

LAY JUDGE DECISIONS IN SEX CRIME CASES: THE MOST CONTROVERSIAL AREA OF SAIBAN-IN TRIALS

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I. INTRODUCTION: HOW DO PEOPLE LIKE THE NEW SAIBAN-IN SYSTEM SO FAR?

Japan’s much anticipated *Saiban-in* System (“*Saiban-in Seido*” or the Lay Judge System) began in May 2009. Before its introduction, one of the biggest concerns was whether or not Japanese people would in fact embrace and be willing participants in this new judicial process. Previous polling of the Japanese citizenry indicated some negative and skeptical attitudes toward lay participation, suggesting that many Japanese people expressed their general reluctance to serve as lay judges.²

In the midst of great anticipation and ambiguity, the first lay judge trial was held in August of 2009. It was a homicide case, and I was honestly surprised to find out how well Japanese people embraced the new system and participated in the *Saiban-in* trial. When local

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² Hikui Sanka Ishiki, *Handan wa Omoni, Oyobigoshi: Tochigi Ken [Low Interest in Participation, Burdensome Judgments, and People’s Reluctance: Tochigi Prefecture]*, ASAHI SHIMBUN, Mar. 27, 2009, at 35.

courts summoned prospective lay judges, people showed up with great enthusiasm and high percentages, ranging from 61 to 91% appearance rate in most court jurisdictions.³ The next most surprising finding was that many lay judges were willing to attend post-verdict press conferences and respond to questions regarding their views and trial experiences. Some of them even agreed to release their names and pictures in newspapers. In May of 2010, exactly one year after the introduction of the *Saiban-in* trial, the Supreme Court issued the report on the *Saiban-in* trials, indicating that lay judges agreed to participate in post-trial press interviews in 95 percent of *Saiban-in* trials⁴.

Another surprising finding was that many lay judges expressed their concerns about verdicts and rightful disposition of criminal defendants. An opinion survey conducted by the Yomiuri Newspaper, a major newspaper in Japan with one of the largest circulation, indicated that even after serving as lay judges, 60% of them expressed their strong concerns for, and interests in, the successful rehabilitation of defendants. Their concerns and consideration on the dispositive welfare of the defendants were twice as high as their expressed sympathy and/or feelings toward crime victims and their families.⁵

These findings suggest that Japanese citizens are in support of the new lay adjudication system. Even though the system was still quite new and alien to many lay participants, they demonstrated a great passion and enthusiasm with the new adjudicative system and were willing to share their positive deliberative experiences with the media. As the *Saiban-in* system becomes three years old in May 2012, it is important to think how such enthusiasm for this young system can be maintained to ensure a high level of public participation and continued collaboration.

To study the effectiveness of the new system for criminal adjudication, this article focuses on different kinds of sex crime trials since the introduction of the *Saiban-in* system, examining the impact of the lay adjudication on sentencing patterns. While past sex crimes have been mostly adjudicated in male-dominated professional judge trials, the *Saiban-in* system allowed the use of random selection of lay judges and thus promoted the greater gender diversity in the deliberation of sex crimes. Sex crime trials thus became the site

³ *Id.*

⁴ *Saiban-in, 95% Ga Hanketsu Go Kaiken [In 95 % of All Trials, Lay Judges Attended Post-Verdict Press Conferences]*, JI-JI TSUSHINSYA, May 21, 2010 (reporting the finding from the Shimbun Kyokai (the Newspaper Association of Japan) that lay judges attended post-verdict interviews in 217 of 228 *Saiban-in* trials after the introduction of the *Saiban-in* trial).

⁵ *Saiban-in Saiban 1-nen, Shiminkankaku Hanei madeno Kakugo to Kuno [One Year after the Introduction of a Lay Judge System: Determination & Pain to Reflect People's Common-Sense Judgment]*, YOMIURI SHIMBUN, May 30, 2010.

where the greatest gender impact was expected during trial proceedings with respect to judicial discretion and sentencing outcomes. The lay judge system also serves to create an important intellectual and scholarly discussions_(to search for equitable ways to adjudicate egregious sex crimes and establish measures for deterring future sexual offenders and predators.

II. IMPACTS OF THE *SAIBAN-IN* SYSTEM

Two of the biggest initial concerns with the system's introduction were: (1) how the new system would change sentencing patterns; and (2) whether or not lay people could decide cases rationally and logically without being driven by their feelings and innate emotions. These concerns were amplified by the fact that the *Saiban-in* system also incorporated the Crime Victims Participation System (Criminal Procedure Code 316-33), where victims of crimes, including bereaved families and/or other affected parties, were allowed to participate in criminal trials, give oral or written statements, and provide a recommendation for potential sentencing in court.⁶ This victim participation system itself was only introduced six months prior to the introduction of *Saiban-in* system, and the impact of this system on lay judges and their decision-making patterns had been also a big concern. Nonetheless, the presence or absence of victim participation in overall *Saiban-in* trials generally has not brought about detectable changes in the patterns and the quality of sentencing in most *Saiban-in* trials, especially compared to that of professional judge trials.⁷

One significant change in sentencing outcomes has to do with lay judges' decisions on suspended sentences. Lay judges were more inclined to include some form of supervision of defendants, namely probation, when they decided to give suspended sentences. According to a report by the Supreme Court, 59% of suspended sentences were ordered in conjunction with probation in *Saiban-in* trials, as opposed to 37% in traditional professional judge trials.⁸ It had been quite rare for judges to give probation even if a defendant had no prior conviction history. This finding suggests that in trials with decisions on suspended sentences, lay judges

⁶ Masahiko Saeki, *Victim Participation in Criminal Trials in Japan*, 38 INT'L J. L. CRIME & JUST. 149 (2010).

⁷ *Id.*

⁸ Supreme Court Office, *Saiban-in Saiban no Jissijyokyo ni Tuite: Seido Shiko-Heisei 22 nen 5 gastsumatsu Sokuho* [The Implementation of the *Saiban-in* Trial: Bulletin Report by the End of May 2010] (2010) (providing statistical summaries of *Saiban-in* trial proceedings from May 21, 2009 to May 31, 2010).

may be more likely to be concerned with giving defendants possible venues for rehabilitation.

Lastly, when we examine these sentencing patterns on the basis of the category of criminal offenses, we begin to see a clear, yet paradoxical pattern of polarization. In homicide cases that involved defendants' complicated history of struggles and conflicts within their own families, defendants received more lenient sentences than defendants in trials with other criminal offenses. On the other hand, the defendants in sex crime trials generally received more severe sentences than the defendants in other criminal cases. In some cases, the sentences imposed by the judicial panel even exceeded the punishment recommended by Japanese prosecutors. The next section analyzes these contradictions in detail.

III. SEX CRIMES AND THE SAIBAN-IN SYSTEM

As has already been suggested, it appears that the greatest impact of the *Saiban-in* trial may be seen in sex-related criminal trials. The impact can be seen in overall trial proceedings, their sentencing, new measures to protect crime victims' privacy, and criminal justice policies for sex crime cases. Few articles have discussed these issues, even as trials involving sex crimes generate the bulk of the controversy for the *Saiban-in* system.⁹

A. CATEGORIZATION OF CRIMES TRIED BY THE SAIBAN-IN PANEL

The *Saiban-in* Law states in article 3 that "the *Saiban-in* system deals with crimes which carry death penalty or indefinite imprisonment. And if a perpetrator intentionally commit a crime which results in death of a victim," he/she is also tried by lay judges. The list of crimes that can be adjudicated by *Saiban-in* trials are specified in Table 1.

More than two thousand cases were expected to be tried by lay judge panels each year, which account for approximately 2.5% of all criminal trials in Japan. Approximately 20% of *Saiban-in* trials will involve sex crimes. Not every sex crime case involves an incident of rape. Some sexual crime, such as an indecent assault, does not involve any injury on the part of

⁹ See Mari Hirayama, *Saiban-in Saiban to Seihanzai* [*Saiban-in Trials and Sex Crime*], 327/328 RITSUMEIKAN L. REV. 668 (2009); Sawako Hirai, *Seiboryoku Hanzai to Saiban-in Saiban* [*Sexually Violent Crime and Saiban-in Trials: Cases in 2009*], 42 SEINAN UNIV. L.REV. 225 (2010). Regarding difficulties defense lawyers faced in sex crime trials, please see Ruri Kobashi, *Zeiin ga Jyosei Saiban-in no Motode Seihanzai no Hikokunin o Bengo shita Jirei (Osaka Chisai H 22. 3. 25)* [*The Sex Crime Case in Which I Represented the Defendant at the All Female Lay Judge Trial (Osaka District Court on March 25, 2010)*], 66 KEIJI BENGO 77 (2011).

victims.

How does the government then decide which crimes should and should not be tried by lay judges? The Justice System Reform Council of the Ministry of Justice (hereinafter the Council) had discussions on the possibilities for a model of citizen participation in trials since 1999. Included in their official reports were some potential choices for a new categorization of crime that would be tried by the new system.¹⁰ After the Final Report by the Council was issued, the Task Force on the *Saiban-in* System and the Criminal Justice (“*Saiban-in Seido Keiji Kentokai*”) was formed by the Prime Minister in January 2001, and this task force finally created the following three groups of criminal offenses to be applied to lay adjudication: (1) Plan A with “all criminal cases currently adjudicated by a collegial panel of professional judges, excluding cases of treason; (2) Plan B with criminal cases where defendants may be sentenced to death penalty or life imprisonment, excluding cases of treason; and (3) Plan C with criminal offenses that were committed intentionally and lead to victims’ death.”¹¹ Of these three, the task force suggested that criminal categories of Plan B and Plan C be applicable to lay adjudication.¹² Its decision reflected the Council’s final recommendation which indicated that “the scope of the cases covered should be cases of serious crime to which heavy statutory penalties attach, ... in which the general public has a strong interest and that they have a strong impact on society.”¹³

The strict application of the task force’s recommendation of adjudicable offenses, nonetheless, may lead to the possibility that certain classes of sexual crimes such as indecent assaults or sexual molestation may be excluded from adjudication in the *Saiban-in* trial. The exclusion of these sex crimes may send a wrong message to the public that these crimes were not considered heinous enough and thus unworthy of lay adjudication.¹⁴ Of course, the Supreme Court, when faced with this question, may claim that the limited category of triable

¹⁰ Shiho Seido Kaikaku Shingikai [Justice System Reform Council], Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21st Century (2001), http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612_e.html.

¹¹ Minutes from 24th Meeting of the Task Force, Judicial System Reform Council Headquarters, Sept. 11, 2003, <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai24/24gijiroku.html>.

¹² Minutes from 28th Meeting of the Task Force, Judicial System Reform Council Headquarters, Oct. 28, 2003, <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai28/28gaiyou.html>.

¹³ Justice System Reform Council, *supra* note 10, at Chapter IV(3).

¹⁴ When I presented my paper, “The Impact of *Saiban-in* System on Crime Policy for Sex Crime” at the Law and Society Association Annual Meeting in 2010, Prof. David Johnson of the University of Hawaii, who served as a chair & commentator at my panel session, commented, “It sounds like rape and indecent assaults are not categorized as serious crimes in Japan.” I had never thought that way; however, what Prof. Johnson pointed out is significant in order to question the legitimacy of the legal framework used to classify criminal offenses for lay adjudication in Japan.

criminal offenses was based strictly on statutory penalty. Under the current Japanese Penal Code, the crime of rape only carries a maximum incarceration of three years. And thus, the government rationale that the *Saiban-in* trial was only reserved for serious offenses with severe penalties may be a reasonable answer. At the same time, the government failed to pay sufficient attention to viewpoints of sex crime victims who desperately need societal recognition of the egregious nature of sexual predation upon women, as well as societal support to create maximum deterrence against future sexual offenders. The government's decision to exclude many sex crimes from lay adjudication thus failed to recognize the egregious nature of sexual crimes committed against women in Japan.

B. LAY JUDGE IMPACT ON SENTENCING- IS IT WELCOME?

As I stated above, one of the most salient effects of the *Saiban-in* system is that lay judges have a greater tendency to impose disproportionately harsher punishment on defendants in sex crime cases than for other crimes. There are interesting data which show different patterns in sentencing for sex crimes between *Saiban-in* and traditional bench trials.¹⁵ The data show that the most severe sentencing for rape resulting in injury was “over 3 years to less than 5 years” in professional bench trials, while it was “over 5 years to less than 7 years” in *Saiban-in* trials.¹⁶ Also, while the most severe punishment for cases involving indecent assault causing injury was “less than a year” in professional bench trials, it was “over 5 years to less than 7 years” in *Saiban-in* trials.¹⁷

I also analyzed the impact on sentencing using a different approach. In total, there were 208 cases involving sex crime adjudicated by the *Saiban-in* trials in the 2 years after the introduction of the system (i.e., from May 21, 2009 to May 20, 2011, see Table 2 for individual sex crime trials). Of these cases, there were a total of 212 defendants (some cases had more than one defendant). A total of 177 out of 212 defendants received a prison sentence without a stay of suspension, and 2 of the 177 defendants received a 30 year sentence, in which indefinite sentence was demanded by prosecution.

In the following, the sentencing ratio was computed for 175 defendants, i.e., an actual sentence divided by a demanded sentence in years. The average sentencing ratio (actual

¹⁵ KUNIO HARADA, *SAIBAN-IN SAIBAN TO RYOUKEIHO* [SAIBAN-IN TRIALS AND SENTENCING LAW] 268 (2011).

¹⁶ *Id.*

¹⁷ *Id.*

sentence of lay judges divided by the demanded or recommended sentence by the prosecution prior to deliberations) in all cases is 75.95% (until the end of January 2010).¹⁸ On the other hand, the sentencing ratio for all sex crimes for the two years is 82.17%, which is more than 5% higher than the average. If we focus only on “rape resulted in injury” cases, the ratio goes up even higher to 86.54%.

Additionally, there had been six *Saiban-in* trials where sentencing exceeded the demanded sentence. Two cases came from sex crime trials (see Case No. 59 and Case No. 181 in Table 2). The remaining four sentences came from trials involving the death of victims. Thus in sex crime cases, lay judges did not hesitate to impose exceeded sentences, even in cases where no death has resulted.

It is quite clear that the new sentencing guideline or patterns in sex crime cases appeared after the introduction of the *Saiban-in* trial and these changes seemed to be welcomed by both lay and professional judges. The following are some of the lay judges’ comments on the sentencing.

- i . A female lay judge stated, “if it weren’t a lay judge trial, this [harsh] sentence would not have been possible” (Case No. 52)
- ii . Another female lay judge commented, “in sex crime cases, lay people’s wisdom should be incorporated [into the deliberation on the sentencing]” (Case No. 64)
- iii . A male lay judge commented, “from the point view of the lay people, much longer sentence should be given” (Case No. 105).

Judging from these comments, lay judges were proud that their participation has played a greater role in issuing harsher punishment against the defendants. But what about professional judges? Did they feel the same way as the lay judges? The following are some of the comments from chief judges at the sentencing:

- i . At the sentencing, the chief judge stated, “the sentences for sexual crimes so far have been too lenient according to the general sense of the people” (Case No. 45)
- ii . Another chief judge articulated the identical sentiment (Case No. 49)

¹⁸ *Chekku! Saiban-in Jodai:Houtei ni Shimin-Kankaku Chaku Chaku to* [Check! The Saiban-in System Era: General People’s Common Sense Has Been Steadily Introduced to Court of Law], ASAHI SHIMBUN, Dec. 29, 2009, at 19; see also Hirayama, *supra* note 9.

iii. In another case, the chief judge said, “the sentences for sexual crimes so far have been too lenient. The lay judge trials should provide a [new] opportunity to consider proper sentencing in sexual crimes cases from viewpoints of healthy common sense judgments shared among the general populace” (Case No. 52).

The third comment is especially interesting, as it stresses the importance of incorporating people’s “common sense judgments” into the sentencing decision, thereby respecting the opinion of citizen participants and closing “a great gap” between what professional judges had thought as proper sentencing in sex crime cases and those recommended by lay people.

Why were there significant perceptible as well as performative gaps between lay and professional judges in sex crime sentencing patterns? One reason may be that the professional judgeship in Japan is a profession predominantly occupied by males.¹⁹ In such a male-dominated culture of the legal profession, there may have been a widespread perception that women victims were partly to blame for the sex crimes committed against them. Another reason may be that professional judges have been restricted to the rule by precedents and/or may be largely preoccupied with procedural matters. So even if they wish to render harsher punishment in some egregious cases, professional judges might have felt great pressure not to step outside the boundary of meting out punishments that have been widely accepted legally. Professional judges might also have refrained from incorporating “a healthy common sense shared among general citizenry” that has often been considered irrational or illogical.

It should also be pointed out that a legal procedure called Ji-Da-N (i.e., a settlement out of court) has played a significant role in criminal litigation. In sex crime cases, it is critical for defense lawyers to try to obtain the agreement for the out-of-court settlement from crime victims. When defendants or defense lawyers try to obtain the settlement, they normally offer monetary compensation to victims. In most out-of-court settlements involving sex crimes, victims were then asked to sign a document which states that they “will not demand harsh punishment against the defendant” and “will not file a lawsuit against the defendant for further monetary compensation” and so on. If the Ji-Da-N is established, judges can take it into consideration as a mitigation factor when deciding the final sentence. In *Saiban-in* trials, however, lay judges are not as concerned with the overall implication of the Ji-Da-N and do

¹⁹ Leon Wolff, *Gender, Justice, and the Japanese Judiciary*, 5 TOHOKU ANN. REV. GENDER, L. & POL’Y 205 (2007) (“Women are considerably under-represented on the Japanese judiciary”).

not use it to mitigate the sentencing. In some instances, victims were under tremendous economic, social, or psychological pressure to accept Ji-Da-N, given that many victims lost their jobs and needed receiving medical and psychological treatment from post-traumatic stress disorder (PTSD). Thus accepting even small amount of monetary compensation became economically appealing to some victims and their families. Many victims also became reluctant to go through the court process in order to avoid social stigma or the re-visitation of the trauma they endured. It seems that women and men in *Saiban-in* panels are able to recognize and understand this reality much better than professional judges. But as judges' comments indicate, many judges also welcomed harsher punishment; the *Saiban-in* trial presented professional judges a justifiable rationale to issue harsher punishment against criminals in sex crime cases.

C. GENDER AND SEX CRIME SAIBAN-IN TRIALS

I wish to discuss the broader issues of gender relations in the adjudication of sexual crimes. First, as sex crimes invariably involve deep entrenched issues of gender in society, the gender composition of lay judges is significant for deliberation and has the potential to dramatically alter verdicts of sex crime cases. To investigate this claim, I have collected the data on the gender makeup of *Saiban-in* panels that adjudicated various sex crimes. This collection process was incredibly difficult. Other than observing actual trials by myself, I had to rely on newspaper articles and other legal reports to gather such information.²⁰ Out of 208 sex crime *Saiban-in* trials, an all male or all female lay judge panel occurred in only eight trials (please see the cases marked with an asterisk mark (★) in Table 2). It appears that there is little difference in overall harshness of sentencing with respect to gender composition of lay judge panels. Even in instances with either an all-male or all-female panel, there appears to show no extreme bias in the overall trial outcome.

My research also found that female lay judges are less likely to be chosen to participate in sex crime trials. Kyodo news press also pointed out that 43 female lay judges and 77 male lay judges had been selected in sex crime trials until the end of November 2009, suggesting

²⁰ When I asked the courts about information on gender compositions in some sex crime cases, they replied that they had not collected gender information on lay judges, which was very surprising for me (Mar. 4, 2010). It seemed that the courts showed no interest in gender representation or other gender-related issues.

that 64% of lay judges in sex crime cases were males.²¹ In other crimes, male lay judges made up 54% of the panels, i.e., 10% less than that of sex crime trials. One explanation may be that defense attorneys intentionally tried to avoid female lay judges during the selection process.²² Further analysis will be necessary to discover the causes for the significant underrepresentation of female lay judges in sex crime trials.

Nevertheless, it is apparent from examining the comments of lay judges that many expressed the concern regarding the potential consequences of disproportionate gender composition for the overall outcome. I placed a white asterisk mark (☆) for the trials in which lay judges expressed their concern about the gender-makeup of the panel in Table 2.

- i . Female lay judge stated, “as I was the only female lay judge, I felt a pressure to articulate women’s viewpoints during the deliberation.” (Case No. 53, with 1 female & 5 male lay judges)
- ii. One female lay judge commented that “men and women sometimes have different opinions on sexual crimes”. (Case No. 56, with 3 female & 3 male lay judges)
- iii. One male lay judge commented that “we needed women’s points of view” (Case No. 59 with all male lay judges).

In the U.S., much research has been undertaken in order to understand the impact of the gender and racial composition of the juries on the nature of deliberation and sentencing, particularly in death penalty cases.²³ In Japan, if the *Saiban-in* system is to gain greater public respect and support from the general citizenry in coming years, there should be equitable decisions rendered by judicial panels of lay judges chosen from a fair cross-section of local communities.²⁴

²¹ *Seihanzai wa Josei Koho Kihī? Tajiken to 10 Pointo-Sa [Elimination of Women Candidates from Sex Crime Trials? Ten Percentage-Point Difference from Other Trials]*, CHUGOKU SHIMBUN, Dec. 14, 2009 [hereinafter *Seihanzai*].

²² *Id.*

²³ See generally HIROSHI FUKURAI, EDGAR W. BUTLER & RICHARD KROOTH, RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE (1993).

²⁴ Hiroshi Fukurai, *Sennin Tetsuzuki niokeru Hoshinrigaku [Legal Psychology in Voir Dire]*, in SAIBAN-IN SEIDO TO HO-SHINRIGAKU [SAIBAN-IN SYSTEM AND LEGAL PSYCHOLOGY] 90 (Yoshinori Okada et al. eds., 2009) (suggesting that jury decisions rendered by racially and sexually diverse panels are more likely to receive greater respect from the community).

IV . VICTIMS' ISSUES – WHAT DO THEY FEAR AND EXPECT?

Trial experiences may pose the worst nightmare for many victims of sexual crimes. They are legally placed in position to disclose their most painful stories not only to professional judges, but to lay people as well. As lay judges are chosen from local communities where alleged crimes occurred, many of victims may know some members of the same community, close acquaintances of perpetrators, their family members, and/or others affected by the crime. Many victims advocate groups thus expressed great concern about the integrity of the trial and asked the Japanese government to establish legal and procedural safeguards to protect sexual crime victims prior to the start of each *Saiban-in* trial.²⁵

In September 2009 in Ohita Prefecture, a twenty-year-old college student was raped and injured. As she did not want to go through a *Saiban-in* trial, she asked the local police to categorize the crime as a simple “rape,” and not as “rape resulting in bodily injuries,” in order to avoid the process of lay adjudication. She told the Ohita Prefectural Police that “I do not want to be seen by people in a *Saiban-in* trial. I fear that my personal information may be released to the public in some way.”²⁶ The police agreed and reported it to the prosecutor’s office as a conventional rape case.

The prosecutors, however, did not agree with the police’s classification of the offense and reclassified it as a “rape resulting in injury” case. This case was eventually adjudicated in a *Saiban-in* trial (Case No. 143 in Table 2). It became a paradigmatic example of the consequence for the absence of special attention and care required for handling sexual crimes that led to the erosion of the privacy and possible psychological humiliation for the victim.

Without special protections for sex crime victims in *Saiban-in* trials, many victims may become increasingly reluctant to report incidents to the police in the first place in order to avoid the lay judge trial. In order to eliminate such possibilities, many privacy protection measures for victims of sexual crime have been applied to the *Saiban-in* system, while many improvements are still needed.

²⁵ *Saiban-in Seido: Seihanzai Higahisya no Niji-Higai no Boshi Wo Jyosei Dantai Yobo* [Saiban-in System, Avoiding Second-Victimization for Victims of Sex Crime- Women Right Group Claim], MAINICHI SHIMBUN, May 19, 2009.

²⁶ “Gokan Chisyo” wo “Gokan”, *Yohgi Kae Saiban-in Saiban Kaihi. Ohita Kenkei Souken. Higai Jyosei ni hairyo* [“Rape Resulting in Injury” to “Rape”, Changing the Charge in order to Avoid a Saiban-in Trial. The Ohita Prefectural Police sent the Case to the Prosecutor’s Office. They Cared the Victim], NISHINIHON SHIMBUN, Apr. 19, 2010 [hereinafter *Gokan*].

The first protection measure starts at the *voir dire* stage of lay judge selection. Given that lay judge candidates are not bound by a confidentiality agreement, some women support groups claimed that the confidentiality requirement should be extended to the *voir dire* stage of lay judge selection in order to protect the privacy of crime victims.²⁷ Today, many district courts attempt to protect victims' privacy by being more meticulous and selective when disclosing trial information to individuals at the stage of lay judge selection.²⁸

Additionally, the Japanese Supreme Court of Japan has decided to ask each and every district court to disclose the list of lay judge candidates to sex crime victims prior to the trial.²⁹ Victims are then allowed to go through the list, check the names and demographic information of lay judge candidates, and ask prosecutors to exclude some candidates from *voir dire* whom the victim identifies as neighbors, acquaintances, or any other individuals related to them or their cases. For sex crime cases tried by lay judges, specific personal records or private information of victims were also disallowed in court. For example, crime victims were often referred by a pseudonym, i.e., Victim A or Victim B, thereby eliminating the use of their true names or disallowing any personal information which can be used to trace and identify crime victims. Prosecutors and defense lawyers can also request lay judges to examine relevant documents or evidence "confidentially" and question crime victims and witnesses very quietly.³⁰ Because of such special provisions and procedural measures in sex crime trials, court spectators were often unable to hear the court proceedings or recognize verbal exchanges between victims and lay judges in court. These special protections were

²⁷ *Seihanzai*, *supra* note 21.

²⁸ See *Saiban-in Taisyo no Seihanzai Saiban. Kohosya ni Jitumei Tugezu. Saiko-Sai Hoshin. Initial nado de Situmon* [Sex Crime Cases tried by Saiban-in Trials. Lay Judge Candidates are not told Victims' Real Names. In *Voir Dire, Initials of Victims are Used*], NISHINIHON SHIMBUN, May 30, 2009.

²⁹ *Saiban-in Sennin, Seihanzai Higaisya ni Meibo wo Kaiji. Saikousai ga Tsuchi he* [List of Lay Judges Candidates are Disclosed to Victims of Sex Crime in Advance. The Supreme Court Announced the Policy], AHASHI SHIMBUN, June 5, 2009.

³⁰ One important slogan of the *Saiban-in* system has been that the lay judge trials are easy to observe, listen to, and understand ("Mite-Kite-Wakariyasui-Saiban"); however, sex crime cases seemed to be an exception. It often happened that the court spectators were unable to hear witnesses and/or see evidence at the trial in an effort to protect victims' privacy. Such court procedures may be necessary; however, there is another concern that the fact-finding may become complicated even for defendants themselves. For example, in a trial of the defendant who committed 13 sex crime cases (the Sakai Branch of the Osaka District Court in March 2010), the court referred to each of previous sex crimes as "Case 1, 2, 3...", in order to avoid victims' names and/or exact addresses of venues. The defendant committed so many sex crimes that he remained even perplexed in trying to identify the case or incident during the questioning. Excessive protective measures sometimes create procedural confusion in trial proceedings.

instituted in the *Saiban-in* trial under the Criminal Procedure Code, Article 290-2.³¹ Nonetheless, the greater and more equitable protection of crime victims may be needed to preserve victims' privacy in the lay judge trial.

Many victims and their advocate groups have claimed that cases involving sex offenses should be excluded altogether from the *Saiban-in* trial.³² Regional bar associations, too, joined them, stating that sex crime cases should be excluded from lay adjudication and that the *Saiban-in* Law must be also altered accordingly when it undergoes its first review by the Japanese government in 2012.³³

The growing outcry for greater victims' support is indicative of a need to extend the protection system even further. Some women's rights groups have even suggested that victims should be given the right to choose whether their cases go to lay judge trials or bench trials.³⁴ One significant difference between the *Saiban-in* system in Japan and the jury system in the U.S. is that under the *Saiban-in* system, defendants have no rights to choose lay judge trials or bench trials.³⁵ Likewise, legal rights extended to the defendants in the U.S. are not given to sexual crime victims in Japan. Under the *Saiban-in* system, many legal issues to protect the rights of criminal defendants have been debated and discussed. Unfortunately, there has not been an equitable amount of attention paid to the needs to protect the rights of victims in sexual crime cases. As indicated earlier, it is clear that lay judges are more likely to render harsher punishment against sex offenders, even more so than professional judges. If crime victims feel that defendants deserve harsher and more severe punishment, victims must also participate in *Saiban-in* trials in order for sexual crimes to be adjudicated by lay judges. The provision of proper legal safeguards for crime victims may facilitate their willingness to participate in lay judge trials.

³¹ The Japanese Criminal Procedure Code, Article 196-4 (Specification of a Pseudonym) indicates that "In cases where the court has issued an order set forth in Article 290-2, ... it [the court] may specify a pseudonym to use in lieu of the victim's name or any other name related to information that identifies the victim." Similarly, the Criminal Procedure Code, Article 35-3 (Pronouncement of a Judicial Decision) indicates that "When an order set forth in Article 290-2 ... is issued, the Pronouncement of judgment under the provisions of the preceding paragraph shall be made by a method where by matters that identify the victim are not disclosed." For the Japanese Criminal Procedure Code, please see the Japanese law translation, <http://www.japaneselawtranslation.go.jp/law/detail/?id=1979&vm=04&re=02>.

³² YOMIURI NEWSPAPER OSAKA, SEI BORYOKU [VIOLENT SEX CRIME] 175 (2011).

³³ For example, the Bar Association of Ohita Prefecture claimed to exclude sex crimes from lay adjudication. See these opinion reports by the president of Bar Associations to the Ministry of Justice. Ohita Bar Association, *Saiban-in Seido Minaoshi wo Motomeru Ikensyo* [Opinion Report to Claim Reforms of the Saiban-in System] (Nov. 28, 2011).

³⁴ *Id.*

³⁵ The Council had discussed the possibility of the selection system; however, it was not introduced.

A victim impact statement given by a father whose 6-year-old daughter was indecently assaulted and injured by a sixty-two-year-old defendant highlights such a view. The father stated that “the lay judge system will provide an [excellent] opportunity to create a new sentencing guideline for sex crime cases” (Case No. 50 in Table 2). The presiding judge then responded to his passionate call, stating that there needs to be “harsher sentences than what previous sentencing patterns have indicated.” Victims may suffer the danger of losing their privacy and face greater psychological humiliation in *Saiban-in* trials than they do in bench trials; however, they may also expect lay adjudication to have more equitable sentencing guidelines and impose greater punishment against sexual predators.

But if the imposition of “harsher punishments” is the only objective shared among many sex crime victims and their families in the *Saiban-in* trials, one can argue that a reform in the sex crime provisions in the Criminal Procedure Code can equally achieve this goal. I, however, think otherwise. Japan’s prominent criminal defense lawyer Satoru Shinomiya once commented that “without participation to a lay adjudication system, ordinary citizens would never realize the seriousness of sex crimes and their impact on victims and their families. If people are unwilling to change their views, everyday reality that victims must face and the hardship they endure in their communities will not change either.”³⁶ Not only does the *Saiban-in* trial create a new opportunity for victims to articulate the fact that defendants should receive a proper and equitable punishment, but that lay adjudication also offers ordinary citizens new opportunities to understand the seriousness of sexual crimes and consider what they can do to help alleviate the pain and suffering of crime victims.

V. IMPACT OF THE SAIBAN-IN-SYSTEM ON CRIME POLICIES FOR SEX CRIMES— ANY FUTURE IMPLICATIONS?

I have discussed many important issues in the lay adjudication of sex crimes in Japan. In examining various comments by the lay judges who served in sex crime trials, it becomes clear that many ordinary citizens came to realize that previous sentencing patterns for sex crime defendants had been quite lenient and that the existing support system for sexual crime victims is still poor. Under the Japanese Penal Code, the statutory sentence for rape is “less

³⁶ *Gokan*, *supra* note 26.

than 3 years,”³⁷ which is more lenient than the standard sentence for robbery (less than 5 years).³⁸ And the punitive leniency to sexual predators has been often criticized both domestically and internationally.³⁹ In *Saiban-in* trials, it is quite clear that both lay and professional judges realized that there is a need to impose harsher punishments in sex crime cases. Many *Saiban-in* trials thus resulted in imposing more severe and longer sentences than ones recommended by the prosecutors (please see cases with * in Table 2). These tendencies and lay judges’ greater “awareness” of the seriousness of the problem could lead to the movement to amend the Japanese Penal Code in order to strengthen the sentence guideline to penalize sex offenses in the future.

Another equally important issue involves the question of whether or there will be any change in people’s attitudes toward crime policies in sexual crimes. As stated in the beginning, many lay judges expressed their concerns about possible rehabilitation of defendants. In March 2005, the Nomura Research Institute conducted survey to examine the extent to which Japanese citizens considered the possible release of sexual predators from prison and the possibility of rehabilitating sexual offenders. The survey was conducted a few months after a tragedy where a young girl was kidnapped and murdered by a repeated sex offender. This nature of the crime was very similar to Megan’s case in the U.S. Many progressive people at that time cried for the establishment of the Japanese-version of Megan’s Law in order to monitor the activities of sexual predators.

The survey asked about what level of the disclosure of information on individuals with a history of sex offences should be allowed in society (n=1180). It found that only 3.7% of the respondents said that this information should be kept secret within the Ministry of Justice (MOJ) without disclosure to the public.⁴⁰ Over 90% of the respondents believed that the information should be released to the public. The Nomura Research Institute also noted that many people desired more detailed information be released and shared among the public. At

³⁷ Keiho [Penal Code], Act No. 45 of 1907, art. 177 (Rape) (Japan) (“A person who ... shall be punished by imprisonment with work for a definite term of not less than 3 years”), *translated in* <http://www.cas.go.jp/jp/seisaku/hourei/data/PC.pdf>.

³⁸ *Id.* at art. 236(1) (Robbery) (“A person who robs another of property ... shall be punished by imprisonment with work for a definite term of not less than 5 years”).

³⁹ Chie Tanitakawa, *Keiho to Jyosei ni Taisuru Boryoku- Danjyo Kyodo Sankaku Shakai ni Okeru Gokan Zai no Arikata ni Tsuite (Kokusai teki na Choryu to Jyosei Kanrei Ho no Ugoki)* [*Criminal Code and Violence against Women- How Rape should be Treated in Criminal Code under Gender Equal Society (International Tendency and Movements in Japan)*], 32 ONNATACHINO 21 SEIKI 24 (2002).

⁴⁰ Nomura Research Institute, Chian ni Taisuru Isiki Chosa [Survey on Citizen’s Attitudes for Safety] 18 (2005), <http://www.nri.co.jp/publicity/nr/pdf/nr20050513.pdf>.

the same time, nearly half of them supported the installation of the tracking system for sex offenders and sharing the information on their whereabouts, including their current residence (44.2%), suggesting that they did not object to the police having exclusive access to sexual predators, as long as the tracking system was not written as part of explicit criminal policies.

Why did some survey respondents still refuse to support tough anti-sexual-crime policies like Megan's Law that could provide them with access to information on individuals required to register as sex offenders in Japan? Nearly a half of survey respondents also failed to support the installation of tracking system as part of explicit criminal policies. First of all, I believe the Japanese have a tendency to place a lot of faith and trust in governmental authorities. It may be paradoxically compared to the American legislation which tends to place law enforcement responsibilities on individual citizens, including people's right to carry a gun in many states in order to protect them and their families. People's support for such legislation may originate in their colonial history and frontier spirit. On the other hand, the Japanese tend to think that crime policies and their proper enforcement should be in the hands of the government agencies and law enforcement personnel. My research on lay adjudication of sex crimes also found that one major impact brought forth by the *Saiban-in*-System is lay participants' concerns and growing interest in crime policies. It will thus be interesting to find out whether or not the same results will occur in the survey conducted after the implementation of the lay judge system in 2009.

Since people who served as lay judges expressed their great concerns for the rehabilitation issues of the defendants, another completely opposite approach to deal with sex offenders is also possible. One can introduce a more re-integrative way to reform sex offenders, in addition to the introduction of the surveillance program like Megan's law in the U.S. to facilitate sex offender registrations and community notification. If people are genuinely concerned about the possible rehabilitation of sex offenders, there may be a possibility for a totally new approach for community-based criminal justice policies to deal with sex offenders.⁴¹ In Canada, for example, various NGOs worked closely with the Department of Correction to provide support for released sex offenders in the community through a prominent program called the Circles of Support and Accountability (COSA). Based on the principle of restorative justice, the COSA model of reintegration recruits trained

⁴¹ Japan has yet to present new and concrete models for community-based programs for sex offenders. In Canada, the program called COSA (Circle of Support and Accountability) can be an interesting example. COSA dramatically decreased sex offenders' recidivism (85%). See Correctional Service Canada, Documents and Reports: Guide to COSA Project Development (Jun. 24, 2011), <http://www.csc-scc.gc.ca/text/prgrm/chap/circ/proj-guid/index-eng.shtml>.

volunteers from local communities to form the circle around the ex-offenders from which they can gain access to medical services, social support, job training, and other social programs. A similar community-based program can be adopted in Japan to reconstruct pro-social strategies for former sexual predators and eradicate their offending cycle of sexual offenses.⁴²

VI. CONCLUSION

This article examined the impact of the *Saiban-in* system on proceedings of trials, sentencing, and criminal justice policies for sex crimes. It seems that most pressing issues of the *Saiban-in* system are evident in sex crime cases tried by lay judges.

The *Saiban-in* law also states that the lay adjudication system will be reviewed 3 years after its enactment, and thus the Japanese government will evaluate the system of lay adjudication in May in 2012. The regional bar associations in some prefectures and many victims-advocate groups have suggested the possible exclusion of sex crimes from *Saiban-in* adjudication. However, I disagree with the exclusion. If sex crimes were excluded from lay adjudication, this also means that we abandon the prospect to facilitate future reforms in criminal justice policies for both victim and offenders of sex crimes. Hence, the *Saiban-in* trial provides an excellent opportunity to have serious debates and discussions to alter criminal policies in Japan.

The broader discussions about sex crime cases tried by *Saiban-in* trials also brings about another excellent opportunity to examine the effect of gender on judicial decision-making processes. One male lay judge selected for the first ever sex crime *Saiban-in* trial which took place in Aomori Prefecture in September 2009 stated that “I felt a huge pressure. I was wondering whether or not victim’s feelings were positively incorporated [into the deliberation]. Since I am a man, I was not sure if I should have been chosen as a lay judge [in this sex crime trial where only one of six lay judges were female].”⁴³

This trial became the first-ever sex crime case in which the victim participation system

⁴² *Id.*

⁴³ *Saiban-in Saiban: Kennai Hatsu, Seihanzai Jikenhikoku ni Choeki 12-nen [Saiban-in Trial: First case in Aomori Prefecture: Defendant was Sentenced to 12 Years in Prison]*, MAINICHI SHIMBUN, Jan. 26, 2010, at 23.

was applied.⁴⁴ Why did he feel that he should not be a lay judge simply because he was male? We need to strive to create the environment in lay courts where both female and male judges can be sympathetic to the suffering of crime victims, while maintaining objectivity in assessing and evaluating testimony and evidence submitted in court.

In September 2011, Osaka Governor Toru Hashimoto, who is also Japan's renowned ultra-conservative politician and attorney, claimed that the prefectural ordinance be passed in order to require ex-sexual offenders to report their whereabouts to the prefectural office.⁴⁵ Right after his resignation, he also became the Mayor of Osaka City in November 2011 and was ostensibly still interested in passing the city ordinance, making ex-offenders' information available to the public, including their names and domiciles.⁴⁶ Today's political climate seems to make it possible to pass the Japanese version of Megan's Law in near future. While I believe that some supervision of sex offenders may be necessary, the community-based support program is also needed for the eventual reintegration of these offenders into society. The governmental monitoring and surveillance program of ex-offenders, which intensifies their social exclusion, will not reduce recidivism in the long run. The lay adjudication of sex crimes has led to debates about the possible rehabilitation of ex-offenders and the creation of community-grounded support programs to help them become reintegrated into a larger society, while eradicating the opportunity of recidivism. The *Saiban-in* trial thus provides an excellent opportunity to revisit the rehabilitation issues and assess equitable criminal justice policies for sex crime offenders in society.

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⁴⁴ *Id.*

⁴⁵ *Seihanzai Shusshosha ni Ijuchi Todokedegimu: Osakafu, Jorei Teiane [Proposal on Mandate Requirement for Report System for Released Pedophiles in Osaka Prefecture]*, ASAHI SHIMBUN, Dec. 17, 2011, at 38.

⁴⁶ *Id.*