' or 'the second dimension of trust' focuses on the ability of the government to perform its functions. It is the same to judiciaries. People trust the judiciary when they believe fair trials and justice in the judiciary. Public confidence in the judiciary depends on the competence of the judiciary to fair trials and justice.

This paper will sometimes call just 'trust' to indicate the both concept together, while noting the subtle difference of the two dimensions.

(2) Constituents of Trust

The maxim "justice should not only be done, but should be seen to be done" suggests that public trust in the judiciary is based more on the subjective belief than on the objective fact that the judiciary is doing justice. Some even say that there is no guarantee that public perceptions reflect actual court performance.[30]

Exactly what of the judiciary people trust in when they are said to trust in the judiciary? It is worthwhile to refer the Trial Court Performance Standards made by the Commission on

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26 *See* Ulbig, Politics, 792; Dougherty et al., Evaluating Performance, 178-179.

27 *See* Barber, Trust; Citrin & Muste, Trust (*cited from* Dougherty et al., Evaluating Performance, 178).

28 *See* Dougherty et al., Evaluating Performance, 178.

29 *See* Levi & Stoker, Trust, 476.

30 *See* Court Standards Commentary, 20.

Trial Court Performance under NCSC[31] and BJA[32] of the USA. The Commission suggested 22 performance standards in five performance areas: (i) Access to Justice; (ii) Expedition and Timeliness; (iii) Equality, Fairness, and Integrity; (iv) Independence and Accountability; and (v) Public Trust and Confidence.[33] Among the five areas, the fifth (v) is different from the other four areas in that it is a subjective criterion whereas the others are objective.

The Commission suggested three standards in the Public Trust and Confidence area: (i) the public perceives the trial court and the justice it delivers as accessible (Accessibility); (ii) the public has trust and confidence that basic trial court functions are conducted expeditiously and fairly, and that court decisions have integrity (Expeditious, Fair, and Reliable Court); (iii) the public perceives the trial court as independent, not unduly influenced by other components of government, and accountable (Judicial Independence and Accountability).[34] The objects of the public perception are the properties courts ought to have. Hence, the stronger the public's belief in those properties is, the stronger is the public's trust in the judiciary.

(3) Perception and Trust

Perception comes from the awareness of courts, that is, the information about courts. A research analyzed the citizen awareness into three measures: (i) attentiveness (how often she receives information about courts from news sources); (ii) knowledge (how much she knows about courts); and (iii) involvement (whether she has direct court experience such as jury experience).[35]

To say from a commonsense, the higher the degree of the awareness of courts is, the higher one can estimate the degree of trust in courts. However, there are several studies about this issue with inconsistent conclusions. With regard to attentiveness, some found strong positive relationship between attentiveness to U.S. Supreme Court proceedings and support for the Court;[36] other studies found no relationship between attentiveness and support for courts.[37] In regard to knowledge, some studies found that citizens who know more about courts have more favorable attitudes toward courts, others found that those who reports a higher level of knowledge about the courts expressed lower confidence in courts.[38] Finally, involvement has mixed conclusion, too. Some found that involvement reduces confidence,[39]

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31 National Center for State Courts.

32 Bureau of Justice Assistance.

33 *See* Court Standards Commentary, 7-22; Court Standards Measurement, 3-6.

34 *See* Court Standards Commentary, 20-22; Court Standards Measurement, 5-6.

35 *See* Dougherty et al., Evaluating Performance, 181, 185-86.

36 *See* Caldeira & Gibson, Public Support.

37 *See* Olson & Huth, Public Attitude; Lehne & Reynolds, Judicial Activism. These studies were about courts at local level.

38 *See* NCSC Survey, 18.

39 *See* NCSC Survey, 18. This research does not directly say this and just suggests that prior involvement with the courts increases knowledge of the courts. However, the negative relationship between involve-

others found no difference,[40] or a polarizing effect,[41] another found people with direct experience have higher levels of support for courts.[42]

How can we understand those seemingly contradictory studies?

2. Information and Trust

(1) Basic Theory

People have some degree of trust even to unknown objects lacking information. We can call this level of trust "general trust." If people get additional positive information on the object's trustworthiness, then the degree of trust increases; while it decreases at additional negative information. This additional trust based on concrete information can be called "information-dependent trust."[43]

A study found that general trust varies from person to person and that this difference influences the sensitivity to additional information. The study classified people into two groups: one with higher general trust and the other with lower general trust. It reached following conclusions: (i) people with higher general trust tend to have higher trust in the object when no information is available; (ii) if positive information is given, both groups increase their trust but no big difference is found between the degrees of the increases; (iii) if negative information is given, both groups decrease their trust and people with higher general trust decrease more trust than people with lower general trust.[44]

This theory can be applied to the judiciary. The general trust in the judiciary might be estimated as similar to the trust in governmental institutions in general. Additional positive information on courts will increase the level of trust and negative information will decrease it. People with higher trust in the judiciary will reduces their trust a lot when they get negative information.

(2) Hypothesis of Virtuous Circle

(A) Provision of Positive Information

Let's say the degree of general trust is 50. The following graph shows changes of trust level according to provision of additional information. Additional information has polarized influence on trust.

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ment and confidence can be inferred from its finding of the negative relation between knowledge and confidence and from the finding of the positive relation between involvement and knowledge.

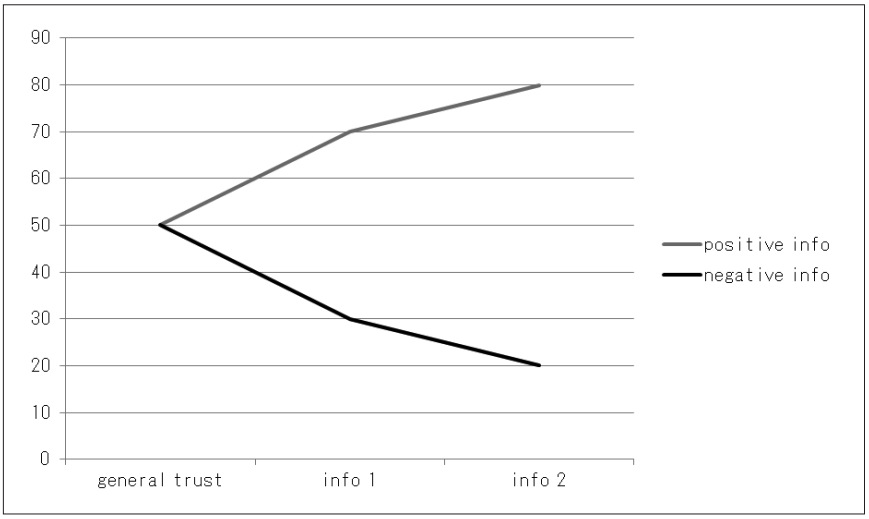
40 *See* Kritzer & Voelker, Wisconsin.

41 *See* Howell, Louisiana.

42 *See* Olsen & Huth, Public Attitude.

43 *See* Trust Structure, 83.

44 *See id*. at 81-86, 217-34.



To make the judicial process open is to give information on the judicial process. Just like provision of additional information, it has polarized influence to open the judicial process. This seems to lead to the conclusion that the judiciary should control the information and open the positive information only in order to get more trust.

(B) Short-term Trust and Long-term Trust

The above control policy would bring effective results if the judiciary could control information forever. At the end of the day, however, people will get the controlled information by some way or other. In addition, they will get to know the fact that the judiciary had controlled the information. This will work as strong negative information, leading to drastic falling of the trust in the judiciary. Thus, information control might increase short-term trust but will definitely result in fallen trust in the long run.

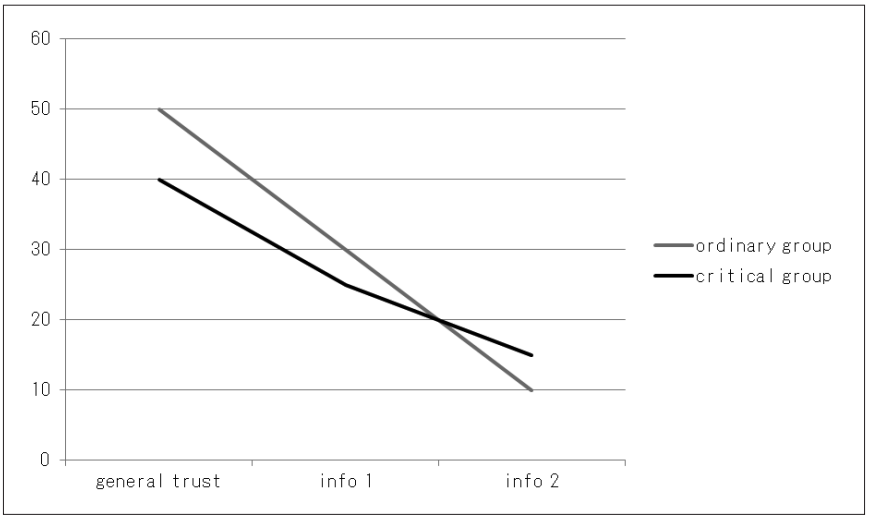
Rather, it can increase the long-term trust to provide even negative information. The judiciary disclosing negative information will make its efforts to overcome the demerits, which results in positive development of the judiciary.

Furthermore, it does not always bring the decrease of short-term trust to provide negative information. The very fact that the judiciary opens voluntarily even negative information produces the images that the judiciary pursues transparent justice and that the negative fact was not intentional but just a mistake. These images might work as positive information. Of course, the positive effect of the negative information on short-term trust is usually weaker than the negative effect. However, it is true that this mitigates the degree of trust loss and positive information is accumulated for long-term trust.

(C) Overestimation of Critical Group

Maybe the fear of critical group is one of the main reasons why the judiciary hesitates to open its information because critical people tend to be ready to attack the judiciary.

However, the fear is groundless. The critical group has lower general trust in the judiciary. The basic theory shows how trust changes at additional negative information as follows.



Even though the initiative trust of critical group is lower than that of ordinary group, the critical group is not so much influenced as the ordinary group by additional negative information, and it is possible for the critical group to trust in the judiciary more than the ordinary group at the end of the day.

The judiciary does not have to be afraid of the existence of critical group.

(D) Procedural Justice

Wider openness of the judiciary makes people think it transparent. Transparency is one of most important constituents of procedural justice. Many studies found that procedural justice is more crucial for judicial trust than substantial justice.

Open judiciary will bring higher trust.

(E) Effects of Involvement

Jurors participating in trials stands in similar position. People tend to feel empathy or sympathy for those in a similar situation. Jurors easily understand judges' thoughts and deeds, which leads to supports for courts.

Participatory Trial will increase the trust in the judiciary.

IV. Conclusion

There are various constituents of trust in the judiciary. Among those constituents, this paper notes openness of the judicial process. This paper also finds a common feature or consistent tendency, to make the judicial process wider open, out of recent changes or reforma-

tion regarding judicial procedures of Korea.

This paper suggested a hypothesis that the more open the judicial process, the more trust the judiciary gets. According to this hypothesis, Korea's recent changes will bring higher trust in the judiciary.

It is a 'hypothesis' in that it needs verification by statistics. It is strongly recommended for the judiciary to conduct statistical research on a regular basis and to make the result open to the public in turn.

Let's see what will happen.

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Session 2 Recent Trend in Criminal Procedure

Japan's Citizen Participation System in Criminal Trials: Saiban-in and Its Operation

Prof. Yutaka OSAWA*

I Introduction

As the current trend common to China, Korea and Japan is to develop citizen participation in criminal trials, this paper focuses on "the saiban-in system", Japan's new system of citizen participation.

The saiban-in system came into effect in May 2009. Under this system, a mixed panel of 6 lay assessors and 3 professional judges hears serious criminal cases and determines guilt and sentence.

Saiban-in is not Japan's first effort to include citizen participation in criminal trials. In the prewar era, Japan had a jury system, which differed from the saiban-in system in several important ways.

This paper will first outline the historical development of citizen participation in Japan and explain the main characteristics of the newly introduced saiban-in system. Then, the saiban-in system will be compared with the Chinese and Korean systems. Following, an overview of the operations within the saiban-in system and its impact on Japanese criminal procedure will be discussed.

II Outline of the Saiban-in System

A. The Old Jury System

The old jury system was introduced in the Jury Law (Baishin-hō), which was enacted in 1923.[1] Under this law, jury trials were conducted from 1928 to 1943. The main characteristics of this prewar jury system include:

- Panel: A jury panel composing of 12 lay jurors heard serious criminal cases and deliberated on guilt independently from professional judges.
- Eligible Cases: The cases to be tried by a jury were limited to contested cases involving two categories of offenses including: 1) offenses punishable by death or life imprisonment (hōtei baishin jiken); and 2) offenses punishable by imprisonment of 3 years or more (seikyū baishin jiken). Cases involving the first category of offenses were by law

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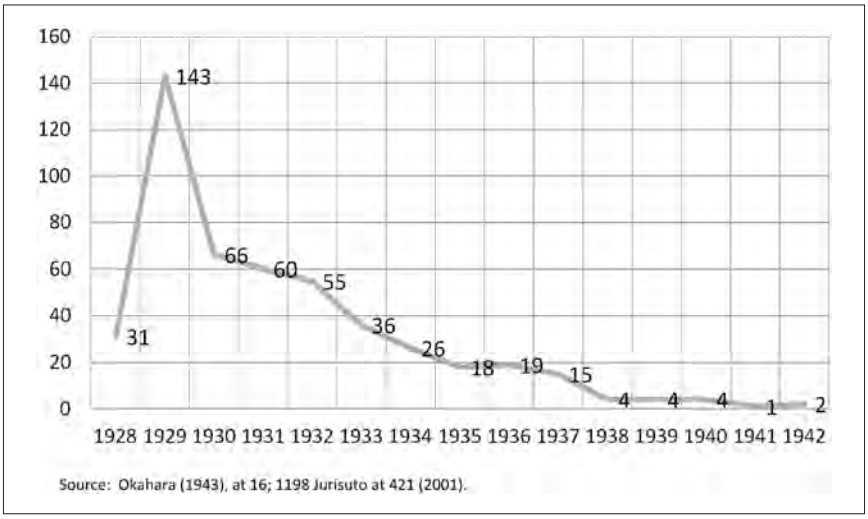
1 Law No.50 of 1923.

Figure 1: Number of Cases Tried by Old Jury 1928~1942



designated to be tried by jury. In the latter, defendants had right to request jury trials.

- Waiver: Defendants charged with eligible offenses for jury trials could, by waiving the right to jury trials, select trials by professional judges.
- Binding Power of Verdicts: If judges disagreed with a jury verdict, they could reject the verdict and empanel a new jury to retry the case.

Figure 1 shows the number of cases tried by the old jury. A peak number of 143 cases were tried in 1929, but numbers declined sharply every year following. Finally, in 1943, the Law was suspended in the middle of the war.

B. The Saiban-in System

In the process of postwar judicial reform, revival or re-adoption of the jury system was considered, but no agreements were reached.[2] As a result, until recently, professional judges have exclusively handled criminal trials in Japan. However, in 1999, the Justice System Reform Council was established under the cabinet for the following purpose:

> to clarify the role to be played by justice in the Japanese society in the 21st century; and to examine and deliberate fundamental measures necessary for …… reforms of the justice system as well as improvements in the infrastructure of that system.[3]

After intensive investigation and deliberation over nearly two years, the Council issued a comprehensive set of recommendations, which included the introduction of the new citizen

2 Art. 3(3) of the Saibansho Hō [Court Organization Law] (Law No.59 of 1947) provides, "The provision of this law shall in no way prevent the establishment of a jury system for criminal cases elsewhere by law".

3 Art.2 of the Shihōseido Kaikaku Shingikai Setti Hō [Justice System Reform Council Establishment Act] (Law No.68 of 1999). See, Recommendations (2001), Introduction. Concerning the Justice System Reform Council generally, see, Foote (2007); Whitepaper on Crime 2009, Part 6/Section 1/1.

participation system in criminal trials. In 2004, the law introducing the saiban-in system was enacted based on the recommendations of the Council.[4] Then, after a 5 years transition period, the saiban-in system came into operation on May 21, 2009.

Compared to the old jury system, the saiban-in system is quite different. Its characteristics include:

- Panel: A mixed panel composing of 6 lay assessors (saiban-in) and 3 professional judges hears serious criminal cases and jointly determines guilt and sentence. Lay assessors are selected for each specific case.
- Eligible Cases: The cases to be tried by saiban-in panels are, no matter whether they are contested or uncontested, cases involving two categories of offenses including: 1) offenses punishable by death or life imprisonment; and 2) offenses in which a victim died due to an intentional criminal act.
- Waiver: Defendants charged with the above eligible offenses are not permitted to refuse a saiban-in trial.
- Decision-making: The decision of a panel on guilt and sentencing shall be made by a majority vote, which includes at least one judge, and one lay assessor.

C. Forms of Citizen Participation

1. A Comparison with the Chinese and Korean Systems

Recently, China and Korea have also developed citizen participation in criminal trials.[5] However, the forms of citizen participation vary between countries (See Table 1).

In the prewar era, Japan adopted an all-lay jury system. Then, the postwar criminal justice system was largely influenced by the American system. However, the newly introduced saiban-in system, which shares commonalities with the Chinese system, follows the European mixed panel model, where laypersons and professional judges jointly determine guilt and sentence. On this main point, the Japanese system differs from the Korean system, which, in

Table 1: Forms of Citizen Participation

	Korean System	Chinese System	Japanese System
Panel Composition	All-lay Jury	Mixed Panel	Mixed Panel
Selection of Layperson	For Each Specific Case	5 Years' Term of Duty	For Each Specific Case

4 Saiban-in no Sanka-suru Keiji-saiban ni kansuru Hōritsu [Act concerning Criminal Trials in which Saiban-in Participate], Law No. 63 of 2004 [hereinafter Saiban-in Law].

5 Concerning the Korean system, see, Lee (2009).

principle, follows the all-lay jury model.

However, the Japanese mixed panel system is unique in its method of selecting lay assessors. For the purpose of providing the opportunity of participation to as many people as possible and avoiding excessive burden on those selected, lay assessors are selected for each specific case,[6] as with jurors in the United States. On this point, the Japanese system differs from the Chinese system as well as from the typical European mixed panel model, where lay judges serve for a certain term of duty and hear more than one case.

2. Reason for Japan's Preference of the Mixed Panel System

It was the most disputed issue in introducing a citizen participation system in Japan, whether to follow the all-lay jury model or the mixed panel model. Several reasons can be found as to why Japan finally adopted a mixed panel system. These include:

a. Confidence in Professional Judges

The most important factor underlying the adoption of the mixed panel system is the positive view on the roles of professional judges.[7] During the 1980s, Japan had 4 acquittals of death row inmates on retrials, which caused heavy criticism against the criminal justice system.[8] Some commentators viewed the convictions as resulting from the inherent bias held by professional judges in favor of government officials including public prosecutors. However, this view has not prevailed and was not shared by the Justice System Reform Council.

Generally, Japanese judges hold high reputations for fairness and accuracy in their decision-making. However, due to their diligence, these judges tend to pursue fairness and accuracy too far, which in the past has resulted in isolation from the public and in technical decisions that are hard for the general population to understand. This point seems to be of great concern to the aforementioned Justice System Reform Council.

If confidence in professional judges can be shared, there is no reason to exclude them from new adjudicating panels. Joint deliberations between judges and ordinary citizens can contribute to the resolution of the problems that professional judges bear. In addition, even when the citizen participation system is introduced in any form, the vast majority of criminal cases remain in the hands of professional judges. In order to have judicial decisions totally conform to a so-called sound common sense of ordinary citizens, the citizen participation system should enable professional judges to have communication with ordinary citizens.

b. The Need for Professional Support in Deliberations

The second reason is the practical need for professional support in deliberations. The citizen participation system focuses on serious criminal cases where fact scenario and the structure of proof are often complicated. In addition, Japanese penal law doctrines are highly elab-

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6 Recommendations (2001), Chap. IV /Part 1/1(2).

7 See, e.g., Katsuta (2010), at 518, 520.

8 See, Foote (1992).

orate. Without any professional support for lay assessors, it would be difficult to ensure their autonomous and meaningful participation in criminal adjudications.

c. The Need for Written Judgments with Reasons

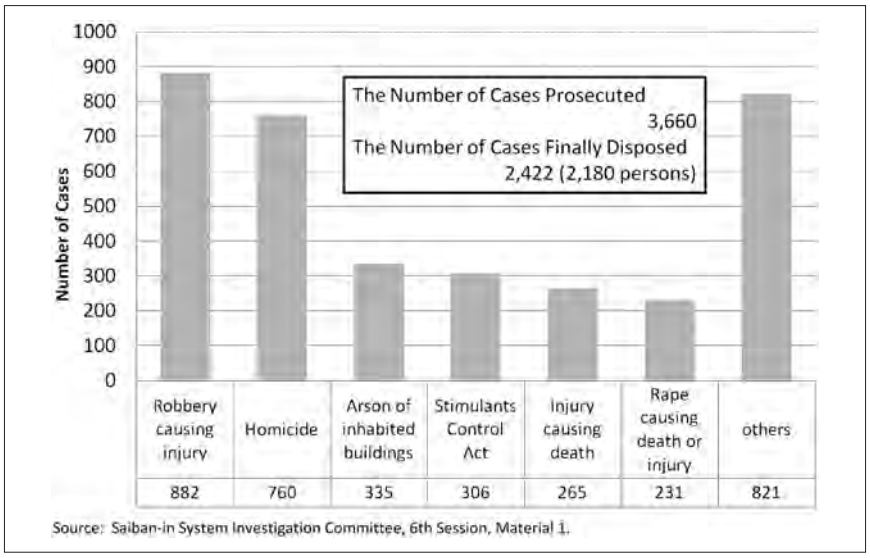
The third account is the need for written judgments with explanations. To promote the confidence of the public as well as the parties of the trials in judicial judgments, it is necessary that judgments set forth substantial reasons.[9] Without reasons, appellate review would be impossible. Under the all-lay jury system, no written explanations could be attached to verdicts, while, under the mixed panel system, judgments with reasons can be given,

III Operation of the Saiban-in System and Its Impact on Criminal Procedures

A. Prosecution

The Saiban-in Law came into force on May 21, 2009. The cases of eligible offenses prosecuted on or after this date shall be tried by saiban-in panels. Between the commencement of the new system and May 20, 2011 (a 2 year period), the number of cases prosecuted with eligible offenses for saiban-in trials has totaled 3,660, of which 2,422 cases (or, 2,180 persons) have been disposed.[10] Of the 3,660 cases prosecuted, as Figure 2 shows, cases of robbery causing injury are the largest in number, and are followed by homicide as well as arson of

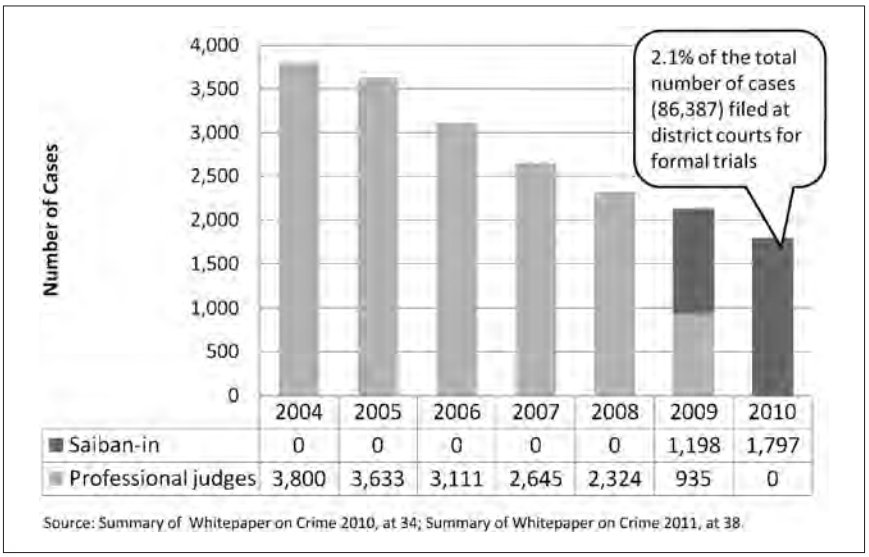
Figure 2: Number of Cases Prosecuted with Eligible Offenses for Saiban-in Trial: 2009/5/21~2011/5/20



9 Recommendations (2001), Chap. IV /Part 1/1(4).

10 Saiban-in System Investigation Committee, 6th Session, Material 1.

Figure 3: Number of Cases Prosecuted with Eligible Offenses for Saiban-in Trial



inhabited buildings.

Figure 3 shows the number of cases of offenses eligible for saiban-in trials, which were newly filed at district courts. In 2010, the first full year after the Saiban-in Law came into force, a total of 1,797 cases were filed at district courts. This number amounted to 2.1% of the total number of cases (86,387) that were filed at district courts for formal trial in the same year.[11]

As Figure 3 indicates, in recent years, the number of cases charged with eligible types of offenses for saiban-in trials remarkably declined. It is difficult to uncover the cause of this tendency from statistics alone. However, some commentators speculate that this decline is, at least in part, caused by public prosecutors' discretion to reduce charges from eligible offenses to lesser offenses.[12]

B. Trial and Trial Preparation

1. Trial

Table 2 shows the administration of trial procedure, comparing the cases handled by saiban-in panels with those handled by professional judges.[13]

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11 Supreme Court, Saiban-in, 2010, at 2.

12 See, e.g., Ibusuki (2010), at 50. For example, it is sometimes said that charges of rape resulting injury are reduced to charges of simple rape when the victims strongly dislike trials before saiban-in panels. Another possible reason to be speculated for charge reduction is to avoid overburden on legal professionals as well as laypersons to prepare and conduct saiban-in trials.

13 The trial by professional judges mean the trial of 1,572 defendants who were charged with the eligible

Table 2: Administration of Trials (Eligible Offenses for Saiban-in Trial)

Cases prosecuted before the date of the Saiban-in Law enforcement	Trials by Professional Judges 2009	Trials by Saiban-in Panels 2009	Trials by Saiban-in Panels 2010
The Average Period of Time from Prosecution to the 1st Trial Session	6.0 months	4.3 months	7.6 months
Uncontested Cases	4.9 months	4.2 months	6.7 months
Contested Cases	7.3 months	5.1 months	9.1 months
The Average Number of Trial Sessions	3.5	3.3	3.8
Uncontested Cases	2.7	3.2	3.5
Contested Cases	4.6	3.7	4.4
The Average Period of Time from the 1st Trial Session to Final Judgment	2.0 months	3.7 days	5.0 days
Uncontested Cases	1.3 months	3.5 days	4.1 days
Contested Cases	2.8 months	4.7 days	6.8 days
The Average Period of Time from Prosecution to Final Judgment	8.0 months	4.9 months	8.3 months
Uncontested Cases	6.2 months	4.8 months	7.4 months
Contested Cases	10.1 months	5.6 months	9.8 months

Source: Supreme Court, Criminal Cases, 2009, at 84-85; Supreme Court, Saiban-in, 2010, at 15.

To ensure the autonomous and meaningful participation of laypersons without casting unduly heavy burdens, it is necessary to make trials quick and easy to understand.[14]

In Japanese previous practice, trials were held at most a few times a month. As a result, trials lasted for months and, in some cases, for years. As Table 2 demonstrates, the average number of trial sessions held by professional judges was 3.5 sessions spread over a 2.0 month period.

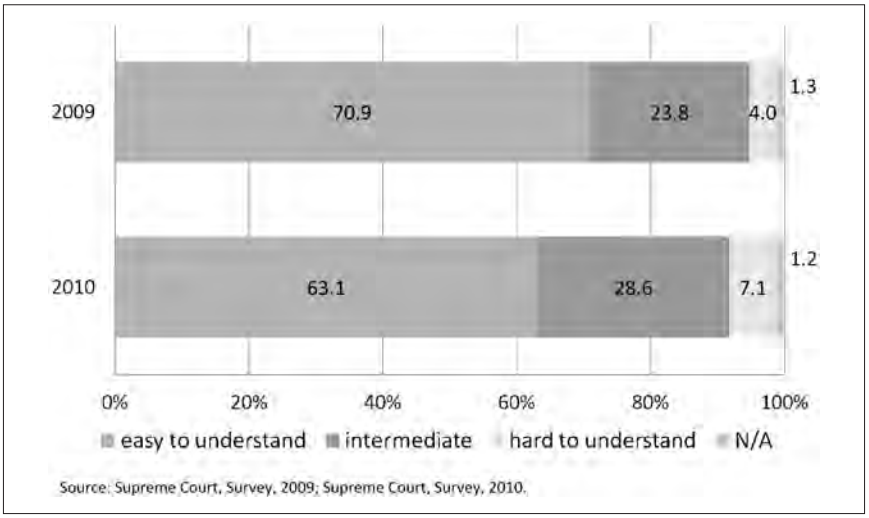
Under this practice, trials inevitably relied on written materials. Japanese criminal procedure law adopted the hearsay rule, which, in principle, excludes out-of-court statements from evidence. However, in practice, a large number of written statements prepared by investigators were introduced as evidence either with the consent of defendants, or as exceptions to the rule. When witnesses were examined in the courtroom, their testimonies were also written in trial records. Non-continuous trials did not prevent judges from making judgments, because they could examine trial records and written statements in their chambers at any time.

Citizen participation necessitated changing this previous practice. Because laypersons cannot be expected to examine long and detailed written statements and records, trials must be conducted orally by live testimonies and oral arguments. Judges and lay assessors must determine judgments based on what they see and hear in the courtroom rather than from written records. To ensure that memories are intact, and to lighten the burden of laypersons,

types of offense for saiban-in trials before the date of the Saiban-in Law enforcement and were finally disposed in 2009.

14 Recommendations (2001), Chap. IV /Part 1/1(4).

Figure 4: Result of the Post-trial Survey of Saiban-in:
Whether Easy or Hard to Understand the Trial



trials must be held consecutively without interruption.

According to Table 2, the average number of trial sessions held by saiban-in panels was 3.8 sessions in 2010, which is not significantly different from the number of sessions held by professional judges (3.3 sessions). But, in the same year, the average period of time from the first trial session to the final was 5.0 days, which is dramatically shorter than the trial period of professional judges.

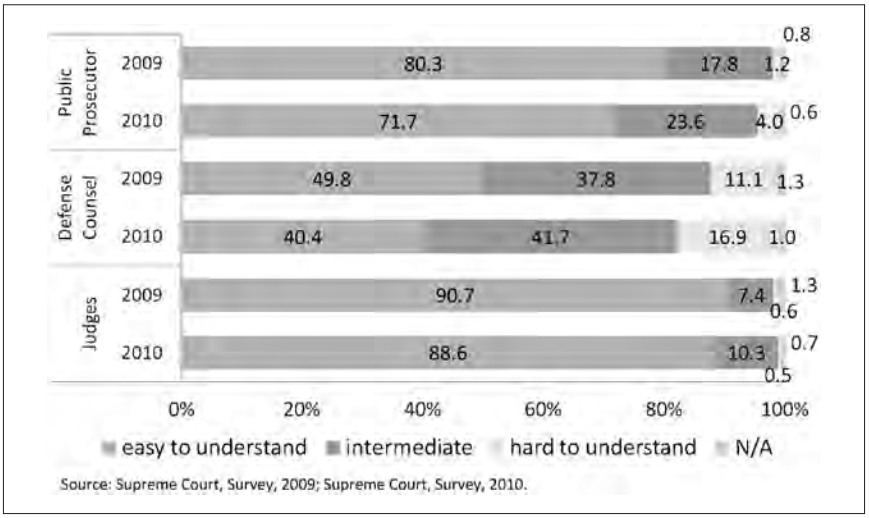
Figures 4 and 5 show the result of the post-trial survey assessing the saiban-in. Regarding the degrees of difficulty to understand the trial, as indicated in Figure 4, those who replied "easy to understand" accounted for 70.9% of respondents in 2009 and 63.1% in 2010. These numbers seem to reflect the efforts dedicated by all three branches of legal professionals.

However, as shown in Figure 5, differences are found when assessing the degrees of difficulty in understanding the arguments and explanations of judges, public prosecutors and defense counsels. While most of lay assessors felt that the arguments and explanations of prosecutors and judges were "easy to understand", less than half of the respondents felt that the arguments and explanations of defense counsels were "easy to understand".

Some reasons for the above results can be speculated. The first is a gap in trainings between those participating in saiban-in trials. Defense counsels as private attorneys have not undergone such systematic trainings as judges and public prosecutors.[15] The second comes from the mission of defense counsels. Defense counsels must argue the explanations provided by whomever they are defending. Defendants' explanations are not always rational, which can cause the arguments of defense counsels to be difficult to understand.

15 See, e.g., Ibusuki (2010), at 47.

Figure 5: Result of the Post-trial Survey of Saiban-in:
Whether Easy or Hard to Understand Legal Professionals' Arguments and Explanations



2. Pretrial Conference

In order to conduct trials in a concentrated fashion, it is indispensible to set up an effective trial plan in advance. Therefore, when the eligible cases for saiban-in trials are prosecuted, they are all brought to a pretrial conference procedure.[16] There, in order for trials to be intensive and systematic, the court clarifies the main points of the case, determines the evidence to be examined and how the examination will take place.

Table 3 shows the administration of pretrial conferences, comparing the cases handled by saiban-in panels with those handled by professional judges. Because saiban-in trials are con-

Table 3: Administration of Pretrial Conferences (Eligible Offenses for Saiban-in Trial)

	Cases Tried By Professional Judges 2009	Cases Tried by Saiban-in Panels	
		2009	2010
The Average Number of Pretrial Conference Sessions	3.1	2.6	4.4
Uncontested Cases	2.3	2.6	3.6
Contested cases	4.1	3.0	5.8
The Average Period of Time to Complete Pretrial	4.3 months	2.8 months	5.5 months
Uncontested Cases	3.4 months	2.8 months	4.8 months
Contested Cases	5.4 months	3.1 months	6.8 months

Source: Supreme Court, Criminal Cases, 2009, at 84-85; Supreme Court, Saiban-in, 2010, at 15.

16 Art. 49 of the Saiban-in Law.

ducted in a concentrated manner, their preparation must be more careful. Therefore, the period of time for pretrial conferences tends to be longer in cases tried by saiban-in panels. However, once a saiban-in trial starts, it is conducted in consecutive days. As Table 2 indicates, these trials take a much shorter period of time than those adjudicated by professional judges. As a result, for the present, the total period of time from prosecutions to final judgments does not greatly differ between the cases tried by saiban-in panels and those by professional judges.

3. Deliberations and Judgments

The autonomous and meaningful participation of lay assessors must be realized in the process of deliberations.[17] Under the saiban-in system, the determination of a panel must be made by a majority vote, which includes at least one judge and one lay assessor.[18] This requirement prevents judges from disregarding the opinions of lay assessors and helps to make the participation of laypersons more effective.

Regarding the effective participation of laypersons, strong skepticism has been expressed towards the mixed panel system.[19] Whether or not lay assessors can stand on an equal footing with professional judges and actually contribute to judicial decision-making has been questioned. Given the fact that saiban-in is selected only for one case, this concern may become more serious than within other mixed panel systems, where lay assessors can accumulate experiences to handle criminal cases by serving for a certain term of duty.

However, for the present, it seems that the risk of judicial domination over deliberations has been successfully controlled. Figures 6 and 7 show the results of the post-trial survey assessing the saiban-in. Regarding the atmosphere of deliberations, 83.1% of the respondents in 2009 and 77.3% in 2010 felt that it was “easy to speak.” Regarding the discussion, 75.8% in 2009 and 71.4% in 2010 replied that they could discuss sufficiently. Overall, judges seem highly sensitive about their conducts in deliberations.

Table 4 indicates the result of saiban-in trials until the end of April 2011 (a period approximating 1 year and 11 months). Of the 2,126 persons, 2,121 were convicted and 5 were fully acquitted.[20] Of the 2,121 persons convicted, 5 were sentenced to death and 43 to life imprisonment.

Citizen participation in sentencing is one of the important features of the saiban-in system. In Japan, the range of punishments provided by the Penal Code is quite broad. In the previous practice, it is said that professional judges have formed unwritten sentencing standards by integrating previous decisions.[21] In the saiban-in system, in order to help laypersons determine appropriate punishment, a computer database, which provides graphs and other

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17 Recommendations (2001), Chap. IV /Part 1/1(1).

18 Art. 67 of the Saiban-in Law. See also, Recommendations (2001), Chap. IV /Part 1/1(1).

19 See, e.g., Ito (2011), at 377.

20 The number of convicted persons includes the number of persons who were partly acquitted.

21 See, Supreme Court, Outline.

Figure 6: Result of the Post-trial Survey of Saiban-in:
Atmosphere of Deliberation

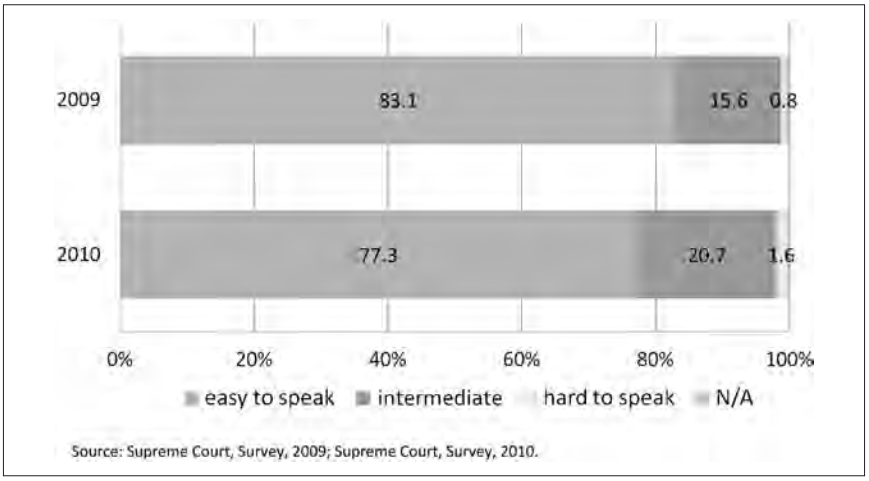
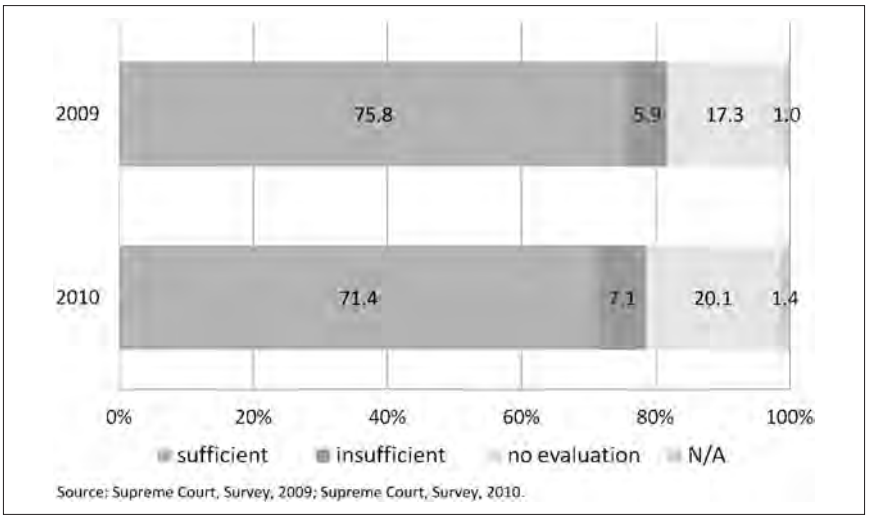


Figure 7: Result of the Post-trial Survey of Saiban-in:
Sufficiency of Discussion in Deliberation



data indicating the trends of sentencing in precedent cases of the same type of offenses, has been established.[22]

When comparing sentences in saiban-in trials with those of professional judges, one remarkable characteristic is the high rate of probationary supervision in cases of suspended sentences.[23] As demonstrated in Table 5, from April 2008 to March 2010, 383 persons charged

22 See, Shiroshita (2010).

23 Ibusuki (2010), at 42.

Table 4: Judgments by Saiban-in Trials
2009/5/21~2011/4/30

Guilty						Not Guilty
Death Penalty	Imprisonment				Fine	
	Life	For a Limited Term				
		2,072				
		without Suspension of Execution of Sentence	Suspended Sentence			
			with Probationary Supervision	without Probationary Supervision		
5	43	1,729	197	146	1	5

Source: Saiban-in System Investigation Committee, 6th Session, Material 9.

Table 5: Probationary Supervision

	Suspended Sentence		Percentage of Probationary Supervision(B/A)
	Total(A)	With Probationary Supervision(B)	
Professional Judges 2008/4～2010/3	383	140	36.6%
Saiban-in Panels 2009/5～2011/4	343	197	57.4%

Source: Saiban-in System Investigation Committee, 3rd Session, Material 4; Saiban-in System Investigation Committee, 6th Session, Material 9.

with eligible offenses for a saiban-in trial were given suspended sentences by professional judges; of those persons 140 (36.6%) were placed under probationary supervision. On the other hand, of the 343 persons given suspended sentences in saiban-in trials between May 2009 and April 2011, 197 persons (57.4%) were placed under probationary supervision. Thus, the rate of probationary supervision is remarkably higher in saiban-in trials.

Figures 8 and 9 provide comparisons of the sentencing patterns of some types of offenses between saiban-in panels and professional judges. Two tendencies have been pointed out and are discussed below.[24]

- Heavier Punishment for Sexual Offenses: Saiban-in panels tend to give heavier punishment for sexual offenses.

24 Ibusuki (2010), at 41.

Figure 8: Sentencing Pattern:
Rape Causing Injury/Indecent Assault causing Death or Injury

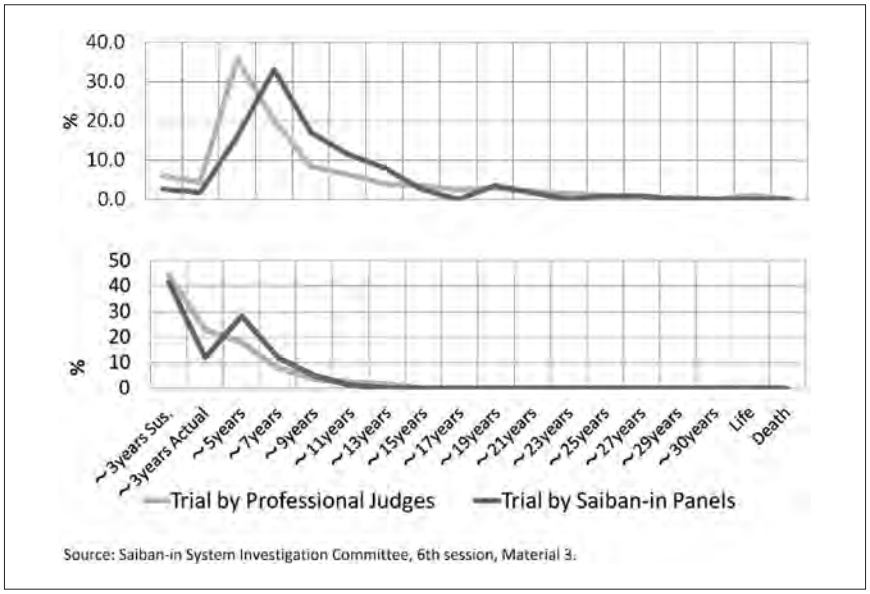
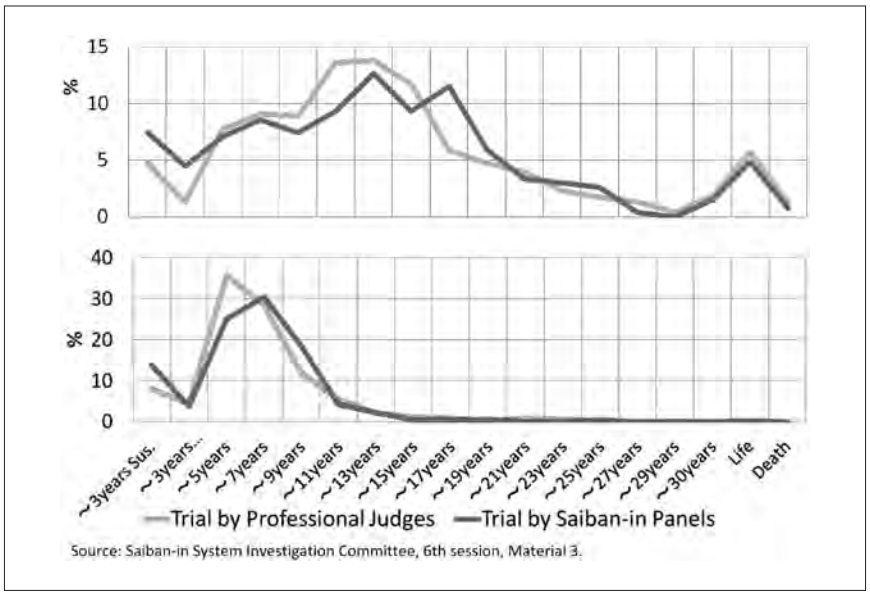


Figure 9: Sentencing Pattern:
Homicide/Robbery causing Injury



•Wider Distribution: For other offenses, sentences by saiban-in panels tend to spread wider than those by professional judges. Saiban-in panels tend to give more severe sen-

tences, but also at times less severe sentences than professional judges.[25]

C. Appeal

When the saiban-in system was introduced, no amendment was made to the appeal procedure. Therefore, both defendants and public prosecutors can appeal to the high courts against judgments made by saiban-in panels. When these appeals are filed, a panel of 3 professional judges reviews the proceedings and judgments of the first instance courts. Grounds for appealing to a high court include: 1) non-compliance with procedural law; 2) an error in the interpretation of or the application of law in judgments; 3) excessive severity or leniency of the sentence; and 4) an error in fact-finding.

Table 6 shows the number of appeals of judgments made by saiban-in panels and the result of the appellate review. In 2009 and 2010, the appeals from saiban-in trials totaled 536, which means that the appeal rate amounted to 32.5%.[26]

In the same period, 261 appeal cases of saiban-in trial judgments were finally disposed. In 12 of the cases, the original judgments were reversed and appellate courts gave new judgments.

Table 6: Appeals

			2009	2010	Total
Final Judgments by First Instance Saiban-in Trials (A)			142	1,506	1,648
Appeals from Judgments by Saiban-in Trials (B)			47	489	536
Appeal Rate (B/A)			33.1%	32.5%	32.5%
Final Dispositions by Appeal Trials			1	260	261
Result	Dismissal of Appeal		1	207	208
	Reversal of Original Judgments	Remanded	0	0	0
		New Judgments	0	12	12
	Withdrawal of Appeal		0	40	40
	Others		0	1	1

Source: Supreme Court, Saiban-in, 2009, at 22; Supreme Court, Saiban-in, 2010, at 22-23.

25 In homicide cases, while nearly 40% of the convicted persons were given sentences of imprisonment between 9 and 15 years by professional judges, about 30% of the convicted persons were given the same sentences by saiban-in panels. Saiban-in panels more frequently gave sentences of imprisonment no more than 3 years (with or without suspension) as well as sentences of imprisonment between 15 and 19 years than professional judges.

26 In only 5 of the 536 cases, appeals were filed by public prosecutors. See, Saiban-in System Investigation Committee, 6th Session, Material 9.

Judgments by saiban-in panels are supposed to reflect the common sense of ordinary citizens. If appellate courts, which are composed of only professional judges, unrestrictedly overturn the judgments made by saiban-in panels on the grounds of error in fact-finding or inappropriateness of sentence, the purpose of citizen participation would be frustrated. Therefore, in principle, appellate courts should uphold the conclusions of saiban-in panels as much as possible.

Of the 12 cases reversed in 2010, 11 were reversed due to the circumstances that occurred after the original judgments were rendered.[27] Those reversals arouse little problem, as the factual basis of judgments made by appellate courts differed from the saiban-in panel's judgments.

In March, 2011, 2 saiban-in panel's judgments were reversed, of which public prosecutors filed appeals. One reversal was due to an error in determining the admissibility of evidence, in which lay assessors were not involved.[28] The other, however, was a reversal of first instance acquittal due to an error in fact-finding.[29] This appellate judgment, which negated the evaluation of evidence by the saiban-in panel, highlights the difficult issue concerning the limitation of appellate review, with which the Supreme Court struggles.

IV Conclusion

One of the most serious concerns in implementing the saiban-in system was the negative attitude held by the public, which was resistant to serve as members of the saiban-in panel. Public opinion surveys showed that between 70 and 80% of respondents were unwilling to serve.[30]

As Table 7 shows, until the end of March 2011, the number of persons summoned to the courts as possible saiban-in candidates (except those whose summons were later withdrawn) has totaled 82,586. Notably, a total of 66,203 persons appeared for selection procedure. Thus,

Table 7: Selection of Saiban-in

Saiban-in Candidates Summoned to the Courts		**82,586**
Saiban-in Candidates Appeared to the Courts		66,203(80.2%)
Persons Served (～2011/3)	Saiban-in	11,889
	Alternate Saiban-in	4,241

Source: Saiban-in System Investigation Committee, 6th Session, Material 2.

27 Art. 397(2) of the Code of Criminal Procedure.

28 Judgment of the Tokyo High Court on March 29, 2011.

29 Judgment of the Tokyo High Court on March 30, 2011.

30 See, e.g., Foote (2007); Ibusuki (2010), at 35, 46.

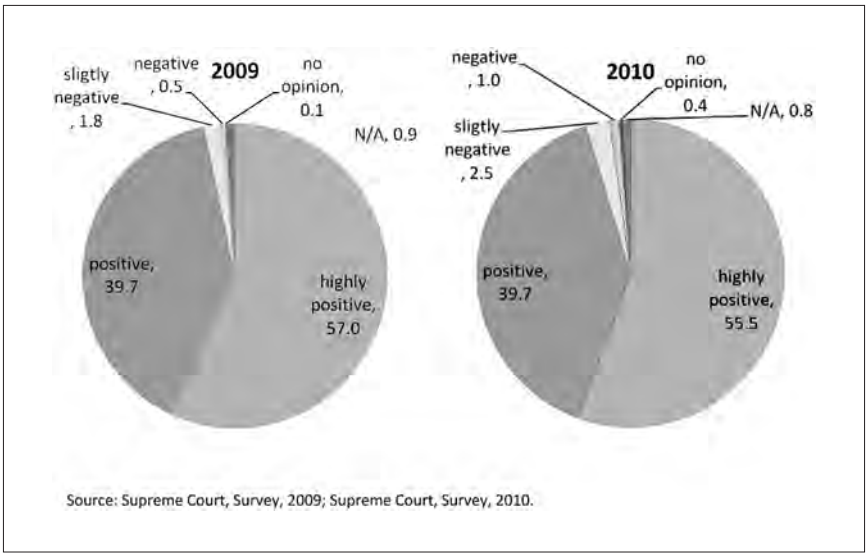
the appearance rate amounted to 80.2%, a number indicating that the public takes its new civic duty seriously.

In the same period, 11,889 persons served as saiban-in and 4,241 persons as alternate saiban-in. According to the result of the post-trial survey shown in Figure 10, over 95% of those who served as saiban-in held positive views about their experiences. Thus, the saiban-in system seemingly contributes to promoting the public understanding of the judicial system, and thereby raises public confidence.

In present day Japan, triggered by a series of irregular events that occurred in the Osaka District Public Prosecutors Office,[31] the fundamental reform of the criminal justice system is under consideration. The reform focuses on the current system that, to uncover the truth, excessively relies on interrogations made behind closed doors by investigators.

As this paper argues, the saiban-in system has a strong impact on criminal trial practices. For example, it has made criminal trials less reliant on written statements. While the saiban-in system has little direct impact on other phases of criminal process, under this system, not only criminal trials but also the entire criminal system, including criminal investigations, has become unable to stand without public understanding and confidence. The citizen participation demands the whole criminal process to be transparent. Overall, the saiban-in system has played a key role in reforming criminal trial practices and will, without doubt, continue to play the same role in future fundamental reforms of the criminal justice system.

Figure 10: Result of the Post-trial Survey of Saiban-in:
Evaluation of the Experience to Serve as Saiban-in



31 See, Ito (2011), at 384.

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